



Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Cleland v. The Owners, Strata Plan LMS1703*, 2022 BCCRT 1112

B E T W E E N :

RICHARD MAURICE CLELAND

APPLICANT

A N D :

The Owners, Strata Plan LMS1703

RESPONDENT

A N D :

RICHARD MAURICE CLELAND

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

David Jiang

INTRODUCTION

1. This dispute is about planters on common property (CP). The applicant and respondent by counterclaim is Richard Maurice Cleland. The respondent and applicant by counterclaim is The Owners, Strata Plan LMS1703 (strata). Dr. Cleland owns strata lot 3 (SL3) in the strata.
2. Dr. Cleland installed wooden planters and later replaced them with metal planters. They say I should order the strata to refrain from taking action to remove the planters. They also seek payment of \$5,000 for what I infer is damages. The strata disagrees and says both the now-removed wooden planters and new metal planters are significant changes under section 71 of the *Strata Property Act* (SPA). It notes that such changes require a $\frac{3}{4}$ majority vote of the owners at an annual general meeting (AGM) or special general meeting (SGM). The strata says the owners voted and did not approve a resolution about the metal planters at the January 24, 2022 SGM.
3. The strata counterclaims for Dr. Cleland to remove the planters at Dr. Cleland's expense. Dr. Cleland disagrees. They say the new metal planters are not a significant change under the SPA.
4. Dr. Cleland represents themselves. A strata council member represents the strata.
5. For the reasons that follow, I find the strata has proven its claims.

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 as follows:
 - a. Are the past wooden planters or current metal planters significant changes under SPA section 71?
 - b. Did the strata act significantly unfairly?
 - c. What are the appropriate remedies, if any?

BACKGROUND, EVIDENCE AND ANALYSIS

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

12. I begin with the undisputed background. A title search shows Dr. Cleland became the sole registered owner of SL3 in October 2009. According to the strata plan, SL3 is on the ground floor. SL3 has an outdoor patio. Photos show a short stone wall encloses SL3's patio.
13. Dr. Cleland marked up a copy of the strata plan to show that the metal planters are on CP. I accept the diagram as accurate as the strata does not say otherwise. Based on other photos in evidence, I find the removed wooden planters and new metal planters occupied the same areas and had the same general size, shape and function. The evidence shows the metal planters are on the northeast side of the building. They line SL3's patio. They are rectangular. Some are terraced and line an upward sloping wall. The wall separates the patio from what Dr. Cleland says is an alley. Based on their size and the size of shrubs in them, I find the planters are difficult to move. I will discuss the appearance of the metal and removed wooden planters in greater detail below.
14. Land Title Office documents show the strata repealed and replaced its bylaws in October 2001. Bylaw 5(1) says that an owner must obtain the written approval of the strata corporation before making an alteration to a strata lot that involves fences, railings or similar structures that enclose a patio, balcony or yard. Bylaw 6(1) says that an owner must obtain the written approval of the strata corporation before making an alteration to CP, including limited common property (LCP), or common assets.
15. I turn to the chronology. In an April 20, 2010 letter, Dr. Cleland asked the strata for permission to construct wooden planter boxes. The June 1, 2010 strata council meeting minutes show that the strata approved Dr. Cleland's request.
16. There is no indication that Dr. Cleland signed any agreement to assume repair and maintenance responsibility for the planters. However, an email shows they discussed the topic with a strata council member, BM. As reported in BM's May 21, 2010 email to the council, BM spoke to Dr. Cleland and expressed concern about who would maintain the planters if Dr. Cleland moved out. Dr. Cleland replied that they were not considering moving out any time soon and would make it clear to any new owner that

the planters were “a unit responsibility”. I find that Dr. Cleland meant that the planters were SL3’s responsibility to repair and maintain.

17. I find the email is likely an accurate record of Dr. Cleland’s comments. This is because it is dated around the time Dr. Cleland sought approval for the planters. Based on its wording, I find it was also clearly created to provide a report to the strata council so it could consider whether to approve Dr. Cleland’s request. So, I find BM likely had an interest in creating an accurate record. I find it shows that SL3, and by extension Dr. Cleland, were responsible for repair and maintenance of the planters. Further, Dr. Cleland commented on this email in submissions. They did not deny that the May 2010 email outlined the parties’ oral agreement on planter maintenance.
18. Dr. Cleland installed the wooden planters. I find that they eventually fell into disrepair and became objectively unpleasant to look at. For example, in an October 28, 2020 email, the strata manager noted to Dr. Cleland that the planter boxes were all “rotted and falling apart” and “weed infested”. Undated photos shows that some of the wood on one side of the planters had rotted away, leaving the dirt inside visible. Some of the plants inside the planters appeared to be weeds.
19. It is undisputed that in April 2021, the strata council president asked Dr. Cleland to remove or replace the planters. I find this was likely a verbal request as there is no written evidence about it. I find that this request was reasonable at the time, given the state of the planters. On balance, I also find it likely that the president did not provide permission for metal planters. The strata’s reaction to the metal planters is consistent with my conclusion.
20. Dr Cleland says, and I find, that in May 2021 they removed the wooden planters and replaced them with metal planters. These are the planters in dispute. As mentioned above, photos show the wooden planters previously occupied the same areas currently occupied by the metal planters.
21. The strata sent Dr. Cleland a July 13, 2021 letter. In it, the strata cited bylaws 5(1) and 6(1). The strata said that Dr. Cleland breached these bylaws by replacing the wooden planters with metal planters. The strata also said Dr. Cleland had breached

the parties' agreement to repair and maintain the planters, leading to them becoming an overgrown eyesore. It also said that one of the planters was a major contributor to a parkade leak as it was installed over a vent shaft. It said that any replacement for the wooden planters required approval by the strata, similar to the process that originally occurred in 2010 to approve the original wooden planters.

22. The strata also wrote that it now believed it lacked the authority to approve installation of the original wooden planters in 2010. It said the strata should have sought the approval of $\frac{3}{4}$ of the ownership at the time. So, it said it could not approve the current installation. The strata gave the owner an opportunity to respond before it would take any further action.
23. Dr. Cleland requested a hearing, which the strata held on October 20, 2021. The strata outlined its decision in an October 25, 2021 letter. It decided that it would retroactively approve the metal planters if Dr. Cleland provided 1) a report from a professional licensed structural engineer about building safety if the metal planters remained, 2) a signed indemnity agreement, and 3) obtained the owners' approval of a resolution to allow the planters by a $\frac{3}{4}$ vote at an AGM or SGM. The strata said that Dr. Cleland would otherwise have to remove the planters within 30 days, at Dr. Cleland's cost.
24. Dr. Cleland obtained a November 2, 2021 report about the planters. I find this to be expert evidence as the writer, AP, identified themselves as a professional structural engineer. AP wrote that the metal planters were "safe and will not pose any danger to the building structure or individuals exiting the building in the event of an emergency".
25. According to the minutes, the owners voted at the January 24, 2022 SGM on a resolution to retroactively approve installation of the metal planters. The resolution did not reach the necessary threshold to pass, as 15 owners voted in favour and 6 against.

Issue #1. Are the past wooden planters or current metal planters significant changes under SPA section 71?

26. I now turn to the parties' positions and the law. Dr. Cleland says both the wooden and metal planters are not significant changes in the use or appearance of CP. The strata disagrees and says that both the wooden and metal planters required owner approval under SPA section 71.
27. Section 71 of the SPA says that a strata corporation must not make a significant change in the use or appearance of CP or land that is a common asset unless the change is approved by a resolution passed by a 3/4 vote at an AGM or SGM, or there are reasonable grounds to believe that immediate change is necessary to ensure safety or prevent significant loss or damage. See *Foley v. The Owners, Strata Plan VR 387*, 2014 BCSC 1333. As noted in *Foley*, the same test applies to owner changes.
28. Dr. Cleland says the planters prevent crime. They cited a police press conference in submissions. I find it too vague to be relevant. I find the submissions about crime prevention are ultimately speculative and unsupported by evidence. There is no indication that the planters are necessary to ensure safety or prevent loss at SL3. So, I will first consider whether the wooden planters were a significant change under the test from *Foley*. In *Foley*, the court summarized the criteria for a significant change at paragraph 19 as follows:
- a. A change would be more significant based on its visibility to residents and towards the general public.
 - b. Whether the change to CP affects the use or enjoyment of a unit or a number of units or an existing benefit of a unit or units.
 - c. Is there a direct interference or disruption as a result of the changed use?
 - d. Does the change impact on the marketability or value of the unit?
 - e. The number of units in the building may be significant along with the general use, such as whether it is commercial, residential, or mixed.

- f. Consideration should be given as to how the strata corporation has governed itself in the past and what it has allowed. For example, has it permitted similar changes in the past? Has it operated on a consensus basis or has it followed the rules regarding meetings, minutes and notices as provided in the SPA?
29. Court decisions suggest that the more permanent the change, the more significant it is. See for example, *Reid v. Strata Plan LMS 2503*, 2003 BCCA 126 and *Sidhu v. The Owners, Strata Plan VR1886*, 2008 BCSC 92. The CRT has previously found that gazebos, sunshades, and pergolas may be significant changes to either CP or LCP. See, for example, my non-binding decision of *Braun v. The Owners, Strata Plan 1295*, 2021 BCCRT 1221 and *Parsons v. The Owners, Strata Plan KAS1436*, 2022 BCCRT 721.
30. Photos show the following. The previously installed wooden planters outlined the borders of SL3's outdoor patio. Some were at ground level. Others lined an upward-sloping brick wall, creating a terraced effect. I find the planters were of significant size. They had bushes in them, rather than smaller plants. The planters lining the upward-sloping wall were also attached to each other and appeared to be several feet long. So, I find they were largely immovable.
31. I find that the *Foley* factors and the planters' degree of permanence support the conclusion that the wooden planters were a significant change. The planters are outside and located on top of, rather than behind, a sloped brick wall separating the patio and a street or sidewalk. Photos show the windows of neighbouring apartment buildings. I find that the planters would have been visible to residents and the general public, including the neighbours and any pedestrians at street level.
32. I find the planters would have been difficult to move. In particular, I find the wooden planter forming the terrace on the upward-sloping wall was essentially immovable, without breaking it apart.
33. I find that the planters would affect the use or enjoyment of SL3 and other strata lots due to their visibility and impact on landscaping. In particular, I find the planters had a negative effect once they started rotting.

34. Based on the photos and the strata's request that Dr. Cleland remove them, I find they were a direct interference or disruption once they fell into disrepair.
35. As noted earlier, the strata provided permission for the wooden planters though it now says that was in error. There is no indication that it allowed similar changes in 2010 or after that. Dr. Cleland points out that the strata permitted strata lot 1's (SL1's) owner to build a shed near SL1, on CP. However, based on the photos of the shed, I find it differs substantially in use and appearance from the planters.
36. There is no evidence about the planters' effects on the marketability or value of SL3. I find the number of strata lots and general use of the strata are not significant factors.
37. For all those reasons, I find the wooden planters were a significant change in the use or appearance of CP under SPA section. As the owners did not vote to approve it, I find the planters breached the SPA until they were removed in May 2021.
38. For similar reasons, I find the currently installed metal planters are a significant change in the use and appearance of CP under SPA section 71. Photos show they are essentially the same size and located in the same areas as before. In particular, the new planters also line the brick wall, creating a terraced effect. Photos show new or transplanted bushes in them. They appear difficult to move at best. Notable differences are that they are metal and have a darker, rust-like colour. The wooden planters had a much lighter colour.
39. As stated above, Dr. Cleland says I should order the strata to refrain from taking action to remove the metal planters. However, I have found that they breach the SPA. Dr. Cleland says that removing the planters would be significantly unfair, so I will consider that next.

Issue #2. Did the strata act significantly unfairly?

40. As noted above, the strata counterclaims for an order that Dr. Cleland remove the planters at Dr. Cleland's expense and repair any damage caused by their removal. The strata also says that if Dr. Cleland does not, I should charge the cost of doing so to SL3's account.

41. Dr. Cleland wishes to keep the metal planters. They say that they are similar in appearance to the previous planters. They submit that, in that sense, the planters are not a significant change. They point out the engineer's November 2021 report concluded the planters do not pose a safety risk. They say that the strata's request to remove the planters is significantly unfair.
42. I have found the planters breach the SPA. So, I find the strata is entitled to a remedy unless Dr. Cleland can show significant unfairness.
43. SPA section 164 sets out the BC Supreme Court's authority to remedy significantly unfair actions. The CRT has jurisdiction over significantly unfair actions under CRTA section 123(2), which has the same legal test as cases under SPA section 164. See *The Owners, Strata Plan BCS 1721 v. Watson*, 2018 BCSC 164. Significantly unfair conduct is conduct that is 1) oppressive in that it is burdensome, harsh, wrongful, lacking in probity or fair dealing, or done in bad faith, or 2) conduct that is unfairly prejudicial in that it is unjust or inequitable: *Kunzler v. The Owners, Strata Plan EPS 1433*, 2021 BCCA 173 at paragraph 88.
44. 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, to consider the following factors:
 - 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?
45. I find that Dr. Cleland expected the strata to allow the metal planters as the strata president asked them to remove or replace the wooden planters in April 2021. Ultimately, I find this expectation was unreasonable. This is because Dr. Cleland did not replace the planters in a like for like manner. Instead, I find the replacement planters differ significantly in materials and appearance. I find it was unreasonable for Dr. Cleland to assume that the strata's permission to get new planters would include the metal planters in dispute. I find this was especially the case because the

planters are in such a highly visible area, so their appearance to others would be important.

46. My conclusion might have been different if Dr. Cleland had either replaced the wooden planters with similar wooden planters or obtained the strata's permission to obtain metal planters, even without the approval of owners under SPA section 71. That is not the situation before me.
47. I also place considerable weight on the fact that the strata held a vote on the planters at the January 2022 AGM. In *Lum v. Strata Plan VR519 (Owners of)*, 2001 BCSC 493 at paragraph 12, the court said it should only interfere with or override a strata's democratic governance when absolutely necessary. While the vote to approve the planters was close, it ultimately fell short of the required threshold. I find this is another factor that weighs against finding significant unfairness by the strata.
48. Dr. Cleland cited *Pretto v. The Owners, Strata Plan VR 2540*, 2020 BCCRT 600 in support of this position. I find it distinguishable on the facts. Notably, there was no allegation that the planters in that dispute were a significant change in the use or appearance of CP. I do not find *Pretto* directly applicable.
49. Given the above, I dismiss Dr. Cleland's claim that the strata treated them unfairly. This includes their request for orders that I ask the strata to refrain from asking them to remove the planters and to pay them \$5,000.
50. As the planters are in breach of the SPA, I order Dr. Cleland to, within 90 days of the date of this order at and their cost, remove the metal planters and to the extent possible restore the CP and LCP areas to their original condition before any planters were installed.

CRT FEES AND EXPENSES

51. 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 Dr. Cleland to reimburse the strata \$125 for CRT fees. I dismiss Dr. Cleland's claims for reimbursement, including a claim for reimbursement of \$225 in CRT fees.

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

ORDERS

53. I order Dr. Cleland to, within 90 days of the date of this order, and at their cost, remove the metal planters and to the extent possible restore the CP and LCP areas to their original condition, before Dr. Cleland installed any planters.

54. I order Dr. Cleland to, within 30 days of the date of this order, pay the strata \$125 for CRT fees.

55. I dismiss Dr. Cleland's claims.

56. The strata is entitled to post-judgment interest, as applicable.

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

David Jiang, Tribunal Member