



Civil Resolution Tribunal

Date Issued: December 6, 2022

File: ST-2021-008582

Type: Strata

Civil Resolution Tribunal

Indexed as: *Umai Japanese Restaurant Inc. v. The Owners, Strata Plan BCS 1695,*

2022 BCCRT 1313

BETWEEN:

UMAI JAPANESE RESTAURANT INC.

APPLICANT

AND:

The Owners, Strata Plan BCS 1695

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

J. Garth Cambrey, Vice Chair

INTRODUCTION

1. This strata property dispute is about an owner's request to alter common property.

2. The applicant, Umai Japanese Restaurant Inc. (Umai) owns strata lot 87 (SL87) in the respondent strata corporation, The Owners, Strata Plan BCS 1695 (strata). Umai is represented by its director, Young-Kwan Lee. The strata is represented by a strata council member.
3. Umai says the strata has treated it significantly unfairly by refusing to allow it to expand its patio and make other landscaping changes in front of SL87. It says the strata unconditionally approved a 2014 request but has subsequently refused to allow the alterations to be done. Umai essentially seeks an order that the strata allow it to proceed with the allegedly approved 2014 alterations.
4. The strata says it has made its best efforts to comply with its obligations under the *Strata Property Act* (SPA) and its bylaws. It also says Umai's claims are out of time under the *Limitation Act* (LA). The strata asks that Umai's claims be dismissed.
5. As explained below, I dismiss Umai's claim and this dispute.

JURISDICTION AND PROCEDURE

6. These are the formal written reasons of the 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 section 123 of the CRTA and the CRT rules, 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 Decision

10. On May 30, 2022, the CRT issued a preliminary decision on whether Umai's claim was out of time under the LA and found 2 of 3 potential claims were not. I am not bound by the tribunal member's preliminary decision and for reasons stated below, I find that Umai's claim is not captured by the LA, so it is not out of time.

.ISSUES

11. The issues in this dispute are:
 - a. What is the nature of Umai's claim?
 - b. Is Umai's claim out of time under the LA?
 - c. Are Umai's requested alterations a significant change in use or appearance of CP?
 - d. If so, did the strata act significantly unfairly by refusing to allow the requested alterations?
 - e. If so, is Umai entitled to an order allowing it to extend the CP patio and use the CP for restaurant seating.

BACKGROUND, REASONS AND ANALYSIS

12. As the applicant in civil proceedings such as these, Umai must prove its claims on a balance of probabilities, meaning "more likely than not". I have considered all the submissions and evidence provided by the parties, but I refer only to information I find

relevant to give context for my decision.

13. The strata was created in February 2006 under the SPA. It consists of residential and non-residential strata lots in a single building. Umai purchased SL87, a non-residential strata lot, on September 8, 2014.
14. On May 3, 2006, the strata filed bylaws at the Land Title Office (LTO) that I find replaced the Standard Bylaws under the SPA. These are the applicable bylaws to this dispute. I note the May 2006 bylaw amendments created a residential section and a commercial section, but neither section is a party to this dispute. Other bylaw amendments have been filed at the LTO, but I find they are not relevant here. Bylaw 2.6(3) requires an owner to obtain the written approval of the strata before altering common property that is not is limited common property.
15. SL87 is located on the ground floor. The parties provided photographs of the exterior of SL87 taken at different times. Drawings of the existing and proposed alterations were also provided in evidence. Based on the photographs and drawings, there is a concrete patio area immediately outside the main entrance to SL87 that runs the width of SL87. I estimate the original patio extends about 8 to 10 feet from the building exterior which is elevated 3 stairs above a concrete sidewalk located a further 8 – 10 feet from the patio. A concrete block retaining wall located inside the sidewalk starts at the foot of the stairs and circles around the patio back to the building. Originally, there was a landscaped area between the top of the retaining wall and the patio. A small hedge ran along the patio perimeter, and other plants plus 2 or 3 larger trees were planted in the landscaped area.
16. There is no dispute that the patio in front of SL87 and the landscaped area between the patio and concrete block wall next to a sidewalk are common property (CP). My review of the strata plan confirms this.
17. The evidence shows 3 separate requests were made to alter the CP in front of SL87.

Request #1

18. The first request for patio alterations was made in 2014 when Umai offered to purchase

SL87. The offer was apparently subject to Umai receiving approval to use the CP in front of SL87 for patio seating and to change the landscaped area. Sketch drawings attached to the document show the requested alterations were to relocate the hedge from beside the patio perimeter out to the retaining wall and fill the landscaped area with “patio stones” (Request #1). A document in evidence dated July 14, 2014, signed by what I infer is the strata’s owner developer and one strata council member, shows the strata approved Request #1 and expressly notes the strata voted to approve the requests knowing they were part of an offer to purchase SL87. Based on the overall evidence, I find the buyer referenced in the signed document must be Umai.

19. August 29, 2014 minutes of the commercial section executive show the SL87 owner requested and received permission to remove trees at its expense, “to improve visibility” to SL87. There was no request for patio alterations. As noted, Umai was not an owner of SL87 until September 8, 2014.
20. Architectural drawings dated December 2014 also show 2 natural gas connections on the proposed patio with a note stating “gas connection for fireplace for winter time”. However, there is no evidence to suggest Umai requested these CP alterations.
21. There is also no evidence that Umai commenced any alterations to the CP before “mid-2019”. The strata submits Umai started altering CP in “mid-2019” and was asked to stop by the strata (2019 stop work order). There is no evidence before me about what work Umai did or intended to do, nor any correspondence about the 2019 stop work order. However, Umai does not dispute it started altering the CP at this time, so I accept Umai did and that it received the strata’s 2019 stop work order. Based on these facts, I find the strata’s 2019 stop work order related to Request #1.

Request #2

22. The second alteration request was made on August 19, 2019 when Umai submitted an “Assumption of Liability” form and renderings for different and more significant alterations. It proposed a patio for seating that extended from the building exterior to the top of the retaining wall, including glass railings and an overhead gazebo, on the common property area outside SL87 (Request #2). The strata considered Request #2

and determined that it was a significant change to the use and appearance of CP and required the strata to approve the alterations by a $\frac{3}{4}$ vote. The strata held a special general meeting (SGM) on September 30, 2019, and proposed a $\frac{3}{4}$ vote to approve Request #2, but the resolution did not pass. In an October 1, 2019 letter, the strata denied Umai's requested alterations. The strata says Request #2 was prompted as a result of the 2019 stop work order. Umai does not say why it submitted Request #2. However, I find on a balance of probabilities, the strata's version of events is most likely correct. I say this because there is no other reasonable explanation why Umai did not question why the strata asked it to stop work and then quickly submitted a new alteration request.

23. Over 1 $\frac{1}{2}$ years later in May 2021, Umai began removing plants from the landscaped area. It says it began this work based on Request #1 that it says was approved by the strata, about 7 years earlier. This resulted in the strata again asking Umai to stop work (May 2021 stop work order).
24. On June 9, 2021, Umai requested a hearing under SPA section 34.1 to discuss the alterations it considered the strata approved in 2014, which I find are the Request #1 alterations. In the letter, Umai acknowledged Request #2 was not approved by the strata. The hearing occurred at the July 6, 2021 strata council meeting attended by 2 individuals representing SL87. The minutes show that prior to the hearing, the strata approved alterations to the landscaping, but denied any alterations relating to increased restaurant patio seating stating the alterations were significant and required the owners to pass a $\frac{3}{4}$ vote under SPA section 71. I note section 71 states the strata must not make a significant change in the use or appearance of common property unless the change is approved by a resolution passed by a $\frac{3}{4}$ vote at general meeting, or there are reasonable grounds to believe that immediate change is necessary to ensure safety or prevent significant loss or damage. The minutes also show the SL87 owner was open to put forward a $\frac{3}{4}$ vote resolution for section 71 approval of its requested alterations at a general meeting.

Request #3

25. On July 8, 2021, the commercial section wrote to the strata enclosing a petition signed by more than 20% of the strata owners under SPA section 46. The petition demanded the addition of a number of things to the agenda of the strata's annual general meeting (AGM) scheduled for August 24, 2021. One of the commercial section's demands was a $\frac{3}{4}$ vote resolution "to allow the changes to SL 87 patio extension as per the approved 2014 application". This is the third request for CP alterations (Request #3) although I find it is clearly a re-submission of the first request.
26. On July 13, 2021, before the August 24, 2021 AGM, the strata wrote to Umai following the July 6, 2021 hearing. The strata denied part of Request #2 about Umai's request to alter the CP for "the installation of additional restaurant seating and/or shade structure" based on SPA section 71. However, the strata approved Umai's requested landscaping alterations including removal of the hedges along the patio perimeter. The letter stated the landscape alterations were approved on the following conditions:
- a. That the hedge be replaced with "alternative greenery and/or landscape architecture that will improve the appearance and remediate safety concerns of this exposed garden bed",
 - b. The landscape improvements be at the owner's cost and submitted to the strata council for approval, and
 - c. That the owner sign an "Assumption of Liability" form provided by the strata no later than July 27, 2021.
27. I find a major difference between Request #1 and what the strata approved in July 2021 is the use of the altered patio area for restaurant seating. Patio use for seating was allegedly permitted in Request #1, but expressly denied in Request #3. I find this is the central issue in this dispute.
28. At the August 24, 2021 AGM, Request #3, the $\frac{3}{4}$ vote resolution for the SL87 patio extension petitioned by more than 20% of the owners, was defeated.

What is the nature of Umai's claim?

29. Based on the overall submissions and evidence before me, I find Umai's claim only relates to Request #1 made in 2014. I say this for the following reasons (my emphasis):
- a. Umai's claim description states when "[it] bought [SL87], patio extension and landscape changes [were] submitted and approved, but when [it proceeded with the work] a stop request [was issued] by strata council". Umai purchased SL87 in September 2014, so the claim must be about Request #1.
 - b. In submissions, Umai says that in early 2021, it "began doing work in front of [SL87] pursuant to the July 2014 approval".
 - c. In its June 9, 2021 hearing request, Umai says the hearing request was to "present my case to the Strata Council to allow the common area alteration as approved in 2014", which I have identified as Request #1. The hearing request also states that Umai understood "the application from 2019 [Request #2] did not pass".
30. Therefore, I need not address the strata's denial of Request #2 or Request #3.

Is Umai's claim out of time?

31. CRTA Section 13 confirms that the LA applies to CRT claims. Section 6 of the LA says that the basic limitation period to file a claim is 2 years after the claim is "discovered". At the end of the 2-year limitation period, the right to bring a claim disappears.
32. However, section 1 of the LA defines a "claim" as "a claim to remedy an injury, loss or damage that occurred as a result of an act or omission". The central issue in this dispute is whether the strata has treated Umai significantly unfairly by not permitting Umai to make alterations to CP. I find that Umai is not asking to remedy an injury, loss or damage caused by the strata. Specifically, Umai has not claimed loss of income or reimbursement of expenses it incurred in May 2021 when it began altering the CP. Rather, Umai says the strata should permit the CP alterations the strata approved in 2014. Therefore, I find that Umai's claim in this dispute is not a "claim" within the meaning of the LA. So, I find that this dispute is not subject to the LA.

Are Umai's requested alterations a significant change in use or appearance of CP?

33. The parties appear to agree and I find that *Foley v The Owners Strata Plan VR 387*, 2014 BCSC 1333 is the leading case for assessing what is a significant change in use or appearance of CP. I note that the strata also cites *Chan v. The Owners, Strata Plan VR677*, 2012 BCSC 1725, which is a cited case in *Foley*.
34. The criteria for determining what is a significant change in use and appearance under section 71 of the SPA was clearly set out 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 are 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 all unit or units;
 - c. Is there a direct interference or disruption as a result of the change to use?
 - d. Does the change impact on the marketability or value of the unit?
 - e. The number of units 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.
35. At paragraph 28 of *Foley*, the court said another consideration is the use and enjoyment of the altered property, finding that Mr. Foley “ostensibly incorporated that portion of common property into his private area” and would be the only owner entitled to the use and enjoyment of the alteration.” The court found that the resulting exclusive use of common property on its own would constitute a significant change in use.
36. Umai argues that its proposed alterations are not a significant change to common property, while the strata argues the opposite.

37. Both parties cite other CRT decisions that have considered *Foley* and addressed SPA section 71. It is clear from the cited CRT decisions that whether a change in the use or appearance in CP is significant is fact specific. I do not find the facts before me in this dispute are similar to the CRT decisions cited so I will not address the cited decisions. Here, I have found that Umai's claim is limited to relocating a hedge and expanding a patio area by placing patio stones where the landscaping was. The main purpose for the requested alterations was to use the expanded patio area for restaurant seating.
38. Therefore, I find it is not the proposed change in appearance that is the main issue here, but the change in use to allow restaurant seating. If the strata were to permit use of the expanded patio for restaurant seating, I find it would be the same as granting Umai authority to incorporate the expanded CP patio area into its private use. Following *Foley*, this on its own is a significant change to the use of CP. For this reason, I find the requested change to CP is significant and requires a $\frac{3}{4}$ vote approving the change under SPA section 71.

Did the strata act significantly unfairly by refusing to allow the requested alterations?

39. As earlier noted, Umai says the strata has treated it significantly unfairly by refusing to allow it to expand its patio and make landscaping changes in front of SL87. The strata denies this allegation.
40. The CRT has jurisdiction to determine claims of significant unfairness under CRTA section 121(1): see *The Owners, Strata Plan BCS 1721 v. Watson*, 2018 BCSC 164.
41. The courts and the CRT have considered the meaning of "significant unfairness" in many contexts and have equated it to oppressive or unfairly prejudicial conduct. In *Reid v. Strata Plan LMS 2503*, 2003 BCCA 126, the BC Court of Appeal interpreted a significantly unfair action as one that is burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith and/or unjust or inequitable. See also *Kunzler v. The Owners, Strata Plan EPS 1433*, 2021 BCCA 173.

42. In *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44, the BC Court of Appeal established a reasonable expectations test, restated in *Watson* at paragraph 28 as follows:
- a. What is or was the expectation of the affected owner or tenant?
 - b. Was that expectation on the part of the owner or tenant objectively reasonable?
 - c. If so, was that expectation violated by an action that was significantly unfair?
43. More recently in *Kunzler*, the Court of Appeal determined the reasonable expectations test set out in *Dollan* could be considered a factor in deciding whether significant fairness has occurred, together with all other relevant factors including the nature of the decisions and the effect of overturning it.
44. Umai's main argument appears to be that the strata unconditionally approved Request #1, but has subsequently refused to allow Umai to complete the alterations. I find Umai's expectation is that the strata must follow through with its approval given in 2014 but which it rescinded in 2019 after considering at least 1 other alteration request from Umai. However, I find Umai's expectation is not objectively reasonable given my finding that the alterations are significant and require the passing of a $\frac{3}{4}$ vote, which again, the strata has not done.
45. To the extent Umai argues the strata council cannot change its decision, I disagree. Under SPA sections 4 and 26, the elected strata council must exercise the powers and perform the duties of the strata according to the SPA, *Strata Property Regulation* (regulations) and bylaws. The SPA, regulations, and bylaws are silent on issue of revisiting council decisions and I could not locate any case law directly on point. Absent any express prohibition for a strata council to change its decision on a particular matter, I find it is entirely appropriate, practical, and reasonable for a strata council to do so. There could be various reasons a strata council would want to change its position or point of view. These might include further consideration of the issue or new information, and as is the case here, reversing a decision of previous strata council.

46. Based on my review of the legislation, I find it is the elected strata council that has authority to exercise the powers and perform the duties of the strata. Therefore, I find the elected strata council has the authority to change or reverse a decision, even if that decision was made by a prior strata council. This is especially true given the decision to approve the alterations was made in 2014, and was rescinded 5 years later in 2019.
47. Further, following *Kunzler*, if I overturn the strata's decision and grant Umai's request to alter the CP and use it for restaurant seating, I would effectively be ordering the strata to contravene the SPA. I am not prepared to do this.
48. For these reasons, I find the strata has not treated Umai significantly unfairly by denying the CP alterations to the patio and landscaping in front of SL87. I dismiss Umai's claim and this dispute.

CRT FEES AND EXPENSES

49. 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 not to follow this general rule in these disputes. The strata was the successful party, but it did not pay CRT fees so I order none.
50. Umai claims \$2,750 for "legal fees and interpreter/translation" expenses but was not successful, so I dismiss its claim for expenses.
51. The strata claims \$7,415 for legal fees. CRT rule 9.5(3) says the CRT will not order reimbursement of lawyer's fees in a strata dispute unless there are extraordinary circumstances. While the strata cited Rule 9.5(3) in its submissions, it made no arguments about whether extraordinary circumstances exist here. I find they do not as the dispute involved a single, relatively straightforward issue about alterations to CP. In determining whether to order reimbursement of legal fees, rule 9.5(4) states the CRT may consider the complexity of the dispute, the degree of involvement of a parties' representative, whether the representative caused any unnecessary delay

expense, and any other factors the CRT considers appropriate. Overall, I find the rule 9.5(4) factors, and the lack of extraordinary circumstances, weigh against ordering reimbursement of the strata's legal fees as a dispute-related expense. Further, the strata did not provide any documentary evidence, such as copies of its legal invoices, so I decline to order that Umai pay the strata's lawyer's fees.

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

ORDER

53. I dismiss Umai's claim and this dispute.

J. Garth Cambrey, Vice Chair