Civil Resolution Tribunal

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Type: Strata

Civil Resolution Tribunal

Indexed as: *Morrison v. The Owners, Strata Plan KAS 2066*, 2024 BCCRT 353

B E T W E E N :

MURRAY MORRISON and PENNY MORRISON

APPLICANTS

A N D :

The Owners, Strata Plan KAS 2066

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Nav Shukla

INTRODUCTION

1. Murray Morrison and Penny Morrison own strata lot B (SLB) in the strata corporation, The Owners, Strata Plan KAS 2066 (strata). The Morrisons say the strata improperly tried to stop them from erecting a wooden gazebo on SLB's limited common property (LCP) patio. They say the strata does not have authority to prohibit them from erecting the gazebo and was wrong to fine them for doing so. In their Dispute Notice, the

Morrisons seek orders that the strata stop pursuing the gazebo's removal and cancel the fines. In their later written submissions, the Morrisons acknowledge the strata has already cancelled the fines and they have taken down the partially erected gazebo, due to a defect with that gazebo. However, the Morrisons seek an order allowing them to erect the same or a similar gazebo. The Morrisons are self-represented.

2. The strata says that the Morrisons started erecting the gazebo without first obtaining the strata council's written approval, as required by the strata's bylaws. It further says that the gazebo is a significant change under *Strata Property Act* (SPA) section 71, which has not been approved by a ¾ owners' vote. So, the strata says it properly demanded the gazebo be removed. The strata also argues that this dispute is now moot since it has already cancelled the fines and the Morrisons have removed the partially erected gazebo. A strata council member represents the strata.

3. For the reasons that follow, I dismiss the Morrisons' claims.

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 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.

Preliminary Issues

7. First, the strata takes issue with the remedy the Morrisons seek in their written submissions for an order allowing them to erect a new gazebo. The strata says that it is procedurally unfair for the Morrisons to ask for a remedy not set out in the Dispute Notice as it deprives it of knowing the case it must meet. While this new remedy may be different than the remedies the Morrisons seek in the Dispute Notice, I find the underlying issue is still the same. Specifically, whether the Morrisons require approval either from the strata or from the owners under SPA section 71 to erect a gazebo on their LCP patio. I find the strata has had the opportunity to address this underlying issue and the new remedy in its written submissions, and it has done so. So, I find it is not procedurally unfair for me to consider whether to grant an order allowing the Morrisons to erect a gazebo on their LCP patio. As a result, and given the CRT's mandate which includes flexibility and proportionality, I find the Morrisons' request for an order allowing them to erect a gazebo in their written submissions is a request to amend the Dispute Notice to add this remedy. I find it appropriate to do so under the circumstances and consider this remedy below.

8. Finally, in their reply submissions, the Morrisons allege the strata has violated CRT rule 1.14(1)(a) which requires an authorized strata council member to act for a strata corporation in CRT disputes. Specifically, the Morrisons allege the strata's lawyer filed its written submissions for it, in breach of this rule. While this may be true, rule 1.16(3) allows parties to use helpers, including lawyers. There is nothing inappropriate about a helper ghost-writing a party's submissions. So, to the extent the strata's lawyer may have assisted with drafting and submitting the strata's submissions to the CRT's online portal, I find no violation of rule 1.14(1)(a).

ISSUES

9. The issues in this dispute are:

    a. Are the Morrisons' claims moot?

b. If not, do the Morrisons require approval, either from the strata council or from the owners under SPA section 71, before they can erect a gazebo on their LCP patio?

EVIDENCE AND ANALYSIS

10. As the applicants in this civil proceeding, the Morrisons 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 the evidence and argument that I find necessary to explain my decision.

11. The strata was created in 1998 and consists of 16 townhouse-style strata lots in 6 buildings. The Morrisons purchased SLB in 2021.

12. On July 5, 2022, after expressing concern to the strata about debris falling on SLB's LCP patio from a nearby chestnut tree, the Morrisons told the strata that they were going to put up a gazebo to protect themselves. The Morrisons, with the help of a professional contractor, started erecting the gazebo 2 days later. On July 8, the strata council president emailed the Morrisons saying that the bylaws require owners to seek strata council's approval before attaching anything permanent to an exterior common property wall. The Morrisons replied the same day saying they were not attaching anything permanent to the outside wall. The parties exchanged further correspondence, including a detailed explanation from the Morrisons about why they needed the gazebo, how the gazebo would be secured, and how it would blend in with the complex's existing architecture. On July 12, the strata wrote to the Morrisons, asking them to remove the gazebo as it found the structure was not consistent with the complex's overall design and appearance and the Morrisons had started erecting the gazebo without first applying to and receiving approval from the strata council. The Morrisons did not comply, so the strata issued bylaw contravention fines, which, as noted above, the strata has since cancelled.

13. It is undisputed that the nearby chestnut tree has since been removed and is no longer an issue. Further, as noted above, at some point after starting this dispute, the

Morrisons removed the partially erected gazebo due to a defect with the gazebo itself. However, the Morrisons still want to erect a gazebo for protection from the elements.

Are the Morrisons' claims moot?

14. I will first consider the strata's argument that the Morrisons' claims are now moot. 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).

15. Though the Morrisons have removed the gazebo structure, and the strata has cancelled all fines, it is clear from the Morrisons' submissions that they only removed the gazebo due to issues with the gazebo itself and not to comply with the strata's requests. Further, the Morrisons still desire to erect the same or a similar gazebo, and that they do not agree that they require approval from the strata council or the owners to do so. Above, I have found it appropriate to amend the Dispute Notice to include the Morrisons' requested remedy for approval to erect a new gazebo. For these reasons, I find there is still a live controversy between the parties about whether the Morrisons are required to obtain strata council's approval under the bylaws before erecting the gazebo, or whether the gazebo would be a significant change under SPA section 71, requiring approval from the owners with a ¾ vote. So, I find this claim is not moot.

16. However, I find there is no longer any live issue between the parties about whether the bylaw fines were validly imposed because the remedy the Morrisons seek for the fines to be cancelled has already occurred. I find there is no compelling reason for me to exercise my discretion to decide this moot issue.

SPA section 71

17. 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 an annual or special general meeting, or there are reasonable grounds to believe that immediate change is necessary to ensure safety or prevent significant loss or damage (see *Foley v. The Owners, Strata Plan VR 387*, 2014 BCSC 1333). As noted in *Foley*, the same test applies to owner changes. Under SPA section 1(1), LCP is a form of common property. So, SPA section 71 applies to significant changes by owners to LCP.

18. I find the evidence does not show that the gazebo is immediately required to ensure safety or prevent significant loss or damage. So, I will consider whether the type of gazebo the Morrisons' seek to erect would be a significant change based on the following non-exhaustive criteria summarized by the court in *Foley* at paragraph 19:

    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 change in use or appearance?

    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?

19. Court decisions suggest that the more permanent the change, the more significant it is (see for example, *Reid v. Strata Plan LMS 2503*, 2003 BCCA 126 and *Sidhu v. The Owners, Strata Plan VR1886*, 2008 BCSC 92). The CRT has previously found that gazebos, sunshades, and pergolas may be significant changes to common property (see, for example, the non-binding decisions of *Giddings et al v. The Owners, Strata Plan BCS 3620*, 2018 BCCRT 61, *Braun v. The Owners, Strata Plan 1295*, 2021 BCCRT 1221 and *Parsons v. The Owners, Strata Plan KAS1436*, 2022 BCCRT 721). In at least one other decision, however, the CRT has found a gazebo was not a significant change under SPA section 71 (see *Soong et al v. The Owners, Strata Plan*

NW 2583, 2019 BCCRT 879). It is clear from these CRT decisions that whether a change in the use or appearance of common property is significant is fact specific.

20. Overall, I find the *Foley* factors and the structure's degree of permanence support the conclusion that the gazebo the Morrisons seek to erect here would be a significant change. Based on photographs in evidence of the previously partially constructed gazebo and the Morrisons' description of what the completed gazebo would look like, I find that the gazebo would be a large wooden structure occupying the majority of the LCP patio. It would be visible to others from the common property and likely also from nearby strata lots. The Morrisons say the gazebo will allow them to properly enjoy their LCP patio, which they say they currently cannot do during warm weather. So, I find the gazebo would positively affect their enjoyment of SLB.

21. The strata says that there are currently no other gazebos at the strata. It is undisputed that unit 102 at the strata previously had a gazebo, which has since been removed. The strata says unit 102's gazebo was also unauthorized as it was erected without the required ¾ vote. It is unclear whether the strata had previously given unit 102's owners' approval for the gazebo. In any event, since unit 102's gazebo has been removed, I find the gazebo the Morrisons' seek to erect would be the only one of its kind now.

22. While the gazebo would be freestanding in the sense that it would not be attached or permanently affixed to the patio or SLB's exterior wall, the evidence shows the Morrisons intend to have the gazebo secured to 4 weighted pedestals. The strata says, and the Morrisons do not dispute, that their previous partially constructed gazebo was approximately 14-feet high, and there is no suggestion that the gazebo they seek to erect now would be any shorter. Given the gazebo's size and construction, I find that once installed, it would take considerable time and effort to take down. So, I find the structure would have a significant degree of permanence. Further, the strata says SLB's value or marketability would likely increase if the gazebo is erected, which the Morrisons do not dispute. So, I find the gazebo would likely increase SLB's marketability or value. Finally, I find the number of units at the strata and the strata's general use are not significant factors in this dispute.

23. Overall, I find the gazebo the Morrisons seek to erect is more similar to the situation in *Giddings*, *Braun* and *Parsons* than the situation in *Soong* given the gazebo's size, permanence, and visibility to others. I find the gazebo would be a significant change in the use and appearance of common property under SPA section 71. Since there has undisputedly been no owner's vote approving the gazebo, I find the Morrisons are not entitled to an order allowing them to erect the gazebo on their LCP patio. Nothing in this decision prevents the Morrisons from pursuing an owners' vote at an annual or special general meeting to obtain approval under SPA section 71.

24. Given my finding that the gazebo would be a significant change, I do not find it necessary to decide whether the bylaws require the Morrisons to obtain the strata council's approval because an owners' vote and approval under section 71 would be required in any event. I dismiss the Morrisons' claims.

CRT FEES AND EXPENSES

25. 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. As the Morrisons were unsuccessful, I dismiss their claim for reimbursement of their paid CRT fees. The strata did not pay any CRT fees but claims $3,200 in legal fees as a dispute-related expense. I note the strata did not provide any supporting document, such as lawyer's invoices, to show what legal fees it has incurred related to this dispute. In any event, CRT rule 9.5(3) says the CRT will only order reimbursement of legal fees in exceptional circumstances. Rule 9.5(4) says the CRT may consider the complexity of the dispute, the degree of the lawyer's involvement, whether the conduct of a party or their representative has caused unnecessary delay or expense, and any other factors the CRT finds appropriate.

26. Here, I find the dispute was not particularly complex and there is no suggestion that the Morrisons' conduct caused any delay or extra expense. It is also unclear the extent to which the strata's lawyer has been involved in this dispute. Given all of the above, I find there are no extraordinary circumstances to order the requested $3,200

reimbursement for legal fees as a dispute-related expense. So, I dismiss the strata's reimbursement claim.

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

ORDER

28. I dismiss the Morrisons' claims, the strata's reimbursement claim for legal fees as a dispute-related expense, and this dispute.

Nav Shukla, Tribunal Member