



Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan LMS1030 v. Sharma*, 2022 BCCRT 198

B E T W E E N :

The Owners, Strata Plan LMS1030

APPLICANT

A N D :

SUNAINA SHARMA and RAJENDRA SHARMA

RESPONDENTS

A N D :

The Owners, Strata Plan LMS1030

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

David Jiang

INTRODUCTION

1. This dispute is about alterations to common property. The respondents and applicants by counterclaim are Sunaina Sharma and Rajendra Sharma. The Sharmas jointly own a strata lot in the strata corporation that is both applicant and respondent by counterclaim, The Owners, Strata Plan LMS1030 (strata).
2. The strata says the Sharmas altered an outdoor sloped area between 2 of the strata's buildings that is common property. The strata says the alterations were made without permission, in breach of the bylaws. It also says that the changes are, in any event, significant changes in the use or appearance of common property that required a $\frac{3}{4}$ vote under section 71 of the *Strata Property Act* (SPA). The strata seeks an order for the Sharmas to return the common property to its original appearance and construction.
3. The Sharmas disagree. They say the strata acted in a significantly unfair manner by fining them under the bylaws and by requesting the alterations be removed. The Sharmas also say that the strata failed to comply with the procedural requirements of SPA section 135 in enforcing the bylaws. Further, they say that the alterations are required to reasonably accommodate Dr. Sunaina Sharma's medical conditions under the *Human Rights Code* (Code). The Sharmas disagree that the alterations are significant changes that require a vote under SPA section 71.
4. The Sharmas counterclaim for the following orders: 1) that the CRT reverse fines imposed about the alterations, 2) that the strata permit the alterations, and 3) that the strata to hold a general meeting under SPA section 43 to consider a resolution to approve the alterations. The strata disagrees that it has done anything improper.
5. For the reasons that follow, I find the strata has proven its claims and make the orders set out below. I dismiss the Sharmas' counterclaims.

JURISDICTION AND PROCEDURE

6. 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.
7. 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.
8. 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.
9. 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.

The Limitation Act

10. The Sharmas also submit that the strata's claims are out of time under the *Limitation Act*. For the reasons that follow, I disagree.
11. Case law shows that the *Limitation Act* does not apply to fines under the SPA. See, for example, *The Owners, Strata Plan KAS 3549 v. 0738039 B.C. Ltd.*, 2015 BCSC 2273, *aff'd The Owners, Strata Plan KAS 3549 v. 0738039 B.C. Ltd.*, 2016 BCCA 370. Further, I find the *Limitation Act* does not apply to the strata's ongoing duty to

enforce the bylaws or otherwise comply with the SPA. See, for example, my non-binding decision of *The Owners, Strata Plan VR.1325 v. Mendelsohn*, 2021 BCCRT 1307 at paragraphs 14 and 15.

What are the Alterations at Issue?

12. The Sharmas submit that it is unclear what alterations the strata want removed in this dispute. The strata did not directly address this submission. I find the evidence and submissions show the alterations at issue are located in the sloped outdoor area between strata lots 93 (SL93) and 94 (SL94) and include the following: the cedar deck built in or around 2020, any steps and ramps leading to the cedar deck, the retaining walls that are not original construction, 2 garden beds, handles or handholds installed against the side of the strata's buildings, reflectors, rope lights, and solar lights. I reach this conclusion for the following reasons.
13. The Sharmas own SL93. The strata plan shows that SL93 is at the northmost end of a building labelled block 12. SL93 is close to SL94, which is located in another building labelled block 11. From the strata plan, pictures, and correspondence in evidence, I find the common property at issue is the sloped, outdoor area between SL93 and SL94. I will refer to it as the sloped area in this decision.
14. The strata provided photos of the alterations as evidence. They show the cedar deck, stairs, new retaining walls, and handles installed on a building that area. The strata also outlined the items of concern in its October 13, 2020 letter to the Sharmas, which expressly mentioned the cedar deck, the steps and ramps leading to the deck, the newly installed retaining walls, a garden bed, and items against or attached to the exterior of SL93. I find the strata, in essence, wishes the sloped area to return to what it looked like in the Sharmas' July 2016 photo, referred to below.
15. The Sharmas replied in an October 31, 2020 letter to the strata and outlined the changes they made to the sloped area. They acknowledged building 2 new staircases and 2 flower beds. I find the strata referred to these as the stairs and ramp and garden bed in its October 2020 letter. They also acknowledged hiring contractors to build the

deck, and adding the handles, reflectors, rope lights, and solar lights. So, I find these items are at issue as well.

16. The Sharmas provided evidence and submissions about a second rear deck, new stairs added to a pre-existing balcony, and a common property crawlspace. I find the strata did not raise these items in this dispute. This is because the strata's photos about the alterations at issue did not include these items or areas. They were also not the subject of the strata's October 13, 2020 letter. So, I find they are not before me in this dispute.

ISSUES

17. The issues in this dispute are as follows:

- a. Are the alterations of the common property a significant change under SPA section 71 that require a $\frac{3}{4}$ vote?
- b. Did the Sharmas breach the bylaws?
- c. Did the strata comply with the procedural requirements of SPA section 135(1)?
- d. Did the strata treat the Sharmas in a significantly unfair manner?
- e. Did the strata breach the Code?
- f. Must the strata hold a special general meeting under SPA section 43 to consider the Sharmas' petition?

BACKGROUND, EVIDENCE AND ANALYSIS

18. In a civil proceeding like this one, the strata and the Sharmas must prove their respective claims and counterclaims on a balance of probabilities. This means more likely than not. I have read all the parties' submissions, including cited case law, but refer only to the evidence and argument that I find relevant to provide context for my decision.

19. I begin with the largely undisputed background. The strata consists of several residential townhouse-style buildings. A title search shows the Sharmas became registered owners of SL93 in the strata in 2002.
20. The Sharmas provided a July 2016 photo of the sloped area. It shows the slope was terraced using “railroad tie” retaining walls. There were some shrubs present, but the ground was largely bare dirt. The Sharmas subsequently hired a contractor to build 2 outdoor decks. An undated contractor’s letter shows one deck was at the rear of SL93 and made of composite material. As noted, above, I find this deck is not at issue in this dispute. The other one was in the sloped area and made of cedar. I find the cedar deck was likely completed in 2020 since the strata sent bylaw enforcement letters about the cedar deck that year.
21. On October 13, 2020, the strata’s property manager sent a bylaw infraction letter to the Sharmas. It advised that it had received a complaint that the Sharmas were building unapproved alterations in the sloped area. As noted above, in the letter the strata referred to the cedar deck, the steps and ramps leading to the deck, the newly installed retaining walls, a garden bed, and items against or attached to the exterior of SL93. The strata advised that the Sharmas had not obtained permission for the alterations and so breached bylaws 15(1) and 14(4). I discuss the bylaws below.
22. The Sharmas replied in an October 31, 2020 letter. I have referred to this letter above. The Sharmas listed the changes they made to the sloped area. Around 2018 or 2019, they cleared the area of underbrush to remove a rat infestation. They made further changes to enhance the safety of moving up and down the sloped area. The Sharmas said they were willing to maintain the sloped area and sign an indemnity agreement.
23. The Sharmas submits that they took over maintenance of parts of the sloped area in 2006, with the strata’s agreement. However, there is no evidence of this. The Sharmas also did not mention such an agreement in their October 2020 letter to the strata.
24. In its November 6, 2020 letter, the strata said to the Sharmas that they had breached bylaws 15(1) and 14(4). The strata also said that the alterations in the sloped area

were also a significant change under SPA section 71 that had not been approved by either the strata council or through a $\frac{3}{4}$ vote. It fined the Sharmas \$200 and warned of continuing fines. The strata fined the Sharmas \$200 again in a December 14, 2020 letter.

Issue #1. Are the alterations of the common property a significant change under SPA section 71 that requires a $\frac{3}{4}$ vote?

25. Section 71 of the SPA says that a strata corporation must not make a significant change in the use or appearance of common property unless the change is approved by a resolution passed by a $\frac{3}{4}$ vote at an annual general meeting (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.
26. In *Foley*, the court summarized the criteria for a significant change 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?

27. 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 and *Sidhu v. The Owners, Strata Plan VR1886*, 2008 BCSC 92.
28. I find that the Sharmas provided equivocal submissions on this issue. They deny that the alterations were significant. However, they also provided lengthy submissions on the benefits of the alterations, which I find suggest that the alterations were significant. Based on the *Foley* factors, I find the alterations clearly meet the threshold for a significant change.
29. The alterations are visible to residents as they are outside. Photos show the cedar deck is sizeable as it spans the entire length of the distance between SL93 and SL94. The sloped area now has garden beds, lights, and reflectors. I find the use has been significantly changed because it resembles a garden. As noted above, the July 2016 photo shows the sloped area previously consisted of sparse shrubs and dirt. I also find from the July 2016 photo that the sloped area was not designed to be used for normal pedestrian traffic. The photo indicates the area was largely used instead for landscaping. The new staircases or ramps clearly increase mobility in the sloped area.
30. I find that the change affects the use and enjoyment or existing benefit for both SL93 and SL94. They essentially have access to more gardening space. The deck also increases the effective living space of SL93. I find this would likely affect the marketability of SL93.
31. The deck, stairs, and installed handles all lead me to conclude the alterations are essentially mean to be permanent.
32. I am not satisfied that the strata has approved similar change in the past. The Sharmas provided photos and letters about past alterations. I find they are about alterations that are of a different nature or scope than those in the sloped area. The most directly comparable situation is outlined in the strata's April 2021 letters to another owner who was building a similar deck between 2 of the strata's buildings.

The letters show the strata decided the deck breached the bylaws and had to be removed.

33. From the evidence, including strata council meeting minutes and bylaw enforcement letters, I am satisfied the strata generally follows the proper procedures regarding meetings, minutes and notices as provided in the SPA.
34. The Sharmas say that the sloped area posed a danger so that immediate change was necessary to ensure safety or prevent significant loss or damage. I find this unproven by the evidence. There is no indication that the sloped area posed any imminent threat. The Sharmas provided letters from other owners that indicate the sloped area was difficult to traverse without the steps. However, I find from the evidence that the sloped area was not designed or intended to be used regularly for travel. I also find this reason insufficient to explain why the Sharmas built flower beds and a deck if they acted primarily to avoid danger.
35. For all those reasons, I find the alterations to the sloped area are significant changes in both the use and appearance of common property under SPA section 71. As such, they require approval by a $\frac{3}{4}$ vote at an AGM or SGM.
36. Given this, I order the strata to, within 90 days of the date of this decision, hold an SGM or AGM to vote on a resolution under SPA section 71 to approve the alterations to the sloped area. If the resolution is not approved by a $\frac{3}{4}$ vote at the general meeting, then within 90 days of the general meeting, the Sharmas must remove the alterations in the sloped area and restore the common property to its state before they were installed at the Sharmas' expense. I have provided further details in the form of order below.

Issue #2. Did the Sharmas breach the bylaws?

37. The strata registered a complete set of bylaws in the Land Title Office in July 2019. Bylaw 15(1) says an owner must have the written approval of the strata before altering common property, including limited common property, or common assets.

38. The Sharmas' say that the strata council approved the alterations in a November 1, 2007 letter. I disagree this letter applies to the alterations at issue. The letter was written more than a decade ago. It did not mention key aspects like the cedar deck built in 2020.
39. The Sharmas also say that the strata otherwise acquiesced to the alterations through inaction. I find this allegation unsupported by any evidence. The Sharmas completed the cedar deck in 2020 and the strata sent a bylaw infraction letter in October 2020. There is no indication that the strata ignored the alterations for any significant period of time. So, I find the Sharmas breached bylaw 15(1).
40. The Sharmas also say they cannot be fined for a continuing contravention under bylaw 15(1). I disagree as the Sharmas continued to refrain from obtaining permission or removing the alterations under bylaw 15(1).
41. The strata also says the Sharmas breached bylaw 14(4). For the reasons that follow, I disagree. I find that bylaw 14(4) provides the remedies for an owner making an unapproved alteration to a strata lot. It says a failure to get permission will result in fines and charge backs to bring the property back to its original condition. As it is a remedy, I find the Sharmas did not breach it. Ultimately, nothing significant turns on this.

Issue #3. Did the strata comply with the procedural requirements of SPA section 135(1)?

42. Under SPA section 135(1), before requiring a person to pay the costs of remedying a bylaw contravention, the strata must have received a complaint, given the owner written particulars of the complaint and a reasonable opportunity to answer the complaint, including a hearing if one is requested.
43. The Sharmas say the strata failed to provide proper notice of the complaint and failed to give the Sharmas a reasonable opportunity to respond.
44. I find the evidence shows the strata complied with SPA section 135. I find the strata explained the complaint in reasonable detail in its October 13, 2020 letter. It also

attached photos of the alterations in the sloped area. The strata provided the Sharmas an opportunity to respond. The Sharmas did so in their October 31, 2020 letter, summarized above. From their response, I find the Sharmas likely understood what the infraction letter was about. I find that the strata appropriate levied its first fine after this, in its November 6, 2020 letter.

Issue #4. Did the strata treat the Sharmas in a significantly unfair manner?

45. SPA section 164 sets out the BC Supreme Court's authority to remedy significantly unfair actions. The CRT has jurisdiction over significantly unfair actions under CRTA section 123(2), which has the same legal test as cases under SPA section 164. See *The Owners, Strata Plan BCS 1721 v. Watson*, 2018 BCSC 164. Significantly unfair conduct is conduct that is 1) oppressive in that it is burdensome, harsh, wrongful, lacking in probity or fair dealing, or done in bad faith, or 2) conduct that is unfairly prejudicial in that it is unjust or inequitable: *Kunzler v. The Owners, Strata Plan EPS 1433*, 2021 BCCA 173 at paragraph 88.
46. In *Kunzler*, the Court of Appeal confirmed that an owner's expectations should be considered as a relevant factor. I therefore use the test from *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44, as follows:
- a. What is or was the expectation of the affected owner?
 - b. Was that expectation on the part of the owner objectively reasonable?
 - c. If so, was the expectation violated by an action that was significantly unfair?
47. I find the Sharmas expected that the strata would allow the alterations. For the reasons that follow, I find this expectation was objectively unreasonable.
48. As noted earlier, I have found that alterations were significant changes that required a $\frac{3}{4}$ vote for approval under SPA section 71. I have also found that the Sharmas made the alterations without permission, and the strata did not approve similar changes in the past. I find the Sharmas could not reasonably expect the strata to permit the alterations or refrain from enforcing the bylaws in such circumstances.

49. The Sharmas also say that they had to make the alterations because the strata failed to maintain the sloped area. The Sharmas say that the strata allowed rodents and weeds to infest the area. I find this allegation unproven. The July 2016 photos show the area was mostly bare dirt instead of weeds. In a May 27, 2019 email, the strata's property manager said they would put out bait stations in response to complaints about rodents. I find the strata did not ignore the issue. Further, I find there is little connection between the alleged rodent infestation and weeds and the most significant aspects of the alterations, such as the cedar deck, staircases, and flower beds.
50. The Sharmas also say the strata failed to maintain the sloped area so that travel up and down it was dangerous. However, as noted earlier, I have found that the sloped area was not meant for pedestrian traffic and was not an imminent danger.
51. For all those reasons, I find the strata did not act in a significantly unfair manner. I dismiss this counterclaim.

Issue #5. Did the strata breach the Code?

52. The Sharmas say that the strata breached the Code. The Sharmas' submissions on this issue were brief. They did not raise it as a counterclaim. However, they say the strata enforced the bylaws in a discriminatory manner and so the strata should reverse the fines or permit the alterations. The Sharmas first raised the issue with the strata in a December 9, 2020 letter, after they had already built the deck and the strata had levied fines.
53. Section 8 of the Code prohibits the strata from discriminating against owners in the services it provides. For the Sharmas to succeed they must first show that Dr. Sharma has a disability, that she was adversely impacted with respect to the strata's service, and that her disability was a factor in the adverse impact. If the Sharmas establish a *prima facie* case of discrimination, the burden shifts to the strata to establish a *bona fide* reasonable justification for its conduct. This includes whether the strata satisfied its duty to accommodate Dr. Sharma to the point of undue hardship. See, for example, *Jacobsen v. Strata Plan SP1773 (No. 2)*, 2020 BCHRT 170 at paragraph 75 to 79.

54. I find the Sharmas have not shown a *prima facie* case. They did not raise the issue of accommodation with the strata until after they had made the alterations at issue. The medical evidence shows Dr. Sharma suffers from conditions affecting her mobility, lung function, and mental health. However, I find it unproven that these conditions were ever a factor in any adverse impact to Dr. Sharma with respect to the strata's service. I note that in an April 26, 2021 letter, a physician wrote that Dr. Sharma would benefit from easy and safe access to a garden. However, I find it unproven that this requires the alterations at issue. There is no indication that Dr. Sharma had to garden in the sloped area and could not garden elsewhere, such as within the bounds of SL93. I also find that access to gardening does not justify the installation of the cedar deck. I find it unproven that the strata breached the Code.

Issue #6. Must the strata hold a special general meeting under SPA section 43 to consider the Sharmas' petition?

55. In May 2021, the Sharmas began gathering signatures for a petition under SPA section 43. The resolution sought approval for a resolution that the strata 1) approve the changes existing on strata lots, limited common property, and common property in the strata, 2) may request an owner to sign an indemnity agreement to assume all costs associated with the changes, and 3) remove all fines against owners for failing to obtain prior written approval for the changes. The resolution was not limited to the alterations in this dispute.

56. SPA section 43(1) says that persons holding at least 20% of the strata corporation's votes may, by written demand, require the strata to hold an SGM to consider a resolution or other matter. SPA section 43(6) allows the person making the demand to hold the SGM if the strata does not.

57. SPA section 26 says the strata council must exercise the powers and perform the duties of the strata corporation, including enforcement of bylaws. SPA section 27(1) says the strata corporation may direct or restrict a strata council in its exercise of power and performance of duties by a resolution passed by a majority vote at an AGM or SGM. SPA section 27(2) says the strata corporation may not direct or restrict the strata council if the direction or restriction is contrary to the SPA or the bylaws or

interferes with the council's discretion to determine whether a person has contravened a bylaw or should be fined.

58. The Sharmas gathered 51 signatures in May 2021, and I find they met the required threshold. The strata refused to hold the meeting. It provided reasons in an undated letter to the owners. It said the resolution appeared "unlawful on its face". I agree and find the resolution breaches SPA section 27(2) for the following reasons.
59. The resolution says the strata must approve the existing changes to strata lots, limited common property, and common property. I find the resolution would essentially bypass the $\frac{3}{4}$ vote requirement of SPA 71 for significant changes to common property or common assets. Further, the resolution interferes with the strata council's discretion to determine whether a person has contravened bylaw 15(1) or should be fined. It expressly directs the strata to approval all alterations and prevents the strata council from performing its statutory duty under SPA section 26.
60. I also note the resolution contains a preamble that I find to be inaccurate. It states that all existing changes to strata lots, limited common property, and common property are not significant changes under SPA section 71. Contrary to this, I have already determined that the alterations to the sloped area are significant changes under SPA section 71.
61. Under CRTA section 2, the CRT's mandate includes providing dispute resolution services that applies principles of law and fairness and recognizes any relationships between parties to a dispute will likely continue after the dispute proceeding is included. I find it would be inconsistent with the CRT's mandate to order the strata to hold an SGM to consider a resolution that, on its face, breaches the SPA.
62. Given the above, I dismiss this counterclaim.

CRT FEES AND EXPENSES

63. 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.
64. I find the strata has been largely successful. I therefore order the Sharmas to reimburse the strata for CRT fees of \$225. I dismiss the Sharmas' claims for reimbursement. The parties did not claim for any specific dispute-related expenses, so I order none.
65. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against the Sharmas.

ORDERS

66. I order the strata to, within 90 days of the date of this order, hold an SGM or AGM to vote on a resolution under SPA section 71 to approve the alterations to the outdoor area between SL93 and SL94, which include the following: the cedar deck built in or around 2020, any steps and ramps leading to the cedar deck, the retaining walls that are not original construction, 2 garden beds, handles or handholds installed against the side of the strata's buildings, reflectors, rope lights, and solar lights.
67. I order that if the resolution is not approved by a $\frac{3}{4}$ vote at the general meeting, then within 90 days of the general meeting, the Sharmas must remove the alterations in the sloped outdoor area and restore the common property to its state before the alterations were installed, at the Sharmas' expense.
68. I order that within 14 days of the date of this order, the Sharmas pay to the strata \$225 in CRT fees.
69. The strata is entitled to post-judgment interest under the *Court Order Interest Act*, as applicable.
70. I dismiss the parties' remaining claims, including the Sharmas' counterclaims.

71. Under section 57 of the CRTA, a validated copy of the CRT's order can be enforced through the British Columbia Supreme Court. Under section 58 of the CRTA, the order can be enforced through the British Columbia Provincial Court if it is an order for financial compensation or return of personal property under \$35,000. Once filed, a CRT order has the same force and effect as an order of the court that it is filed in.

David Jiang, Tribunal Member