



Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Jorgenson v. The Owners, Strata Plan LMS 1343*, 2023 BCCRT 325

B E T W E E N :

TERRY GLENN JORGENSON and JUDY MARIE JORGENSON

APPLICANTS

A N D :

The Owners, Strata Plan LMS 1343

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

J. Garth Cambrey, Vice Chair

INTRODUCTION

1. This is a strata property dispute about a strata corporation's denial of a request to install skylights.
2. The applicants, Terry Glenn Jorgenson and Judy Marie Jorgenson, co-own strata lot 7 (SL7) in the respondent strata corporation, The Owners, Strata Plan LMS 1343

(strata). Mr. Jorgenson represents the applicants. A strata council member represents the strata.

3. The Jorgensons say the strata failed to properly consider their request to install 2 skylights and unreasonably withheld its approval, contrary to the strata's bylaws. They also say the strata has treated them unfairly, given it allegedly permitted other owners to complete similar roof penetrations for venting purposes, and that several other strata lots have similar skylights installed.
4. The Jorgensons seek orders that the strata approve their request to install the skylights subject to reasonable conditions, that the strata council be reprimanded in council meeting minutes for not following due process, and that the strata council president not participate in any discussions concerning the skylight conditions.
5. The strata says it acted properly and reasonably within its authority under the *Strata Property Act* (SPA) and bylaws. In particular, the strata says it had valid concerns about voiding an existing roof warranty and potential tree limb damage to the requested skylights. I infer the strata requests that I dismiss the Jorgenson's claims.
6. As explained below, I find the strata must approve the Jorgensons' skylight request subject to certain conditions.

JURISDICTION AND PROCEDURE

7. 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.
8. 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.

9. 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.
10. 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.

ISSUES

11. The issues in this dispute are:
 - a. Does the strata have authority to decline the skylight installation?
 - b. Did the strata treat the Jorgensons significantly unfairly?
 - c. What is an appropriate remedy, if any?

BACKGROUND, EVIDENCE, AND ANALYSIS

12. As applicants in a civil proceeding such as this, the Jorgensons must prove their claims on a balance of probabilities, meaning more likely than not. I have considered all the submissions and evidence provided by the parties, but refer only to information I find relevant to explain my decision.
13. The strata was created in April 1994. It consists of 31 residential strata lots, each in a separate 2-level building. SL7 is located midway along the strata's west property line. Based on the overall evidence and submissions, I find the requested skylights would be installed on the west-facing portion of the roof, towards the property line.

14. The strata filed a new set of bylaws with the Land Title Office (LTO) on July 4, 2000. Subsequent bylaw amendments have also been filed with the LTO that are not relevant. I summarize the applicable bylaws to this dispute as follows:

Bylaw 1.4 – an owner must repair and maintain their strata lot, except for repair and maintenance that is the responsibility of the strata.

Bylaw 1.11 – an owner must obtain the strata’s written approval before making an alteration to a strata lot that, among other things, involves the exterior of buildings, including skylights. The strata cannot unreasonably withhold its permission but may require the owner to agree in writing to take responsibility for any expenses relating to the alteration.

Bylaw 1.12 – an owner must obtain the strata’s written approval to alter common property. The strata may require the owner to agree in writing to take responsibility for any expenses relating to the alteration.

Bylaw 2.2 – the strata must repair and maintain common property, including the exterior of the buildings and skylights.

15. The basic facts are not at issue.
16. The Jorgensons wrote to the strata on March 13, 2022, to request permission to complete certain alterations affecting SL7, including the installation of a skylight in the building’s roof. As I discuss in greater detail below, I find the installation of a skylight involves an alteration to both common property and to SL7. On March 17, 2022, the strata council secretary requested details (measurements and sketches) of the intended work so the strata council could properly consider the request.
17. On March 24, 2022, the Jorgensons requested architectural and structural plans for SL7. The strata responded that the plans were not “readily available” and asked why the Jorgensons required them. On March 26, 2022, the Jorgensons advised the drawings would help to provide the details requested by the strata council and on March 27, 2022, the strata council president further clarified that details of the requested alterations would be required but did not address the Jorgenson’s request

for plans. While these email communications about details of the Jorgenson's request were occurring, at its March 24, 2022 meeting, the strata denied the Jorgenson's request for a skylight but left open reconsideration of the Jorgensons' other requested alterations that are not at issue here. No reasons for the skylight denial were included in the meeting minutes.

18. On March 30, 2022, the strata emailed the Jorgensons stating in part that their skylight request was denied (reproduced as written):

... for several reasons. Those being: - Sufficient details regarding the size, quality, details on who the installer would be, etc. were not provided.

Regardless, Council would not authorize the installations of a skylight as the work requires cutting into the roof thereby voiding the existing warrantee on that roof.

Secondly, the owners have already brought to the Council's attention their concern over large branches and pinecones constantly falling on their roof. Adding a skylight would bring about the additional risk of a large branch breaking through the skylight. Lastly, skylights are prone to leakages, therefore Council is not willing to take on long term risk and liability of an additional skylight.

19. The Jorgensons responded on April 3, 2022 stating they now wished to pursue the installation of 2 skylights and no other changes, and were working with their contractor to obtain the information requested by the strata. On the same day, a strata council member replied on behalf of the strata council that the skylight installation request had been denied.

20. On April 9, 2022, the Jorgensons provided the strata council secretary information on the type and size of the 2 skylights along with their contractor information. They also noted that all work would be warrantied and that they would take on all responsibility. They sent a similar email to the strata council secretary on April 13, 2022. The strata council secretary responded on April 14, 2022 in part as follows (emphasis in original):

Please carefully reread the document sent to you by Council on March 30 (it is attached again here for your convenience). **It clearly specifies that the request for installing skylight was DENIED**. Therefore the item 1 [skylight] you refer to in your email was NOT allowed by Council for a number of reasons. Council trusts that you will no longer pursue item 1.

21. On April 21, 2022, the Jorgensons requested a council hearing at the next strata council meeting of May 3, 2022 to “refute” the strata council’s denial of their application to install 2 skylights. In their request, the Jorgensons suggested the denial was given before allowing them to provide necessary information. The request also cited bylaw 1.11 mentioned above, stating the strata council could not unreasonably refuse their request and may require the Jorgensons to take responsibility for the skylight installations. In a separate email on the same day, the Jorgensons specified that they could draft a letter taking all responsibility for the skylight installation at least until the roof was replaced. A copy of a proposed letter written by the Jorgensons was provided into evidence but it is unclear when or if the Jorgensons provided it to the strata. Also on April 21, 2022, the Jorgensons requested a copy of the existing roof warranty, but it appears the strata did not give them the warranty information.
22. Also on April 21, 2022, the strata council secretary emailed the Jorgensons advising their request to attend the May 3, 2022 strata meeting for a council hearing was denied. The strata’s stated reason for denying the hearing was that the strata council had not had an opportunity to review the Jorgenson’s recent correspondence. Yet, the May 3, 2022 strata council meeting minutes show the strata discussed a request from the Jorgensons to install 2 skylights including the additional information the Jorgenson’s provided, and again denied their request. The basis for the denial as set out the minutes was that the roof is the strata’s responsibility and it was difficult to enforce any transfer of liability for the alterations to the Jorgensons and future owners.
23. The Jorgensons argue their request is reasonable because similar requests to install vents or chimneys through the common property roofs of other strata lots are routinely approved by the strata. They provided a written statement from their neighbour, who is a past strata council member, that confirms venting, such as for furnaces and hot water tanks, must go through the roof.

24. I will first address the Jorgensons' argument that the strata cannot unreasonably refuse their skylight request and will then address the fairness of the strata's decision.

Does the strata have authority to deny the skylight installation?

25. Neither party expressly discussed common property, but I take from the overall submissions and evidence that there is agreement that the roof of SL7 is common property. I agree. Based on SPA section 1(1) that defines common property, and section 68 that addresses strata lot boundaries, I find the roof of SL7 is common property. I also find the Jorgenson's request to install skylights would alter both the common property roof and SL7.

26. SPA section 72 requires the strata to repair and maintain common property. As noted earlier, bylaw 1.11 requires owners to obtain the strata's written approval before altering **a strata lot**, including skylights on the exterior of a strata lot, which I find includes the roof. Bylaw 1.12 requires an owner to obtain the written approval of the strata before altering **common property**. Read together, I find bylaws 1.11 and 1.12 clearly require the Jorgensons to obtain the strata's written permission to install skylights in the roof of SL7. The remaining questions are whether the strata may withhold its approval to alter the common property roof and, if so, on what basis.

27. Unlike bylaw 1.11 about strata lot alterations, bylaw 1.12 does not say the strata must act reasonably when considering an alteration request. Put another way, the strata has authority under bylaw 1.12 to unreasonably withhold its permission to allow alterations to common property, so long as its decision is not significantly unfair. This is the conclusion I reached in *MacPhee v. The Owners, Strata Plan LMS 2476*, 2022 BCCRT 1128 and in *Reeves v. The Owners, Strata Plan BCS 2235*, 2023 BCCRT 189.

28. Finally, I note that SPA section 71 addresses significant changes to the use or appearance of common property, which requires $\frac{3}{4}$ vote approval at general meeting. Whether a change in use or appearance is significant, and thus requires the passing of a $\frac{3}{4}$ vote, has been considered many times by the court and the CRT. The leading case of *Foley v The Owners Strata Plan VR 387*, 2014 BCSC 1333, sets out a non-

exhaustive list of factors to consider when deciding whether a change is significant. Neither party raised whether the installed skylights would be a significant change to the use or appearance of the common property roof, so I have not addressed it here. However, had I considered the significant change issue, I would have found the installation of skylights was not a significant change based on *Foley*, and on the strata's admission that there was no dispute the skylights proposed by the Jorgensons would be similar to the existing skylights.

Has the strata treated the Jorgensons in a significantly unfair manner?

29. I turn now to the Jorgenson's argument that the strata has treated them unfairly. Although the parties did not use the words "significantly unfairly", I find that is the test the Jorgensons must meet in order for them to be successful. As explained below, I find the strata did treat the Jorgenson's significantly unfairly.

30. The CRT has authority to make orders remedying a significantly unfair act or decision by a strata corporation under section 123(2) of the CRTA. This provision contains similar language to SPA section 164, which allows the BC Supreme Court to make orders remedying significantly unfair acts or decisions. The Court recently confirmed that the legal test for significant unfairness is the same for CRT disputes and court actions. See *Dolnik v. The Owners, Strata Plan LMS 1350*, 2023 BCSC 113.

31. As discussed in *Reid v. Strata Plan LMS 2503*, 2003 BCCA 126, strata corporations must often utilize discretion in making decisions which affect various owners or tenants. At times, the strata corporation's duty to act in the best interests of all owners is in conflict with the interests of a particular owner, or group of owners. Following *Reid*, this means in order for the Court (or CRT) to intervene, a strata corporation must act in a significant unfair manner, resulting in something more than mere prejudice or trifling unfairness. Conduct may be significantly unfair to one owner even if it benefits a majority of other owners.

32. The basis of a significant unfairness claim is that a strata corporation must have acted in a way that was "burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith, unjust or inequitable." See *Reid, Dollan v. The Owners, Strata Plan*

BCS 1589, 2012 BCCA 44, and Kunzler v. The Owners, Strata Plan EPS 1433, 2020 BCSC 576, affirmed 2021 BCCA 173.

33. In *Dollan*, the BC Court of Appeal established the following reasonable expectations test:
 - a. Examined objectively, does the evidence support the asserted reasonable expectations of the owner?
 - b. Does the evidence establish that the reasonable expectation of the owner was violated by the action that was significantly unfair?
34. More recently in *Kunzler*, the courts determined the reasonable expectations test set out in *Dollan* is a factor in deciding whether significant fairness has occurred, together with other relevant factors, including the nature of the decision in question and the effect of overturning or limiting it.
35. While I have found the strata has authority to withhold its permission for the Jorgensons to alter the common property roof of SL7 by installing skylights, that does not mean the strata has acted fairly in doing so.
36. My review of the evidence is that the Jorgensons expected the strata to approve their skylight request because of its similarity to other owners' approved requests to vent pipes through roofs, and that there were 22 skylights located on building roofs throughout the strata. The Jorgenson also said they would accept liability for the skylight installation by signing an alteration agreement as contemplated by the bylaws. I find the Jorgenson's expectations are objectively reasonable.
37. The strata says that permitting vent pipes to penetrate the roof is different than permitting skylights. It says it permitted the vent pipes on the condition the owners installing them used or followed the requirements of its roofing contractor so as not to void the roof warranty. This is confirmed in various strata council meeting minutes provided in evidence. However, the strata does not explain why cutting through a roof to install a vent pipe is different than cutting through a roof to install a skylight. Both involve the removal of shingles and the installation of proper flashing. I note the strata says the current strata council has not approved the installation of skylights. While I

agree there is no evidence that any skylight requests were made before the request at issue here, the strata is nearly 30 years old and the evidence is that there are 22 skylights installed at different locations. The uniqueness of the installations leads me to conclude the skylights were not original, as the Jorgensons suggest, and were likely at some time approved by the strata.

38. The strata says that skylights would create a potential for leaks but did not provide any expert advice to support this. The strata also says it believed the roof warranty would be voided if the skylights were installed, but again, it did not provide any evidence its belief was correct, such the roof warranty itself. On the contrary, the written statement of the Jorgensons' neighbour identified that the neighbour had contacted the roofing company that holds the roof warranty. According to the neighbour, the roofing contractor confirmed the roof warranty would not be voided if certain conditions were met; namely, that a competent contractor was retained for the skylight installation and that the roofing contractor was given photographs of the skylight installation. I accept this hearsay evidence for the limited purpose that the skylight installation *may* not void the roof warranty. I say this because the strata did not dispute it and it aligns with the strata's own evidence that the roofing warranty is not voided when vent pipes are installed through the roof.

39. The strata argues that the portion of the SL7 roof where the skylights would be installed is prone to damage from tree branches falling from a neighbouring property. I do not see that is relevant considering the Jorgensons have agreed to assume liability for the skylight installation under an alteration agreement as permitted under the bylaws, including obtaining insurance. The find the strata did not consider an alteration agreement, given its submissions that, if approved, the skylight installation would be the strata's responsibility.

40. Alteration agreements are commonly referenced in strata corporation bylaws and specifically contemplated in the strata's bylaw here. I find this reflects the owners' approval that alteration agreements are an appropriate way for the strata shift risk to an owner who makes an alteration. I find all of these things weigh in favour of the Jorgensons as they suggest the strata actions are burdensome and harsh.

41. Further, I find it is significant that the strata denied the Jorgensons' request to be heard at the May 3, 2022 strata council meeting because it had not had an opportunity to review their latest information, but at the same meeting, denied the Jorgansens' skylight request. So, the strata denied the skylight request before receiving the details of the requested alteration and then refused to revisit it decision. This weighs in favour of the Jorgansens as it suggests the strata acted in a way that lacked fair dealing.
42. Following *Kunzler*, I have also considered the strata's decision to deny the Jorgensons' skylight request and the effect of overturning it. I find the strata's decision only affects the Jorgensons and to overturn it would not have any wide sweeping effect on the strata, since other similar alterations already exist and the Jorgensons have agreed to assume liability. Based on the foregoing, I find the strata has failed to provide a rational basis for denying the Jorgensons' request. Absent any rational basis, I find that it is inequitable to treat Jorgensons differently from other owners.
43. For all of these reasons, I find the strata treated the Jorgensons significantly unfairly when it denied their skylight installation request.

Remedy

44. The Jorgensons main remedy is an order that they be permitted to install their skylights as requested subject to reasonable conditions, which they did not identify. In the circumstances of this dispute, I find it appropriate make that order. I order the following reasonable conditions:
 - a. Within 45 days of the date of this decision, the Jorgensons must obtain written confirmation from the strata's roofing contractor that the skylight installation will not void the existing roofing warranty, including what steps the Jorgensons must take, if any, to ensure the warranty is not voided. The Jorgensons must provide a copy of the strata contractor's written approval to the strata upon receipt and the Jorgensons must agree in writing to follow the contractor's recommended steps.
 - b. The strata may require the Jorgensons to sign an alteration agreement that includes reasonable clauses. This includes their assumption of liability for the skylight installation, that they will obtain insurance for the alterations made, and

that they will agree to have subsequent purchasers of SL7 accept the agreement as a condition of any future sale of SL7, (as suggested in the British Columbia Strata Property Practice Manual, online current to January 1, 2023, (Vancouver: Continuing Legal Education Society of British Columbia, 2016)).

- c. The strata must notify the Jorgensons of its decision to require an alteration agreement within 15 days of the date of this decision.

45. I decline to address the other remedies requested by the Jorgensons about reprimanding the strata council and excluding the strata council president from participating in the skylight approval process as I find there are no valid or proven reasons to do so.

CRT FEES AND EXPENSES

46. Under CRTA section 49 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 that general rule here. The Jorgensons were the successful party and paid \$225.00 in CRT fees, so I order the strata to reimburse the Jorgensons that amount.

47. I dismiss the strata's claim for reimbursement of \$837.30 in legal fees because CRT Rule 9.5(3), only permits the CRT to order reimbursement of a party's legal expenses, in extraordinary circumstances, which I find do not exist here.

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

ORDERS

49. Within 15 days of the date of this decision, I order the strata to:

- a. Reimburse the Jorgensons \$225.00 for CRT fees,
- b. Approve the Jorgensons' skylight installation request, subject to the following conditions being met:

- i. Within 45 days of the date of this decision, the Jorgensons must obtain written confirmation from the strata's roofing contractor that the skylight installation will not void the strata's existing roof warranty and what steps, if any, the Jorgensons must take to ensure the roof warranty is not voided. A copy of the written approval from the strata's contractor must be provided to the strata upon receipt and the Jorgensons must agree in writing to follow the contractor's recommended steps.
- ii. Within 15 days of the date of this decision, the strata must inform the Jorgensons in writing if it will require them to sign an alteration agreement, which if required, may include terms that the Jorgensons will assume liability for the skylight installation, obtain insurance for the installation, have subsequent purchasers of SL7 accept the agreement as a condition of any future sale of SL7, and other reasonable clauses.

50. I dismiss the Jorgensons' remaining claims and the strata's claim for reimbursement of legal fees.

51. The Jorgensons are entitled to post-judgement interest under the *Court Order Interest Act*, as applicable.

52. 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.

J. Garth Cambrey, Vice Chair