Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Hurst v. The Owners, Strata Plan K466*, 2023 BCCRT 986

B E T W E E N :

KATHLEEN VERLIE HURST

APPLICANT

A N D :

The Owners, Strata Plan K466

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Nav Shukla

INTRODUCTION

1. The applicant, Kathleen Verlie Hurst, co-owns strata lot 10 at the respondent strata corporation, The Owners, Strata Plan K466 (strata). Mrs. Hurst says the strata improperly approved 2 alteration requests made by strata lot 1's (SL1) owners. The first request was to replace sliding windows with casement-style windows on SL1's enclosed limited common property (LCP) balcony. The second was to replace 2 glass

sliding patio doors with larger doors. SL1's owners are not named parties in this dispute.

2. Mrs. Hurst says these alterations are significant changes under *Strata Property Act* (SPA) section 71 and can only be approved by the owners by a ¾ vote at a general meeting, which undisputedly did not happen here. So, Mrs. Hurst seeks an order that the strata call a general meeting to allow all owners to vote on whether or not to approve the alleged significant changes in accordance with SPA section 71. Mrs. Hurst is self-represented.

3. The strata says that the patio door alterations are not alterations to common property, so SPA section 71 does not apply. In the alterative, it argues that the patio door alterations, which SL1's owners have now completed, are not a significant change in use or appearance. The strata further says that since SL1's owners undisputedly decided not to install the casement-style windows and installed fixed windowpanes instead, the issue with respect to the windows is now moot. A strata council member represents the strata.

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 and that an oral hearing is not necessary.

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.

ISSUES

7. The issues in this dispute are:

    a. Is the issue involving SL1's owners' request to replace sliding windows with casement-style windows on the enclosed LCP balcony now moot?

    b. Do the larger patio doors installed by the SL1 owners constitute a significant change to common property under SPA section 71?

    c. If so, what remedy is appropriate?

EVIDENCE AND ANALYSIS

8. As the applicant in this civil proceeding, Mrs. Hurst must prove their claims on a balance of probabilities (meaning more likely than not). I have reviewed all the parties' submissions and evidence but refer only to the evidence and argument that I find relevant to provide context for my decision.

9. The strata plan in evidence shows the strata was created in 1982 under the previous *Condominium Act* (CA). It consists of 6 buildings and 35 strata lots next to a lake. Buildings A, B and C are on the lakeside and are each 2 storeys. There are 22 strata lots in these 3 buildings with 11 upper floor strata lots and 11 lower floor strata lots. SL1 is an upper floor unit located at the extreme northeast corner of Building A. The strata also includes 13 single-story streetside strata lots in 3 other buildings.

10. The strata plan shows that SL1 has an LCP balcony designated for SL1's exclusive use, facing the lake. Photographs in evidence show the balcony is fully enclosed with an aluminum frame and windows. It undisputed that the LCP balcony was not originally enclosed but alterations were at some point approved to enclose the balcony, either by the strata council or the owners under SPA section 71. The 2 patio

doors at issue here allow access to the LCP balcony from SL1 and are located on a wall that separates SL1 from the balcony. The smaller patio door is located approximately 6 feet from the edge of the enclosed balcony and the larger one approximately 10 feet from the edge.

11. Emails in evidence show that on February 20, 2022, SL1's owners asked the strata council to approve various alterations, including replacing a 5 foot patio door that separates the second bedroom from the LCP balcony with the 8 foot sliding door that was at that point separating the living room area from the LCP balcony. The SL1 owners also sought to replace the 8 foot living room area sliding door with a 12 foot door of the same style, in addition to replacing a few east-facing windows that enclose the balcony with larger hinged casement-style windows.

12. The strata council's June 2, 2022 meeting minutes and emails in evidence show that after reviewing engineering reports, drawings, and additional information provided by SL1's owners, the strata council decided SL1's requested alterations were not a significant change and approved them.

Is the window alteration issue now moot?

13. As noted above, it is undisputed that since starting this dispute, SL1's owners decided against installing the casement-style windows and installed fixed windowpanes instead. Mrs. Hurst does not argue that the new fixed windowpanes are a significant change. Mrs. Hurst says in their written argument that the issue with respect to the windows has now been resolved but asks that the CRT proceed with deciding whether the "outswing enclosure windows" would constitute a significant change in order to give guidance to the strata for similar changes that may be proposed in the future.

14. The strata says that since SL1's owners decided not to proceed with the casement-style windows that Mrs. Hurst argues would be a significant change under SPA section 71, this issue is now moot and need not be considered by the CRT.

15. A claim is considered moot when something happens after a legal proceeding starts that removes any "present live controversy" between the parties. Generally, moot claims will be dismissed. However, the CRT has discretion to decide otherwise moot claims if doing so would have a practical impact and potentially avoid future disputes (see *Binnersley v. BCSPCA*, 2016 BCCA 259).

16. As noted above, the remedy Mrs. Hurst seeks with respect to the windows is for the strata to call a general meeting in accordance with SPA section 71 to allow the owners to vote on whether or not to approve SL1's owners' request to install the casement-style windows. As SL1's owners no longer seek to install these windows and have instead installed different windows that Mrs. Hurst does not argue constitute a significant change, I find there is no longer any live controversy between the parties about the windows. Although Mrs. Hurst says it may provide guidance to the strata if the CRT were to decide the issue, Mrs. Hurst's assertion that other owners may seek similar alterations in the future is purely speculative. Further, the CRT does not typically make prospective orders relating to matters that have not yet occurred (see *Bourque et al. v. McKnight et al*, 2017 BCCRT 26 and *Gadbois v. The Owners, Strata Plan NES 206*, 2023 BCCRT 309). Under these circumstances, I decline to exercise my discretion to decide the otherwise moot issue of whether casement-style windows would constitute a significant change as I find doing so would not have any practical impact or avoid future disputes.

17. I turn now to the issue of whether SL1's patio door alterations constitute a significant change under SPA section 71.

Does SPA section 71 apply?

18. SPA section 71 says that a strata corporation 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 ¾ vote at a general meeting. Even though section 71 refers only to the strata, both the BC Supreme Court and the CRT have applied section 71 to alterations made by owners (see *Foley v. The Owners, Strata Plan VR 387*, 2014 BCSC 1333 and *Richardson v. Simmons*, 2020 BCCRT 241).

19. The evidence shows that in order for SL1's owners to install the larger patio doors, alterations were needed to the wall separating SL1 from the LCP balcony.

20. The strata argues that since SL1's LCP balcony is enclosed, this makes the wall separating SL1 and the balcony a part of SL1. So, the strata says the wall is not common property and section 71 therefore does not apply. Mrs. Hurst disagrees and says the wall is an exterior wall that is common property.

21. SPA section 1 says common property includes the part of a building shown on a strata plan that is not part of a strata lot. The strata plan does not designate the wall separating SL1 and the LCP balcony as LCP or as part of SL1. SPA section 68(1) says that unless the strata plan shows otherwise, if a strata lot is separated from common property (which includes LCP) by a wall, the boundary of the strata lot is midway between the surface of the structural portion of the wall that faces the strata lot and the surface of the structural portion of the wall that faces the common property. Based on this section, and the definition of common property in SPA section 1 mentioned above, I find SL1's boundary goes to the midway point of the surface of the structural portion of the wall and the rest of the wall is common property.

22. The patio doors are not shown as being part of SL1 on the strata plan and I infer they straddle the midway between the surface of the structural portion of the wall, which would make them both a part of SL1 and common property. Previous CRT decisions have found that where a building component straddles the SPA-defined boundary between common property and a strata lot, it is common property (see, for example, *Tang v. The Owners, Strata Plan VR656*, 2023 BCCRT 699 at paragraph 37). While prior CRT decisions are not binding on me, I agree with this reasoning and find the patio doors are common property. Accordingly, I disagree with the strata that SL1's alterations to the patio doors are not common property alterations and find that I must determine whether the alterations are a significant change in use or appearance.

Were the patio door alterations a significant change under SPA section 71?

23. The court in *Foley* summarized the following non-exhaustive criteria for a significant change under SPA section 71:

a. Is the change visible to residents and the general public?

b. Does the change affect the use or enjoyment of a unit or an existing benefit of another unit?

c. Is there a direct interference or disruption because of the changed use?

d. Does the change impact the marketability or value of the strata lot?

e. How many units are in the strata and what is the strata's general use?

f. How has the strata governed itself in the past and what has it allowed?

24. In *Frank v. The Owners Strata Plan LMS 355*, 2016 BCSC 1206 (affirmed 2017 BCCA 92), the court noted that individual owners have substantial control and "something approaching a beneficial or equitable interest" in LCP, particularly where LCP is designated in the original strata plan and can only be removed by unanimous vote. The court said that the *Foley* factors must be assessed in the context of this heightened interest where LCP is involved.

25. I now turn to each of the *Foley* factors. Both parties agree that the side of Building A where the disputed patio doors are located cannot be seen from any street. However, they disagree about how visible the patio doors are to the public and other residents from other parts of the strata, the lakeshore or beach. Mrs. Hurst says the patio door alterations are visible through the floor-to-ceiling glass enclosure on the LCP balcony and would be noticeable to those passing by. The strata, on the other hand, says the alterations are not easily visible to the general public. It says that the natural mirroring of the windows enclosing the LCP balcony makes it difficult to see anything inside the balcony, including the patio doors. The strata says that a person walking along the beach would not be able to look up and notice that the patio doors are larger now. It relies on witness statements in evidence provided by 7 other owners, all of whom say, in essence, that the alterations to the patio doors are not noticeable. Based on photographs in evidence, I agree with the strata that the larger patio doors are not easily visible through the balcony's glass enclosure and, when visible, the difference in size from the previous patio doors is not readily apparent.

26. Next, the parties agree that the change to the patio doors does not affect the use or enjoyment of any other strata lots. Mrs. Hurst says that SL1 benefits from the change. The strata says that the alterations do not give SL1's owners exclusive access to a larger portion of common property. On balance, I find there is no change to the use or enjoyment of other strata lots and the use or enjoyment of SL1 likely changes only minimally as a result of the larger patio door alterations.

27. Third, Mrs. Hurst admits the change to the patio doors does not cause any disruption or direct interference to other strata lots. However, Mrs. Hurst alleges that the construction work was disruptive to neighbouring strata lots 2 and 3. The strata says that while the construction work itself may cause some intermittent temporary disruption, this is the nature of any construction. I find this *Foley* factor is less so concerned about construction-related disruptions that may occur to implement a change, and more so about interference or disruption once the change is in place. As the parties agree that the change to the patio doors itself is not disruptive to any other strata lots, I find this factor weighs in the strata's favour.

28. Fourth, Mrs. Hurst says the alterations would likely increase SL1's market value as the resultant expanded view of the lake and mountains would be very attractive. The strata says that while there is no expert evidence with respect to any change in market value, the patio door alterations likely do not negatively affect the value of any strata lots. Despite the lack of any expert evidence on this point, I find it likely that SL1's market value would increase slightly as a result of the expanded view of the mountains and lake through the larger patio doors.

29. With respect to the fifth *Foley* factor, there are 35 residential strata lots that sit on a private lot. It is undisputed that cars cannot access the strata on the lakeside and pedestrians can see Building A from the lakeside beach. The evidence shows that over the years, some of the LCP balconies on the lakeside strata lots have been enclosed, fully or partially.

30. With respect to the final *Foley* factor, Mrs. Hurst argues that the current and past strata councils have a mixed history of addressing common property and LCP

alterations but that the strata generally governs itself in accordance with the SPA. The strata says that it has a long history of exterior appearance changes but that its general attitude toward renovations has been that the alterations should not change the overall character of the complex. It further notes that the strata had previously granted a similar alteration request to the owners of strata lot 35, where sliding patio doors were also changed to 8 foot and 12 foot sliding doors. Mrs. Hurst suggests, without providing any documentary evidence in support, that strata lot 35's alterations were also a significant change, and the strata council should not have approved the alterations without an owners' vote.

31. In their written argument, Mrs. Hurst says there are 2 further factors the CRT should consider in determining whether the patio door alterations are a significant change. These are (a) whether the change affects the structure of the building, and (b) whether the change is permanent. The strata says that it did not find any court or CRT decisions that suggest that impact on the structure of a building should be taken into consideration in a section 71 analysis. It further says that while some decisions reference the permanence factor, permanence is not determinative and is most commonly used only to exclude temporary alterations. The strata says the CRT should consider only the 6 *Foley* factors in its analysis. I do not agree. As noted above, the enumerated list of 6 factors from *Foley* is not meant to be exhaustive. An adjudicator has the discretion to consider additional factors that may be relevant in a particular situation. Here, while the alterations are undisputedly meant to be permanent (so long as the LCP balcony remains enclosed, as agreed between the strata and SL1's owners) and did require some changes to the wall separating SL1 from the LCP balcony, there is no indication that the changes negatively impacted the structural integrity of the wall. Overall, I find these additional considerations, while relevant, do not sway my findings one way or the other.

32. To summarize, I find the change in appearance as a result of the patio door alterations is at most minimally visible or noticeable, the changes do not affect other residents, and the strata has approved at least 1 similar alteration request in the past. Further, the evidence before me shows that while the lakeside strata lots have some uniformity, their exteriors are far from identical given the various alterations that have

been made over the last 35 to 40 years. Together, I find these factors outweigh any benefit that SL1's owners receive from the upgrades and any associated increased value to SL1.

33. I also note that in *Chan v. The Owners, Strata Plan VR677*, 2012 BCSC 2255, the addition of a door from a common property hall into a strata lot and the replacement of an exterior door with a window below street level were not considered significant changes. The court found the changes did not interfere with the use and enjoyment or the marketability of other strata units and were minimally visible to other strata members. I find the same reasoning applies here. With that and given the court's finding in *Frank* that the *Foley* factors must be assessed in the context of an owner's heightened interest where LCP is involved, I conclude that the patio door alterations are not a significant change within the meaning of SPA section 71, and a ¾ vote is not required. As a result, I dismiss Mrs. Hurst's claims.

CRT FEES AND EXPENSES

34. 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. Since Mrs. Hurst was unsuccessful, I dismiss their request for reimbursement of their paid CRT fees. The strata did not pay any fees, nor does it claim any dispute-related expenses, so I award no reimbursement.

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

ORDER

36. I dismiss Mrs. Hurst's claims and this dispute.

Nav Shukla, Tribunal Member