Civil Resolution Tribunal

Date Issued: April 19, 2024

File: ST-2023-000776

Type: Strata

Civil Resolution Tribunal

Indexed as: *Hestvik v. The Owners, Strata Plan EPS7152*, 2024 BCCRT 376

B E T W E E N :

LUKAS HESTVIK and TAMARA HESTVIK

APPLICANTS

A N D :

The Owners, Strata Plan EPS7152

RESPONDENT

REASONS FOR DECISION

Tribunal Member: J. Garth Cambrey, Vice Chair

INTRODUCTION

1. This strata property dispute is about the installation of a fence and artificial turf, and alleged significant unfairness.

2. The applicants, Lukas Hestvik and Tamara Hestvik, are owners of a strata lot (SL21) in the respondent strata corporation, The Owners, Strata Plan EPS7152 (strata). Mr. Hestvik represents the applicants. A strata council member represents the strata.

3. The applicants make 3 claims against the strata. First, they say the strata unreasonably declined their request to install fences to the rear of SL21. They also say the requested fence installation would not be a significant change to the use or appearance of common property under *Strata Property Act* (SPA) section 71, so it was wrong for the strata to ask the strata owners to vote on approving the fence alterations at a special general meeting (SGM).

4. Second, the applicants say the strata failed to fully complete repairs to the rear of SL21 at its cost. In particular, they say the strata voted against installing artificial turf on the common property as recommended by landscape professionals to make the property "useable and enjoyable", which they say the Civil Resolution Tribunal (CRT) ordered in a previous decision, *Hestvik v. The Owners, Strata Plan EPS7152*, 2022 BCCRT 1066 (Hestvik 2022).

5. Third, the applicants say the strata has treated them significantly unfairly. The say the strata is "acting in a manner that is a perversion of power" with a "priority of treating them unfairly above anything else".

6. The applicants seek orders that the strata:

    a. Permit the applicants, at their cost, to install their requested fences,

    b. Pay for the artificial turf installation to the rear of SL21 using a contractor selected by the applicants, and

    c. Pay the applicants $20,000 in damages as compensation for its significantly unfair treatment which the applicants say caused them distress.

7. The strata disagrees with the applicants. It says the requested fence installation would be a significant change under SPA section 71, which requires approval by ¾ vote. The strata put the applicants' request to a ¾ vote of the owners at an SGM, which the owners defeated. As for the applicants' claim for installation of artificial turf, the strata says it complied with Hestvik 2022 by completing the CRT-ordered repairs. The strata also says it approved the installation of artificial turf at the applicants' cost as they requested. The strata denies it has treated the applicants significantly unfairly

by not approving the fence installation and not paying for the installation of artificial turf. It asks the CRT to dismiss the Hestvik's claims.

8. As explained below, I dismiss the Hestvik's claims and this dispute.

JURISDICTION AND PROCEDURE

9. These are the CRT's formal written reasons. 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.

10. 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. I am satisfied an oral hearing is not required as I can fairly decide the dispute based on the written evidence and submissions provided.

11. CRTA section 42 says the CRT may accept as evidence information that it considers relevant, necessary, and appropriate, whether or not the information would be admissible in court.

Preliminary Issues

Anonymization and Sealing of Records

12. In an email to CRT staff in October 2023, the applicants requested their names be anonymized in any publications, which I infer includes this final decision. They said they would be disclosing information relating to their "health care, medical history, physician notes and assessments". CRT staff requested the strata's position on the anonymization request. Even though the respondent took no position, I decline the applicants' anonymization request. They disclosed limited medical information, and I did not rely on it. I make this finding because parties in CRT proceedings are generally named, consistent with an "open court" principle that favours transparency. I find

there is nothing in this dispute that would warrant departing from the open court principle, so I will not anonymize the applicants' names.

13. Although the applicants did not request dispute records be sealed, I considered CRT rule 12.1(5), which allows me to direct records be sealed. However, CRT rule 12.1(3) sets out the factors the CRT will consider when reviewing a public request for records, including any potential privacy concerns. Here, I see nothing sufficiently sensitive or private that could not be addressed under CRT rule 12.1(3) in any future records request. I note that an order sealing a dispute file is an extraordinary remedy, which I do not find is necessary in this dispute.

Claims not in Dispute Notice and Additional Evidence

14. After the parties had exchanged evidence and submissions, the applicants advised CRT staff they had received information from the strata which they had requested since August 2023. Through staff, the applicants provided their additional evidence and submissions on it. The strata was given an opportunity to respond, which it did, and the applicants were given an opportunity to provide a final reply, which they did. In fact, there were 2 rounds of evidence and submissions exchanged between the parties.

15. The applicants' description of the strata's allegedly unfair treatment in the amended Dispute Notice is vague and ambiguous. I agree with the strata that the additional submissions and late evidence generally included allegations about issues unrelated to those set out in the amended Dispute Notice. In particular, I find the additional evidence and submissions relate to allegations about unfulfilled document requests, bylaw complaints about the applicants' neighbour, the installation of a privacy lattice on the existing fence between the applicants' and their neighbour, and the strata's compliance with the SPA. While these things may relate to unfair treatment, none of these allegations were included in the amended Dispute Notice, nor do they relate to the applicants' claims about their requested fence or artificial turf installations.

16. The applicants amended the Dispute Notice in July 2023 to increase the amount of their claimed damages but chose not to request an amendment to add these additional claims. Under CRT rule 1.19(3), the CRT will not issue an amended

Dispute Notice after the dispute has entered the tribunal decision process except in extraordinary circumstances. With this in mind, I do not find extraordinary circumstance exist here, so I have not considered the applicants' additional information in my decision below.

17. The applicants also make allegations about bullying and harassment, which they say contravenes the strata's bylaw 8. However, I note bylaw 8 was not filed with the Land Title Office until April 3, 2023, and was therefore effective on that date. The original Dispute Notice was filed on March 23, 2023 and did not include claims about bullying and harassment. Again, the applicants had an opportunity to amend the Dispute Notice and add additional claims in July 2023, when they increased the amount they claim for damages, but chose not to do so. Therefore, I also decline to address the applicants' allegations about bullying and harassment.

18. Given the above, I have limited my analysis on significant unfairness to the strata's decisions about the applicants' other 2 claims. Namely, the claims about the strata's decisions not to approve the applicants' fence request or install artificial turf.

Enforcement of Hestvik 2022 and res judicata

19. In submissions, the strata says the applicants' artificial turf claim is really a claim that the strata failed to comply with Hestvik 2022, which addressed repair of the lawn area to the rear of SL21. The strata argues such a claim is not within the CRT's jurisdiction because the CRT cannot enforce its own decisions as set out in CRTA sections 57 to 60. I have also considered if the applicants' claim is *res judicata* (already decided) in Hestvik 2022.

20. I find the applicants' claim that the strata install artificial turf in this dispute is neither a claim that the strata failed to comply with Hestvik 2022 nor is it *res judicata.* My reasons follow.

21. In Hestvik 2022, the issue was the condition of the common property yard area behind SL21 and the other strata lots in building 13. There, the CRT found the strata failed to repair and maintain common property drainage problems. The CRT ordered the strata to retain an independent landscape architect to provide written

recommendations about how to repair the drainage problems for the SL21 common property yard and complete repairs by June 30, 2023, in accordance with the landscape architect's recommendations. There is no mention of artificial turf in Hestvik 2022, so I find the applicants' claim cannot be *res judicata.*

22. The strata retained a landscape architect as ordered. A copy of the architect's May 20, 2023 field review report was provided in evidence. I agree with the strata that the landscape architect reported the most significant problem had to do with the kind of soil used by the developer's landscaper, which did not allow for rainwater to permeate properly.

23. The strata says the work it completed was done in compliance with the Hestvik 2022. In reply submissions, the applicants say their claim is not about compliance with Hestvik 2022. They say the strata's "actions in remediating [the SL21] yard" were unreasonable and significantly unfair because they were "not appropriate to provide a lasting, enjoyable yard". I take the applicants' argument to be that while they do not dispute the strata complied with the Hestvik 2022 order, they say additional work was required to make the SL21 yard "enjoyable". I find both can be true. I find the applicants' claim about artificial turf is not a claim about compliance with Hestvik 2022 and I consider it further below.

ISSUES

24. The issues in this dispute are:

    a. Does the strata have authority to deny the applicants' requested fence installation and, if so, did the strata act reasonably?

    b. Must the strata pay for artificial turf installation to the rear of SL21?

    c. Did the strata treat the applicants significantly unfairly?

    d. What remedies, if any, are appropriate?

BACKGROUND, EVIDENCE AND ANALYSIS

25. In a civil proceeding such as this, the applicants 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.

26. The strata was created in November 2020 under the SPA. It consists of 81 3-level townhouse-style strata lots in 15 buildings. SL21 is an end unit located in building 13 along with 4 other strata lots. Each of the strata lots in building 13 has a patio area at ground level to the rear of the strata lot. The patio is limited common property for the exclusive use of the owner of the adjacent strata lot. There is a yard area beyond the patio that is shown as common property on the strata plan. Photographs in evidence show wooden patio dividers between neighbouring patios and short (3 to 4 foot high) wooden picket fences extending from the building to a back perimeter fence. The back perimeter fence is along the strata's north property line and the picket fences separate the yard areas behind each strata lot. There are gates located in the picket fences near the back fence to allow for maintenance of the yard areas. The parties agree the picket fences essentially create exclusive use yard areas for each strata lot.

27. The strata's owner developer filed bylaws with the Land Title Office (LTO) different from the Standard Bylaws under the SPA. I note that bylaws 2(3) and 8(e) were added and make the strata responsible for maintaining all common property and limited common property landscaped areas. Standard bylaw 8(c), which was not amended, also requires the strata to repair and maintain common property. Bylaw 6 requires an owner to obtain the prior written permission of the strata before altering common property. I find these are the relevant bylaws for this dispute.

Does the strata have authority to deny the applicants' requested fence installation and if so, did the strata act reasonably?

28. In January 2023, the applicants requested permission to replace the picket fences in the SL21 rear yard area with 6-foot solid fences and a gate to match the perimeter fence. The applicants noted a similar fence had been installed in the rear yard of unit

70, located at the other end of building 13.

29. The strata did not approve the request. The January 10, 2023 strata council meeting minutes say the strata denied the applicants' request because it would "change the esthetics and design of the entire complex". The strata was also unsure whether the City of Surrey had guidelines about fence installations. According to the January 10, 2023 meeting minutes, the fence at unit 70 along the west or outside of its rear yard was installed to help prevent vehicle headlights and emissions from 2 visitor parking stalls located next to the fence from affecting the rear yards of building 13. I discuss whether the strata's denial to permit the applicants' fence installation was significantly unfair below.

30. At some point, the strata determined the fence installation would be a significant change in common property under SPA section 71. Section 71 says a strata corporation must not make a significant change (or allow a significant change to be made) in the use or appearance of common property unless:

    a. The *Strata Property Regulation* (regulation) permit the change,

    b. There are reasonable grounds to believe an immediate change is necessary to ensure safety or prevent significant loss or damage, or

    c. The change is approved by a ¾ vote resolution at a general meeting.

31. Although the strata did not expressly say why it found the change significant, I find it could only be related to the appearance of common property, since the requested fencing was to replace existing fencing.

32. The strata put a ¾ vote resolution before the strata owners at a special general meeting (SGM) held on June 22, 2023. The resolution sought to approve the applicants' fence request subject to them adhering to certain construction standards, obtaining applicable municipal permits, and signing an indemnity agreement with the strata. The proposed resolution was defeated with 4 votes in favour, 19 opposed and 15 abstentions.

33. The applicants say the strata's denial of their fence was unreasonable and it did not

require ¾ vote approval because it would not be a significant change in the use of common property. I find the strata's decision was reasonable. I also find the strata's decision that the fence installation would result in a significant change to common property is not relevant. My reasons follow.

34. I will first address the strata's finding of a significant change. Even if the strata did not determine the fence alteration would be a significant change in the use of common property, bylaw 6 still requires the applicants to obtain the strata's permission to alter the fences. The strata chose not to approve the fence and instead asked the strata owners to decide the alteration.

35. As for the strata acting reasonably, the applicants cite bylaw 5(2) which says the strata must not unreasonably withhold its approval when considering a request to alter a ***strata lot***. However, bylaw 5(2) does not apply here because the applicants' fence alteration request is not a strata lot alteration as it would only affect common property. Therefore, bylaw 6 noted above applies. Unlike bylaw 5(2), bylaw 6 does not contain the same language about the strata unreasonably withholding its approval for a common property alteration. Put another way, the strata has broad authority under bylaw 6 to deny requests to alter common property, so long as the decision is not significantly unfair, which I discuss below.

36. The main reason the strata did not approve the solid fence installation was because a 6-foot solid fence was more likely to have a detrimental effect on grass growth in the rear yard areas of building 13. This is supported by the strata's landscape architect's report that concluded the rear yard areas were north-facing and that 2 large trees contributed to a higher shade factor, which limited grass establishment. Importantly, the report also stated that air circulation through "permeable fencing" such as the existing picket fences was important and that the existing fencing allowed for adequate air movement. I find the report implies solid fencing would not allow for the same air movement. Further, a report from the strata's landscape company says that grass growth along the north side of the property was minimal due to the lack of sunlight. It recommended against installing solid fencing for the same reasons as the landscape architect. Based on the landscape reports, I find it was reasonable for strata to deny the applicants' fence request.

37. I acknowledge the applicants also obtained opinions from landscape contractors that stated the installation of artificial turf was the only way to make the yard area enjoyable. However, the strata's obligation under SPA section 72 and bylaw 8 is to repair and maintain common property, such as the rear yard of SL21, to a reasonable standard as I discuss below. I dismiss this aspect of the applicants' claim.

Must the strata install artificial turf to the rear of SL21 at its cost?

38. The landscape architect's report says that artificial turf ***could*** be installed as an alternate solution to improving the soil conditions, if the strata found ongoing maintenance of the grass was unsatisfactory. The architect suggested ongoing maintenance costs could be lower with artificial turf, but installation costs may be higher. I find artificial turf was clearly an option for the strata to consider but, according to the landscape architect, the recommendation was to improve the soil conditions to improve natural grass growth.

39. As noted in *Weir v. Strata Plan NW 17*, 2010 BCSC 784, a strata corporation may have several reasonable options available to undertake necessary repairs. The fact that one of the options may be a more cautious approach or even turn out in hindsight to be the less wise or preferable course of action will not give the court (or CRT) a basis for overturning a strata council's decision regarding the repair option selected, as long as the option selected is reasonable one.

40. *Weir* also confirmed that, in assessing what is "reasonable", a strata corporation may consider the available financial resources of the owners to undertake the necessary work.

41. The strata did obtain quotations from landscape companies for artificial turf installation for all 5 strata lots in building 13. However, it ultimately decided to move forward with soil improvement and natural grass for reasons that I find include the initial cost of artificial turf. Based on *Weir*, I find the strata's actions not to move forward with artificial turf were reasonable. I do not find the strata was required to install artificial turf and I dismiss this aspect of the applicants' claim.

Did the strata treat the applicants significantly unfairly?

42. As mentioned, I have only considered whether the strata acted significantly unfairly when it declined to approve the applicants' fence alteration and did not pay the cost to install artificial turf in SL21's rear yard area. For the reasons that follow, I find the strata to not treat the applicants significantly unfairly.

43. 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. 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.

44. 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 v. Strata Plan LMS 2503*, 2003 BCCA 126, *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44, and *Kunzler v. The Owners, Strata Plan EPS 1433*, 2021 BCCA 173.

45. 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?

46. In *King Day Holdings Ltd. v The Owners, Strata Plan LMS3851*, 2020 BCCA 342, the Court of Appeal determined the reasonable expectations test set out in *Dollan* is not determinative. Rather, the Court found the test 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.

The Fence Alteration

47. The applicants' main argument about their fence request is that they requested the

same style and type of fence that was installed at unit 70, at the other end of building 13. They say a precedent was set. The applicants argue the strata approved the unit 70 fence installation. However, the strata says the owner developer installed it to help prevent vehicle headlights and emissions from 2 visitor parking stalls located on the outside of the fence from affecting the rear yards of all building 13 strata lots, as I have mentioned. In support of its argument that the owner developer installed the fence, the strata submitted an email and photograph from the current owner of unit 70 confirming they did not request the strata to approve the fence and that it was installed before they purchased the strata lot. The applicants provided no evidence to the contrary other than their own assertions. On a balance of probabilities, I agree with the strata and the unit 70 owner that the owner developer installed the fence for privacy from the visitor parking stalls.

48. Overall, I do not find the strata's actions to deny the applicants' fence request were harsh, wrongful, unfair, or unjust. The strata was entitled to consider the opinions of its landscape architect and contractor about maximizing airflow to better allow the natural grass to thrive. Therefore, I do not find the strata's actions were significantly unfair and I dismiss the applicants' claim about their fence request.

The Artificial Turf Cost

49. The applicants requested permission to install artificial turf in SL21's rear yard area in January 2023 and offered to pay the excess cost over the cost to improve the soil conditions and install natural grass. At the June 22, 2023 SGM, the strata owners passed a ¾ vote resolution to permit artificial turf to be installed in common property backyards at an owners' expense upon the strata's approval and if the owners signed an indemnity agreement. That is what happened here, and the applicants' signed an indemnity agreement on June 25, 2023, which the strata accepted.

50. The strata also says it offered the applicants with a credit equal to the cost of the SL21 repairs the strata was prepared to complete for soil improvement and new grass. The strata's credit offer was $4,777.50, which I find the applicants accepted. The applicants' contractor installed the artificial turf, and the applicants paid it. The applicants do not dispute this and admit this is what they had originally requested.

51. In reply submissions, the applicants now say the strata should pay for the total cost of the artificial turf installation, largely based on their new allegations of unfair treatment which I have not considered. In any event, given my finding that the strata acted reasonably in its decision to move forward with natural grass, provided the applicants with what they originally requested, ***and*** the applicants agreed to that arrangement by signing the indemnity agreement, I cannot find the strata acted unfairly.

52. I also note that at least 1 other owner applied for and received permission to install artificial turf as noted in the September 14, 2023 strata council meeting minutes.

Damages Claim

53. Given my finding that the strata did not act significantly unfairly, I dismiss the applicants' claim for damages.

54. For all of these reasons, I dismiss the applicants' claims and this dispute.

CRT FEES AND EXPENSES

55. 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 the successful party but did not pay CRT fees nor claim dispute-related expenses. Therefore, I order none.

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

DECISION AND ORDER

57. The applicants claims and this dispute are dismissed.

J. Garth Cambrey, Vice Chair