



Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan BCS2438 v. Graham*, 2022 BCCRT 904

B E T W E E N :

The Owners, Strata Plan BCS2438

APPLICANT

A N D :

JAMES GRAHAM

RESPONDENT

A N D :

The Owners, Strata Plan BCS2438

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

Nav Shukla

INTRODUCTION

1. This is a dispute about alleged smoking bylaw violations. The respondent (and applicant by counterclaim), James Graham, owns strata lot 21 (SL21) in the applicant (respondent by counterclaim) strata corporation, The Owners, Strata Plan BCS2438 (strata). The strata says that someone has been smoking marijuana, cigarettes, or both in SL21 and breaching the strata's bylaws. The strata says it has imposed fines, but Mr. Graham continues to smoke in SL21. Mr. Graham denies smoking inside SL21.
2. The strata seeks an order that Mr. Graham pay \$800 in fines for the alleged bylaw violations. The strata further seeks an order that Mr. Graham immediately cease smoking and vaping any substance in SL21 and on strata property. Lastly, the strata seeks reimbursement for the legal expenses it has incurred to enforce its bylaws against Mr. Graham, including in litigating this dispute.
3. Mr. Graham counterclaims against the strata for reimbursement of his legal expenses for defending against the strata's claims that he breached the bylaws. He seeks reimbursement for the legal expenses he has incurred both before and during this dispute.
4. The strata is represented by a strata council member. Mr. Graham is represented by a lawyer, Aman Oberoi.

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. Though I found that some aspects of the parties' submissions called each other's credibility into question, I find I am properly able to assess and weigh the documentary evidence and submissions before me without an oral hearing. In *Yas v. Pope*, 2018 BCSC 282, the court recognized that oral hearings are not always necessary when credibility is in issue. 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.
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.

Preliminary Issues

9. In addition to the orders mentioned above, the strata seeks certain alternative orders in the event Mr. Graham needs to smoke marijuana for a medical purpose. However, since Mr. Graham denies smoking in SL21 altogether, and since he does not argue that he needs to use marijuana for medical reasons, I find I do not need to consider these alternative orders.
10. The strata submitted some evidence after the CRT's deadline. The late evidence includes the strata's legal counsel's updated fee ledger and evidence about a strata council hearing that took place on April 26, 2022, after the strata's evidence deadline. With respect to the updated legal fee ledger, the strata says that it could not have known or finalized its legal fees until after the strata's reply submissions were drafted by its legal counsel. The strata says that the April 26, 2022 hearing documents contain information about Mr. Graham which is relevant to this dispute and contrary

to claims he previously made. Mr. Graham had the opportunity to review and respond to this late evidence but chose not to make any submissions about it. I find that both the updated legal fee ledger and the documents about the April 26, 2022 hearing are relevant to issues in this dispute. So, consistent with the CRT's mandate that includes flexibility, and since Mr. Graham has not objected to it, I allow the late evidence.

11. The strata takes issue with one piece of Mr. Graham's evidence, a February 8, 2022 email from CRT staff to the parties during the CRT's case management stage. The strata says that discussions from the case management stage are confidential and Mr. Oberoi has contravened CRTA section 89(1) by disclosing this email. CRTA section 89(1) refers to information or records provided by one party to another. The email disclosed is not information exchanged between the parties but, rather, information from CRT staff. So, I find that Mr. Oberoi has not contravened CRTA section 89(1).
12. However, CRT rule 1.11 says that communications (not just communications between parties) made attempting to settle claims by agreement in the CRT process are confidential and must not be disclosed during the CRT decision process. CRT rule 1.11 exists to encourage settlement by allowing parties to make admissions without fear that those admissions will end up as evidence in a later hearing. So, given the confidential nature of these types of discussions during the CRT's case management stage and the absence of an agreement between the parties to disclose such information, I have not considered this email, or any of Mr. Graham's submissions referring to the email's contents in my decision.
13. Lastly, after reviewing the evidence and submissions provided by both parties, I asked CRT staff to obtain further evidence and submissions from the strata about its reimbursement claim for legal expenses. Mr. Graham was also provided an opportunity to provide submissions in response. I have considered these submissions below in deciding the strata's claim for legal expenses.

ISSUES

14. The issues in this dispute are:

- a. Did Mr. Graham breach the strata's bylaws?
- b. Are the \$800 fines valid?
- c. Is the strata entitled to reimbursement of its claimed legal expenses?
- d. Is Mr. Graham entitled to reimbursement of his claimed legal expenses?

EVIDENCE AND ANALYSIS

15. In a civil proceeding like this one, the applicants must prove their claims on a balance of probabilities (meaning “more likely than not”). So, the strata has the burden of proving that Mr. Graham breached its bylaws, that it validly imposed the fines, and that it is entitled to reimbursement of its legal expenses. Mr. Graham has the burden of proving his counterclaim for reimbursement of his legal expenses. I have read all the parties’ submissions and evidence but refer only to the evidence and argument that I find relevant to provide context for my decision.

Did Mr. Graham breach the strata’s bylaws?

16. In October 2019, the strata repealed its existing bylaws and filed new bylaws with the Land Title Office. In September 2021 the strata amended bylaw 3(8). I find any other amendments to the bylaws after October 2019 are not relevant to this dispute. I discuss the relevant bylaws below.

17. The strata says Mr. Graham breached bylaw 3(1), the previous bylaw 3(8), the new bylaw 3(8), and bylaw 40(5). The relevant parts of bylaw 3(1) say that an owner must not use a strata lot or common property in a way that (a) causes a nuisance or hazard to another person, or (c) unreasonably interferes with a person’s rights to use and enjoy another strata lot or common property. I will refer to these collectively as the “nuisance bylaws”.

18. The old bylaw 3(8), which was in place before September 27, 2021, prohibited an owner, tenant, occupant or visitor from smoking on common property, or within 2 metres of any window, entrance door or air intake system. As of September 27, 2021, the new bylaw 3(8) prohibits smoking or vaping tobacco, marijuana, or any similar organic substance, in any interior or exterior common or limited common property as well as in strata lots, except as permitted by bylaw 40(3).
19. Bylaw 40(3) provides an exception to the new bylaw 3(8) and allows anyone with a valid medical marijuana license or with a letter from a medical doctor confirming the need to consume marijuana for medical purposes to smoke marijuana in a strata lot. Bylaw 40(5) says anyone that falls under this exception and smokes marijuana within a strata lot must not allow the smoke to escape the strata lot such that it can be smelled by another resident. As mentioned above, in this dispute, Mr. Graham does not claim that the exception set out in bylaw 40(3) applies to him. Specifically, Mr. Graham does not argue that he has a valid medical marijuana license or that he needs to consume marijuana for medical purposes. So, I focus my analysis on whether Mr. Graham breached the nuisance bylaws and bylaw 3(8) (both old and new).

Nuisance Bylaws

20. The strata says that someone in SL21 has been smoking or vaping tobacco, marijuana, or other similar substances inside SL21 since January 1, 2021 up until at least March 28, 2022. The strata further says Mr. Graham has permitted smoke and odour to escape from SL21 and permeate a neighbouring strata lot, such that it can be smelled by another resident (complainant). The strata says the smoke and odour coming from SL21 is interfering with the complainant's use and enjoyment of the neighbouring strata lot and having a detrimental impact on her health. As mentioned, Mr. Graham denies smoking in SL21 and says the strata has failed to prove that any smoke or smell are coming from SL21.
21. It is undisputed that the complainant moved into the neighbouring strata lot in January 2021. It is also undisputed that SL21 and the complainant's strata lot are located directly next to each other.

22. The evidence includes over 20 emails from the complainant to the strata manager from January 21, 2021 to March 28, 2022 complaining about the smell of cigarette and marijuana smoke coming from SL21 (complaint emails). Many of the complaint emails included detailed logs noting the dates, times, and locations within the neighbouring strata lot where the complainant said the smell was present.
23. Taken together, the complaint emails report the smell permeating the neighbouring strata lot over 260 times between January 21, 2021 and March 28, 2022. The complaint emails note the smell emanated from the drain openings in the upstairs bathroom, plug outlets on the walls adjoining SL21, in the master bedroom, upstairs bedroom (which is also the complainant's home office), and the kitchen cupboards. The complaint emails also detail negative health impacts on the complainant, such as extreme nausea and headaches, as well as aggravating the complainant's allergies. In the emails, the complainant said there were days the smell was so bad that she could not work from her home office, take baths in the upstairs bathroom, or make breakfast in the kitchen. The complainant also noted some days where she was forced to leave the neighbouring strata lot because the smell was particularly unbearable.
24. The evidence includes a written statement from MH, one of the strata council members who attended the neighbouring strata lot on May 15, 2021 and August 1, 2021 to investigate the complaints. In this statement, MH says that when MH and another council member visited the neighbouring strata lot on May 15, 2021, they noticed a heavy smell of marijuana coming through electrical outlets on the second floor on the wall shared with SL21. MH said the smell was especially strong in the guest bathroom upstairs, the guest bedroom which contains the complainant's home office, and the pantry. MH said they could smell the marijuana while wearing masks even with the strong air freshener the complainant was using. When MH attended the neighbouring strata lot again on August 1, 2021, MH said the smell was even stronger. MH said that considering what they have smelled in the neighbouring strata lot with the wall shared with SL21, there is no doubt Mr. Graham was smoking marijuana in SL21.

25. The evidence also includes emails between MH and the strata manager from August 4 to 6, 2021 where MH reported the results of the August 1, 2021 investigation. In these emails, the strata manager asked MH how MH knew the smell was coming from SL21 and not another strata lot. MH replied that the smell only came from the outlets connected to SL21 and there was no smell on the other side of the neighbouring strata lot.
26. In a strata setting, a nuisance is 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). The test for nuisance depends on several factors, such as its nature, severity, duration and frequency (see *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64). The test is an objective one, measured with reference to a reasonable person occupying the premises. In a strata corporation, a certain amount of "give and take" is necessary among neighbours (see *Sauve v. McKeage et al.*, 2006 BCSC 781.)
27. Based on the complaint emails and the evidence detailing the strata council's May 15, 2021 and August 1, 2021 investigations, I find that the strata has proven on a balance of probabilities that the smell created a nuisance to the complainant and interfered with her ability to use and enjoy her strata lot.
28. Next, I consider whether the strata has proven the smell was coming from SL21. The evidence includes Mr. Graham's emails to the strata manager and to the strata's legal counsel responding to the strata's bylaw violation letters. In a February 10, 2021 email responding to the strata manager's January 25, 2021 bylaw violation letter, Mr. Graham agreed to comply with bylaws 3(8) and 40(3). The email also included a doctor's note which said that Mr. Graham needed "pot" for depression, anxiety, gastrointestinal disorder and pain. Mr. Graham also told the strata manager that he had purchased an air purifier that he said he would operate in SL21 to stop any odours that may linger. The email included a picture of the air purifier's box which had a "smoke" icon circled. The strata says Mr. Graham circled the icon and Mr. Graham does not dispute this.

29. In a March 1, 2021 letter, the strata's legal counsel noted that if Mr. Graham chose to continue smoking within SL21, the strata required him to take steps by March 31, 2021, at his own cost, to seal SL21 such that there was an airtight barrier between SL21 and the neighbouring strata lot. Mr. Graham responded by email on March 11, 2021 and said that he would not be undertaking any repairs. He also said that he would take his cigarette and marijuana smoking outside, beyond strata property and common property.
30. The strata's legal counsel wrote a follow-up letter to Mr. Graham on April 1, 2021 advising that the strata continued to receive complaints that he was smoking in SL21. Mr. Graham responded the same day and said that he had already informed strata's legal counsel that he would not be doing any repairs and that he would not be smoking in SL21 after March 31, 2021.
31. Read together, I find that Mr. Graham's February 10, 2021, March 11, 2021, and April 1, 2021 emails are acknowledgments that he was smoking in SL21.
32. Mr. Graham says that the strata has failed to prove that he was smoking in SL21. He suggests that the smell in the neighbouring strata lot is "third-hand smoke residue" from the neighbouring strata lot's previous owners. However, Mr. Graham has provided no evidence in support of his allegation that the previous owners were smokers.
33. Mr. Graham also says that the complaint emails include dates where the complainant says she smelled smoke coming from SL21 but he was not home, including complaints during late August 2021 when he was on a trip. Other than an airline itinerary showing that Mr. Graham had a trip booked between August 19, 2021 to August 27, 2021, Mr. Graham has provided no additional evidence establishing that he was not home at the time of the complaints made outside of this time frame.
34. Given the details in the complaint emails, the evidence detailing the strata council's May 15, 2021 and August 1, 2021 investigations, and Mr. Graham's emails mentioned above, I find it is more likely than not that Mr. Graham was smoking in SL21 and allowing the smell from his smoking to permeate the neighbouring strata lot on several

occasions between January 2021 and March 2022. So, I find that Mr. Graham breached the nuisance bylaws by creating the smell which interfered with the complainant's ability to use and enjoy the neighbouring strata lot.

35. Mr. Graham says that it is possible he smokes outside, off strata property, and the smoke smell travels with him. Though not addressed in the evidence, if this was proven, Mr. Graham would still be in breach of the nuisance bylaws since the evidence shows that the smell at issue is strong enough to interfere with the complainant's ability to use and enjoy her strata lot.

Bylaw 3(8)

36. Since I have already found that Mr. Graham breached the nuisance bylaws, I find I do not need to decide whether Mr. Graham has also breached the old and new bylaw 3(8). However, as mentioned above, the new bylaw 3(8) prohibits any type of smoking inside a strata lot or on interior or exterior common or limited common property, unless the exception in bylaw 40(3) applies. As mentioned, Mr. Graham does not argue that the exception in bylaw 40(3) applies to him. So, since I have found that Mr. Graham breached the nuisance bylaws, I order Mr. Graham to immediately stop smoking and vaping any substance in SL21 or on any of the strata's common or limited common property.

Are the \$800 fines valid?

37. Mr. Graham argues, in essence, that the strata did not conduct reasonable investigations before imposing fines. He says the strata has failed to prove that it was him who was smoking. He further says that the strata was required, but failed, to conduct an independent investigation for each complaint before imposing a fine. Though not worded this way, I find that Mr. Graham essentially argues that by imposing the fines, the strata acted in a way that was significantly unfair to him.
38. The strata says that its investigations were adequate and that it is not obligated to investigate each complaint made against an owner. The strata says that it weighed the evidence it gathered from the complainant, the findings from the council's 2 investigations, and Mr. Graham's email correspondence, and then decided that Mr.

Graham had breached the bylaws, after giving Mr. Graham an opportunity to respond to the bylaw violation allegations.

39. Under CRTA section 123(2), the CRT can make orders remedying significantly unfair actions by a strata corporation or a strata council (see *The Owners, Strata Plan BCS 1721 v. Watson*, 2018 BCSC 164). Courts have found that a strata's actions are significantly unfair when they are burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith, or are unjust or inequitable (see *Reid v. Strata Plan LMS 2503*, 2003 BCCA 126 and *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44). *Dollan* also established a reasonable expectations test. According to paragraph 28 of *Watson*, the reasonable expectations test asks whether an objectively reasonable expectation by an owner or tenant was violated by a significantly unfair action.
40. Mr. Graham relies on the previous CRT decision *Wright v. The Owners, Strata Plan BCS 4303*, 2021 BCCRT 1161 and argues that the strata has not adequately explained how it determined that Mr. Graham breached the bylaws. Mr. Graham also says that, like in *Wright*, the strata here considered each new complaint to be a new contravention but did not investigate each complaint. I find the *Wright* decision, which is not binding on me, distinguishable on the facts.
41. In *Wright*, the strata had received noise complaints about Mr. Wright and levied fines totalling over \$15,000 for more than 70 bylaw contraventions. The tribunal member in *Wright* noted that it is generally accepted that the disturbance caused by noise depends on factors such as background noise and the time of day. Since the strata in *Wright* had not considered the noise's duration and time of day for each noise complaint, the tribunal member found that the strata acted significantly unfairly in finding each noise complaint to be a bylaw contravention. Here, I find there is no similar generally accepted notion that smoking disturbances depend on the time of day or other similar factors. Further, though the strata's letters stated that each of the listed complaints was a separate contravention, the strata did not fine Mr. Graham for each of those contraventions, unlike in *Wright*. So, I find that the strata was not required to investigate each complaint made against Mr. Graham.

42. Rather, the strata has a duty to enforce its bylaws under SPA section 26. *Chorney v. The Owners, Strata Plan VIS770*, 2016 BCSC 148 at paragraph 52, says that a strata may investigate bylaw contravention complaints as it sees fit, if it complies with the principles of procedural fairness and is not significantly unfair to any person who appears before it.
43. According to *Leclerc v. The Owners, Strata Plan LMS 614*, 2012 BCSC 74 at paragraph 61, perfection is not required of the strata council, only reasonable action and fair regard for the interests of all concerned. So, a strata corporation will meet its obligations under SPA section 26 so long as it acts reasonably.
44. Further, SPA section 135 sets out the requirements a strata corporation must meet before imposing a fine. It says the strata must not impose a fine unless it has received a complaint and given the owner particulars of the complaint in writing and a reasonable opportunity to answer the complaint, including a hearing if requested. The strata must also give the owner notice in writing “as soon as is feasible” if it has decided to impose a fine for the bylaw breach.
45. The BC Court of Appeal has found that strict compliance with SPA section 135 is required before a strata corporation can impose bylaw fines, and fines may be found to be invalid if the procedural requirements of section 135 are not followed (*Terry v. The Owners, Strata Plan NW 309*, 2016 BCCA 449). In *Terry*, the Court of Appeal specifically considered what constituted sufficient particulars for the purpose of section 135. In paragraph 28, the Court in *Terry* said that an owner must be given notice that the strata is considering imposing a fine for the alleged contravention of an identified bylaw or rule, and particulars sufficient to call attention to the owner of the contravention at issue.
46. So, I must determine whether the strata followed the procedures set out in SPA section 135 and provided sufficient particulars before imposing each of the fines against Mr. Graham.
47. Bylaw 30 (1)(a) says the strata can fine an owner a maximum of \$200 for each bylaw contravention. The evidence before me includes letters sent by the strata manager

and the strata's legal counsel to Mr. Graham between January 25, 2021 and May 2, 2022. Mr. Graham was informed of the first \$200 fine being imposed on June 1, 2021 and the following 3 fines on September 1, 2021.

48. Before these fines were imposed, the strata sent Mr. Graham letters describing and listing the complaints (including specific dates and times) and setting out the bylaws Mr. Graham was alleged to have breached. In these letters, Mr. Graham was also told that fines might be imposed against him, and he was given an opportunity to respond to the allegations, including requesting a council hearing. Though Mr. Graham says that none of the fines were levied under the nuisance bylaws, I note the evidence shows that the bylaw violation letters and the letters notifying Mr. Graham that fines were imposed referred specifically to the nuisance bylaws. I have reviewed all of the above-mentioned letters and find that the strata's January 25, 2021, March 1, 2021 and April 1, 2021 letters satisfied SPA section 135's requirements before the strata imposed the first fine. So, I find that the first \$200 fine is valid.
49. The strata's legal counsel's letter dated September 1, 2021 informed Mr. Graham that the strata had decided to impose 3 additional fines totaling \$600 against him for his repeated bylaw breaches. The letter referred specifically to Mr. Graham's breaches on June 28, June 29, and June 30, 2021. The strata manager's earlier July 2, 2021 letter provided Mr. Graham particulars of these alleged breaches. The July 2, 2021 letter also advised Mr. Graham that he could be fined and gave him 20 days to respond and request a hearing. I find that the July 2, 2021 letter satisfied the section 135 requirements. So, I find the \$600 in fines are also valid.
50. Since I have found that the strata satisfied the section 135 requirements before imposing the \$800 in fines, I find that the strata complied with the principles of procedural fairness and provided Mr. Graham with an opportunity to be heard and address the allegations against him prior to imposing the fines.
51. Further, and as mentioned above, the evidence shows that the strata conducted its own investigations before imposing the fines. Mr. Graham argues that the strata's investigations were inadequate because the strata did not engage an expert or use

“technologies” to prove the smell was coming from SL21. I find the evidence does not establish that the strata needed to engage an independent expert to determine the smell’s source. The evidence shows that the strata felt confident in its determination that the smoke was coming from SL21, and I find the strata acted reasonably in making that determination. I find the strata reasonably relied on the complaint emails, the results of the strata council’s 2 investigations, as well as Mr. Graham’s own admissions from his emails mentioned above in finding that the smell and smoke was coming from SL21 and that Mr. Graham had breached the bylaws.

52. With that, I find that the strata reasonably investigated the complaints, met SPA section 135’s requirements, and was not significantly unfair to Mr. Graham in imposing the \$800 in fines. So, I order Mr. Graham to pay the strata \$800 in fines for the bylaw violations.

Is the strata entitled to reimbursement of its claimed legal fees?

53. The strata relies on bylaw 38(2) in support of its claim for legal expenses it incurred both before this dispute was commenced (pre-CRT legal expenses) and for the legal expenses related to this dispute (CRT legal expenses), excluding those expenses incurred to defend Mr. Graham’s counterclaim. It says that the strata’s legal counsel’s involvement was necessary due to Mr. Graham’s continued disregard for the strata’s enforcement measures and repeated bylaw breaches.
54. Mr. Graham says that the strata is not entitled to reimbursement of any legal fees because the strata has failed to prove that he breached any strata bylaws. However, as noted above, I have already found Mr. Graham breached the bylaws. So, I consider whether bylaw 38(2) entitles the strata to reimbursement of its claimed legal expenses.
55. Bylaw 38(2) says as follows:

The strata corporation, in enforcing the Act, the bylaws or the rules or in collecting money owed to the strata corporation (including money owing as a fine) against or from one or more owners, tenants or occupants of a strata lot

shall (unless the court or arbitrator orders otherwise) be entitled to recover from that owner, tenant or occupant (or one or more of them jointly and severally) its legal costs on a solicitor-and-own-client basis.

56. The strata claims \$5,040.49 for its pre-CRT legal expenses and \$13,948.74 for its CRT legal expenses.

Pre-CRT legal expenses

57. As noted by the strata, the CRT has previously ordered reimbursement of legal fees where recovery of those fees was specifically authorized under a strata corporation's bylaws (see *The Owners, Strata Plan VR 293 v. Bains*, 2019 BCCRT 504 and *The Owners, Strata Plan KAS 1201 v. Neilson*, 2021 BCCRT 667). In *Bains*, the Vice Chair noted there was a specific bylaw allowing the strata corporation to charge an owner for legal fees incurred by the strata in correcting or curing bylaw violations. The Vice Chair went on to note that under sections 123(1)(c) and 121(1)(d) of the CRTA, the CRT has authority to order payment of money owed under a strata bylaw. Though not binding on me, I agree with and adopt the Vice Chair's reasoning in *Bains*.
58. Here, bylaw 38(2) specifically says that the strata is entitled to recover its legal costs incurred in enforcing the SPA or its bylaws or in collecting fines against an owner, from that owner. So, I find the strata is entitled to reimbursement for the legal costs it incurred for the purpose of enforcing its bylaws and collecting the fines owed by Mr. Graham prior to this CRT dispute.
59. As mentioned, the strata claims \$5,040.49 for its pre-CRT legal expenses. In support of its claim for reimbursement of its pre-CRT legal expenses, the strata provided 8 invoices. I find the strata's legal invoices dated March 17, 2021 (for \$1,051.41), April 21, 2021 (for \$560), June 16, 2021 (for \$392), August 25, 2021 (for \$784), September 9, 2021 (for \$448), October 22, 2021 (for \$392) and November 1, 2021 (for \$1,245.08) are invoices for legal costs that properly fall within the scope of bylaw 38(2). This is because these invoices are for legal costs incurred by the strata for enforcing the SPA, its bylaws, and related to collecting money owed by Mr. Graham to the strata. These invoices total \$4,872.49.

60. The July 30, 2021 invoice for \$168 included charges for legal advice about enforcement actions the strata could take against Mr. Graham as well as work the strata's lawyer did in drafting amendments to smoking bylaw 3(8) for the strata. The strata says that Mr. Graham's repeated bylaw breaches led the strata to seek the amendments to bylaw 3(8). However, I find the legal costs related to implementing the amendments do not properly fall within bylaw 38(2) and are not recoverable against Mr. Graham. This is because I find these legal expenses are not related to enforcing the SPA, the bylaws or in collecting money owed to the strata, which is required in order for the strata to recover its legal expenses under bylaw 38(2).
61. The July 30, 2021 invoice does not detail how much of the \$168 was in relation to drafting the bylaw amendments. So, on a judgment basis, I find the strata is entitled to reimbursement of half the July 30, 2021 invoice's amount, being \$84. In total, I find the strata is entitled to reimbursement of \$4,956.49 for its pre-CRT legal expenses. I find this amount reasonable based on the detailed invoices mentioned above.

CRT legal expenses

62. As mentioned above, the strata also relies on bylaw 38(2) for reimbursement of \$13,948.74 from Mr. Graham for its CRT legal expenses. The strata says that since bylaw 38(2) entitles it to recover its legal costs on a solicitor-and-own-client basis, it is entitled to reimbursement on a full indemnity basis. The strata says that there is no requirement for its claimed CRT legal fees to be considered reasonable in order to be reimbursed. In the alternative, the strata says that its claimed \$13,948.74 in CRT legal expenses is reasonable and was proportionally incurred for the purposes of enforcing the bylaws against Mr. Graham and collecting money owed by him to the strata.
63. Mr. Graham refers to the CRT decision of *The Owners, Strata Plan BCS945 v. Miller*, 2021 BCCRT 1111 to say the strata is not entitled to reimbursement of its CRT legal expenses. Mr. Graham also argues, in essence, that based on CRT rule 9.5(3), reimbursement for legal fees should only be awarded in extraordinary circumstances, which do not exist here for the strata. I consider each of these arguments in turn below.

CRT Miller Decision

64. In *Miller*, the tribunal member dealt with a similar bylaw to bylaw 38(2) and found that the strata could not recover the legal fees related to the strata filing its application in the CRT, participating in the dispute, or defending Mr. Miller's dispute claims because of SPA sections 167(2) and 171(6)(a). These sections of the SPA essentially say that an owner in a legal dispute with a strata corporation, is not required to contribute to the strata's expenses in litigating (section 171(6)) or defending (section 16(2)) that dispute.
65. However, as noted by the strata, in *Wang v. The Owners, Strata Plan LMS2970*, 2021 BCCA 369, the BC Court of Appeal clarified that SPA section 167(2) does not prevent a court from ordering legal costs against an owner, and that to suggest otherwise is "misguided" (see also *The Owners, Strata Plan LMS 2269 v. Tilley*, 2022 BCCRT 318 at paragraph 25). Since SPA section 189.4 confirms that sections 167(2) and 171(5) and (6) also apply to the CRT, I find the same reasoning applies to CRT disputes started by a strata corporation.
66. As mentioned by the Vice Char in *Tilley*, the courts reasoning in *Wang* is binding on the CRT. So, I find that SPA sections 167(2) and 171(5) and (6) cannot entirely preclude a strata corporation from successfully claiming reimbursement of legal fees in a CRT dispute. I now consider Mr. Graham's argument about CRT rule 9.5(3).

CRT Rule 9.5(3)

67. Rule 9.5(3) says that the CRT will not order one party to pay another party's legal fees in a strata property dispute unless there are extraordinary circumstances which make it appropriate. Rule 9.5(4) goes on to say that in determining whether a party must pay the fees that a lawyer charged to another party, the CRT may consider:
- a. the complexity of the dispute,
 - b. the degree of involvement by the representative,
 - c. whether a party or representative's conduct has caused unnecessary delay or expense, and

d. any other factors the CRT considers appropriate.

68. Rule 9.5(3) is similar to *Small Claims Act* (SCA) section 19(3) which says that the British Columbia Provincial Court must not order one party in a proceeding under the SCA or the small claims rules to pay counsel or solicitor's fees to another party to the proceeding. Section 19(3) has been interpreted as limiting a litigant's ability to recover legal fees incurred during a legal proceeding, even where recovery of legal fees was agreed to in a contract (see *Upcountry v. Heros International*, 2013 BCPC 109 at paragraphs 3 to 6). In *Upcountry*, the court stated that this conclusion was in line with the purpose of the SCA set out in section 2 which is to allow people who bring claims to the provincial court to have them resolved in a just, speedy, inexpensive and simple manner.
69. The CRT's mandate set out in CRTA section 2(2) is similar to that of the Provincial Court. As mentioned above, it says that the CRT is to provide dispute resolution services in a manner that is accessible, speedy, economical, informal and flexible. This mandate is reflected in CRT rule 9.5(3) as well as CRTA section 20 which says that unless otherwise provided in the CRTA, the parties in a CRT dispute are to represent themselves. In general, these provisions support that the CRTA will rarely order reimbursement of legal fees in a CRT dispute.
70. Unlike SCA section 19(3), however, CRT rule 9.5(3) gives me the discretion to award legal fees incurred during a CRT dispute where there are extraordinary circumstances. Even though the strata here is claiming reimbursement for its CRT legal expenses under bylaw 38(2), I find that the CRT's mandate as reflected in rule 9.5(3) cannot be ignored. So, I find extraordinary circumstances must exist in order for the strata to be awarded reimbursement for its CRT legal expenses.
71. I agree with the Vice Chair's finding in *Tilley* that rule 9.5(3) does not exclude the possibility of legal fee reimbursement where specifically permitted under a strata bylaw. Rather, the existence of such a bylaw can constitute an extraordinary circumstance for the purpose of CRT rule 9.5(3). Here, although the dispute was not particularly complex, I find that given Mr. Graham's representation by his legal

counsel in this dispute it was reasonable for the strata to request assistance from its legal counsel. From the invoices in evidence, it is clear that the strata's lawyer ran the dispute on the strata's behalf. Though not particularly complex, the parties' submissions were lengthy, and there was a considerable volume of evidence. Overall, given bylaw 38(2), the degree of both parties' legal counsel's involvement and the volume of evidence, I find extraordinary circumstances exist here entitling the strata to reimbursement for its CRT legal expenses. I discuss the extent of that reimbursement below.

How much is the strata entitled to for its CRT legal expenses?

72. As mentioned, the strata claims \$13,948.74 for its CRT legal expenses. The strata says that because bylaw 38(2) entitles it to recover its legal costs on a solicitor-and-own-client basis (i.e., full indemnity), there is no requirement that the CRT legal expenses be considered reasonable. However, in *Wanson (Bristol) Development Ltd. v. Sahba*, 2019 BCCA 459, the Court of Appeal registrar considered the principle of special costs versus full indemnity costs and found that when assessing solicitor-and-own-client costs, the question is subjective: are the charges reasonable in the circumstances? Based on the court's reasoning in *Wanson*, I find that bylaw 38(2) does not automatically entitle the strata to full reimbursement of its CRT legal expenses. The legal expenses must be reasonable in the circumstances. This is in line with SPA section 133(2) which says that a strata corporation may require the reasonable costs of remedying a contravention be paid by the person who might be fined for the contravention.
73. In *The Owners, Strata Plan NWS3075 v. Stevens*, 2018 BCSC 1784, the court, referring to "reasonable costs" under SPA section 133(2), said that proportionality is an important consideration in assessing to what extent the strata's actual costs are reasonable. Though the strata says it does not rely on SPA section 133(2), I find SPA section 133(2) is the legislation that enables bylaw 38(2). So, I find the court's reasoning applies here and proportionality must be a part of the reasonableness analysis.

74. Further, in *Wanson*, the registrar considered the factors set out in section 71(4) of the *Legal Profession Act* as a guide in considering what is reasonable. These factors are as follows:

- a. the complexity, difficulty or novelty of the issues involved,
- b. the skill, specialized knowledge and responsibility required of the lawyer,
- c. the lawyer's character and standing in the profession,
- d. the amount involved,
- e. the time reasonably spent,
- f. if there has been an agreement that sets a fee rate that is based on an amount per unit of time spent by the lawyer, whether the rate was reasonable,
- g. the importance of the matter to the client, and
- h. the result obtained.

75. Here, I find the issues involved in the dispute were not complex. The evidence does not address the skill, specialized knowledge of the strata's lawyer, or the lawyer's character and standing in the profession. However, based on the strata's lengthy written submissions which were undisputedly drafted by the strata's legal counsel, I find the strata's legal counsel had specialized knowledge of strata disputes. The amounts involved in the dispute are the \$800 fines, plus the pre-CRT legal expenses which together equal approximately \$5,800. The invoices do not specify a set fee rate per unit of time or how much time was spent. Though not specifically addressed by the strata, I find the subject matter of this dispute was significantly important to it, given the time and effort put in by the strata to enforce the bylaws against Mr. Graham. Lastly, the strata's legal counsel has obtained positive results for it in this dispute.

76. The evidence includes the following invoices detailing the strata's claim for CRT legal expenses: the November 23, 2021 invoice (for \$461), March 15, 2022 invoice (for

\$560), March 30, 2022 invoice (for \$8,635.68), April 27, 2022 invoice (for \$364), April 28, 2022 invoice (for \$560) and the May 6, 2022 invoice (for \$3,368.06).

77. I find the March 15, 2022, April 27, 2022, and the April 28, 2022 invoices are reasonable. The November 23, 2021 invoice's amount includes a \$125 disbursement for CRT fees paid by the strata's legal counsel on its behalf. Since I deal with the strata's entitlement to CRT fees below, I find the November 23, 2021 invoice's amount must be deducted by \$125. So, I find the strata is entitled to \$336 for the November 23, 2021 invoice.
78. The March 30, 2022 invoice for \$8,635.68 was largely for reviewing and organizing the strata's evidence and drafting the strata's written submissions. On balance, I find this invoice's amount is not proportional to the amount at issue in the dispute. Since the invoice did not specify the amount of time spent by the strata's lawyer for the work listed or the lawyer's hourly rate, on a judgment basis, I find the strata is entitled to reimbursement of \$4,000 for this invoice.
79. The May 6, 2022 invoice for \$3,368.06 was mainly for drafting submissions, including reply submissions and compiling additional evidence. I find this invoice's amount is also not proportional to the amount at issue in this dispute. So, I reduce the strata's reimbursement for this invoice to \$1,500 on a judgment basis. In total, I find Mr. Graham must reimburse the strata \$7,320 for its CRT legal expenses.

Is Mr. Graham entitled to reimbursement of his claimed legal expenses?

80. By way of counterclaim, Mr. Graham claims reimbursement of the legal expenses he incurred in defending against the strata's bylaw violation allegations against him both before and during this CRT dispute. He relies on *Allen-Hughes v. Vargas*, 2019 BCCRT 921 to say that legal fees are recoverable in exceptional cases, akin to circumstances favouring an award of special costs by courts. He says that the way the strata has treated him is reprehensible, outrageous and deserving of rebuke. Mr. Graham further says that he has certain cognitive and learning disabilities, making him an exceptional case.

81. The strata says that Mr. Graham's case is not exceptional and refers to CRT Rules 9.5(3) and (4).
82. As mentioned, the burden is on Mr. Graham to prove his counterclaim for reimbursement for legal expenses. Based on the evidence before me, I find that Mr. Graham has failed to meet that burden. The evidence does not establish that Mr. Graham is an exceptional case due to his alleged cognitive and learning disabilities. Mr. Graham's sole piece of evidence about his disabilities is a March 29, 2022 letter from his doctor saying that Mr. Graham was poorly schooled so he cannot read well. The letter also says that Mr. Graham's medical condition includes an old left ear surgery so, he needs representation at any meeting. Whether or not Mr. Graham required representation is not at issue in this dispute because his request to be represented by a lawyer was granted by the CRT. What is at issue is whether or not he is entitled to reimbursement for his legal expenses.
83. I find the evidence before me does not establish Mr. Graham's entitlement to reimbursement for his claimed legal expenses. As mentioned above, I have already found that this dispute was not complex though there was a considerable volume of evidence and submissions. I accept that Mr. Graham's has been represented by his lawyer throughout this dispute. Based on the evidence before me, I find Mr. Graham's legal representation started in or around June 2021. However, unlike the strata, there is no SPA provision or strata bylaw entitling Mr. Graham to reimbursement for legal expenses.
84. Further, despite his allegations to the contrary, there is also no evidence of reprehensible and outrageous conduct on the strata's part. Mr. Graham argues that the strata pursuing this matter before the CRT is evidence of reprehensible conduct because he says that the strata has failed to prove that he breached the bylaws. However, as I have already found that the strata has successfully established that Mr. Graham breached the bylaws, this argument must fail.

85. On balance, taking into consideration the factors set out in CRT rule 9.4, I find sufficient extraordinary circumstances do not exist here entitling Mr. Graham to reimbursement for his claimed legal expenses. As a result, I dismiss his counterclaim.

CRT FEES, EXPENSES AND INTEREST

86. 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 the strata was largely successful in this dispute, I order Mr. Graham to reimburse the strata for CRT fees of \$225. The strata did not claim any dispute-related expenses other than its legal expenses which I have already dealt with above, so I make no additional order about dispute-related expenses. Since Mr. Graham was unsuccessful with his counterclaim, I find he is not entitled to any reimbursement.

87. The SPA does not permit interest to be charged on fines, although interest under the *Court Order Interest Act* (COIA) applies. I find interest is reasonably calculated on the \$200 fine from the date of the June 1, 2021 letter imposing the fine until the date of this decision. I find interest on the \$600 fines is reasonably calculated from September 1, 2021, which is the date the 3 \$200 fines were imposed, until the date of this decision. The total interest on the fines is \$4.79.

88. I find the strata is entitled to prejudgment interest on the pre-CRT legal expenses from the date of each invoice to the date of this decisions. This equals \$30.55. COIA section 2(c) says there is no interest on costs, so I order no interest on the \$7,320 awarded for the strata's CRT legal expenses.

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

ORDERS

90. I order that within 30 days of this decision, Mr. Graham pay the strata a total of \$13,336.83, broken down as follows:

- a. \$800 in fines,
- b. \$4,956.49 for pre-CRT legal expenses,
- c. \$7,320 for CRT legal expenses,
- d. \$35.34 in prejudgment interest under the COIA, and
- e. \$225 in CRT fees.

91. The strata is entitled to post-judgment interest under the COIA, as applicable.

92. I also order Mr. Graham to immediately stop smoking and vaping any substance in SL21 or on any of the strata's common or limited common property.

93. I dismiss the parties' remaining claims.

94. 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.

Nav Shukla, Tribunal Member