



Civil Resolution Tribunal

Date Issued: October 31, 2022

File: ST-2021-005921

Type: Strata

Civil Resolution Tribunal

Indexed as: *McFadyen v. The Owners, Strata Plan NW 2154*, 2022 BCCRT 1191

B E T W E E N :

DARNAL MCFADYEN and ELIZABETH AMEZCUA-EMARY

APPLICANTS

A N D :

The Owners, Strata Plan NW 2154

RESPONDENT

A N D :

DARNAL MCFADYEN and ELIZABETH AMEZCUA-EMARY

RESPONDENTS BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

Nav Shukla

INTRODUCTION

1. The applicants, Darnal McFadyen and Elizabeth Amezcua-Emary (owners), co-own strata lot 14 (SL14) in the respondent strata corporation, The Owners, Strata Plan NW 2154 (strata). The strata says that the owners have breached the strata's bylaws by altering common property (CP) outside of SL14 without proper approval. In particular, the strata says that the owners have put numerous potted plants on the CP and river rock over the previously existing perennial bed. The strata says that this is a significant change to the CP under *Strata Property Act* (SPA) section 71 which has not been properly approved.
2. The owners say that the strata has incorrectly fined them because the previous strata council had given the owners approval to put the river rock and potted plants on the CP. The owners further say the river rock and potted plants are not alterations or a significant change to the CP. They seek an order for the strata to stop imposing fines against them.
3. In its counterclaim, the strata seeks an order that Ms. Amezcua-Emary return the CP in front of SL14 to the state it was in prior to her moving in, at her own expense. The strata also seeks an order that the owners pay \$8,400 in fines that have been assessed against them for the alleged bylaw breaches.
4. Mr. Darnal represents the owners in this dispute. A strata council member represents the strata.

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.

Preliminary Issues

9. After filing their Dispute Notice, the owners amended it to add a monetary amount of \$8,400. The owners did not further explain this amendment in their submissions. However, since the \$8,400 amount is the same amount the strata seeks in its counterclaim for unpaid fines, I find the owners request is not for \$8,400 in damages but for the levied fines to be reversed from their strata lot account, in addition to the strata not imposing further fines.
10. Further, in their submissions, the owners request additional remedies not sought in their Dispute Notice. In particular, the owners ask the CRT to order the strata to leave Ms. Amezcua-Emary alone with respect to her potted plants and for the strata council to issue a letter of apology for allegedly harassing and treating Ms. Amezcua-Emary badly.
11. Though the CRTA and CRT rules permit applicants to request to amend the Dispute Notice to add new claims or remedies, the owners did not add these 2 remedies when they amended their Dispute Notice. I find the purpose of the Dispute Notice is to

define the issues and provide notice to the respondent of the claims against it. CRT rule 1.19(3) says that the Dispute Notice will only be amended after the dispute has entered the CRT decision process where exceptional circumstances apply. I find no exceptional circumstances here that would justify adding new claims or remedies at this late stage of the CRT process. So, I decline to address the owners' requests for an apology letter or that the strata to leave Ms. Amezcua-Emary alone.

ISSUES

12. The issues in this dispute are:

- a. Are the river rock and potted plants on the CP outside of SL14 a significant change under SPA section 71?
- b. Is Ms. Amezcua-Emary required to return the CP outside of SL14 back to its original state?
- c. Are the owners required to pay the outstanding fines or should the fines be reversed?

EVIDENCE AND ANALYSIS

13. In a civil proceeding like this one, as the applicants, the owners must prove their claims on a balance of probabilities (meaning "more likely than not"). The strata must prove its counterclaims to the same standard. 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.

14. The strata is a residential strata building with 63 strata lots. The strata filed a complete set of bylaws with the Land Title Office (LTO) on January 29, 2016. I find these bylaws apply to this dispute. Subsequent bylaw amendments have been filed with the LTO but are not relevant to this dispute. I refer to the relevant bylaws in my analysis below.

15. The owners and another individual jointly purchased SL14 in the summer of 2020. Ms. Amezcua-Emary undisputedly moved into SL14 on August 7, 2020.

16. The strata plan shows a patio attached to SL14 that is designated as limited common property (LCP) for the use of SL14's owners. The area beyond this patio is at issue here. SPA section 1 defines "common property" as that part of the land and buildings shown on a strata plan that is not part of a strata lot. Since it is not marked as part of SL14 on the strata plan, I find the disputed area here is CP.
17. Emails in evidence show that before moving in, Ms. Amezcua-Emary contacted the strata about bringing her mobile garden with her and proposed a plan to put various potted plants on the CP outside of SL14. In a July 29, 2020 letter, the strata informed Ms. Amezcua-Emary that it did not accept her proposed plan and welcomed her to bring a reasonable amount of plants to put on the LCP patio as well as 3 to 4 potted plants for the CP.
18. After Ms. Amezcua-Emary moved in, she placed potted plants on the CP and the strata received verbal complaints from other owners. The strata wrote to Ms. Amezcua-Emary on August 11, 2020 and gave her 14 days to resolve the issues. Though the letter did not specify how Ms. Amezcua-Emary was to resolve the issues, I infer the strata council's request was for her to remove the potted plants from the CP. A September 13, 2020 email chain between strata council members shows that Ms. Amezcua-Emary worked with the strata council to re-arrange the potted plants to the council's satisfaction. Further, on September 14, 2020, the strata wrote to Ms. Amezcua-Emary and rescinded its previous 2 letters. The parties do not say exactly how many potted plants are on the CP. However, based on an April 19, 2022 photograph of the CP, I find there are approximately 15 potted plants.

Are the river rock and potted plants on the CP a significant change under SPA section 71?

19. In its submissions, the strata repeatedly says that it agrees that in September 2020, the strata council decided to allow the owners to leave their potted plants on the CP. I find the September 13, 2020 email chain mentioned above and the strata's September 14, 2020 letter to Ms. Amezcua-Emary confirm this approval. I find the September 13, 2020 email chain also confirms the strata council approved river rock to be put on the CP outside of SL14, which the owners undisputedly did at their own

cost. Despite acknowledging this approval, the strata says that the new strata council considers these changes to be a significant change under SPA section 71 which have not been properly approved.

20. SPA section 71 says a strata corporation must not make significant changes in the use or appearance of CP unless the change is approved by a resolution passed by a $\frac{3}{4}$ vote or there are reasonable grounds to believe that immediate change is necessary to ensure safety or prevent significant loss or damage. Section 71 also governs changes made by an owner that have been authorized by a strata corporation, which is the case here (see *Foley v. The Owners, Strata Plan VR 387*, 2014 BCSC 1333 at paragraph).
21. The criteria for determining what is a significant change in use and appearance under SPA section 71 was set out by the BC Supreme Court in *Foley* at paragraph 19 as follows:
 - a. A change would be more significant based on its visibility or non-visibility to residents and its visibility or non-visibility towards the general public;
 - b. Whether the change to common property affects the use or enjoyment of the unit or 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-use;
 - f. Consideration should be given as to how the strata corporation has governed itself in the past and what it is followed. 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?
22. In *Reid v. Strata Plan LMS 2503*, 2003 BCCA 126, some owners placed potted plants, bushes and other shrubs in a common property entrance area. The Court of Appeal

said that this type of change was decorative and did not constitute a significant change to the use or appearance of the CP under section 71. The Court of Appeal's finding in *Reid* is binding on me. So, as in *Reid*, I find the potted plants here are not a significant change to the CP under SPA section 71. I consider the *Foley* factors with respect to the river rock below.

23. The owners say that only 6 out of the 63 strata lots can see the CP outside of SL14. They say that SL14 abuts a retaining wall and hedge above it which obscures it from any other strata lots. The owners also say that SL14 is at the back of the building and the CP is not visible to the public. None of this is disputed. So, I find the CP is visible to only a small number of strata lots and not visible to the general public.
24. The owners say the change also does not affect the use of enjoyment of other strata lots. Though the strata says that the potted plants give the appearance that the area outside of SL14 is a private space rather than CP, the strata has provided no evidence to prove that the changes affect the use and enjoyment of other strata lots. Similarly, I find there is no evidence of a direct interference or disruption as a result of the changes, nor is there evidence of changes in marketability.
25. The owners say that 2 other strata lots have put river rock down to mitigate drainage issues. Based on a September 13, 2020 email between council members in evidence, I find the strata had likely given approval to at least 1 other strata lot owner to put river rock on CP outside of their strata lot. So, I find the strata has permitted similar changes in the past.
26. Weighing the *Foley* factors, I find the river rock is also not a significant change in the use or appearance of CP. So, I find a $\frac{3}{4}$ vote under SPA section 71 was not required before the owners made the disputed changes to the CP.

Is Ms. Amezcua-Emary required to return the CP outside of SL14 back to its original state?

27. As mentioned above, it is undisputed that in September 2020, the strata council gave the owners permission to put in the river rock and place the potted plants on the CP. However, the strata says that in 2021, a new strata council decided to re-examine the

issue and decided the changes were significant changes to the appearance and use of CP under SPA section 71. It refers to the CRT Vice Chair's decision in *Wallace v. The Owners, Strata Plan NW2141*, 2021 BCCRT 1088 and says that based on *Wallace*, a new strata council can change a decision made by a previous strata council if it determines that a significant change has been made to CP without approval by the strata's owners.

28. In *Wallace*, the applicant wanted to construct exit stairs and railings to the rear of their strata lot. The strata had given approval but the newly elected strata council then reversed the decision and refused to allow them to complete the requested change. The Vice Chair found at paragraph 28 that absent any express prohibition for a strata council to change its decision on a particular matter, it could do so. The Vice Chair went on to say that there could be various reasons for a strata council to change its position, such as new information about whether a previously approved alteration is a significant change in the use or appearance of CP under SPA section 71.
29. I note the *Wallace* decision is not binding on me. I also find *Wallace* is distinguishable on its facts. In *Wallace*, the construction of the stairs and railings had not been completed, whereas the potted plants and river rock here have been in place for over a year. Further, in *Wallace*, the strata corporation had paid a deposit for the construction, and likely retained the contractor. Here, as noted above, it is undisputed that the owners paid for the river rock. Lastly, the owners in this dispute argue the strata council's decision to reverse the approval is significantly unfair, something not argued or considered in *Wallace*.
30. Under CRTA section 123(2), the CRT can make orders remedying significantly unfair actions or decisions by a strata corporation or 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.

31. For the reasons that follow, I find the strata's decision to reverse its approval was significantly unfair. Given the strata council's prior approval, I find the owners had a reasonable expectation that the strata would not reverse its decision without valid reason. I have already found above that the river rock and potted plants are not a significant change to the CP under SPA section 71. There is also no evidence that the strata council changed its position based on new information. So, I find the strata has failed to prove that it had a valid reason for reversing its decision and violated the owners' reasonable expectation that the approval would not be reversed without reason.
32. Further, since the owners put the river rock in at their own expense, I also find that revoking the approval and ordering the owners to return the CP to its original state was burdensome and harsh. For those reasons, I find it was significantly unfair for the strata to reverse its prior approval and require the owners to remove the potted plants and river rock. So, I find the strata's September 2020 approval still applies. Accordingly, I decline to order the owners to return the CP to the state it was in prior to them purchasing SL14 and dismiss this claim.

Are the owners required to pay the outstanding fines?

33. In its counterclaim, the strata claims \$8,400 for unpaid fines from the owners. However, in its submissions, the strata says that the amount owing is actually \$7,400. The strata claims the \$7,400 in unpaid fines for the owners' alleged continuing contravention of bylaws 8.1 and 8.2.
34. Bylaw 8.1(b) says an owner must obtain the strata's written approval before making any alteration to CP, LCP, or to common assets. Bylaw 8.2(a) says as part of an application for approval of any alteration under bylaw 8.1, the strata may require an owner to submit a written detailed plan and description of the intended alteration.

35. As noted above, I have found the strata council originally approved the owners' request for potted plants and river rock in the September 13, 2020 email chain and the strata's September 14, 2020 letter. The evidence shows that the strata sent Ms. Amezcua-Emary letters on April 12, 2021 and June 24, 2021 asking her to remove the potted plants because they were allegedly not approved by the strata. In the June 24, 2021 letter, the strata referred to bylaws 8.1 and 8.2 and said failure to remove the potted plants and other items from the CP within 14 days may result in fines. The owners undisputedly did not remove the plants from the CP. On July 9, 2021, the strata informed the owners the strata council had voted to assess \$200 in fines every 7 days until owners removed the plants and other items from the CP.
36. The owners say the changes they made to the CP are not alterations. In any event, they say the strata council had already given them the required approval. As noted above, the strata does not dispute the owners were given approval. Given this, I find I do not need to decide whether the river rock and potted plants are alterations to the CP.
37. The strata says that since it reversed the prior approval and the owners undisputedly did not submit a detailed plan and obtain new approval, the owners have breached bylaws 8.1 and 8.2. However, I have already found above that the council's September 2020 email and letter approval remains valid. So, I find the owners were not required to obtain new approval and the strata has failed to prove the owners breached bylaws 8.1 and 8.2.
38. Accordingly, I find the \$7,400 fines are invalid and order the strata to reverse them from the owners' strata lot account. The owners also seek an order that the strata stop imposing fines. The evidence shows that the strata has not imposed any additional fines since March 24, 2022. So, since the strata has already stopped imposing fines, and since I have ordered the strata to reverse the \$7,400 fines it imposed, I find no further orders are necessary.

CRT FEES AND EXPENSES

39. 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 successful, I order the strata to reimburse the owners \$225 for CRT fees. Since the strata was unsuccessful, I dismiss its claims for reimbursement of CRT fees. The parties did not claim any dispute-related expenses.
40. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against the owners.

ORDERS

41. Within 14 days of this decision, I order the strata to:
- a. pay the owners \$225 for CRT fees, and
 - b. reverse the \$7,400 in fines from the owners' strata lot account.
42. The owners are entitled to post-judgment interest under the *Court Order Interest Act*, as applicable.
43. I dismiss the strata's counterclaims.
44. 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