



Civil Resolution Tribunal

Date Issued: December 11, 2023

File: ST-2022-008157

Type: Strata

Civil Resolution Tribunal

Indexed as: *Foster v. The Owners, Strata Plan LMS 35*, 2023 BCCRT 1082

B E T W E E N :

DARYL FOSTER and TANYA FOSTER

APPLICANTS

A N D :

The Owners, Strata Plan LMS 35

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

J. Garth Cambrey, Vice Chair

INTRODUCTION

1. This is a strata property dispute about governance, bylaw enforcement, and alleged misuse of personal information. It is linked to another dispute (ST-2022-008158), which has the same underlying facts. However, neither the issues nor the respondents are the same in the linked dispute, so I have issued separate decisions for each dispute. My decision for the linked dispute is indexed as *Foster v. The Owners, Strata Plan LMS 35*, 2023 BCCRT 1083.

2. The applicants, Daryl Foster and Tanya Foster, co-own strata lot 158 (SL158) in the respondent strata corporation, The Owners, Strata Plan LMS 35 (strata). Daryl Foster represents the applicants. A strata council member represents the strata.
3. The applicants say the strata failed to investigate their complaints about smoking and unfairly imposed fines against them for photographing smoking violations, when the strata requested they provide proof of bylaw breaches. They also say they determined a council member who owns strata lot 123 (SL123), Kristine Clark, breached the smoking bylaws and abused her council position by using Ms. Foster's private email address for personal communications. I have named Ms. Clark here given the related facts and evidence in the linked decision, in which she is a named respondent. The applicants say Ms. Clark's use of Ms. Foster's email was illegal, a nuisance, and caused an unreasonable interference with her use and enjoyment of SL158. They also say it is significantly unfair for the strata to enforce its nuisance bylaws against them and not its council member. Finally, the applicants say the strata council "falsified the incident" and "included inflammatory and incorrect statements" in published strata council meeting minutes.
4. The applicants seek orders that the strata:
 - a. Issue a bylaw infraction notice to Ms. Clark for using Ms. Foster's email for illegal purposes contrary to bylaws 4.1(c) and (d),
 - b. Not use owners' private email addresses and other personal information for personal communications.
 - c. Remove Ms. Clark from her position of privacy officer,
 - d. Remove untrue, misleading, biased, and inflammatory statements from the May 25, 2022 council meeting minutes, and
 - e. Issue a public retraction and apology for false statements made in the May 25, 2022 council meeting minutes.
5. The strata denies the applicants' allegations. It says it has made its best efforts to comply with its obligations and has acted honestly, in good faith, and in the best

interests of the strata. In submissions, the strata says its privacy policy does not permit owners to take photographs of other owners. The strata asks that the applicants' claims be dismissed.

6. As explained below, I generally find in favour of the strata.

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. Under section 10 of the CRTA, the CRT must refuse to resolve a claim that it considers to be outside the CRT's jurisdiction.
9. 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.
10. 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

11. The issues in this dispute are:
 - a. Did the strata treat the applicants significantly unfairly?

- b. Did Ms. Clark illegally use Ms. Foster's private email address for personal communications?
- c. Must the strata amend its May 2022 council meeting minutes and issue a public retraction and apology for allegedly false statements?

BACKGROUND

12. As applicants in a civil proceeding such as this, Daryl Foster and Tanya Foster must prove their claims on a balance of probabilities, meaning more likely than not. I have considered all the parties' submissions and evidence but refer only to information I find relevant to explain my decision. I note the applicants' submissions for this dispute and the linked dispute are identical, even though they requested different remedies. The strata's response submissions were also identical. The applicants' reply submissions are different in the 2 disputes largely because of Ms. Clark's involvement. Most of the submissions and the majority of the evidence is about the strata's failure to enforce its bylaws about Ms. Clark's smoking, which does not apply to this dispute as I have mentioned. As a result, I have not included background details here that do not relate to the requested remedies in this dispute, except to the extent they provide context.
13. The strata was created in May 1991 under the *Condominium Act*. It continues to exist under the SPA and comprises 220 strata lots in 2 high-rise towers shown as towers 1 and 2 on the strata plan. Balconies and patios have been designated as limited common property for the strata lots next to them. Although the parties refer to the balcony of SL123, I note the strata plan identifies the area as a patio. Nothing turns on this and I will use the term "balcony" to be consistent with the parties' submissions. SL158, also known as unit 806-71, is located on the 8th floor of tower 2. SL123, also known as 306-71, is located on the 3rd floor of the same tower, directly below SL158.
14. The strata filed a complete new set of bylaws with the Land Title Office on January 26, 2018, which I find are the bylaws applicable to this dispute. Bylaw amendments filed later do not apply here. I summarize the relevant bylaws as follows:

“Resident” is defined to include owners, tenants, and occupants.

Bylaw 4.1 says a resident or visitor must not use a strata lot, common property, or common assets in a way that:

(a) Causes a nuisance or hazard to another person,

...

(c) Unreasonably interferes with the rights of other persons to use and enjoy the common property, common assets or another strata lot,

(d) Is illegal or otherwise contrary to provisions, rules or ordinances of any statute or municipal bylaw.

Bylaw 45.1 says a resident or visitor must not smoke “inside the buildings”.

15. The applicants first complained to the strata of smoke entering SL158 in May 2021. In the June 2021 council meeting minutes, the strata reminded owners of bylaw 45.1.
16. In a June 11, 2021 email exchange with the council president, the applicants identified 4 possible smoke sources by suite number. One of the suites was SL123.
17. A further email exchange between the applicants and the strata council president occurred in September 2021, in which the applicants provided additional smoke logs. The council president advised the applicants that it had contacted several residents, including Ms. Clark. The president said the bylaws did not restrict smoking on balconies, but that Ms. Clark had been informed her smoking was considered a nuisance.
18. The applicants continued to raise their smoke concerns and provided additional logs to the strata. In a May 13, 2022 email to the strata manager, the applicants provided handwritten logs noting 281 complaints about smoke entering SL158 between September 2021 and May 13, 2022. The applicants identified units 105 and 306 as possible sources of the smoke. The email included photographs of people smoking on SL123's balcony. The applicants noted bylaw 4.1 addresses nuisance and

requested the strata investigate their concerns and enforce its bylaws, including bylaw 4.1.

19. On May 24, 2022, Ms. Clark emailed the applicants. Among other things, Ms. Clark said she was aware the applicants took pictures of her and others smoking on her balcony without her permission and that she had unsuccessfully attempted to speak directly with the applicants. Ms. Clark said she had contacted the police, who suggested she email them to ask they delete the photographs they had taken and stop taking any more, because it was an invasion of privacy. Ms. Clark also said that if the applicants did not stop, she would consider pressing formal charges and that she would file a nuisance complaint with the strata. Finally, Ms. Clark said she was open to discuss the matter with the applicants in person and invited them to contact her at her suite. It is clear from the email that Ms. Clark was writing to Ms. Foster in her capacity as an owner and not as a strata council member or on behalf of the strata council.
20. The May 25, 2022 council meeting minutes reported a complaint from an owner against people for creating a nuisance and negatively impacting their use and enjoyment of their strata lot by taking photographs of people smoking on their balcony. The minutes do not name the owners involved, but I find state the complaint came from the owner of SL123. It is clear the minutes are about Ms. Clark's complaint against the applicants. The minutes show the strata council voted unanimously to send a bylaw violation letter to applicants. The evidence shows the strata issued the letter on June 7, 2022, but the letter is not in evidence.
21. On June 14, 2022, the applicants' lawyer wrote to the strata council about their ongoing issues with smoke entering SL158 and the strata's alleged failure to address the applicants' complaints. The letter also states the May 2022 minutes are defamatory because they do not say the applicants took the photographs to assist the strata in determining the smoke source. In part, the letter made the following demands:
 - a. retract the bylaw violation notice sent as approved at the May 25, 2022 meeting, and

- b. issue a public retraction and apology about the May 25, 2022 council minutes.
- 22. A council hearing was held on July 6, 2022. The strata responded to the applicants' lawyer's letter on July 10, 2022. Among other things, the strata said it would not take further action against the applicants about the alleged bylaw contravention in its June 7, 2022 letter. It declined to amend the May 2022 minutes or offer any apology as it said the minutes were accurate and did not identify the applicants.

EVIDENCE AND ANALYSIS

- 23. As earlier mentioned, the applicants do not seek remedies for the strata's failure to investigate their smoke complaints, even though their submissions are largely focused on that issue. Therefore, I limit my analysis to the applicants' claims that relate to their requested remedies in this dispute.

Significant Unfairness

- 24. As mentioned, the applicants claim the strata does not fairly enforce its bylaws. They argue it is significantly unfair for the strata to enforce its nuisance bylaws against the applicants and not against council members. I find I do not have to decide if the strata acted significantly unfairly because I find the applicants' claim about the strata's allegedly unfair bylaw enforcement is moot (of no legal relevance). I dismiss the applicants' claim for the following reasons.
- 25. 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.
- 26. The evidence is that the strata wrote to the applicants on June 7, 2022, after they photographed people smoking on Ms. Clark's balcony. Based on the May 25, 2022 council meeting minutes, the strata's June 2022 letter resulted from Ms. Clark's allegation the applicants were breaching her privacy and creating a nuisance by

taking photographs of her and her guests smoking on SL123's balcony. Contrary to the applicants' submission, there is no evidence the strata took any enforcement action against the applicants after the June 7, 2022 letter. In fact, on August 9, 2022 the strata wrote to the applicants advising it would not take further action against them for taking the photographs. In particular, the strata did not impose any fines. For this reason, I find applicants' significant unfairness claim about bylaw enforcement is moot.

27. Following *Binnarsley*, I have considered whether deciding this claim anyway would have any practical impact or potentially avoid future claims. I see no practical reason to decide this claim because the strata has stated it will not take further action. I find going through a significant unfairness analysis would be purely academic and a waste of the CRT's resources.
28. As for potentially avoiding future claims, I acknowledge that the relationship between the strata and the applicants is likely to continue and that future significant unfairness claims may arise. However, significant unfairness is entirely fact-based. If I were to decide this claim, the potential for future claims for significant unfairness would not be avoided.

Use of Email Address

29. The applicants say Ms. Clark abused her council position by illegally emailing Ms. Foster using a personal email address. As I understand the applicants' claim, they say Ms. Clark likely had access to Ms. Foster's personal email address as a council member from emails Ms. Foster had previously sent to the strata council. They say Ms. Clark's actions are contrary to the *Personal Information Privacy Act* (PIPA) and the strata's privacy policy. They also say that Ms. Clark did not recuse herself from strata council discussions and decisions about their smoking complaints. The applicants also say Ms. Clark's email caused a nuisance and unreasonable interference with Ms. Foster's use and enjoyment of SL158, implying Ms. Clark breached parts of bylaws 4.1.

Bylaw contraventions

30. In part, the applicants allege Ms. Clark breached parts of bylaw 4.1 by acting illegally, causing a nuisance, and interfering with their use and enjoyment of SL158. However, I find bylaw 4.1 does not apply as it only deals with an owner's use of a strata lot, common property, or common assets. As earlier noted, Ms. Clark's alleged smoking violations are not before me in this dispute. It is only her actions of emailing Ms. Foster and making a complaint about the applicants taking photographs that form part of this dispute. I do not find those actions of Ms. Clark relate to her use of her strata lot, common property, or common assets as contemplated in bylaw 4.1. Therefore, the strata was not required to enforce its bylaws against Ms. Clark, and I dismiss the applicants' claim that the strata failed to do so.

Privacy and illegal actions

31. An undated version of the strata's privacy policy is in evidence, which I find was created to meet PIPA requirements. PIPA is provincial legislation that governs how private organizations, including strata corporations, collect, use, disclose, and destroy personal information. PIPA does not govern individual council members or owners. PIPA section 36(2)(e) states the Office of the Information and Privacy Commissioner for B.C. has jurisdiction over whether personal information has been collected, used, or disclosed by an organization in contravention of the PIPA.

32. Ms. Clark emailed Ms. Foster on May 24, 2022, which I have found was a personal email. How Ms. Clark obtained Ms. Foster's email address is not clear. Even though Ms. Clark likely obtained the email address in her capacity as a strata council member, that was her own doing. While that may have been wrong, I find her actions are not likely not captured under PIPA or the strata's privacy policy, because those things govern the strata and not individual owners or strata council members. I also note Ms. Clark is not a party in this dispute and the applicants do not request any remedies against her.

33. To the extent the applicants argue the strata has a duty to protect personal information, including personal email addresses, I find such a claim is within the jurisdiction of the Office of the Information and Privacy Commissioner and therefore

outside the CRT's jurisdiction. Accordingly, I must refuse to resolve the applicants' claim under section 10 of the CRTA.

Privacy officer

34. Given my conclusions above, I find the applicants' request the strata remove Ms. Clark as the strata council's privacy officer is best left to the Office of the Information and Privacy Commissioner.

Failure to leave council meetings

35. The applicants' allegation is that Ms. Clark did not recuse herself from strata council discussions and decisions about their smoking complaints or that somehow the strata failed to ensure she recused herself. I find the applicants' claim is captured by SPA section 32, which deals with conflicts.
36. The BC Supreme Court has found the CRT has no authority to deal with the accountability of council members for actions taken while performing their duties, including failing to recuse themselves from a council meeting if a conflict existed. See for example, *Williams v The Owners, Strata Plan NW 1340*, 2021 BCSC 2058 at paragraph 66.
37. For all of these reasons, I refuse to resolve the applicants' claims that the strata acted illegally or contrary to the SPA or the PIPA.

May 2022 council meeting minutes

38. I do not agree with the applicants that the strata council improperly reported Ms. Clark's complaint against them in the May 25, 2022 council meeting minutes. The applicants emailed the strata council president on May 13, 2022, with photographs of smoking occurring on SL123's balcony. I have reviewed Ms. Clark's email complaint dated May 24, 2022 and compared it to the language in the May 25, 2022 minutes. While the strata could have used softer language, I find the minutes essentially detail Ms. Clark's complaint about the applicants taking photographs. In other words, the minutes describe Ms. Clark's concerns and not those of the strata. The strata council voted to write to the applicants based on Ms. Clark's complaint.

39. The applicants say they provided the photographs as proof of smoking based on the recommendation of the strata council president in June 2021. However, in the email exchange between the applicants and the president in June 2021, the president does not ask for photographic proof. Rather, in response to the applicants providing 4 suite numbers as possible smoke sources, the president asked the applicants to “step outside when [they smell smoke] and see if [they] can then identify the suite it is coming from”. The strata council president did not recommend taking photographs and I find it reasonable the strata council was surprised when the applicants provided the photographs almost a year later. Contrary to what the applicants and their lawyer stated, the strata did not have reason to expect receiving the applicants’ photographs.
40. I dismiss the applicants’ claim about the May 2022 council meeting minutes.

CRT FEES AND EXPENSES

41. 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. The strata was successful but did not pay CRT fees, so I make no order for reimbursement of CRT fees.
42. Neither party claimed dispute-related expenses, so I order none.
43. Under section 189.4 of the SPA, the strata may not charge any dispute-related expenses against the applicants.

DECISION

44. I refuse to resolve the applicants’ claims that the strata acted illegally or contrary to the SPA or the PIPA.
45. I dismiss the applicants’ remaining claims.

J. Garth Cambrey, Vice Chair