



Civil Resolution Tribunal

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Type: Strata

Civil Resolution Tribunal

Indexed as: *Carfra v. The Owners, Strata Plan 951*, 2022 BCCRT 1008

B E T W E E N :

ANA CARFRA and JENNIFER STARK

APPLICANTS

A N D :

The Owners, Strata Plan 951 and ELIZABETH PAIGE TATEM

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Nav Shukla

INTRODUCTION

1. This dispute is about alleged bylaw violations.
2. The applicants, Ana Carfra and Jennifer Stark (owners) each own or co-own a strata lot in the respondent strata corporation, The Owners, Strata Plan 951 (strata). The other respondent, Elizabeth Paige Tatem, owns strata lot 6 (SL6) in the strata.

3. The owners say that Ms. Tatem is manufacturing scented products from SL6 in breach of the strata's bylaws. In particular, they say the scents emanating from SL6 are a nuisance and seek an order prohibiting Ms. Tatem from manufacturing any kind of scented products from SL6. The owners also seek an order imposing a \$200 fine against Ms. Tatem for her alleged bylaw violations.
4. Ms. Tatem says that she is not manufacturing scented products in SL6 and denies that the smells the owners complain about are coming from SL6. The strata says the strata council members disagree about how to deal with the owners' complaints, noting that the majority of council members do not believe there is sufficient proof the alleged scents are coming from SL6.
5. The owners and Ms. Tatem each represent themselves. The strata is represented by DS, a strata council member.

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.

ISSUES

10. The issues in this dispute are:
 - a. Is Ms. Tatem breaching the strata's bylaws by allegedly manufacturing and storing scented items in SL6?
 - b. If so, what is the appropriate remedy?

BACKGROUND, EVIDENCE AND ANALYSIS

11. In a civil proceeding like this one, the owners, as the applicants, must prove their claims on a balance of probabilities (meaning "more likely than not"). 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. The strata provided no documentary evidence in this dispute, despite having the opportunity to do so.
12. On July 9, 2001, the strata filed amended bylaws (July 2001 bylaws) with the Land Title Office and repealed all previous bylaws. The July 2001 bylaws state that the Schedule of Standard Bylaws in the *Strata Property Act* (SPA) are an integral part of the bylaws so long as they do not conflict with the July 2001 bylaws. So, I find the July 2001 bylaws are the relevant bylaws here, along with the bylaws set out in the Schedule of Standard Bylaws that do not otherwise conflict with the July 2001 bylaws. The strata filed subsequent amendments to the July 2001 bylaws that I find are not relevant in this dispute.

13. The key bylaw in this dispute is bylaw 2(c) which says that strata lots shall not be used in a manner or for any purpose that will cause a nuisance or hazard or unreasonably interfere with any other strata lot owner (nuisance bylaw).
14. The owners and the strata both cited bylaw 3(c) which they say is the nuisance bylaw. It is unclear where the discrepancy in the bylaw's numbering comes from. However, I find nothing turns on this discrepancy since the wording of the nuisance bylaw that is registered with the Land Title Office and the bylaw 3(c) the parties cite is the same.
15. The owners say Ms. Tatem has breached and continues to breach the nuisance bylaw by manufacturing or storing ingredients needed to make scented items such as soaps and bath bombs in SL6. It is undisputed that Ms. Tatem has a business selling these items. It is also undisputed that Ms. Carfra's strata lot is directly above SL6, and Mrs. Stark's strata lot is directly above Ms. Carfra's. The owners say that a strong scent comes from SL6, travels up to their strata lots and makes it impossible for them to enjoy their balconies or open their windows. They also allege the scent causes them headaches and aggravates Mrs. Stark's asthma.
16. Ms. Tatem admits she previously manufactured and stored scented items in SL6 but says she has not done so since receiving the strata council's July 23, 2021 letter referred to below. She says the smell the owners complain of is coming from elsewhere.
17. The strata says that the strata council has been in conflict over the past few years about how to approach the owners' complaints, with some council members wanting fines imposed. The strata says the majority of strata council members believe that before imposing a fine, they must first be sure the scent is coming from SL6 and that it is causing the owners discomfort.

Complaints and evidence about the scent

18. It is undisputed that the previous owners of Ms. Carfra's strata lot sent the first complaint to the strata council in 2018. At this time, it was believed the scent was

caused by vaping and the strata owners subsequently voted to amend the non-smoking bylaw to also restrict vaping.

19. In an August 31, 2019 email to herself, Mrs. Stark made note of an encounter she had with Ms. Tatem. In this email, Mrs. Stark noted that the scent had been bothering her for a few days, so she went to speak with Ms. Tatem. She says she could smell the scent when Ms. Tatem opened SL6's door and could also see a table filled with bath bombs. During their conversation, Mrs. Stark says she asked Ms. Tatem if she could make her items elsewhere and Ms. Tatem at first did not comment and later said "there is nothing you can do about it".
20. The evidence shows Mrs. Stark made her first complaint to the strata council by email on August 4, 2020. In this email, Mrs. Stark said that she and her husband were bothered by heavily scented fragrance coming from SL6. She said the smell came into her strata lot from the windows, the hot water tank room, and sometimes even the dryer vent.
21. The strata says that after receiving this complaint, DS, the strata council president at that time, went into SL6 to investigate and could not smell any strong odours aside from a strong smell on SL6's deck of herbs and flowers. The strata says that it addressed the issue at its August 12, 2020 council meeting. An excerpt from the August 12, 2020 council meeting minutes notes the council voted that Ms. Tatem had breached the nuisance bylaw and asked her to eliminate the scent Mrs. Stark complained about. From the evidence, it is unclear why the council voted the nuisance bylaw had been breached given DS had found no strong smell other than from the herbs and flowers when he visited SL6.
22. Excerpts from the strata council's September 9, 2020 meeting minutes note the strata received further complaints but that Ms. Tatem had claimed to have eliminated the scent. The minutes noted the strata council asked the "complainant" for documentation for the council to review at their next meeting.
23. The next complaint in evidence was on January 5, 2021 when Mrs. Stark emailed the strata council and said the strong scents were ongoing and aggravating her asthma.

The strata says that after receiving this complaint, DS attended at SL6 again, this time unannounced. The strata says that DS did not notice any strong scents in SL6 during this visit and also saw no signs that Ms. Tatem was still making soap there.

24. DS then emailed Mrs. Stark saying that he had looked into the complaint and Ms. Tatem had guaranteed that she was not making soap in SL6.
25. On June 30, 2021, Mrs. Stark wrote a complaint letter to the strata council, alleging the strong scent coming from SL6 was a nuisance and causing her severe health problems. Mrs. Stark noted that if the products were no longer being manufactured in SL6, Ms. Tatem must have been storing them since the scent persisted. She listed various dates from March 16 to June 29, 2021 when she says the smell was so strong that she had to close her windows because the alleged scent severely aggravated her asthma. Mrs. Stark then requested a council hearing to deal with the issue.
26. The evidence shows that this council hearing took place on July 15, 2021. In a July 20, 2021 email to the strata, Ms. Tatem explained the soap making process to the strata council and noted that she had been measuring ingredients in SL6 before taking them to another location to make the soap.
27. The strata council then sent Ms. Tatem its July 23, 2021 letter and informed her that the council had determined that SL6 had contravened the nuisance bylaw by emitting smells. The letter said Ms. Tatem was no longer allowed to store any raw materials for making soaps and bath bombs in SL6 and gave her 2 weeks to find a suitable storage place. As noted above, Ms. Tatem says she has complied with the strata's request since receiving this letter.
28. The next complaint in evidence was on February 7, 2022 when Mrs. Stark emailed the strata council saying that the scent was happening again. In this email, Mrs. Stark noted 4 dates when she says she was not able to open her windows due to the smell and asked for the matter to be brought up at the next council meeting.
29. Ms. Carfra emailed the strata council on February 16, 2022 making her own complaint about strong scents coming from her balcony. She said she could not sit on her

balcony due to the strong smell. Ms. Carfra said the smell was unpleasant and that she did not want to end up with a headache. Extracts from the strata council's February 17, 2022 meeting minutes show that the council agreed to send Ms. Tatem a second letter demanding scented products not be manufactured in SL6. The minutes note the strata sent the letter to Ms. Tatem on February 25, 2022.

30. Mrs. Stark and another resident, DM, made further complaints to the strata council about the scent in March 2022. On March 25, 2022, DS emailed Mrs. Stark asking her to send a message to all council members the next time the scent was in her strata lot. In the email, DS said that the council would like to smell the scent firsthand and then go into SL6 and see if they could determine that the scent was coming from there. Despite the owners' assertion that the scent persists, the strata says that it has received no requests to attend at Mrs. Stark's strata lot in response to this email.
31. The owners also say that on June 10, 2022, Ms. Tatem put two red storage bins in the strata's parking area. The owners say the bins contained soaps and bath bombs. Despite the items being wrapped, the owners say the smell coming from the bins was very strong and was "definitely, and without a doubt, the exact same perfumy scent" they have been complaining about. The owners say this confirms the scent they complain of is coming from SL6.
32. As noted, Ms. Tatem denies she is still making soaps or bath bombs in SL6. In support, Ms. Tatem has provided photographs of her current and previous workspaces outside of the strata where she says she has been manufacturing and now also storing her products since receiving the strata's July 23, 2021 letter.

Is Ms. Tatem breaching the nuisance bylaw?

33. I now consider whether Ms. Tatem is breaching the nuisance bylaw as the owners allege. I first turn to the law of nuisance.
34. The courts have found that nuisance in a strata setting is an 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. Whether or not

an interference, such as a strong scent, is unreasonable depends on several factors including its nature, severity, duration and frequency. The interference must also be substantial such that it is intolerable to an ordinary person: see *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64.

35. Though I accept the scent the owners complain about is bothersome to them, on the evidence before me, I find the owners have not proven (1) that the scent is coming from SL6, and (2) that the scent is a nuisance based on *Triple P and St. Lawrence Cement*. I discuss each of these points in turn below.
36. Other than the owners' assertions, there is no evidence that Ms. Tatem continues to manufacture or store scented items in SL6. Further, the evidence before me falls short of establishing that the scent complained of is coming from SL6. In an email to the strata council, DM, who is undisputedly Mrs. Stark's friend and neighbour, noted 4 dates between January 27, 2022 to February 15, 2022 when they went to the building's second floor where SL6 is located to investigate the scent. DM said that on January 27, 2022, they stood in the hallway between SL6 and the elevator and could smell a very strong perfumed scent. DM said on February 6, 2022, they had been invited to Mrs. Stark's strata lot and stopped on the second floor, stood outside SL6 and could again smell a strong perfumed scent. DM said they then went up to Mrs. Stark's strata lot, went onto the balcony and "the scent had obviously travelled up" because they could smell it very strongly. DM noted on February 13, 2022 the scent was there but not as strong and on February 15, 2022 they could not smell anything.
37. I find DM's email establishes at most that a strong perfumed scent is sometimes present in the second floor's hallway. However, the evidence does not go so far as to prove that the scent is coming specifically from SL6. For example, DM does not say that they could not smell the scent further down the hall from SL6 or that the scent was strongest by SL6.
38. In addition, though the owners say their smelling the same scent from the products found in the storage bins in the parking lot confirm the scent is coming from SL6, I disagree. This is because other than the owners' assertions, there is no evidence that

Ms. Tatem was storing those bins or any other scented products inside SL6 at that time. Further, though the owners submit that other strata lot owners saw the bins and confirmed the scent, there are no statements from these other owners in evidence proving this.

39. I find Ms. Tatem's photographs showing her workspace outside of SL6 and the strata's submissions about DS's visits to SL6 and not smelling any strong scents raise sufficient doubt about the scent's source. As such, I find it is just as likely that the scent complained of is coming from a different source, such as another strata lot or from outside of the strata.
40. Even if I found the owners met their burden of proving SL6 was emitting the alleged scent, other than the owners' own assertions, there is no evidence the scent is an unreasonable interference with the use of their property. The owners' observations about the scent are inherently subjective and difficult to assess against a reasonableness standard. I recognize that scent or odour is more difficult to objectively measure than noise, the more common strata nuisance. However, the owners did not, for example, provide any statements from independent witnesses describing the scent, its source, its frequency, its intensity, or how offensive it is.
41. The owners complain that the smell causes them headaches and aggravates Mrs. Stark's asthma. In their submissions, they say Mrs. Stark's doctor attributed her recent poor lung function test results to the ongoing scent issue. However, the owners have not provided evidence, such as a doctor's note, to prove these allegations.
42. The only evidence of any potential health impacts due to scents is in an email from DM to the owners that appears to be copied and pasted information from the Canadian Lung Association's website. However, I find this document does not prove the owners in this dispute are suffering from health issues due to the alleged scent. Based on the above, I find the owners have failed to prove that the scent complained of unreasonably interferes with their use of property. As such, I find Ms. Tatem has not breached the nuisance bylaws.

Remedy

43. Since I have found that the owners have failed to prove that Ms. Tatem breached the nuisance bylaw, I decline to grant the orders they seek.
44. Even if I had found Ms. Tatem had breached the nuisance bylaw, I would not have granted the requested orders in any event because I find they do not have standing (legal right) to seek those orders. This is because the owners are essentially attempting to enforce the strata's bylaws against Ms. Tatem. In *Kuan et al. v. The Owners, Strata Plan NW2603*, 2019 BCCRT 800, the tribunal member found that an owner does not have standing to pursue bylaw enforcement against another owner. Though the *Kuan* decision is not binding on me, I agree with the tribunal member's reasoning and find that it applies here.
45. The owners may have a claim against Ms. Tatem in nuisance at common law, but such a claim is outside of the CRT's strata property jurisdiction as it is not a claim that is "in respect of" the SPA, as required under CRTA section 121(1). The owners' potential common law nuisance claim would also be outside of the CRT's small claims jurisdiction. This is because both of the remedies the owners seek are injunctive orders which, except for certain exceptions set out in CRTA section 118(1) that do not apply here, the CRT cannot make under its small claims jurisdiction.
46. Further, even if the owners had standing in this strata dispute and had proven Ms. Tatem breached the strata's bylaws, I would not order the \$200 fine they seek because such an order would not comply with section 135 of the SPA. SPA section 135 sets out specific requirements that must be met before a strata corporation can issue a bylaw violation fine. This includes receiving a bylaw violation complaint, giving the owner particulars of the complaint in writing, and giving the owner a reasonable opportunity to respond, including a hearing if requested. SPA section 135(2) requires the strata to give notice in writing of a decision to fine a person for a bylaw violation, as soon as feasible. Without first satisfying these requirements, any fine imposed would be invalid.
47. For those reasons, I dismiss the owners' claims.

CRT FEES AND EXPENSES

48. 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 owners were unsuccessful in this dispute, I find they are not entitled to any reimbursement. Ms. Tatem and the strata did not pay any CRT fees or claim any dispute-related expenses, so I order no reimbursement

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

ORDER

50. I dismiss the owners' claims and this dispute.

Nav Shukla, Tribunal Member