Civil Resolution Tribunal

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Civil Resolution Tribunal

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B E T W E E N :

SINA SHAKIBAEI

APPLICANT

A N D :

The Owners, Strata Plan LMS 298

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Micah Carmody

INTRODUCTION

1. Sina Shakibaei owns strata lot 58 in the respondent strata corporation, The Owners, Strata Plan LMS 298 (strata). In 2021, Mr. Shakibaei installed a “mini-split” heat pump on the patio outside his ground-level strata lot.

2. The strata has imposed at least $11,600 in fines against Mr. Shakibaei's account for the heat pump. Mr. Shakibaei says he had the strata's permission to install the heat pump, based on an alteration and indemnity agreement (agreement). Mr. Shakibaei wants an order that the strata remove the fines from his account. He also wants orders that would prevent the strata from removing the heat pump or forcing him to remove the heat pump. Lastly, Mr. Shakibaei wants $15,000 in damages for what he says is the strata's significantly unfair treatment.

3. The strata says the agreement is not valid because the strata council never approved the heat pump. It also says the heat pump contravenes the strata's bylaws and required a ¾ vote under section 71 of the *Strata Property Act* (SPA). If the agreement is valid, the strata says it has the right under the agreement to demand that Mr. Shakibaei remove the heat pump.

4. Both parties are represented by lawyers. Ben Scheidegger represents Mr. Shakibaei. Vienna Wong represents the strata. As I explain below, I find Mr. Shakibaei did not have the strata's approval for the heat pump, and I dismiss most of his claims.

JURISDICTION AND PROCEDURE

5. 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). The CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. The CRT must act fairly and follow the law.

6. The CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in court.

7. The CRT conducts most hearings in writing, but it has discretion to decide the format of the hearing, including by telephone or videoconference. In this dispute, a central issue is whether the strata approved Mr. Shakibaei's heat pump. An oral hearing would allow the parties to test the witnesses' recollection of the relevant strata meetings and decisions. However, for reasons I explain below, the issue of strata

approval here does not turn on credibility. Therefore, although much is at stake for both parties, I find the advantages of an oral hearing are outweighed by the efficiency of written submissions. Based on the evidence and submissions provided, I am satisfied that I can fairly decide this dispute without an oral hearing.

8. 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

9. The issues in this dispute are:

    a. Did the strata approve the heat pump installation and is the agreement binding?

    b. Is the heat pump a significant change in the use or appearance of common property under SPA section 71?

    c. Does the agreement allow the strata to remove the heat pump?

    d. Should I order the strata to remove any fines from Mr. Shakibaei's account?

    e. Is Mr. Shakibaei entitled to damages for alleged significantly unfair treatment by the strata?

EVIDENCE AND ANALYSIS

10. As the applicant in this civil proceeding, Mr. Shakibaei must prove his claims on a balance of probabilities, meaning more likely than not. While I have considered all the parties' evidence and submissions, I only refer to what is necessary to explain my decision.

11. The strata was created in 1992 and includes 130 residential strata lots. On December 12, 2019, the strata repealed all previous bylaws and replaced them with new set of bylaws. I refer to the bylaws where relevant below.

12. The bylaws establish sections for townhouse and apartment strata lots. Mr. Shakibaei owns strata lot 58 in the apartment section. Mr. Shakibaei is the only owner with a heat pump or air conditioner.

13. Strata lot 58 is on level two and backs onto a common property plaza or courtyard. Mr. Shakibaei says the heat pump is located on a patio designated as limited common property for strata lot 58. The area that the parties refer to as Mr. Shakibaei's patio is separated from the surrounding courtyard by a lattice fence. The parties appear to have treated it as limited common property. However, the strata plan does not identify any property as limited common property for the exclusive use of strata lot 58, and there are no resolutions designating limited common property before me. I find the patio is not limited common property, but my decision would be the same even if it were limited common property.

14. On September 9, 2022, the strata corporation wrote to Mr. Shakibaei about a complaint that an "unauthorized installation of a split air conditioning unit" had damaged the building envelope. It is now agreed that the air conditioning unit is a heat pump, capable of heating and cooling Mr. Shakibaei's strata lot. The strata said the heat pump contravened bylaw 12.1, which requires owners to obtain approval from the strata before altering common property, among other things. The strata also said the heat pump contravened bylaw 50.10, which says a resident must not erect or fasten to the common property any "air conditioning devices […] or similar structure or appurtenance thereto."

15. I find that bylaw 50.10 prohibits heat pumps because it prohibits "air conditioning devices," which I find includes a heat pump, which is capable of reducing indoor temperatures. If I am wrong, I find that "similar structure[s] or appurtenance[s]" includes a heat pump, because it is similar to an air conditioning device. Mr. Shakibaei does not argue otherwise.

16. Instead, Mr. Shakibaei says the strata approved his heat pump as an exception to bylaw 50.10. The strata does not directly address the question of whether it had authority to approve a common property alteration that another bylaw explicitly

prohibits. As the parties focused their arguments on the approval itself, or lack thereof, that is what I address below.

17. The strata asked Mr. Shakibaei to remove the heat pump by September 16, 2022. It said if he failed to comply, the strata may impose a $200 fine, and may impose another fine every seven days if the contravention continued.

18. In response, Mr. Shakibaei gave the strata a copy of the August 25, 2021 agreement that he said confirmed the strata's approval for the heat pump installation. The strata did not accept the agreement and determined that Mr. Shakibaei contravened the bylaws. Records show that the strata fined Mr. Shakibaei on November 8, 2022, and continued to fine him weekly until December 12, 2023. At that point, the fines totalled $11,600. It is not clear whether the strata has imposed any fines since then.

Alteration and indemnity agreement

19. The agreement bears Mr. Shakibaei's signature as the applying owner. It was also signed by former strata council president SJ as a "witness". It was signed digitally by former strata manager LC on behalf of the strata. The apartment section was not a party to the agreement, but the parties do not suggest section approval was required under the bylaws.

20. The strata says despite the agreement, Mr. Shakibaei never received strata council approval for the alteration, so the alteration contravenes bylaw 12. The strata says that because there was no strata council approval, LC had no authority to enter into the agreement on the strata's behalf, and so the agreement does not bind the strata.

21. Mr. Shakibaei says SJ's signature is evidence that the strata council approved the alteration. Mr. Shakibaei did not give evidence as a witness, but through his lawyer says that he appropriately recused himself from an unspecified council meeting that LC oversaw. Mr. Shakibaei says he reasonably believed that his fellow council members acted appropriately in granting approval. Mr. Shakibaei does not say which council members were present at this meeting or when it was held.

22. Mr. Shakibaei relies on emails from SJ and LC, which provide their recollection of the council meeting and approval. Both said that Mr. Shakibaei presented the heat pump installation request at a council meeting and abstained from voting. Both said the request was approved but it was not the strata's usual practice to document alteration request approval decisions. The point about documentation is undisputed and I accept it. However, what matters is not whether the strata documented the approval, but whether the strata actually approved the alteration request.

23. Neither LC nor SJ identified any council members who attended the meeting other than SJ and Mr. Shakibaei. In a September 26, 2022 email to the new strata manager investigating the approval, LC said that along with Mr. Shakibaei and SJ, another council member, RC, attended.

24. It is undisputed that at the time the agreement was signed, council comprised seven members: Mr. Shakibaei, SJ, RC, JL, GC, ML and HZ. Four of those council members – JL, GC, ML and HZ – submitted written statements for this dispute. Those four said they were not at any meeting where Mr. Shakibaei's heat pump was discussed. They said they never received or sent correspondence about the heat pump, and never voted on it. Mr. Shakibaei does not directly challenge any of this evidence, and I accept it.

25. Bylaw 26 says council decisions must be made by a majority of the members present at the meeting. Although the strata submits that bylaw 24 says a quorum is at least three council members and there were only two at the meeting, I find Bylaw 24 actually says a quorum is four if the council has seven members. So, given that four of the seven members did not attend the meeting where Mr. Shakibaei's application was discussed, or otherwise vote, there were only three possible council members who did – Mr. Shakibaei, SJ, and RC. This means that there was no quorum at that meeting, and so the strata council could not vote on Mr. Shakibaei's alteration application. This means there was no valid approval decision under the bylaws.

26. Mr. Shakibaei argues that SPA section 30(1) protects the validity of the agreement. That provision says that a contract's validity is not affected by a defect in the

appointment or election, or a limitation on the authority, of a council member. It is not clear that this section applies to a decision made without quorum like this one. However, assuming section 30(1) does apply, section 30(2) says that a person who knew or reasonably should have known about the defect or limitation at the time they made the agreement cannot rely on section 30(1) to bind the strata. I find that Mr. Shakibaei, as a council member and vice president, knew or should have known that SJ and RC did not have authority to approve his alteration application without quorum. He also knew or should have known that LC did not have the authority to enter into the agreement on the strata's behalf because there was no bylaw-complaint decision from the strata council.

27. The law of agency does not assist Mr. Shakibaei. It is true that where a principal (here, the strata) limits an agent's authority (here, the strata manager's authority to sign agreements), and the agent exceeds that authority in entering into a contract, the principal will generally be bound by the contract (see *Barnett v. Rademaker, et al*, 2004 BCSC 1060, at paragraph 31). However, if the third party (here, Mr. Shakibaei) is aware of the limitation, the principal will not be held to the contract (see *Bank of Montreal v. Wilder*, 1983 CanLII 309 (BC CA) at paragraph 54). As Mr. Shakibaei knew LC did not have authority to enter in the agreement, the strata is not bound by it.

28. With that, I find that Mr. Shakibaei did not have the strata's approval to install a heat pump on common property and that Mr. Shakibaei breached bylaw 12.1(b) and bylaw 50.10. This means that the strata is free to require Mr. Shakibaei, at his sole expense, to restore the common property to its condition before the alteration. If he refuses, the strata may restore the common property and charge the reasonable costs back to Mr. Shakibaei under bylaw 12.6.

29. It follows that I dismiss Mr. Shakibaei's requests for orders related to the heat pump. This means I do not need to consider whether specific terms in the agreement allowed the strata to remove the heat pump. I also will not consider the strata's argument that the heat pump was a significant change to common property and therefore required a ¾ vote resolution at an annual or special general meeting.

30. That leaves Mr. Shakibaei's requests to cancel the bylaw fines and to pay damages for significantly unfair treatment, which I address together below.

Bylaw fines and significant unfairness

31. The CRT has authority to make orders remedying a strata corporation's significantly unfair act or decision under CRTA section 123(2). The court has the same authority under SPA section 164 and the same legal test applies (see *Dolnik v. The Owners, Strata Plan LMS 1350*, 2023 BCSC 113). 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.

32. Mr. Shakibaei says he reasonably expected that his alteration request was approved and that the strata would honour the agreement. I find this expectation was not objectively reasonable. Mr. Shakibaei was a strata council member, and as noted above, he knew or should have known about the requirement for council to make decisions at meetings with quorum. He should have known that strata council did not approve his alteration request. In the circumstances, it was not significantly unfair for the strata to refuse to honour the agreement. I therefore dismiss Mr. Shakibaei's claim for damages. My decision would likely be different had Mr. Shakibaei not been a council member at the time.

33. I turn to the fines. Mr. Shakibaei does not allege that the strata failed to follow the procedural steps set out in SPA section 135 before imposing the first $200 fine for contravening bylaw 50.10. Based on the correspondence, I find the strata complied with section 135. It follows that I will not make Mr. Shakibaei's requested order that the strata remove all the fines from his account.

34. The strata submits that if it succeeds in this dispute, I should order Mr. Shakibaei to pay $11,600 for the bylaw infraction fines issued to date. However, the strata did not file a counterclaim, so I cannot make that order.

35. In *Kok v. Strata Plan LMS 463 (Owners)*, 1999 CanLII 6382 (BC SC), the court observed at paragraph 55 that the imposition of bylaw fines does not serve to correct or remedy bylaw contraventions. Rather, the purpose is to discourage bylaw contraventions. Some CRT decisions have relied on *Kok* to reduce the aggregate bylaw contravention fines an owner is required to pay, particularly where the strata had the option of remedying the contravention, such as by removing the alteration. In two decisions, the CRT allowed a monthly instead of a weekly fine (see *The Owners, Strata Plan LMS 2503 v. Vasiu,* 2019 BCCRT 538 and *The Owners, Strata Plan BCS 1644 v. Lukovic,* 2018 BCCRT 219).

36. In *The Owners, Strata Plan VR 484 v. Lawetz*, 2017 BCCRT 59, the CRT found that a $200 weekly fine was fair given that the owner had clear notice of the strata corporation's position before it began imposing fines. However, the CRT said once the CRT proceeding began, the issue of how to remedy the bylaw contravention was a matter for the CRT to decide, and the strata had to stop imposing fines.

37. I find the approach in *Lawetz* is correct and I adopt it here. I find it is not unfair for the strata to impose the fines it said it was going to impose, consistent with its bylaws and the SPA. I find the strata was permitted to fine Mr. Shakibaei until he started this CRT dispute on February 3, 2023. Those fines total $2,600. I therefore order the strata to reduce the total bylaw contravention fines related to the heat pump on Mr. Shakibaei's account to $2,600.

CRT FEES AND EXPENSES

38. Based on the CRTA and the CRT's rules, as Mr. Shakibaei was largely unsuccessful, I find he is not entitled to reimbursement of CRT fees.

39. Mr. Shakibaei claims for $7,325.49 in legal fees, disbursements and taxes, relying on a letter from Mr. Scheidegger explaining his involvement in the proceeding. Given that Mr. Shakibaei was largely unsuccessful, I find he is not entitled to reimbursement of legal fees. Further, CRT rule 9.5 permits the CRT to order one party to pay another

party's legal fees only in extraordinary circumstances, which are not present here. I dismiss the claim for reimbursement of legal fees and disbursements.

40. The strata was largely successful but did not pay CRT fees or claim expenses, including legal fees.

41. The strata must comply with SPA section 189.4, which includes not charging dispute-related expenses against Mr. Shakibaei.

ORDERS

42. I order the strata to immediately reduce the total bylaw contravention fines related to the heat pump on Mr. Shakibaei's account to $2,600.

43. I dismiss Mr. Shakibaei's remaining claims.

44. This is a validated decision and order. Under CRTA section 57, 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 a court order.

Micah Carmody, Tribunal Member