Civil Resolution Tribunal

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Civil Resolution Tribunal

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B E T W E E N :

MARGARET CUPPLES

APPLICANT

A N D :

The Owners, Strata Plan LMS 2074

RESPONDENT

REASONS FOR DECISION

Tribunal Member: J. Garth Cambrey, Vice Chair

INTRODUCTION

1. This strata property dispute is about an owner's use of an inflatable hot tub and pop up tent on a limited common property deck.

2. The applicant, Margaret Cupples, owns a strata lot (SL79) in the respondent strata corporation, The Owners, Strata Plan LMS 2074 (strata). Mrs. Cupples represents herself. A strata council member represents the strata.

3. Mrs. Cupples says she sustained serious injuries in a January 2020 motor vehicle accident. She borrowed an inflatable “soft tub spa” in June 2020 to assist with her physical recovery. She placed the spa on the deck beside SL79. In November 2020, she says the Insurance Corporation of British Columbia purchased a soft tub spa to help with her healing and recovery. At some point she purchased a pop up tent which she placed on the deck to cover the spa. She says the strata asked her to remove the spa and tent between June and August 2022 because it considered the items breached the strata’s bylaws. After a council hearing in September 2022, the strata requested the tent be removed immediately, but allowed Mrs. Cupples to keep the spa until March 31, 2023.

4. Mrs. Cupples says the inflatable spa and tent do not breach the bylaws and that the strata has treated her unfairly. She asks for orders that the strata allow her spa and tent to remain on the deck as long as she is an owner, including an exemption from any future bylaws about hot tubs and her inflatable spa.

5. The strata disagrees. It says the strata’s bylaws do not allow tents or spas on decks and that it had to enforce them. It says a 5-month period to March 31, 2023, was a reasonable accommodation for the spa, but the tent was not necessary to her recovery, so it requested the tent be removed. The strata asks the Civil Resolution Tribunal (CRT) to dismiss Mrs. Cupples claims.

6. As explained below, I agree with Mrs. Cupples that the tent and spa do not breach the bylaws, but I decline to order the strata to permit her to keep them on the deck indefinitely.

JURISDICTION AND PROCEDURE

7. 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.

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

9. 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.

ISSUES

10. The issues in this dispute are:

    a. Did Mrs. Cupples breach the strata's bylaws and if so, did the strata treat her significantly unfairly?

    b. What remedies if any, are appropriate?

BACKGROUND, EVIDENCE AND ANALYSIS

11. In a civil proceeding such as this, Mrs. Cupples must prove her 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.

12. The strata was created in August 1995 and exists under the *Strata Property Act* (SPA). The strata consists of 118 apartment-style strata lots in 2 low rise buildings. SL79 is located at the end of the second floor of one of the buildings. It is undisputed that the spa and tent were located on a large deck, identified on the strata plan as limited common property for the exclusive use of the owner of SL79. I note limited common property is a form of common property under the SPA.

13. The strata filed a complete new set of bylaws with the Land Title Office (LTO) on June

29, 2022. I find these are the applicable bylaws for this dispute. I discuss the relevant bylaws below as necessary.

14. The basic facts are undisputed. On June 14, 2022, the strata manager wrote to Mrs. Cupples to advise her it had received a complaint about her spa and tent. The letter said the spa was not an "approved" deck item under the strata's bylaws and that Mrs. Cupples did not receive the strata's approval for the tent. The strata manager cited certain bylaws, which I discuss further below. The letter advised that the strata may impose fines if she did not respond or request a council hearing by June 27, 2022. If Mrs. Cupples formally responded to the letter, that response is not before me. However, it appears she provided the strata with June 2022 letters from her massage therapist, physiotherapist, and occupational therapist that supported her argument the spa was necessary for her recovery. It also appears the strata took no further action at this time.

15. On August 24, 2022, the strata manager again wrote to Mrs. Cupples that the spa was placed on the deck contrary to the bylaws and asked her to remove it immediately. The strata manager incorrectly cited bylaw 4(10), about throwing "material substances" from a deck, but I find nothing turns on the error. The letter gave Mrs. Cupples until September 7, 2022, to respond or request a council hearing and advised her that the strata may impose fines if she did not. This time, Mrs. Cupples did request a council hearing. The hearing was held on September 22, 2022.

16. On September 27, 2022, the strata manager emailed Mrs. Cupples that the strata needed more time to reach a decision. This is also reflected in the September 22, 2022 strata council meeting minutes. The October 13, 2022 strata council meeting minutes show the strata agreed the spa could remain until March 31, 2023, subject to "conditions set by the Council", but requested the tent be removed because it did not comply with the bylaws. On October 19, 2022, the strata manager wrote to Mrs. Cupples to confirm the strata's decision that the tent must be removed within 7 days, but the spa could remain until March 31, 2023, on the condition Mrs. Cupples provided a letter from a doctor by November 15, 2022, which stated the spa was critical to her well-being.

17. On October 27, 2022, Mrs. Cupples emailed the strata manager a copy of her doctor's note, which the strata accepted. From the overall submissions, it appears the issue then became one of how long Mrs. Cupples needed the spa. I say this because the strata submits that it was reasonable for it to allow Mrs. Cupples to keep the spa until March 31, 2023 "despite its bylaws" and that Mrs. Cupples refused to provide an end date for her recovery. Mrs. Cupples argues she cannot provide an end date for her recovery because it is simply not possible to know when she will have recovered.

18. Although Mrs. Cupples says the spa and tent were removed from the deck by May 31, 2023, a November 25, 2023 email from the strata manager to Mrs. Cupples confirms the strata agreed to allow her to use the spa and tent without fines "as you negotiate an end date for your rehabilitation". Neither party made submissions on this email.

Did Mrs. Cupples breach the strata's bylaws and if so, did the strata treat her significantly unfairly?

19. The key to this dispute is whether Mrs. Cupples breached the strata's bylaws by putting the spa and tent on her limited common property deck. Mrs. Cupples cites several CRT decisions and one court decision that she says apply to this dispute. These decisions find the placement of a soft-type hot tub or spa on a common property deck was not contrary to the applicable bylaws. She says these decisions support her argument.

20. On the contrary, the strata says the bylaws do not permit an owner to place a soft-type hot tub or spa, or a tent, on the deck. The strata says it has been reasonable in accommodating Mrs. Cupples need for the spa but that the accommodation must eventually end. For the reasons that follow, I agree with Mrs. Cupples that the strata's bylaws do not prohibit her use of the spa and tent on the limited common property deck.

21. In its June 14, 2022 correspondence, the strata says Mrs. Cupples breached bylaws 6(7), 6(8), and 7(1). It is unclear whether the cited bylaws were amended on June 29, 2022. Given the strata did not act on its June 14, 2022, correspondence I will not review bylaws that existed at that time. Instead, I focus my analysis on the June 29,

2022 bylaws that were in place on August 24, 2022, when the strata again wrote to Mrs. Cupples about the spa and tent.

22. The June 29, 2022 bylaws have not been amended. I have already stated that bylaw 4(10) cited in the strata's August 24, 2022, letter was incorrect, so I need not review it. Further, bylaw 6 generally addresses alterations to a strata lot. The installation of a spa and tent on the deck is clearly not a strata lot alteration.

23. However, included in bylaw 6 are the following bylaws that might be relevant to the strata's argument, but that I find are not.

    a. Bylaw 6(5) says several things, including awnings, may not be placed on, attached, hung from, or protrude from the exterior of a strata lot without the prior written permission of the strata council. Here, neither the spa nor the tent are connected to the building exterior, so I find this bylaw does not apply.

    b. Bylaw 6(6) says white shade screens are permitted if they are not visible when they are not in use, but only during certain months and for certain times of the day. Read in conjunction with the whole of bylaw 6, I find this bylaw only applies to shade screens attached to a strata lot. This would require the screen to be attached inside an exterior strata lot window which is not the case with the tent in this dispute. So, I find this bylaw does not apply.

    c. Bylaw 6(11) says alterations to electrical or plumbing are not permitted unless approved by the strata. Based on the photographs and submissions, I find the spa is self-contained and simply plugs into an electrical outlet, so I find this bylaw does not apply.

24. The only bylaws I find relevant to this dispute are bylaw 6(8) that limits items that may be put on a deck to include "summer furniture and accessories", and bylaw 7(1) that requires an owner to obtain the written permission of the strata before altering common property.

25. I will first address bylaw 7(1). To the extent the strata argues the spa and tent are alterations to the limited common property deck, I find they are not.

26. The court and the CRT have previously considered similar issues about soft hot tubs or spas and shade covers. In *The Owners, Strata Plan LMS 4255 v. Newell*, 2012 BCSC 1542, the Court considered whether a hot tub was an "alteration" to common property within the meaning of a similar bylaw to bylaw 7(1). The owner asserted that the hot tub was freestanding and did not require alterations to the building's plumbing or electrical systems, which the strata corporation did not dispute. The Court found that the hot tub was not designed to be permanent and was therefore not an alteration that required strata approval. Although there are less details about the spa installation before me in this dispute, I find from the photographs and submissions that the spa was free standing and plugged into a common electrical outlet.

27. Since *Newell* is binding on me, I find that the spa installed by Mrs. Cupples was not an alteration of common property within the meaning of the strata's bylaws.

28. As for the tent, there is no evidence it was permanent or affixed to the building or deck. I agree with Mrs. Cupples that it is a pop up tent used for shade. It is no different than a patio umbrella. I find the tent is not an alteration of common property within the meaning of the bylaws.

29. As for bylaw 6(8), it does not explicitly prohibit soft tub spas from decks. Instead, it limits permitted items to those listed in the bylaw, which includes "summer furniture and accessories". So, I find this part of the dispute turns on the interpretation of "summer furniture and accessories". I note the bylaw does not place a time limit on when the summer furniture and accessories can be used on the deck. In other words, if the item meets the definition, it can remain on the deck all year.

30. I have considered other similar CRT disputes involving hot tubs and the interpretation of bylaws. In *Noriega v. The Owners, Strata Plan BCS 2331*, 2022 BCCRT 1232, a tribunal member considered whether a similar spa was captured by the meaning of "patio-style furniture" in a similar bylaw and found that it was. The CRT member used a definition of furniture found in the Merriam-Webster.com dictionary. That definition has also been used in other non-binding but persuasive CRT decisions. It includes equipment that is necessary, useful, or desirable, such as movable articles used in readying an area, such as a room or patio, for occupancy or use (see *Trent v. The*

Owners, Strata Plan EPS3454, 2020 BCCRT 358 and *Balazs v. The Owners, Strata Plan VR420*, 2021 BCCRT 986).

31. I note that in *Balazs*, the tribunal member held that a hot tub was not furniture, as that term was used in the applicable bylaw. However, the hot tub in *Balazs* required a crane to place it on the patio, and it was embedded into a deck specifically designed and constructed around the hot tub. On the available evidence, the tribunal member found the hot tub there had a degree of permanence and was not reasonably moveable.

32. In *Trent*, the tribunal member did a thorough review of court and CRT decisions involving an interpretation of the terms "furniture" and "patio furniture". The tribunal member cited *Allwest International Equipment Sales Co. Ltd. v. The Owners, Strata Plan LMS4591*, 2017 BCSC 1646, where the court found all the permitted items under the applicable bylaw were readily moveable on a patio except the item in dispute (a heat pump). I agree with the reasoning in *Trent*, and subsequent CRT decisions that have found a key aspect in determining whether something is furniture is whether it is readily or reasonably moveable. See for example *Emmerton v. The Owners, Strata Plan BCS 3407*, 2022 BCCRT 872, affirmed on judicial review in 2023 BCSC 1571.

33. Here, I find there is no permanent quality to Mrs. Cupples' spa. It is inflatable and given the spa's size, I find it can be drained, deflated, and moved relatively easily and quickly. Overall, I find Mrs. Cupples' inflatable spa is a piece of furniture which she can use and enjoy on her deck.

34. What then about the bylaw's use of the word "summer"? I find a plain reading of the bylaw permits furniture generally used in warmer summer months. I have already found the spa is furniture. It can clearly be used in summer months, so I find it meets the definition of summer furniture set out in the bylaws. As mentioned, there is no time restriction in the bylaw to limit placement of summer furniture to specific months. Therefore, I find that the inflatable spa complies with bylaw 6(8).

35. For the same reason, I find Mrs. Cupples' pop up tent also complies with the bylaw.

Did the strata treat Mrs. Cupples significantly unfairly?

36. 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.

37. 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.

38. 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?

39. 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.

40. I find Mrs. Cupples had a reasonable expectation that the strata would fairly enforce its bylaws against her. This includes properly interpreting it bylaws. Based on my finding above that Mrs. Cupples did not breach any bylaws, I find the strata treated her significantly unfairly by forcing her to remove her spa and tent, which did not breach the bylaws.

41. I also note that SPA section 121(1) says a bylaw is not enforceable if it contravenes any enactment of law, including the BC *Human Rights Code* (Code). While the strata

provided submissions that it was accommodating Mrs. Cupples due to her physical injuries, neither party argued the accommodations were necessary under the Code. I do not need to consider whether the Code applies to this dispute given my finding that there was no bylaw breach.

What remedies, if any, are appropriate?

42. As earlier noted, Mrs. Cupples asks for orders that the strata allow her spa and tent to remain on the deck as long as she is an owner. She also requests an exemption from any future bylaws about hot tubs and her inflatable spa.

43. I agree Mrs., Cupples may keep her spa and tent on the deck for as long the bylaws permit. However, the strata has discretion to amend its bylaws and may choose to do so at a future date. Mrs. Cupples must comply with the bylaws, which includes any new bylaws the strata may properly approve. Therefore, I decline to make the order that Mrs. Cupples is exempt from any future bylaws about hot tubs or inflatable spas.

CRT FEES AND EXPENSES

44. 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. Mrs. Cupples was the successful party, so I order the strata to reimburse her $225 for CRT fees. She did not claim dispute-related expenses, so I order none.

45. The strata must comply with SPA section 189.4, which includes not charging dispute-related expenses against Mrs. Cupples.

DECISION AND ORDER

46. I order the strata to:

    a. Immediately allow Mrs. Cupples to place her inflatable spa and tent on her limited common property deck for as long as the bylaws permit, and

    b. Within 15 days of this decision, pay Mrs. Cupples $225 for CRT fees.

47. Mrs. Cupples' remaining claims are dismissed.

48. Mrs. Cupples is entitled to post-judgment interest under the *Court Order Interest Act*, as applicable.

49. 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. Under section 58 of the CRTA, the order can be enforced through the British Columbia Provincial Court if it is an order for financial compensation or return of personal property under $35,000. Once filed, a CRT order has the same force and effect as an order of the court that it is filed in.

J. Garth Cambrey, Vice Chair