



# Civil Resolution Tribunal

Date Issued: April 22, 2024

File: ST-2022 009071  
and ST-CC-2023-002146

Type: Strata

Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan NW 3296 v. Mendiburu*, 2024 BCCRT 382

B E T W E E N :

The Owners, Strata Plan NW 3296

**APPLICANT**

A N D :

MIKE MENDIBURU

**RESPONDENT**

A N D :

The Owners, Strata Plan NW 3296

**RESPONDENT BY COUNTERCLAIM**

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## REASONS FOR DECISION

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Tribunal Member:

Christopher C. Rivers

## **INTRODUCTION**

1. This dispute is about smoking bylaw fines.
2. The strata corporation, The Owners, Strata Plan NEW 3296 (strata), received complaints that Mike Mendiburu, a tenant, was smoking in his strata lot. The strata's bylaws specifically prohibit smoking on strata property, including in strata lots.
3. The strata fined Mr. Mendiburu for smoking but says he has not stopped. The strata asks for an order compelling Mr. Mendiburu to comply with the strata's smoking bylaw and an order that allows it to have an independent third party enter Mr. Mendiburu's strata lot to determine why smoke is coming from his apartment.
4. Mr. Mendiburu denies smoking in a strata lot. His counterclaim asks me to cancel the fines. He says the strata did not follow the proper procedure before issuing the fines and that the strata is treating him in a significantly unfair manner. He also asks for an order that the strata reimburse him for his legal expenses of \$11,602.52.
5. The strata is represented by its lawyer, Leah Vidovich. Mr. Mendiburu is represented by his lawyer, Benjamin Scheidegger.
6. For the reasons that follow, I dismiss the strata's claim and order it to cancel Mr. Mendiburu's smoking fines. I dismiss Mr. Mendiburu's claim for legal expenses.

## **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. 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. While the parties specifically disagree on whether or not Mr. Mendiburu was smoking in a strata lot, my decision does not turn on that issue. 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.
9. 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.
10. 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.

## **ISSUES**

11. The issues in this dispute are:
  - a. Should I cancel Mr. Mendiburu's fines for breaching the strata's smoking or nuisance bylaws?
  - b. Should I order Mr. Mendiburu to comply with strata bylaws?
  - c. Should I allow the strata to appoint a third party to enter Mr. Mendiburu's strata lot to investigate future smoking complaints?
  - d. Is Mr. Mendiburu entitled to reimbursement of the legal fees he incurred addressing the allegations in this dispute?

## EVIDENCE AND ANALYSIS

12. In a civil proceeding like this one, each party, as applicant, must prove their respective claims on a balance of probabilities, which means more likely than not. I have read all the parties' submissions and evidence but refer only to the evidence and argument that I find necessary to explain my decision.
13. The strata consists of two residential buildings, together containing 81 strata lots. Mr. Mendiburu is a tenant of a strata lot owned by members of his family.
14. Since an April 2019 amendment, the strata's bylaws have prohibited smoking tobacco, marijuana, or vape products anywhere in the strata complex. The bylaw specifically includes strata lots and balconies.
15. On February 8, 2022, a strata council member wrote Mr. Mendiburu that it had received two complaints of him smoking and asked him to abide by the no-smoking bylaw. The letter was brief and informal.
16. On April 9, 2022, the strata president sent Mr. Mendiburu a more formal letter alleging that he had breached the no-smoking bylaw. The strata president said strata had received an April 3 complaint from another strata lot owner that Mr. Mendiburu's cigarette smoke was preventing the owner from enjoying their property. They also told Mr. Mendiburu that a technician testing smoke alarms had found on April 6 that Mr. Mendiburu was "on oxygen" and smoking. The letter does not make clear whether the April 3 complaint or April 6 technician comment allege smoking on any particular day.
17. The strata advised Mr. Mendiburu he faced a fine of \$500 if he contravened the strata bylaws and that he had an opportunity to respond or request a hearing.
18. There is no copy of either the April 3 complaint or the technician's comments in evidence. There is an email from a third party, ES, that says only "The technician from Pacific Coast Fire commented on the danger of the situation and said "the management should be notified, he could blow the building up." I find this does not

make it clear if the technician observed evidence that Mr. Mendiburu had smoked or whether they simply offered an “if true” opinion.

19. In the April 9 letter, the strata cited bylaw 5.2 for its authority to enforce bylaws and the procedure it must follow to issue fines. Bylaw 5.2(b) says, in part, that once the strata has received a complaint, it must give particulars to the alleged contravener in writing, give a copy to the strata lot owner, and consider the complaint at their next meeting. Once it has done that, it must then issue a decision about the complaint in writing.
20. Section 5.2(c) says that once the strata has complied with this section of the bylaw, the strata may impose fines for the contravention and continuing contravention of the bylaw without further compliance with that section.
21. I note the language in bylaws 5.2(b) and (c) is very similar to SPA sections 135(1) and (3). Those sections place the same obligations on a strata and provide the same protections to tenants and strata lot owners.
22. In a May 2 letter, a lawyer for Mr. Mendiburu denied that anyone had smoked in his strata lot and noted the strata had provided no objective evidence. The lawyer specifically wrote that no one from strata council had apparently investigated the complaint about the source or nature of the alleged smoke.
23. On July 25, the strata again wrote Mr. Mendiburu, alleging that he had violated the no-smoking bylaw. While it offered him a hearing under strata bylaw 4.15(a), which allows an owner or tenant to request a hearing at a council meeting, it also imposed a \$200 fine for an “ongoing violation”. In other words, it fined Mr. Mendiburu before he had the opportunity to have a hearing.
24. The strata warned that Mr. Mendiburu would continue to receive \$200 fines every 7 days if he continued to violate the bylaw. The strata said it had received “various reports and complaints” about ongoing smoking and the smell of smoke from Mr. Mendiburu’s strata lot and that there was “no doubt” he is smoking in his unit. The letter specifically cited the text of the strata’s no-smoking and nuisance bylaws, but it

did not provide any particulars about when Mr. Mendiburu had allegedly breached the bylaws, such as date, time, or frequency. It also did not provide any evidence of any investigation it undertook to support its “no doubt” conclusion.

25. The BC Court of Appeal, which is binding on me, has found that particulars must be sufficient to call the attention of the owner or tenant to the contravention at issue.<sup>1</sup> I find this must include basic information, like the date and the time of the alleged breach. None of this information is clearly included in any of the strata’s letters.
26. The strata sent 5 further letters throughout September and October 2022. Each of those letters referred to the July 25 letter and issued an additional \$200 fine. Each fine covered a 7-day period and was for continuing to smoke on common property and in hallways. Each one cited SPA section 130 for its authority to issue the fine, and did not mention bylaw 5.2. Each letter contained the same basic text, only adjusting the dates. As before, none of the letters contained any particulars or evidence to support the strata’s allegations.

### ***Bylaw Enforcement***

27. As I note above, the strata cited both bylaw 5.2 and SPA section 130 for its authority to issue fines, including the procedure it must take. For the strata to use its authority to fine under SPA section 130, it must comply with SPA section 135. As I note above, the language between the two is similar, and I find the analysis is the same. So, I limit my analysis to the SPA sections which are mandatory with our without the redundant bylaw. So, for the reasons that follow, I find the strata has not complied with SPA section 135.
28. SPA section 135(1)(e) requires the strata council to consider a complaint at its next meeting and then give notice of its decision in writing. Here, I find the strata has not done so. There is nothing in evidence that shows the strata made and provided a written decision about the complaints it flagged in its April 9 letter. I also note the strata did not provide any particulars about the alleged complaint, such as date or

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<sup>1</sup> See: *Terry v. The Owners, Strata Plan NW 309*, 2016 BCCA 449.

time. These issues alone are sufficient for me to cancel any fine the strata issued, since it did not comply with its obligations under SPA section 135(1)(e).

29. Instead, the strata's next written correspondence, dated July 25, says it is about violations that relate to "continued smoking in the strata lot." The July 25 letter does not apparently contain any decision about the complaints from April 9. In fact, it specifically references a "similar warning" that contained mention of Mr. Mendiburu's right to respond – the April 9 letter. That implies the July 25 letter is about a similar, but necessarily *different* violation of the strata's bylaws.
30. There is no evidence that the strata ever issued a decision about the April 9 complaints in writing. This means it did not comply with SPA section 135(1)(e). Since it did not, it is not entitled to depend upon SPA section 135(3) in issuing any future fines.
31. Mr. Mendiburu then explicitly argues that none of the strata's July, September, or October letters were provided to the strata lot owner. Under SPA section 135(1)(f), this is a necessary pre-condition to the strata fining Mr. Mendiburu.
32. Further, I find the fines the strata imposed for the complaints set out in the September and October letters are not continuing fines, as the strata indicates, but separate fines for separate incidents of alleged smoking. I note that in *The Owners v. Grabarczyk*, 2006 BCSC 1960, the BCSC said that incidents of nuisance are not continuous or continuing contraventions when observed on different dates. This means that a strata corporation can impose subsequent fines for the same behaviour, only if notice is provided for each fine under SPA section 135: see *Grabarczyk* at paragraphs 43-44.
33. Since it did not do so, I find it did not comply with the SPA, and so did not have the authority to fine him. While not necessary for my decision, I note that any of the other SPA breaches I have identified above would also be enough for me to have cancelled the fines.

34. On the basis of its failure to follow the correct procedure under either its own bylaws or the SPA, I order the strata to cancel the fines against Mr. Mendiburu for violation of its non-smoking bylaws.

### ***Order to Compel Compliance***

35. The strata asks for an order compelling Mr. Mendiburu to comply with the strata's smoking and nuisance bylaws.

36. However, as Mr. Mendiburu argues, he is already required to comply with the strata's bylaws. There is no benefit in making an order that duplicates that obligation.<sup>2</sup> I dismiss the part of the strata's claim.

### ***Order for Entry to a Strata Lot***

37. The strata also asks for an order that allows an independent third party to enter Mr. Mendiburu's strata lot to determine if he is smoking.

38. There is nothing in the SPA that explicitly grants authority to the council to enter a strata lot to investigate a bylaw breach. Some strata corporations have passed bylaws allowing for entry into a strata lot to investigate bylaw compliance, but this strata's bylaws do not. I note, however, that a tenant or owner declining a reasonable request to investigate a credible and specific allegation faces the prospect of enforcement, because a strata could reasonably interpret that refusal as evidence of a breach. The strata would still need to comply with its bylaws and the SPA in issuing any fines and the owner would retain the right to dispute them.

39. Here, there is no evidence that Mr. Mendiburu ever declined the strata an opportunity to investigate smoke in his strata lot. While the strata compiled complaints from other strata lot owners, there is no evidence that anyone from strata council ever investigated the issue, such as by attempting to observe the smoke from a complainant's strata lot or common property, or requested access to Mr. Mendiburu's strata lot.

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<sup>2</sup> See, eg: *Macdonald v. The Owners, Strata Plan EPS522*, 2021 BCCRT 1012, at para 24, affirmed on judicial review, *Macdonald v. The Owners, Strata Plan EPS522*, 2023 BCSC 1215

40. Even had strata performed a more complete investigation prior to requesting the order, I still would not grant it, as the strata did not provide any details about the nature of the order it sought. For example, it did not explain who the proposed third party would be, what notice would be required, or what entitlement Mr. Mendiburu would have to know particulars of the complaint before entering his unit.
41. So, I dismiss this part of the strata's claim.

### ***Legal Expenses***

42. Mr. Mendiburu asks for an order that the strata pay the legal costs he incurred in refuting the strata's claims. He argues that the strata acted in a significantly unfair manner by failing to comply with SPA section 135, and cites *Banerjee v. The Owners, Strata Plan LMS1634*, 2023 BCCRT 1034 in support.
43. He says this significant unfairness required him to retain a lawyer to defend himself against the strata's claims. He argues the CRT has authority under CRTA section 123(2) of the to make an order to remedy any significantly unfair actions of the strata corporation.
44. In *Kunzler v. The Owners, Strata Plan EPS 1433*, 2021 BCCA 173, the court confirmed that significantly unfair actions or decisions 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 objectively reasonable expectations are a relevant factor, but are not determinative.
45. Mr. Mendiburu claims for legal expenses incurred prior to the start of the CRT process and once it began. A letter from his lawyer shows he incurred \$3,223.73 in legal fees and disbursements prior to litigation and \$11,602.52 after litigation began, though that amount includes a \$5,000 unbilled estimate.
46. While *Banerjee* is not binding on me, I find the analysis persuasive and agree that Mr. Mendiburu had a reasonable expectation that the strata would comply with the SPA. However, *Banerjee*, the CRT found the strata's actions were "harsh, burdensome, and significant unfair." In that case, the strata did not advise Mrs.

Banerjee she was facing the prospect of a fine or provide her any opportunity to respond to the complaint.

47. That is not the case here. While the strata failed to provide adequate particulars, it did advise Mr. Mendiburu of its intention to issue both the initial fine and subsequent fines. It gave Mr. Mendiburu an opportunity to respond to its initial warning, if not its subsequent fines.
48. While it did not strictly comply with the SPA, I find it acted in good faith in attempting to enforce the strata's bylaws. It sent letters with increasing formality in an attempt to resolve the matter. While it did not ultimately meet the obligations set out by its bylaws and the SPA, not all statutory breaches are necessarily significantly unfair. Overall, I find the strata's failure to adhere to the SPA was appropriately addressed by reversing the fines. While not binding on me, I also note this was the same remedy the CRT applied in *Banerjee*.
49. As Mr. Mendiburu acknowledges, CRT Rule 9.5(3) permits the CRT to order one party to pay to the other party legal fees only in extraordinary circumstances. CRT Rule 9.5(4) lists the factors that the CRT may consider when determining whether to order the legal fees as follows: the complexity of the dispute, the degree of involvement by the representative, whether a party or representative's conduct has caused unnecessary delay or expense, and any other factors the CRT considers appropriate.
50. Mr. Mendiburu says CRT staff suggested Mr. Mendiburu receive assistance from a "representative". However, even if correct, I find this does not mean that CRT staff suggested Mr. Mendiburu obtain a *lawyer* or that he needed to do so. While I acknowledge that his lawyer's submissions were helpful, clear, and detailed, I do not consider the complexity of this dispute to be such that I order the strata to pay Mr. Mendiburu's legal fees. The dispute was of ordinary difficulty and was addressed on the relatively common basis of procedural defects in seeking to enforce bylaw fines. I dismiss this part of Mr. Mendiburu's counterclaim.

## **CRT FEES and EXPENSES**

51. 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 see no reason in this case not to follow that general rule. Mr. Mendiburu was successful in his claim to reverse the fines, and the strata was entirely unsuccessful in its claim. I therefore order the strata to reimburse Mr. Mendiburu \$125 for paid CRT fees. I have addressed his claim for legal expenses above.

## **ORDERS**

52. I order the strata to immediately cancel the fines it issued Mr. Mendiburu in July, September, and October 2022 for breaching its smoking and nuisance bylaws.

53. I order the strata to pay Mr. Mendiburu \$125 in CRT fees.

54. I dismiss the parties' remaining claims.

55. This is a validated decision and order. Under section 57 of the CRTA, a validated copy of the CRT's order can be enforced through the British Columbia Supreme Court. Once filed, a CRT order has the same force and effect as an order of the court that it is filed in.

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Christopher C. Rivers, Tribunal Member