



# Civil Resolution Tribunal

Date Issued: June 27, 2022

File: ST-2021-008406

Type: Strata

Civil Resolution Tribunal

Indexed as: *Fleming v. The Owners, Strata Plan 1290*, 2022 BCCRT 742

B E T W E E N :

DOUG FLEMING

**APPLICANT**

A N D :

The Owners, Strata Plan 1290

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Micah Carmody

## INTRODUCTION

1. This dispute is about a rule prohibiting hot tubs on limited common property (LCP) patios.

2. The applicant, Doug Fleming, owns a strata lot in the respondent strata corporation, The Owners, Strata Plan 1290 (strata). At the strata's 2020 annual general meeting (AGM), the strata ratified a rule prohibiting hot tubs. Mr. Fleming says the 2020 AGM procedures did not comply with the *Strata Property Act* (SPA).
3. The strata says the rule was validly ratified at the 2020 AGM. I infer it asks me to dismiss Mr. Fleming's claim.
4. In his application for dispute resolution, Mr. Fleming says he wants the strata to "remove" the rule prohibiting hot tubs that was passed at the 2020 AGM. I find it is clear from the context that he wants an order that the strata stop enforcing the rule. I also find it is clear from the context that the strata understands that this is what Mr. Fleming wants. Given the CRT's mandate that includes efficiency and flexibility, I have considered Mr. Fleming's claim as if he had explicitly asked for this order.
5. Mr. Fleming represents himself. A strata council member represents the strata.

## **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.

## **ISSUE**

10. The issue in this dispute is whether the strata can enforce the rule prohibiting hot tubs, which turns on whether the rule was ratified at the 2020 AGM in compliance with the SPA.

## **EVIDENCE AND ANALYSIS**

11. As the applicant in this civil proceeding, Mr. Fleming must prove his claims on a balance of probabilities, meaning more likely than not. While I have read all the parties' evidence and submissions, I only refer to what is necessary to explain my decision.
12. Mr. Fleming owns strata lot 52 on the north end of a side-by-side triplex. The strata plan shows an adjoining ground-level LCP patio designated for strata lot 52.
13. Mr. Fleming describes his hot tub as "foldable" although he does not provide a lot of detail about its materials and specifications. It is undisputed that the hot tub is not attached to the patio and is removable. It plugs into an existing electrical outlet without modification.
14. It is not clear exactly when Mr. Fleming acquired the hot tub. It came to the strata's attention by May 7, 2020, when the strata manager asked Mr. Fleming to seek council's approval of the hot tub under bylaw 1-6 and stop using it until approval was granted. Mr. Fleming did not seek approval. The strata apparently abandoned its

position that Mr. Fleming needed approval. Instead, on July 28, 2020 the strata council made a rule that prohibited the storage or use of a hot tub or jacuzzi, portable or attached, on common property (CP) or LCP.

15. SPA section 125 says that strata councils may make rules governing the use, safety and condition of CP, which includes LCP. Rules take effect immediately, but they have no effect after the first AGM held after the rule is made if the rule is not ratified by a resolution passed by a majority vote at that AGM or a previous special general meeting (SGM).
16. The next AGM was held on November 5, 2020. According to the minutes, 5 new rules were ratified by majority vote, including the rule prohibiting hot tubs on CP.
17. On October 14, 2021, the strata wrote to Mr. Fleming advising that he was contravening the hot tub rule and must remove the hot tub or face possible fines. On March 18, 2022, the strata demanded Mr. Fleming remove the hot tub no later than March 21, 2022. The strata said if he failed to comply, it may fine him up to \$50 every 7 days.
18. It is not clear whether the strata has imposed any fines on Mr. Fleming. Mr. Fleming did not seek any remedy related to rule or bylaw contravention fines, so I have not considered the issue further.

### ***Did the 2020 AGM comply with the SPA?***

19. Section 54 of the SPA sets out a person's right to vote at an AGM or SGM. Generally, all owners, and in some cases tenants and others, can vote. Section 56 says a person with the right to vote may vote in person or by proxy. A proxy is a person appointed to stand in the place of a person otherwise able to vote and participate in discussions at AGMs and SGMs.
20. Mr. Fleming alleges the 2020 AGM did not comply with SPA, and therefore the hot tub rule was not properly ratified. Specifically, he says owners were prevented from selecting their own proxies.

21. The 2020 AGM notice said the meeting would be held “via Zoom”. However, there were no Zoom meeting details provided and the minutes show that only the strata president and 1 other owner attended in person, with 55 votes by proxy. Based on this evidence, I find that owners were not permitted to attend the 2020 AGM.
22. The 2020 AGM notice package included a “restricted proxy” form. The form identified 2 strata council members available to serve as proxies and instructed voters to “circle one only”. Proxy forms had to be delivered 24 hours before the AGM.
23. Under SPA section 56, a person may appoint any proxy they choose other than an employee of the strata or a person who provides management services to the strata. So, I find the strata contravened SPA section 56 because the 2020 AGM proxy form did not allow owners to freely select any proxy they wished.
24. In *Balayewich v. The Owners, Strata Plan LMS317*, 2021 BCCRT 110, I found that despite the COVID-19 pandemic and regulations aimed at facilitating safe strata meetings, strata corporations cannot prevent owners from participating in AGMs or SGMs. I adopt that reasoning here. I find the 2020 AGM procedure did not allow a proxy holder to “stand in place of the owner” as required under section SPA 56(4). There was no opportunity to discuss the proposed rules and propose changes, to amend resolutions or vote on those amended resolutions as allowed under SPA section 50(2). Any communication that did take place during the 2020 AGM would have been meaningless given the votes had already been recorded. I also find the 2020 AGM procedure did not allow for voter cards to be issued or for votes to be held by secret ballot if requested, as required under bylaw 5-27.
25. Overall, I find the 2020 AGM did not comply with SPA sections 50(2) and 56, and bylaw 5-27. I find the motion identified as item 7(a) in the minutes ratifying the hot tub rule was not properly approved by the owners as required by SPA section 125(6). I find the rule therefore ceased to have effect after the November 5, 2020 AGM. I therefore order the strata to stop enforcing rule B(4), the hot tub rule.

26. I acknowledge the strata relied on a legal opinion stating that the hot tub rule was valid. However, that opinion was explicitly based on an understanding that the rule was ratified at the 2020 AGM and did not consider whether the AGM procedure complied with the SPA.
27. Nothing in this decision prevents the strata council from making a new rule prohibiting hot tubs. Such a rule will be subject to SPA section 125, meaning if it is not ratified at or before the next AGM, it stops having effect. I have not considered whether the rule can be applied retroactively to Mr. Fleming's existing hot tub as the strata's legal opinion indicates. I have also not considered whether such application would be significantly unfair to Mr. Fleming. I find those issues are not squarely before me in this dispute.

## **CRT FEES AND EXPENSES**

28. 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 therefore order the strata to reimburse Mr. Fleming for CRT fees of \$225. Neither party claimed dispute-related expenses.
29. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against Mr. Fleming.

## **ORDERS**

30. I order the strata to immediately stop enforcing rule B(4) prohibiting hot tubs.
31. Within 30 days of this order, I order the strata to pay Mr. Fleming \$225 for CRT fees.
32. Mr. Fleming is entitled to post-judgment interest, as applicable.

33. 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.

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Micah Carmody, Tribunal Member