Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Henry v. The Owners, Strata Plan EPS5455*, 2022 BCCRT 359

B E T W E E N :

GINA HENRY and BILL HENRY

APPLICANTS

A N D :

The Owners, Strata Plan EPS5455

RESPONDENT

REASONS FOR DECISION

Tribunal Member: David Jiang

INTRODUCTION

1. This dispute is about permission to extend a patio located on limited common property (LCP). The applicants, Gina Henry and Bill Henry, jointly own strata lot 25 (SL25) in the respondent strata corporation, The Owners, Strata Plan EPS5455 (strata). The Henrys say the strata unfairly denied their request to extend their patio by 4 rows of pavers by only permitting 3. They seek orders for the strata to grant permission for 2

more rows of pavers, which results in more than their original request, and to explain why it applied a different standard to a similar request for strata lot 23. They also seek orders for the strata to pay $589.71 in lost wages for Mrs. Henry to attend a June 28, 2021 hearing about the patio, and to disclose an audio recording for that same hearing.

2. The strata disagrees. It says it reasonably permitted a patio extension of 3 additional rows of pavers instead of the requested 4. It also says Mrs. Henry agreed to the suggested hearing date so it should not be liable for lost wages. Finally, the strata says it is not required to disclose the hearing recording under the *Strata Property Act* (SPA).

3. Mrs. Henry represents the Henrys. A strata council member represents the strata.

4. For the reason that follow, I dismiss the Henrys' 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 Outside this Dispute

9. In submissions the Henrys raised various allegations. These included allegations that the strata failed to disclose certain documents, and that strata council members breached the standard of care under SPA section 31 and failed to disclose conflicts of interests under SPA section 32. As these allegations are not in the Dispute Notice, I find they are not properly before me and make no findings about them. Even if they were properly raised, the CRT does not have jurisdiction to decide claims under SPA sections 31 and 32. See *Dockside Brewing Co. Ltd. v. Strata Plan LMS 3837*, 2007 BCCA 183 at paragraph 59.

10. The Henrys said that the strata improperly installed video surveillance cameras. While these allegations are in the Dispute Notice, the Henrys did not request a remedy for them. So, I make no findings about whether the strata should remove the video surveillance cameras.

ISSUES

11. The issues in this dispute are as follows:

    a. Did the strata act in a significantly unfair manner when it only partially granted the Henrys' request to expand the patio located on LCP, if so, what is the appropriate remedy?

    b. Did the strata act in a significantly unfair manner by providing only 1 hearing date, and if so, what is the appropriate remedy?

c. Must the strata disclose the audio recording for the June 28, 2021 hearing?

EVIDENCE AND ANALYSIS

12. In a civil proceeding like this one, the Henrys as applicants must prove their claims on a balance of probabilities. This means more likely than not. 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.

13. I begin with the undisputed background. As noted above, the Henrys own SL25. It has a backyard designated as LCP for SL25's exclusive use. Photos and letters from other strata lot owners supporting the Henrys show that the backyards of strata lots 20 through 25 face vacant land.

14. When the Henrys originally purchased SL25, its backyard was partially covered by an outdoor patio. It was made of a grid of pavers and measured 6 pavers in length and 4 pavers in depth. As discussed below, the strata granted permission for 3 additional pavers. It now runs 9 pavers in length along the side of SL25. Each paver looks identical: squares with sides measuring slightly less than 1 foot. The Henrys seek an order to extend the patio's length by 2 additional rows, for a total of 11 pavers.

15. The strata uses the SPA's Schedule of Standard Bylaws. There are amendments registered in the Land Title Office, but I find them irrelevant to this dispute. It is undisputed that bylaw 6 applies. Bylaw 6(1) says that an owner must obtain the written approval of the strata corporation before making an alteration to LCP. Bylaw 6(2) says that the strata corporation may approve the alteration subject to the owner agreeing, in writing, to take responsibility for any expenses relating to the alteration.

16. It is undisputed that the strata made patio rules under SPA section 125(1). That section says that the strata corporation may make rules governing the use, safety and condition of common property and common assets. Rule 4(a) says an owner must obtain approval from the strata council before installing or removing pavers. Rule 4(b) says all pavers must conform to the standard of installation currently used. Rule 4(c) says all pavers must be professionally installed by an approved installer.

17. I turn now to the chronology of events. On May 10, 2021, the Henrys emailed the strata for permission to install 4 additional rows of pavers to extend its length. They wrote that they would use a professional to install the pavers, use matching pavers, and would sign an indemnity agreement. So, I find that the Henrys agreed to comply with rule 4.

18. In a May 24, 2021 letter, the strata decided to approve the Henrys' request to the extent of 3 additional rows of pavers instead of 4. Photographs show that at some point the Henrys installed the 3 additional rows and there is no dispute about them.

19. Dissatisfied with the strata's decision, the Henrys asked the strata for permission for another row in emails dated June 2 and 8, 2021. They also requested a hearing on June 13, 2021, which the strata held on June 28, 2021. I elaborate on whether the strata should have provided more hearing dates below. The strata declined the Henrys' request for the additional row of pavers in a June 29, 2021 letter.

20. No party says the partially approved or requested patio extension is a significant change under SPA section 71. Under that section, a significant change in the use or appearance of common property must generally be approved by a resolution passed by a ¾ vote at an annual or general meeting. Given the parties' positions, and the lack of evidence to suggest otherwise, I find the approved and requested patio extensions are not significant changes under SPA 71.

Issue #1. Did the strata act in a significantly unfair manner when it only partially granted the Henrys' request to expand the patio located on LCP, if so, what is the appropriate remedy?

21. The Henrys say the strata's denial of their request was signficantly unfair. 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. Signficantly 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.

22. 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?

23. I find the Henrys had an objectively reasonable expectation that the strata would grant their patio extension request. This is because, as discussed below, the strata granted numerous requests for patio extensions and there are no rules or bylaws that specifically limit the size of such extensions. However, I find the strata did not violate this expectation with a significantly unfair action.

24. In reaching this finding, I put significant weight on the fact that the strata granted most of the Henrys' request. As stated above, the Henrys were permitted to install 3 rows of pavers instead of 4. Put another way, the strata's decision results in SL25's patio having a total length of 9 pavers instead of 10. Without minimizing the importance of the Henrys' reasonable expectations, I find the disparity is relatively small and weighs heavily against finding that the strata's decision was oppressive or unfairly prejudicial.

25. Further, the strata council minutes show that the strata approved 3 more rows of pavers for strata lot 23 in April 2021, strata lot 24 in June 2021 and strata lot 22 in August 2021. Photos, and the Henrys' captions for them, show these other strata lots now have patios measuring 9 pavers in length and 4 pavers in depth. This is the same as SL25. The photos also show strata lots 20 and 22 have patios that are still 6 pavers in length. So, I find that the strata granted the same patio extension to SL25 that it granted to strata lot 23 in April 2021 and to other strata lots thereafter. Given this, I find that strata had a rational basis for its decision and did not single out the Henrys.

26. The Henrys say strata lot 23 received favourable treatment. I disagree with this characterization. Its owner was merely the first of strata lots 20 through 25 to request a patio extension, and it asked for 3 more rows, which the strata granted. The strata says it wishes to use this as a benchmark or standard for a uniform appearance. I find this approach falls short of showing bad faith or significant unfairness.

27. The Henrys rely on *Wilder et al v. The Owners, Strata Plan BCS 3152*, 2019 BCCRT 212. In that decision, the CRT found that the strata corporation's decision to deny permission for a patio extension was significantly unfair. However, I do not find *Wilder* directly appliable. This is because the CRT found that the strata had approved similar requests for other owners but denied the applicants' request by holding them to a different standard than other owners. As explained above, I have found that the strata treated the Henrys much like other owners.

28. For those reasons, I find the strata did not act in a signficantly unfair manner. Accordingly, I dismiss the Henrys' claims for permission to further extend their patio and for the strata to provide a further explanation about their decision.

Issue #2. Did the strata act in a significantly unfair manner by providing only 1 hearing date, and if so, what is the appropriate remedy?

29. As noted above, Mrs. Henry claims $589.71 in lost wages for time spent at the June 28, 2021 hearing. The strata disputes this claim.

30. SPA section 34.1(1) allows an owner to request a hearing at a council meeting. Subsection 2 says the council must hold the hearing within 4 weeks after the request. The SPA does not further elaborate on how to schedule the hearing. However, I find that the strata must reasonably accommodate the requesting owner's schedule, otherwise it is at risk of acting in a signficantly unfair manner.

31. In its June 16, 2021 email, the strata told the Henrys that the strata council could meet on June 28, 2021 at either 11:00 a.m. or 1:00 p.m. Mrs. Henry replied that she was working that day. She said she was "disappointed" the strata did not provide more dates to choose from and would "try to get sometime off".

32. I find that the most reasonable interpretation of the emails is that Mrs. Henry accepted the hearing date and time of June 28, 2021 at 11:00 a.m., subject to getting time off work. I reach this conclusion because Mrs. Henry did not propose an alternate date or say that she could not miss work. She did not warn the strata that she would seek indemnification for lost wages.

33. I acknowledge that Mrs. Henry expressed some reluctance about the date and time. However, I find that Mrs. Henry could not reasonably expect the strata to provide further hearing dates without a clearer request by her. I find the strata did not act in a significantly unfair manner. I dismiss this claim for lost wages.

Issue #3. Must the strata disclose the audio recording for the June 28, 2021 hearing?

34. The Henrys emailed a request to the strata for an audio recording of the June 28, 2021 hearing. It is undisputed that the recording exists and that the strata is willing to play it back for the Henrys by appointment. Evidence shows the strata's attempt to email the recording to the Henrys in July 2021 was stymied by its file size.

35. SPA section 35 and S*trata Property Regulation* (SPR) section 4.1 set out the records that the strata must prepare and retain. SPA section 36(1) says that if an owner requests access to any of these records, the strata must make the records available for inspection and must provide copies. SPA section 36(3) says the strata corporation must comply within 2 weeks of the request, or within 1 week for bylaws or rules.

36. In my previous decision of *Roberts v. The Owners, Strata Plan LMS 1901*, 2020 BCCRT 854 at paragraph 15, I found that the SPA and SPR did not require the strata to prepare or retain audio recordings of meetings. While CRT decisions are not binding, I find similar considerations apply. I find that to request audio recordings of hearings such as the one held on June 28, 2021, it must be listed as information the strata must prepare and retain. The SPA and SPR do not require the strata to keep such information. So, I find the Henrys are not entitled to request copies or inspection of the June 2021 hearing recording. I dismiss this claim.

CRT FEES AND EXPENSES

37. 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 dismiss the Henrys' claims for reimbursement. The strata did not claim for any specific dispute-related expenses.

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

ORDER

39. I dismiss the Henrys' claims and this dispute.

David Jiang, Tribunal Member