



Civil Resolution Tribunal

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Civil Resolution Tribunal

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B E T W E E N :

STUART ALEXANDER LEISHMAN

APPLICANT

A N D :

The Owners, Strata Plan VR 2648

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

David Jiang

INTRODUCTION

1. This dispute is about approval to install a heat pump. The applicant, Stuart Alexander Leishman, is 1 of 2 registered owners of strata lot 6 (SL6) in the respondent strata corporation, The Owners, Strata Plan VR 2648 (strata). Mr. Leishman says the strata wrongfully refused his request to install a heat pump. He seeks an order for the strata to provide an indemnity agreement he can sign for permission to install a heat pump

compliant with the requirements outlined in a document known as “Appendix G”. I discuss Appendix G below. Mr. Leishman also says the heat pump is necessary to reasonably accommodate his disability under section 8 of the *Human Rights Code* (Code).

2. The strata disagrees. It says Mr. Leishman’s request is premature because 1) Mr. Leishman did not ask the strata council to approve a heat pump, 2) the strata is currently working on obtaining a consensus from the owners on the types of heat pumps and air conditioners they can install, if any, and 3) the strata requires further time to investigate the electrical load of such units. The strata also says that the heat pump is a significant change in the use or appearance of common property (CP) that requires owner approval under section 71 of the *Strata Property Act* (SPA). The strata also says that Mr. Leishman is free to use a portable air conditioning unit, so the heat pump is unnecessary.
3. Mr. Leishman represents himself. A strata council member represents the strata.
4. For the reasons that follow, I dismiss Mr. Leishman’s claims.

JURISDICTION AND PROCEDURE

5. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over strata property claims under section 121 of the *Civil Resolution Tribunal Act* (CRTA). CRTA section 2 says the CRT’s mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between the dispute’s parties that will likely continue after the CRT process has ended.
6. CRTA section 39 says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT’s mandate that

includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice and fairness.

7. CRTA section 42 says the CRT may accept as evidence information that it considers relevant, necessary and appropriate, even where the information would not be admissible in court. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
8. Under CRTA section 123, in resolving this dispute the CRT may order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the CRT considers appropriate.

Section 189.1 of the SPA

9. Section 189.1 of the SPA says a strata lot owner may not ask the CRT to resolve a strata dispute unless the owner has requested a strata council hearing under SPA section 34.1, or the CRT waives the hearing requirement under section 189.1(2)(b).
10. It is undisputed that Mr. Leishman did not request a strata council hearing under section 34.1 before applying for CRT dispute resolution on April 5, 2022. He asked the CRT to waive this requirement. The strata did not object. CRT staff did so.
11. Based on evidence discussed below, the parties have been grappling with the issue of air conditioners and heat pumps since at least May 2019. I find it unlikely that a hearing would help the parties resolve their dispute. In these circumstances, I find it reasonable to waive the hearing requirement of SPA section 189.1. I find the CRT's mandate to provide dispute resolution services in an accessible, speedy, economical, informal, and flexible manner supports this.

Late Evidence

12. Mr. Leishman provided an August 2021 newsletter for the strata as late evidence. The strata had the opportunity to view the evidence and provide submissions. I find the evidence relevant to this dispute. Consistent with the CRT's mandate that

includes flexibility, I find there is no prejudice to the parties in allowing the late evidence. I note that my decision does not turn on the late evidence in any event.

ISSUES

13. The issues in this dispute are as follows:

- a. Is Mr. Leishman's request for dispute resolution premature?
- b. Is the proposed heat pump a significant change under SPA section 71?
- c. Did the strata act significantly unfairly?
- d. Did the strata breach the *Code*?
- e. What are the appropriate remedies, if any?

BACKGROUND, EVIDENCE AND ANALYSIS

14. In a civil proceeding like this one, Mr. Leishman as the applicant must prove his claim on a balance of probabilities. This means more likely than not. I have reviewed all the parties' submissions and evidence but refer only to the evidence and argument that I find relevant to provide context for my decision.

15. I begin with the undisputed background. A title search shows Mr. Leishman became a co-owner of SL6 in July 2013. As shown on the strata plan, the strata consists of several buildings, some of which consist of 1 strata lot and some 2. SL6 is house with a single strata lot. Strata lots 5 and 7 are located on its west and east sides, respectively. Strata lots 16 and 17 form a duplex located across from SL6. No buildings in the strata have installed air conditioning units or heat pumps, though some use portable units.

16. Mr. Leishman provided several photos to show the location of the proposed heat pump and a video showing its make and model. I further discuss its attributes below. In the photos, Mr. Leishman placed a white bucket at the intended location of the pump. I find the location is next to an exterior wall of SL6 at ground level, on a paved

walkway running under a covered area. I find that the intended installation area is CP. Photos show it would be on the side of SL6 facing SL7.

17. The strata's bylaws are registered in the Land Title Office. Bylaw 3(1) says that prior to installing supplementary heating or air conditioning devices, an owner or resident must obtain the written permission the strata council. Further, the installation must not interfere with any other owner's use of the common property or strata lot, or significantly alter the appearance of the common property. Bylaw 5(1)(g) says that an owner must obtain written approval from the strata for changes to wiring, plumbing, heating, and air conditioning systems. Bylaw 6(1) says an owner must obtain the written approval of the strata before making an alteration to common property (CP), including limited common property (LCP), or common assets.
18. I now turn to the chronology. The strata council drafted guidelines dated May 24, 2019 for owners seeking approval to install air conditioners or heat pumps. These guidelines included decibel limits and other specifications. The guidelines said that they did not apply to internal air conditioners.
19. The strata never used these guidelines or approved any equipment under them. It later revised the guidelines and produced a new version dated August 4, 2021. These guidelines later became known as Appendix G.
20. On October 18, 2021, Mr. Leishman emailed the strata council and his immediate neighbours to request permission to install "air conditioning with a heat pump" at SL6. Mr. Leishman said he wished to install a Daikin Fit brand heat pump. Its dimensions were 36.6 inches wide, 12.6 inches deep, and 27.4 inches high. Mr. Leishman said he intended to place it on the concrete walkway on the east side of SL6, at the top of the three steps. I find this is consistent with the location of the white bucket shown in the photos. As noted earlier, it was meant to indicate the planned location of the heat pump. It is undisputed that this heat pump complied with Appendix G.
21. The strata did not immediately decide Mr. Leishman's request. At the November 29, 2021 annual general meeting (AGM), the strata asked owners to vote on amending the bylaws to allow air conditioners that complied with the August 2021 guidelines.

The strata attached Appendix G, labelled as such, forming part of a proposed bylaw amendment, to the notice for the AGM.

22. At the November 2021 AGM some owners expressed concerns about the potential noise and placement of installed heat pumps or air conditioners. As stated in the minutes, the owners voted 19 to 4 to postpone approving the bylaw and Appendix G in order to obtain more information.
23. On November 30, 2021, Mr. Leishman emailed the strata council. He wrote, “It is obvious there is a move to stop air conditioning coming into Tiffany Pines. I will not be pursuing it [anymore].”
24. On January 27, 2022, the strata hosted a workshop held by North Shore Plumbing and Heating (North Shore). The strata summarized the information from the workshop in a discussion paper. According to the paper, 16 owners attended. The paper generally outlined the characteristics of heat pumps, high efficiency furnaces, and air conditioners, as described by North Shore. The strata noted some owners expressed concerns about the noise and appearance of the equipment. The strata wrote that the issue of installing heat pumps and air conditioners was a “community issue”. It said it would hold a special general meeting (SGM) for owners to decide on what to do.
25. On March 28, 2022, the strata held the SGM. As noted in the minutes, the owners voted 19 to 3 against amending the bylaws to allow installing heat pumps or air conditioners in compliance with Appendix G. Mr. Leishman then applied for dispute resolution on April 5, 2022. The strata says, and I accept, that it subsequently formed a group to study the matter further.

Issue #1. Is Mr. Leishman’s request for dispute resolution premature?

26. As noted earlier, Mr. Leishman requested approval for a heat pump in an October 18, 2021 email to the strata. I find that he later withdrew his request in his November 30, 2021 email. Mr. Leishman then applied for dispute resolution shortly after owners

voted against bylaw amendments about guidelines for approving and installing heat pumps and air conditioners.

27. The strata says Mr. Leishman's request for dispute resolution is premature. It says he should, at a minimum, submit another application to install the heat pump. Mr. Leishman disagrees and says the strata was aware that he still wished to install the heat pump.
28. On balance, I find that refusing to resolve this dispute so that Mr. Leishman can ask the strata again for permission to install a heat pump would serve no useful purpose. The evidence shows the strata never approved Mr. Leishman's October 2021 request. Instead, it decided to first seek owner approval on what guidelines to use. While Mr. Leishman withdrew his request, I find he did so because the strata decided to seek input from the owners, and the owners opposed the heat pumps. The strata also opposes his request in this dispute. I therefore find that, in these unique circumstances, the strata substantively rejected Mr. Leishman's request to install a heat pump.
29. Given this and keeping in mind the CRT's mandates of flexibility and speed, I find Mr. Leishman's request for dispute resolution is not premature.

Issue #2. Is the proposed heat pump a significant change under SPA section 71?

30. Mr. Leishman says the heat pump is not a significant change in the use or appearance of CP. The strata disagrees. 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 like the one in this dispute.
31. Mr. Leishman says that he has disability that requires accommodation under the Code. As evidence, he provided a picture of his parking permit for persons with a

disability. He also provided a screenshot from the Canada Revenue Agency website showing he qualified for disability tax credits since 1995. While I accept that Mr. Leishman has an unspecified disability, there is no evidence that a heat pump is necessary to ensure his safety or prevent significant loss or damage. I elaborate on this point below when discussing the Code.

32. I will consider whether the proposed heat pump is 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?

33. 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. I have also considered CRT decisions on heat pumps on air conditioners, though I note such decisions are not binding. The CRT has previously found heat pumps and air conditioners to be a significant change in some circumstances and not others. See for example *Peace v. Hyde*, 2020 BCCRT 1284, *Fleming v. The Owners, Strata Plan 1290*, 2021 BCCRT 1117, and *Colabraro v. Adams*, 2022 BCCRT 592. From my review, I find that

whether a heat pump or air conditioner is a significant change largely depends on the specific facts of each case.

34. As stated earlier, the proposed heat pump would be located outdoors on common property. Based on the photos, I find it would be visible to strata lots 7, 16, and 17. I find it would be visible to residents walking in the area, but not the general public. Photos show there are no fences between the houses to block the sound or sight of the heat pump. In particular, there is no fence between SL6 and strata lot 7.
35. I find the change would positively affect Mr. Leishman's use or enjoyment of SL6, particularly during hot days. I find it would likely negatively affect the use and enjoyment of neighbouring strata lots and create a direct disruption or interference. I reach this conclusion in part because owners voted by a large majority against approving bylaw amendments to allow the installation of air conditioners or heat pumps described in Appendix G. This includes the type of heat pump at issue.
36. Notably, most of Mr. Leishman's neighbours wrote letters opposing the proposed heat pump. IL and DL, the owners of strata lot 7, wrote a June 24, 2022 letter expressing concerns about its noise and appearance. They also expressed support for having owners discuss and vote on what type of equipment would be generally acceptable. MJ and TJ, the owners of strata lot 17, both wrote a June 6, 2022 letter to the strata opposing the heat pump. They both wrote that it would "most certainly impact" their quality of life. They expressed concerns about the heat pump's noise, appearance, and close proximity to their home. Similarly, JA and NA, the owners of strata lot 16, both wrote a June 28, 2022 letter to the strata. They opposed the heat pump. They both said they had concerns about its noise and appearance.
37. The parties also disagreed on whether the strata's infrastructure could support the added electrical load if all buildings used air conditioners or heat pumps. I find the evidence inconclusive on that topic. A June 28, 2022 letter from Cove Power and a May 3, 2022 email from a strata council member, NR, suggest that the strata's buildings are currently limited to drawing 100 amps, and cannot all switch to 200 amps. However, the evidence does not directly address whether all buildings must

switch to 200 amps to run air conditioners or heat pumps, or if that is possible. I reach this conclusion regardless of whether the letter and email are expert evidence under the CRT rules.

38. There is no evidence about the impact the heat pump will have on the marketability or value of SL6. I find this to be an insignificant factor.
39. I place some significance on the fact that the strata consists of 23 residential homes. I find that the addition of the heat pump would have a greater impact than if the strata consisted of commercial or mixed-use strata lots, which I find would generally be busier or noisier.
40. I also place weight on the fact that the strata has not previously allowed similar changes in the past. I find it followed the rules set out in the SPA and has placed great importance on reaching an owner consensus on this issue. This is demonstrated by the fact that the strata first started drafting guidelines for owner approval in May 2019.
41. Finally, I find the heat pump has a high degree of permanence. Photos show it must be installed outside and left in place. It is not a portable unit.
42. I conclude from the *Foley* factors that the proposed heat pump is therefore a significant change in the use and appearance of CP under SPA section 71. Accordingly, I find owner approval under SPA section 71 by way of an approved $\frac{3}{4}$ vote is required in order for Mr. Leishman to install the proposed heat pump.

Issue #3. Did the strata act significantly unfairly?

43. As the proposed heat pump required ownership approval, I find Mr. Leishman is not entitled to a remedy unless he can show significant unfairness or a breach of the Code. 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, as restated in *Watson*, 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 Mr. Leishman expected the strata to approve or allow the heat pump. Ultimately, I find his expectation was unreasonable. I have found that the heat pump is a significant change that requires owner approval. I place considerable weight on the fact that the strata appropriately held votes on the issue of the heat pumps at both the January 2022 AGM and March 2022 SGM. I find the strata also held deep consultation with the owners. As stated above, the strata had a professional from North Shore visit to provide information at the end of January 2022. Given that 16 owners went, I find it was highly attended. The strata summarized the information, including the questions and answers, in the discussion paper and distributed it to owners.

46. Mr. Leishman says the discussion paper is misleading, but I find this allegation unsupported by evidence. I find it likely that the strata council wished to prepare an accurate document given that it arranged for North Shore to attend.

47. I also find that the strata did not take a significantly unfair action by respecting the results of the votes. 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. Here, the owners voted by a considerable margin at the March 2022 SGM to reject the installation of heat pumps

such as the one Mr. Leishman seeks approval for. I find that ordering the strata to allow the heat pump would clearly be an unnecessary interference in the strata's democratic governance. Further, as noted above, the strata continues to seek input via its study group formed after the votes.

48. Given the above, I dismiss Mr. Leishman's claim for significant unfairness.

Issue #4. Did the strata breach the Code?

49. Mr. Leishman says the heat pump is necessary to reasonably accommodate his disability under the Code. The strata disagrees.

50. Section 8 of the Code prohibits the strata from discriminating against owners in the services it provides. For Mr. Leishman to succeed he must first show that he has a disability, that he was adversely impacted with respect to the strata's service, and that his disability was a factor in the adverse impact. If Mr. Leishman establishes a prima facie case of discrimination, the burden shifts to the strata to establish a bona fide reasonable justification for its conduct. This includes whether the strata satisfied its duty to accommodate Mr. Leishman to the point of undue hardship. See, for example, *Jacobsen v. Strata Plan SP1773 (No. 2)*, 2020 BCHRT 170 at paragraphs 75 to 79.

51. I find Mr. Leishman has not shown a prima facie case of discrimination. There is no medical evidence, such as a physician's diagnosis, about the precise disability that affects Mr. Leishman. There is no medical evidence, such as a physician's note, that says Mr. Leishman requires a heat pump or air conditioner. I note that Mr. Leishman submits he is able to provide "more detail" on his disability. However, under rule 1.7, parties are responsible for providing evidence to support their position on each claim. Mr. Leishman also bears the burden to prove his claims as applicant.

52. Mr. Leishman also said that his age makes him vulnerable to the heat. The strata says Mr. Leishman is free to use a portable air conditioner. Mr. Leishman does not dispute this. He says that portable air conditioners are inefficient, wasteful, and more

than one is required. However, he did not say the cooling provided would be insufficient to address his disability.

53. Given the above, I find it unproven that Mr. Leishman's disability was ever a factor in any adverse impact to him with respect to the strata's service. I find it unproven that the strata breached the Code.

CRT FEES AND EXPENSES

54. 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 dismiss Mr. Leishman's claims for reimbursement of CRT fees. The parties did not claim for any specific dispute-related expenses, so I order none.

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

ORDER

56. I dismiss Mr. Leishman's claims and this dispute.

David Jiang, Tribunal Member