



Civil Resolution Tribunal

Date Issued: December 22, 2022

File: ST-2022-003089

Type: Strata

Civil Resolution Tribunal

Indexed as: *Commisso v. The Owners, Strata Plan LMS 2188*, 2022 BCCRT 1365

B E T W E E N :

SONIA COMMISSO

APPLICANT

A N D :

The Owners, Strata Plan LMS 2188

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Kristin Gardner

INTRODUCTION

1. This dispute is about bylaw fines for smoking and excessive noise.
2. The applicant, Sonia Commisso, owns a strata lot in the respondent strata corporation, The Owners, Strata Plan LMS 2188 (strata). Ms. Commisso says the strata levied several \$200 fines against her related to smoking and noise, which she

says were unjustified. She says the fines constitute harassment. Ms. Commisso seeks an order that the strata remove the imposed fines from her strata lot account, totalling \$1,200.

3. The strata says the bylaw fines were imposed according to its bylaws and the *Strata Property Act* (SPA). The strata denies Ms. Commisso's harassment allegations.
4. Ms. Commisso is self-represented. The strata is represented by a strata council member.

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. When Ms. Commisso filed her application for dispute resolution, she referred to only 2 bylaw fines totalling \$400. In submissions, Ms. Commisso refers to 6 bylaw fines totalling \$1,200. As the strata provided evidence and submissions in response to all 6 alleged fines, I find the strata had sufficient notice of the increased claim. So, I have addressed all 6 alleged bylaw fines below.
10. In the Dispute Notice and her submissions, Ms. Commisso says that a tenant physically assaulted her. The evidence before me shows the strata has repeatedly advised Ms. Commisso to report the alleged assault to police. As the tenant is not a party to this dispute, and Ms. Commisso has not specifically requested any remedy against the strata for the alleged assault, I have not addressed this allegation below.
11. Ms. Commisso provided several items of evidence after the CRT's deadline. CRT staff advised me that the strata was given an opportunity to comment on the late evidence in its submissions. Given the strata does not object to the late evidence, I have admitted it and discussed it where relevant below.

ISSUES

12. The issues in this dispute are:
 - a. Did Ms. Commisso breach the strata's bylaws?
 - b. If so, were the bylaw fines validly imposed?

EVIDENCE AND ANALYSIS

13. In a civil proceeding like this one, the applicant Ms. Commisso must prove her claims on a balance of probabilities (meaning "more likely than not"). I have read all of the

parties' evidence and submissions, but I refer only to what I find is necessary to explain my decision.

Background

14. On June 2, 2021, the strata filed a consolidated set of bylaws with the Land Title Office. I find these are the bylaws applicable to this dispute.
15. The relevant bylaws include the following:
 - a. Bylaw 3.1(b) says owners must not make, cause, or produce undue noise or smell in or around a strata lot or common property or do anything that will interfere unreasonably with other owners, tenants or occupants, or cause unreasonable noise. The bylaw specifically states at the end: "For example: second hand smoke or illegal substances".
 - b. Bylaw 3.8(a) says an owner must only smoke or vape within their strata lot. Bylaw 3.8(b) says an owner must not smoke or vape anywhere on common property, including but not limited to hallways, elevators and other specified common property, within 3 meters of a door, window or air intake, and on any land that is a common asset.
 - c. Bylaw 3.17 says excessive noise and disturbances may be subject to fine upon notice and each successive offence will result in the fine being doubled.
16. The strata says that Ms. Commisso has smoked cigarettes to the extent that smoke entered other strata lots. The strata also says that Ms. Commisso engaged in confrontational behaviour and used abusive language to others on strata property, justifying the other fines it imposed for excessive noise.

Ms. Commisso's alleged smoking

17. Three of the disputed fines, totalling \$600, relate to Ms. Commisso allegedly smoking cigarettes in and around her strata lot.
18. In a January 27, 2022 letter, the strata advised Ms. Commisso that it received a complaint that "the smell of constant cigarette smoke" had been emanating from Ms.

Commisso's strata lot and from the balcony. I note the strata plan shows there is a limited common property deck designated for Ms. Commisso's exclusive use, which I infer is the "balcony" referred to in the parties' evidence and submissions. The letter also stated that regardless of whether her windows were closed, the smell "seeped" into a neighbouring unit on 8 specified dates and times. The letter referred only to contravention of bylaw 3.8 and stated a \$200 "penalty" would be applied to her account, though she was given an opportunity to respond to the complaint.

19. Ms. Commisso requested a hearing, which was held on February 28, 2022. In a March 2, 2022 letter, the strata advised it was upholding the fine. The letter noted that Ms. Commisso admitted she smokes in her strata lot, and the strata council found the smoke was entering other units, which negatively and unreasonably interfered with other residents. The letter referred to a contravention of both bylaw 3.8 and bylaw 3.1(b).
20. In a June 9, 2022 letter, the strata advised Ms. Commisso that it had received multiple complaints about her continuing to smoke cigarettes, causing smoke to fill the apartment. I infer the "apartment" refers to the strata lot located directly above Ms. Commisso's strata lot, as the evidence shows the occupants of that strata lot are the complainants of Ms. Commisso's alleged smoking. The letter set out 20 specified dates and times of smoke coming into the complainants' apartment between March 29 and June 1, 2022. The letter referred only to contravention of bylaw 3.8.
21. Finally, in a July 26, 2022 letter, the strata advised Ms. Commisso that it had received a complaint that she had continued to smoke in her strata lot on 6 specified dates and times in June. This letter also referred only to a breach of bylaw 3.8.
22. In submissions, Ms. Commisso admits that she smokes in her strata lot, albeit only occasionally. She specifically says she does not smoke on common property or on the balcony.
23. The evidence shows the complainants completed bylaw violation forms about Ms. Commisso's alleged smoking on January 20, 2022 and June 3, 2022. The January 20 form stated Ms. Commisso smoked cigarettes multiple times a day "inside her unit

as well as on the balcony”. The June 3 form stated Ms. Commisso continued to smoke “inside and outside” her unit. However, the forms did not set out specific instances that the complainants observed Ms. Commisso smoking on the balcony or on common property. There is no other evidence, such as a statement from the complainants or any other strata residents, that Ms. Commisso smoked in any location specifically prohibited under bylaw 3.8(b).

24. As noted, bylaw 3.8(a) permits owners to smoke within their strata lot. Given her admission, I accept that Ms. Commisso does so. However, I find the vague statements on the complainants’ bylaw violation forms are insufficient to establish that Ms. Commisso smoked outside her strata lot. Had she been doing so, I would have expected the strata to provide some photographic or other witness evidence. In the absence of detailed evidence to the contrary, I accept Ms. Commisso’s submission that she has restricted her smoking to within her strata lot. So, I find Ms. Commisso has not contravened bylaw 3.8.
25. However, this finding is not necessarily determinative of whether the fines for smoking were validly imposed, given bylaw 3.1(b). While owners are permitted to smoke within their strata lot, I find bylaw 3.1(b) restricts smoking in strata lots to the extent that it must not produce undue smell or interfere unreasonably with other owners, tenants, or occupants. This conclusion is supported by the specific reference to the example of second-hand smoke included in bylaw 3.1(b).
26. I find the law about nuisance in the strata context applies to the analysis of whether cigarette smoke is causing undue smell or unreasonable interference under bylaw 3.1(b). In *The Owners, Strata Plan LMS 1162 v Triple P Enterprises Ltd.*, 2018 BCSC 1502, the BC Supreme Court (BCSC) defined nuisance in the strata setting as a substantial, non-trivial, and unreasonable interference with use and enjoyment of property (paragraph 33). In *Campbell et al v. Blainey et al*, 2005 BCSC 250, the BCSC said in paragraph 55 that a nuisance occurs when one person’s use of property unreasonably inflicts inconvenience and discomfort on another.

27. The test of whether a potential nuisance is unreasonable is objective and is measured with reference to a reasonable person occupying the premises: see *Sauve v. McKeage et al.*, 2006 BCSC 781. The test for nuisance depends on several factors, such as its nature, severity, duration, and frequency: see *St Lawrence Cement Inc. v. Barrette*, 2008 SCC 64.
28. The complainants' bylaw violation forms referenced above describe cigarette smoke "filling" their unit. The June 3 form also notes the smoke is causing respiratory issues, and that one complainant has asthma. I note that in an April 20, 2021 email to the strata, one of the occupants of the strata lot above Ms. Commisso stated that smoke "infiltrates" their unit to the point that their clothes, sheets, and furniture smell of stale cigarette smoke. It also stated that they smell smoke under their sinks and in the closet for their washer and dryer, and that they have been woken up in the night to the smell of cigarette smoke. While this email related to previous 2021 bylaw fines that the strata ultimately reversed, I find it is more likely than not that these conditions persisted, particularly given the complainants' ongoing documentation of Ms. Commisso's continued, frequent smoking.
29. In addition to reporting the ongoing smoking to the strata, the evidence shows the complainants have advised Ms. Commisso on several occasions that they smell smoke in their unit from her continual smoking. Given the frequency that the complainants have reported smelling smoke in their strata lot, I find that Ms. Commisso's cigarette smoking produced objectively undue smell that interfered with other owners, tenants, or occupants in a substantial, non-trivial, and unreasonable manner. Therefore, I find that Ms. Commisso's smoking breached strata bylaw 3.1(b).
30. However, I find only the first \$200 fine was validly imposed, and the 2 subsequent fines are invalid. My reasons follow.
31. Section 135 of the *Strata Property Act* (SPA) sets out the procedural requirements the strata must follow before it imposes a fine. SPA section 135(1) says a strata corporation may not impose a bylaw fine unless it has received a complaint, given

the owner details of the complaint in writing and a reasonable opportunity to answer the complaint, including a hearing if requested.

32. SPA section 135(2) says the strata must also give notice to the owner in writing of its decision to impose the fine, as soon as feasible. SPA section 135(3) says that once the strata has complied with these procedural steps, the strata may impose a fine for a continuing contravention of that bylaw without further compliance with section 135.
33. The requirements set out in SPA section 135 are strict, and the strata has no leeway or discretion in following section 135. If the strata does not follow the requirements, the bylaw fines are invalid. See *Terry v. The Owners, Strata Plan NW 309*, 2016 BCCA 449 and *The Owners, Strata Plan NW 307 v. Desaulniers*, 2019 BCCA 343.
34. I find each of the strata's January 27, June 9, and July 26 letters provided Ms. Commisso with sufficient detail about the complaints against her. However, only the January 27 letter provided Ms. Commisso with a reasonable opportunity to respond. As noted, Ms. Commisso attended a February 28, 2022 hearing, and 3 days later the strata advised Ms. Commisso of its decision to impose the fine.
35. I acknowledge that the January 27 letter referred only to bylaw 3.8, which I have found Ms. Commisso did not breach. However, SPA section 135(1) does not specifically require the strata to set out the correct bylaw, only details of the complaint. Further, the strata's March 2 letter confirming the fine refers to a breach of bylaw 3.1(b), so I find it is likely the parties addressed bylaw 3.1(b) at the hearing. I note the evidence also shows the strata had previously explained in an August 9, 2021 letter that Ms. Commisso could only smoke in her strata lot, so long as smoke did not ingress and negatively affect another unit. Overall, I find that Ms. Commisso had sufficient notice of the alleged bylaw violation, so that she could reasonably respond. Therefore, I find the strata complied with SPA section 135 in imposing the March 2, 2022 \$200 fine for her breach of bylaw 3.1(b), and Ms. Commisso is responsible for paying that fine.
36. In contrast, the strata's June 9 and July 26 letters did not provide Ms. Commisso with any opportunity to respond to the complaints against her. The letters did not refer to SPA section 135 or say she was entitled to a hearing. Rather, they state that in light

of the “continued bylaw contravention”, the strata had determined she breached bylaw 3.8 and a \$200 penalty would be applied to her account. In other words, it appears the strata notified Ms. Commisso of the complaint and imposed a fine at the same time.

37. I find the fines the strata imposed for the complaints set out in the June 9 and July 26 letters are not continuing fines, but separate fines for separate incidents of smoking. I note that in *The Owners v. Grabarczyk*, 2006 BCSC 1960, the BCSC said that incidents of nuisance are not continuous or continuing contraventions when observed on different dates. This means that a strata corporation can impose subsequent fines for the same behaviour, only if notice is provided for each fine under SPA section 135: see *Grabarczyk* at paragraphs 43-44.
38. As the strata did not give Ms. Commisso an opportunity to respond to the complaints, I find the strata did not comply with section 135(1) for the 2 \$200 fines it imposed against Ms. Commisso for the smoking complaints set out in its June 9 and July 26, 2022 letters. I order the strata to immediately reverse these 2 fines.

Ms. Commisso’s alleged disruptive behaviour

39. The evidence shows the strata imposed 3 fines, totalling \$600, against Ms. Commisso for various incidents of alleged disruptive behaviour and excessive noise.
40. In an April 8, 2022 letter, the strata advised Ms. Commisso of a complaint about her speaking very loudly on the phone in a common property hallway on March 29, 2022, knocking on various doors, and yelling in the hallway about neighbours and the strata council. The letter stated this was a breach of bylaw 3.17.
41. In a June 9, 2022 letter, the strata advised Ms. Commisso it had received complaints about 2 additional incidents that breached bylaw 3.1(b), noting:
- a. On March 3, 2022, Ms. Commisso engaged in “confrontational behaviour and abusive language” towards a neighbour during an encounter at the elevator lobby.

- b. On May 31, 2022, Ms. Commisso yelled at the strata caretaker and a neighbour from her balcony, which escalated to an argument with the other neighbour.
42. Finally, in a July 20, 2022 letter, the strata advised Ms. Commisso that it had received a complaint that she was heard “verbally abusing” a fireman attending a medical emergency and a strata council member on June 22, 2022, in breach of bylaw 3.1(b).
43. I find it is unnecessary to determine whether Ms. Commisso’s behaviour during these alleged incidents was a breach of the strata’s bylaws. This is because I find the strata did not comply with SPA section 135 before imposing the respective fines. My reasons follow.

April 8, 2022 letter

44. While I find the April 8 letter provided sufficient details of the complaint against Ms. Commisso, it did not provide her with any opportunity to respond to the complaint or request a hearing. It stated only that the strata council had determined she breached bylaw 3.17, such behaviour would not be tolerated, and a \$200 penalty would be applied to her account.
45. I note that bylaw 3.17 says excessive noise and disturbances may be subject to a fine upon notice. However, I find that does not mean the strata can impose a fine without complying with the mandatory notice provisions in SPA section 135. As the strata did not refer to SPA section 135 in its letter and it imposed the fine without providing Ms. Commisso with an opportunity to answer to the complaint, I find the strata did not validly impose the bylaw fine for this alleged contravention.
46. Therefore, I order the strata to immediately reverse the \$200 bylaw fine imposed for breach of bylaw 3.17.

June 9 and July 20, 2022 letters

47. I find the June 9 and July 20 letters provided sufficient details of the complaints against Ms. Commisso. These letters also mentioned SPA section 135 and stated that Ms. Commisso could answer the complaints, including by requesting a hearing.

There is no evidence before me that Ms. Commisso responded to either letter or requested a hearing.

48. The difficulty is that each of the strata's letters state the strata council had already decided Ms. Commisso breached bylaw 3.1(b) as a result of the stated incidents and would be applying a \$200 penalty. SPA section 135 requires the strata to provide the owner with the opportunity to respond to a complaint *before* it decides to impose a fine, and once the opportunity to respond has passed, the strata must then notify the owner of its decision to impose the fine.
49. I find the strata did not strictly comply with its obligations under SPA section 135 and imposed the fines without proper notice of its decision to do so. Therefore, I order the strata to immediately reverse the 2 \$200 bylaw fines imposed for the incidents set out in its June 9, 2022 and July 20, 2022 letters.

Summary

50. In summary, I find the strata must reverse a total of \$1,000 in bylaw fines it imposed for the 2 smoking complaints referenced in its June 9 and July 26, 2022 violation letters, and for the complaints of disruptive behaviour referenced in its April 8, June 9, and July 20, 2022 letters. I find the \$200 fine imposed on March 2, 2022 is valid.
51. I note that despite my findings that most of the contested bylaw fines were invalid, I find there is insufficient evidence that the strata imposed the fines to harass Ms. Commisso, as she alleged. The evidence shows the strata received the complaints detailed above, and section 26 of the SPA requires the strata to enforce its bylaws. Overall, I find the evidence does not support Ms. Commisso's position that the strata acted unreasonably in attempting to enforce its bylaws against her.

CRT FEES AND EXPENSES

52. 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 find Ms. Commisso was substantially successful, and so she is entitled to reimbursement of \$225 in CRT fees.

53. Ms. Commisso claims \$500 for legal fees, but she provided no evidence that she incurred any such expenses. In submissions, she says the \$500 claim is for “pain and suffering” from poor treatment by a strata council member and the strata manager. I find a claim for pain and suffering is not a dispute-related expense. Further, as she did not mention a claim for pain and suffering in the Dispute Notice, I find it is not properly before me, and I decline to address it. I dismiss Ms. Commisso’s claim for dispute-related expenses.
54. The strata also claims \$500 in dispute-related expenses for property management fees, documentation retrieval, affidavits, phone call, and emails. However, it also did not provide any evidence or submissions to explain or support these alleged expenses. Given the strata was largely unsuccessful, I dismiss the strata’s claim for dispute-related expenses in any event.
55. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against the owner Ms. Commisso.

ORDERS

56. I order that:

- a. The strata must immediately reverse the \$1,000 in fines it imposed on Ms. Commisso in relation to the complaints set out in the strata’s letters dated April 8, June 9, June 9, July 20, and July 26, 2022.
- b. Within 30 days of the date of this decision, the strata must pay Ms. Commisso \$225 for CRT fees.
- c. Ms. Commisso is entitled to post-judgment interest under the *Court Order Interest Act*.

57. I dismiss the remainder of Ms. Commisso's claims, and the strata's claim for expenses.

58. 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.

Kristin Gardner, Tribunal Member