



Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan EPS7397 v. Teschner*, 2023 BCCRT 545

B E T W E E N :

The Owners, Strata Plan EPS7397

APPLICANT

A N D :

PETER TESCHNER and TERESA TESCHNER

RESPONDENTS

A N D :

The Owners, Strata Plan EPS7397

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

Kristin Gardner

INTRODUCTION

1. This strata property dispute is about a hot tub. Peter Teschner and Teresa Teschner own strata lot 140 (SL140) in a strata corporation, The Owners, Strata Plan EPS7397 (strata). The Teschners placed a 2-person hot tub on the limited common property (LCP) deck outside SL140. The strata says that hot tubs are not permitted under its bylaws.
2. In the primary claim, the strata seeks orders for the Teschners to remove the hot tub and pay \$1,600 in outstanding bylaw fines. The strata is represented by a strata council member.
3. The Teschners say that the strata is treating them significantly unfairly by requiring them to remove the hot tub. They counterclaim for an order that the strata reverse all bylaw fines related to the hot tub and amend the bylaws to permit hot tubs such as theirs to be placed on outside decks. The Teschners are self-represented.

JURISDICTION AND PROCEDURE

4. 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.
5. 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.

6. 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.
7. 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.

The strata's increased claim

8. In the Dispute Notice, the strata claimed the Teschners owed \$1,200 in unpaid bylaw fines. In submissions, the strata increased its claim for outstanding fines to \$1,600 because had it imposed additional fines for the continuing infraction after the Dispute Notice was issued. In a recent decision, *Foxcroft v. Arora*, 2023 BCCRT 489, a vice chair noted that the CRT is unique from a court because it requires parties to claim a specific monetary figure to file an application for dispute resolution. The vice chair found that damages in a personal injury claim may change from when the applicant files their application to the time the dispute is adjudicated, and that it was appropriate in the circumstances before her to consider the increased claim.
9. While prior CRT decisions are not binding on me, I agree with the reasoning in *Foxcroft* and find it applies here, where the strata imposed fines for a continuing bylaw contravention and the outstanding fines have increased since the strata filed its CRT application. As the Teschners had an opportunity to provide evidence and submissions about the increased claim amount, I find it is appropriate to consider the strata's claim for payment of \$1,600 in bylaw fines. In any event, nothing turns on this given my conclusion on the fines below.

ISSUES

10. The issues in this dispute are:
 - a. Did the Teschners breach the bylaws by placing a hot tub on the deck?

- b. Did the strata treat the Teschners in a significantly unfair manner?
- c. Must the Teschners remove the hot tub and pay \$1,600 in bylaw fines?

EVIDENCE AND ANALYSIS

11. In a civil proceeding like this one, the applicant strata must prove its claims on a balance of probabilities (meaning “more likely than not”). The Teschners must prove their counterclaims to the same standard. I have read all of the parties’ evidence and submissions, but I refer only to what I find is necessary to explain my decision.
12. The strata consists of 2 high-rise towers, with over 400 residential strata lots and several commercial strata lots. Tower 1 is 36 storeys and was completed in 2021. Tower 2 is 29 storeys and was completed in 2022.
13. The strata’s owner developer filed a notice of different bylaws in the Land Title Office (LTO) on July 13, 2021, which modified the standard bylaws set out in the SPA. So, I find the Standard Bylaws, together with the different bylaws filed in the LTO, are the bylaws applicable to this dispute. The strata filed further bylaw amendments in the LTO on August 13, 2021, that I find are not relevant to this dispute.
14. Bylaw 3(10)(a)(ii) says owners of a strata lot will not place any items on any patio, balcony, terrace, deck or roof deck except free-standing, self-contained planter boxes, summer furniture and accessories. Bylaw 3(10)(a)(iii) also permits natural gas-powered barbeques on patios, balconies, terraces, and decks. Bylaw 3(10)(2), which I infer is meant to be bylaw 3(10)(b), says that “for greater certainty”, no person shall place or store any bicycle on any patio, balcony, terrace, deck or roof deck.

Did the Teschners breach the bylaws by placing a hot tub on the deck?

15. The Teschners purchased and moved into SL140 on August 20, 2021. SL140 is located on the 21st floor of Tower 1. The strata plan in evidence shows there is a deck outside SL140 that is designated as LCP for SL140. The parties’ evidence and submissions refer to it as both a deck and a balcony. I find both terms accurately describe the space, though for ease of reference I will refer to it as the deck. The

deck's measurements on the strata plan show that its size is approximately 27.625 square meters, and it is partly covered by the deck directly above it.

16. When the Teschners moved in, they undisputedly brought a 2-person SpaBerry hot tub and placed it on the covered portion of the LCP deck outside SL140. The SpaBerry brochure in evidence states that it weighs 285 pounds when dry and 1325 pounds when filled with water. It has a 125-gallon water capacity and plugs into a regular 110V 15 AMP plug. I note that while all parties refer to the item as a hot tub, the Teschners distinguish it from a "full size" hot tub, as they say it is "portable" and can be used both indoors and outdoors. In any event, I refer to it as a hot tub in this decision.
17. The strata says that the Teschners' hot tub is prohibited by bylaw 3(10)(a)(ii) because it is not properly considered "summer furniture and accessories". The strata also says the LCP decks were not built with hose bibs or drains, as hot tubs were not contemplated by the developer, and that any water escape on an outward sloping deck such as the Teschners' could potentially cause "catastrophic" damage.
18. In contrast, the Teschners say there is no bylaw specifically prohibiting hot tubs, and their hot tub is properly considered furniture or an accessory. The Teschners also say that their hot tub does not require a hose bib or drain on the deck because it is easily filled and drained from the kitchen faucet and sink inside their strata lot. The Teschners say the chance of water escape is very low, but that they have insurance to cover the strata's water damage deductible in any event.
19. I find the main question is whether the Teschners' hot tub is captured within the definition of "summer furniture and accessories", which are permitted items on LCP decks under the bylaws. I find it is not. My reasons follow.
20. The Teschners refer to the CRT decision in *Noriega v. The Owners, Strata Plan BCS 2331*, 2022 BCCRT 1232, in which a tribunal member found that an inflatable spa was "patio-style furniture" as that term was used in the relevant bylaws. The tribunal member referred to the Merriam-Webster online dictionary (www.merriam-webster.com) definition of "furniture", which includes equipment that is necessary,

useful, or desirable, such as movable articles used in readying an area, such as a room or patio, for occupancy or use. The tribunal member also agreed with previous CRT decisions that found a key factor in determining whether something is furniture is whether it is readily or reasonably moveable.

21. Similarly, I previously found in *Emmerton v. The Owners, Strata Plan BCS 3407*, 2022 BCCRT 872, that an inflatable hot tub was properly considered “patio furniture” as that term was used in the relevant bylaws. I found the evidence in that dispute showed the inflatable hot tub was a readily moveable piece of furniture, as the owners used it to sit and enjoy the patio space and it could be easily relocated or packed away.
22. I find that the relevant bylaws in *Noriega* and *Emmerton* were somewhat broader than the bylaws here. As noted, items permitted on decks in *Noriega* included “patio-style furniture”, and simply “patio furniture” in *Emmerton*. Here, permitted items are restricted to “summer furniture and accessories”.
23. The CRT considered a bylaw that permitted “summer furniture and accessories” on decks in *Doig et al v. The Owners, Strata Plan VR 1712*, 2017 BCCRT 36. The tribunal member noted that the hot tub at issue in that dispute required a municipal permit and a crane to install it into an engineer-designed base. As the hot tub was not readily moveable and admittedly used throughout the winter, the tribunal member found it was not a piece of summer furniture as contemplated under the bylaws. The tribunal member also found the hot tub was not an accessory, relying on the Meriam-Webster dictionary definition of “accessory” as “an object or device that is not essential in itself, but adds to the beauty, convenience or effectiveness of something else”.
24. While previous CRT decisions are not binding on me, I generally agree with the reasoning in the above decisions. I find that “summer furniture” items are readily movable pieces that are used to occupy and enjoy outdoor space during the summer months, and that “accessories” are items that add to or complement the summer furniture.

25. The Teschners' undisputed evidence is that they brought their hot tub up the elevator and through their front door. I find the Teschners' hot tub is likely more moveable than the hot tub in *Doig*, as it is free-standing and does not require a crane or other installation equipment. However, it is almost 300 pounds when dry and cannot be packed up and stored elsewhere. So, I find it is more permanent than the inflatable hot tubs considered in *Noriega* and *Emmerton*. Further, the Teschners admit that they use their hot tub almost exclusively during the colder winter months, and that they place plants in it during the summer. I also find it is a stand-alone item that is not intended to add to or complement other summer furniture.
26. For the above reasons, I find the Teschners' hot tub is not "summer furniture and accessories", as that term is used in the strata's bylaws. Contrary to the Teschners' submission, I find it is unnecessary for the strata to expressly prohibit hot tubs in the bylaws, as the permitted items are reasonably clear. I find the Teschners' hot tub is not a permitted item, and they are in breach of bylaw 3(10)(a)(ii) by having the hot tub on the deck.
27. As for the strata's submission that the Teschners' hot tub could cause damage, I find that issue is not relevant to the analysis under bylaw 3(10)(a)(ii). Rather, I find the strata is essentially arguing the hot tub also violates standard bylaw 3(1), which prohibits owners from using a strata lot or the common property in a way that causes a nuisance or hazard to another person. However, none of the parties raised that bylaw and given my conclusion that the hot tub violates bylaw 3(10)(a)(ii), I find it is unnecessary to address that issue.

Did the strata treat the Teschners significantly unfairly?

28. The Teschners say that it was significantly unfair for the strata to enforce bylaw 3(10)(a)(ii) against them.
29. 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 section 164 of the SPA, which allows the BCSC to make orders remedying significantly unfair acts or decisions. The BCSC recently confirmed that

the legal test for significant unfairness is the same for CRT disputes and court actions: *Dolnik v. The Owners, Strata Plan LMS 1350*, 2023 BCSC 113.

30. In *Kunzler v. The Owners, Strata Plan EPS 1433*, 2021 BCCA 173, the BC Court of Appeal stated that significantly unfair actions are those that are burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith, unjust, or inequitable. In applying this test, the owner's reasonable expectations are a relevant factor, but are not determinative. The use of the word "significant" means that the impugned conduct must go beyond mere prejudice or trifling unfairness.
31. The Teschners argue it is unfair for the strata to compel them to remove their hot tub because bylaw 3(10)(a)(ii) was "enacted" after they moved in on August 20, 2021, and their hot tub was already set up. I find from their submissions that the Teschners take this position because the strata's first annual general meeting (AGM) was on November 10, 2021, and I infer that they believe the bylaw amendments were not effective until the AGM took place.
32. Bylaws become effective once they are filed in the LTO. As noted above, the strata's developer filed the relevant bylaw amendment in the LTO on July 13, 2021. So, I find bylaw 3(10)(a)(ii) was effective before the Teschners moved in and placed their hot tub on the deck. Further, even if that bylaw had been filed after the hot tub was already set up, I find the Teschners would not be exempt from it. In other words, I find there is nothing in the bylaws or the SPA that says a new bylaw about what items are permitted on decks would not apply to existing owners.
33. Under section 26 of the SPA, a strata corporation has an ongoing duty to enforce its bylaws. I find the strata reasonably considered that hot tubs were not permitted items on LCP decks under bylaw 3(10)(a)(ii). As the Teschners did not deny that they had a hot tub on the deck, I find the strata was obligated to enforce its bylaws, including by demanding the Teschners remove the hot tub.
34. For these reasons, I find the strata did not treat the Teschners significantly unfairly by enforcing bylaw 3(10)(a)(ii) against them.

35. I note that the Teschners submit that Ms. Teschner uses the hot tub to help treat a medical condition. I find they are essentially arguing that the strata should permit them to keep the hot tub to accommodate a disability. However, they did not raise this issue in the Dispute Notice, and so I find it is not properly before me. Further, I find there is no evidence that the Teschners previously advised the strata about Ms. Teschner's medical condition or asked the strata to accommodate her under the BC *Human Rights Code*. So, I find it is premature to consider whether the strata has treated Ms. Teschner significantly unfairly by refusing to accommodate her, and I decline to consider that issue.

Remedy

36. Given I have found the Teschners' hot tub violates bylaw 3(10)(a)(ii) and the strata did not enforce that bylaw against the Teschners in a significantly unfair manner, I turn to the appropriate remedy. As noted, the strata requests orders for the Teschners to remove the hot tub and pay \$1,600 in bylaw fines.

37. I begin with the fines. The Teschners say the strata failed to provide them with any documentation that it received a complaint about their hot tub. I find the Teschners are arguing that the strata failed to comply with section 135 of the SPA.

38. SPA section 135 sets out the procedural requirements the strata must follow before it imposes a fine. 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.

39. 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.

40. 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.

41. The evidence shows that the strata manager emailed the Teschners on May 28, 2022 that it had come to their attention the Teschners had a personal hot tub on the deck. The email referred to bylaw 3(10)(a)(ii) and noted the strata council asked that the Teschners remove the hot tub promptly to “avoid further action”. The email does not mention how the strata manager became aware of the hot tub.
42. The strata says that its strata manager only informed the council about the Teschners’ hot tub on June 9, 2022. As this was after the strata manager’s email to the Teschners, I find the source of the complaint, if any, is unclear.
43. The Teschners argue that the strata manager likely discovered the hot tub’s presence by flying a drone around the building to observe owners’ decks, which they argue is a violation of the *Personal Information Protection Act* (PIPA). I find there is insufficient evidence before me that the strata manager used a drone, so I find that allegation unproven. Nevertheless, the strata has not provided any evidence that it received any complaint, either written or verbal, about the Teschners’ hot tub. So, I find the strata had no authority to impose a fine for the hot tub under SPA section 135(1).
44. Even if it did receive a complaint, I find the strata has not established it complied with the other SPA section 135 procedural requirements. The strata says it sent the Teschners a June 12, 2022 notice of bylaw contravention, and “immediately” issued a \$200 fine for contravening the bylaw. The strata also says the Teschners attended a June 22, 2022 hearing, after which the strata “upheld” the notice of bylaw contravention and issued further \$200 fines every 7 days since.
45. However, the strata did not provide copies of its alleged June 12, 2022 notice of bylaw contravention or its decision to impose the initial fine. It also provided no evidence about the exact date that it imposed the initial fine or the continuing fines. So, I find it is impossible to determine whether the strata complied with the strict requirements under SPA section 135 before imposing the bylaw fines. That is, I find the strata has

not proven it imposed the first fine after it held the June 22, 2022 hearing and advised the Teschners in writing of its decision to impose a fine.

46. As I find the strata has not established the initial fine was validly imposed, I find the continuing bylaw fines must also be found to be invalid. So, I dismiss the strata's claim for payment of outstanding bylaw fines. I grant the Teschner's requested order for the strata to reverse all bylaw fines it has imposed against the Teschners' strata lot account related to their hot tub and breach of bylaw 3(10)(a)(ii).
47. I turn to whether the Teschners must remove the hot tub. As noted, the Teschners requested an order that the strata amend the bylaws to specifically permit hot tubs such as the Teschners'. There is no evidence the Teschners have attempted to obtain the necessary support from owners under SPA section 46(2) to propose a resolution to amend the bylaws to permit hot tubs. While the CRT has jurisdiction to direct the strata to pass a bylaw if it would remedy or prevent a significantly unfair action or decision, I find the Teschners' have not established any such significant unfairness. So, I decline to order the strata to pass a bylaw to permit hot tubs.
48. As I find the Teschners' hot tub breaches bylaw 3(10)(a)(ii), I find it is appropriate to order the Teschners to remove it from the deck within 30 days.

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 find that the parties were both partially successful in their claims. Under the circumstances, I find it is appropriate for the parties to each bear the cost of their own CRT fees. No party claims any dispute-related expenses.
50. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against the Teschners.

ORDERS

51. I order that:

- a. The strata immediately reverse all bylaw fines imposed on the Teschners related to the hot tub and breach of bylaw 3(10)(a)(ii).
- b. Within 30 days, the Teschners remove their SpaBerry hot tub from the deck outside their strata lot, at their own expense.
- c. The parties' remaining claims are dismissed.

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.

Kristin Gardner, Tribunal Member