



Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Noriega v. The Owners, Strata Plan BCS2331*, 2024 BCCRT 453

B E T W E E N :

ALEJANDRO JOSE NORIEGA

APPLICANT

A N D :

The Owners, Strata Plan BCS2331

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Alison Wake

INTRODUCTION

1. Alejandro Jose Noriega co-owns a strata lot in the respondent strata corporation, The Owners, Strata Plan BCS2331. In a previous Civil Resolution Tribunal (CRT) decision¹, the CRT ordered the strata to cancel bylaw fines it issued against Mr.

¹ *Noriega v. The Owners, Strata Plan BCS 2331*, 2022 BCCRT 1232

Noriega for placing an inflatable spa on the limited common property (LCP) patio outside his strata lot. In that decision, the CRT found that the spa was permitted under the strata's bylaws at the time, which allowed "patio-style furniture" to be kept on patios.

2. After the CRT made the previous decision, the strata passed a bylaw which explicitly prohibits hot tubs and spas on patios. Mr. Noriega says that this bylaw contradicts the strata's other patio bylaws, and is not retroactively enforceable. He asks the CRT to order that he is permitted to use his spa on his patio, and to order the strata to acknowledge that he is permitted to do so.
3. The strata says that the new bylaw is not contradictory and is not being enforced retroactively. The strata disagrees with Mr. Noriega's requested remedies.
4. Mr. Noriega is self-represented. The strata is represented by a strata council member.

JURISDICTION AND PROCEDURE

5. 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.
6. 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, neither party requested an oral hearing, and I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Considering 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. So, I decided to hear this dispute through written submissions.
7. 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

8. The issues in this dispute are:
 - a. Whether the strata's bylaw prohibiting hot tubs and spas is inconsistent with its other bylaws, and
 - b. Whether the strata's bylaw prohibiting hot tubs and spas is enforceable against Mr. Noriega.

BACKGROUND AND EVIDENCE

9. As the applicant in this civil dispute, Mr. Noriega must prove his claims on a balance of probabilities (meaning more likely than not). I have read all the parties' evidence and submissions, but only refer to what is necessary to explain and give context to my decision.
10. The CRT made the previous CRT decision about bylaw fines for Mr. Noriega's spa on November 10, 2022. At the strata's annual general meeting (AGM) on November 29, 2022, among other bylaw amendments, the owners passed a resolution to add a new bylaw prohibiting hot tubs and spas of any type. The strata repealed its previous bylaws and replaced them with a new set of bylaws, including this addition. The new bylaws were filed in the Land Title Office (LTO) on January 12, 2023.
11. While the resolution shows the new bylaw as bylaw 47.4, the bylaws registered in the LTO show it as bylaw 44.7. I find nothing turns on the numbering difference, as the wording of the bylaw is the same. For clarity, in this decision I will refer to the bylaws by the numbers in the registered LTO copy.
12. Mr. Noriega says that on January 24, 2023, the strata informed him that he was in breach of bylaw 44.7. While Mr. Noriega did not provide documentary evidence of this, such as a letter from the strata, the strata does not dispute that it did so. In submissions, the strata maintains that Mr. Noriega's spa is not permitted under its current bylaws. While there is no indication that the strata has fined Mr. Noriega for the alleged breach, I find I may still determine whether bylaw 44.7 applies to Mr.

Noriega's spa under the CRT's jurisdiction over the interpretation of the strata's bylaws.

ANALYSIS

Is bylaw 44.7 inconsistent with the strata's bylaws?

13. Mr. Noriega says that bylaw 44.7 is not enforceable because it contradicts bylaw 44.1, which says: "The only items that may be kept on patios, balconies, decks and front porches are:
 - a. Patio-style furniture;
 - b. Natural gas, propane gas or electric barbecues;
 - c. Non-permanent, CSA approved natural gas or propane gas fire pits;
 - d. Non-permanent, CSA approved natural gas or propane gas patio heaters; or
 - e. Plants, provided that the containers are placed on plant saucers or drip trays to contain water that may drain from the plant container in order to protect the deck surface."
14. Bylaw 44.7 says: "Hot tubs and spas of any type are not allowed on patios, balconies, decks or front porches or on common property." Mr. Noriega says that this is inconsistent with bylaw 44.1, because his spa is permitted under that bylaw as "patio-style furniture".
15. The strata says that the bylaws are not contradictory, and that they must be read together. It says that bylaw 44.1 sets out the items that are allowed on patios, and bylaw 44.7 provides clarification about bylaw 44.1 by specifying items that are not allowed on patios. It notes that bylaw 44.2 similarly specifies that bicycles are not allowed on patios.
16. I agree with the strata. I find bylaw 44.1 sets out broad categories of items that are permitted on patios and balconies, and bylaws 44.2 and 44.7 create exceptions to this general permission by setting out specific items that are not permitted. While Mr.

Noriega's spa was considered patio-style furniture under bylaw 44.1 before bylaw 44.7 was added, with the addition of bylaw 44.7, spas are explicitly no longer permitted.

17. I find there is no ambiguity or contradiction in bylaw 44.7. So, I find it is enforceable, subject to Mr. Noriega's arguments about retroactive enforcement and unfairness, as discussed below.

Can the strata enforce bylaw 44.7 against Mr. Noriega?

18. Mr. Noriega argues that bylaw 44.7 cannot retroactively apply to his spa. He relies on *Hansen*,² a BC Supreme Court decision in which the court found that the respondents did not need to remove a hot tub they had installed before the strata passed a bylaw prohibiting hot tubs, because there was no authority for the bylaw to have retroactive effect.
19. The strata says that *Hansen* is not applicable to this dispute because the strata plan in *Hansen* involved fully fenced areas adjacent to each strata lot, whereas its own strata plan is open concept, and does not have fences to delineate each strata lot.
20. Mr. Noriega says that the lack of fences is irrelevant. I agree. I find the decision in *Hansen* was not dependent on the strata lots being fenced. However, I find *Hansen* is not applicable to this dispute, for the following reasons.
21. *Hansen* was decided in 1996, under the *Condominium Act* (CA), the predecessor to the *Strata Property Act* (SPA). The CA is no longer in force, and the SPA governs the strata in this dispute. The CA did not contemplate retroactive exemptions to bylaws. In contrast, the SPA imposes some retroactive exemptions, but only to certain bylaws such as pet and age restriction bylaws. The SPA only imposes automatic retroactive exemptions from bylaws in these limited circumstances.³ In the absence of an exemption in the SPA or bylaws, new bylaws become effective against all owners when they are filed in the LTO.

² *The Owners, Strata Plan Nw243 v. Hansen*, 1996 CanLII 2957 (BC SC).

³ See *Kunzler v. The Owners, Strata Plan EPS 1433*, 2020 BCSC 576 (affirmed 2021 BCCA 173), at paragraph 73.

22. Bylaw 44.7 does not provide for an exemption for existing hot tubs or spas, and the SPA does not impose an exemption. So, I find bylaw 44.7 is effective against all owners as of January 12, 2023, when it was filed in the LTO.
23. I also find *Hansen* distinguishable from this dispute on its facts. In *Hansen*, the hot tub in question was installed on the owner's patio, including being hard-wired to the electrical panel, before the strata passed a bylaw prohibiting the installation of a hot tub. So, the court found that the strata could not retroactively enforce the bylaw to require the owner to reverse that installation. In contrast, here, the evidence is that Mr. Noriega's spa is portable and can be easily removed. There is no indication that it is hard-wired or otherwise permanently attached to the patio. So, I agree with the strata's argument that it is not attempting to retroactively enforce the bylaw. Instead, it is applying the bylaw to Mr. Noriega's current use of his portable spa on the patio.
24. However, the strata may still be prevented from enforcing bylaw 44.7 against Mr. Noriega if doing so would be significantly unfair to Mr. Noriega. Under CRTA section 123, the CRT may make orders to remedy a strata corporation's significantly unfair actions or decisions. Significantly unfair actions are those that are burdensome, harsh, wrongful, lacking in probity and fair dealing, done in bad faith, unjust, or inequitable.⁴ In considering whether a strata's actions were significantly unfair, an owner's objectively reasonable expectations are a relevant factor, but are not determinative, particularly where applying the reasonable expectation test could result in an order that a bylaw does not apply to a particular owner.⁵
25. Here, it appears Mr. Noriega's expectation is that he be permitted to continue to use his spa on his patio, despite bylaw 44.7. I find this expectation is not objectively reasonable. There is no dispute that the new bylaw passed with the required $\frac{3}{4}$ vote resolution under the SPA, and as noted, there is no exemption in the SPA or in the bylaw itself for existing hot tubs or spas. So, I find that it is unreasonable for Mr. Noriega to expect bylaw 44.7 not to apply to him.

⁴ See *Dollan v. The Owners, Strata Plan 1589*, 2012 BCCA 44 and *King Day Holdings Ltd. v. The Owners, Strata Plan LMS3851*, 2020 BCCA 342.

⁵ See *Kunzler*, note 3.

26. I also find the strata's actions have not been significantly unfair to Mr. Noriega. The strata is entitled to amend its bylaws with the required owner approval under the SPA. The strata says, and Mr. Noriega does not dispute, that it is applying bylaw 44.7 consistently to all current owners. There is no indication that the strata has specifically targeted Mr. Noriega's spa for enforcement, or has not enforced bylaw 44.7 against other owners with spas or hot tubs. So, I find the strata has not acted inequitably towards Mr. Noriega.
27. I also find bylaw 44.7 is not unduly burdensome to Mr. Noriega. While in some cases it may be significantly unfair to require an owner to remove previously approved permanent construction or improvements, that is not the case here. As discussed in the previous CRT decision and noted above, Mr. Noriega's inflatable spa is portable and can be drained, deflated and packed away in 30 minutes. So, I find it is not burdensome for Mr. Noriega to remove the spa to comply with bylaw 44.7.
28. Lastly, there is also no indication that the strata acted in bad faith in proposing the new bylaw at the November 29, 2022 AGM. The AGM minutes indicate that the strata noted concerns about the impact of hot tubs and spas on decks, patios, and landscaped areas, as well as potential liability and noise concerns. The strata argues that the tribunal member in the previous CRT decision specifically noted that the decision would not prevent the strata from amending its bylaws to specifically prohibit inflatable or permanent spas. I find the strata was entitled to propose this bylaw amendment for the owners to vote on. As the owners validly approved the new bylaw, the strata is entitled to enforce it against all owners, including Mr. Noriega.
29. I conclude that the strata has not acted significantly unfairly to Mr. Noriega. He is not entitled to use his spa on his patio. So, I dismiss Mr. Noriega's claims.

CRT FEES AND EXPENSES

30. 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 Mr. Noriega was unsuccessful, I dismiss his claim for CRT fees. Neither party claimed dispute-related expenses.

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

ORDER

32. I dismiss Mr. Noriega's claims and this dispute.

Alison Wake, Tribunal Member