Civil Resolution Tribunal

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File: ST-2023-002571

Type: Strata

Civil Resolution Tribunal

Indexed as: *Brown v. Section 1 of The Owners, Strata Plan VIS 3990*, 2024 BCCRT 1058

B E T W E E N :

KENNETH BROWN and ELIZABETH CAROL DALES

APPLICANTS

A N D :

Section 1 of The Owners, Strata Plan VIS 3990

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Eric Regehr, Vice Chair

INTRODUCTION

1. The applicants, Kenneth Brown and Elizabeth Carol Dales, own a strata lot in the strata corporation, The Owners, Strata Plan VIS 3990. The strata has two sections, one for the strata's apartment building and another for its townhouses. The respondent is the apartment section, where the applicants' strata lot is located.

2. This dispute is about the apartment section's rejection of the applicants' request to alter common property by installing a heat pump that includes rooftop components. The applicants claim the refusal was unreasonable. They ask for an order that the apartment section grant permission for the applicants to install a heat pump, plus $5,000 in compensation to reflect increased costs since they first requested permission. Mr. Brown represents the applicants.

3. As discussed in more detail below, the apartment section did not file a Dispute Response and is technically in default.

JURISDICTION AND PROCEDURE

4. 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. It must also recognize any relationships between dispute parties that will likely continue after the CRT's process has ended.

5. Section 39 of the CRTA says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I have considered the potential benefits of an oral hearing. Here, I am properly able to assess and weigh the documentary evidence and submissions before me. There are no credibility issues, and the apartment section has not participated. So, I decided to hear this dispute through written submissions.

6. The CRT may accept as evidence information that it considers relevant, necessary, and appropriate, even if the information would not be admissible in court. The CRT may also ask the parties and witnesses questions and inform itself in any way it considers appropriate.

Preliminary Issue – Proper Respondent

7. The applicants initially named the strata as the only respondent. The strata filed a Dispute Response, participated throughout the CRT's facilitation process, and provided evidence and submissions opposing the applicants' claims. After reviewing the materials, I determined that the apartment section may be the appropriate respondent. I asked the applicants and the strata for submissions about the issue. In response, the applicants asked to amend the Dispute Notice to substitute the apartment section for the strata. The strata did not respond.

8. In a preliminary decision, I granted the applicants' request and amended the Dispute Notice by replacing the strata with the apartment section as the sole respondent. I directed the applicants to serve the apartment section, which they did by providing it to a section executive member. The apartment section never filed a Dispute Response, and so is technically in default.

9. Under CRT rule 4.3, when a respondent is in default, the CRT may assume they are liable. I decline to do so here. The applicants' claim is about something that affects all the apartment section's owners. In that context, it is preferable to make a decision on the merits if it is possible to do so fairly.

10. To that end, I considered whether it would be procedurally unfair for me to rely on the strata's evidence and submissions when it is no longer a party. I decided it would be fair to do so. First, and most importantly, the applicants had an opportunity to reply to the strata's evidence and submissions, which they did. Second, the strata's evidence and submissions were about the merits of the applicants' claims because the strata believed it was the proper respondent at the time. This means relying on the strata's evidence and submissions will create the adversarial context necessary for me to make an informed and just decision. Finally, it appears from the strata's submissions that the person who made them misunderstood the distinction between the strata and the apartment section. For example, they refer to "council meetings" that were actually apartment section executive meetings. So, I find that the strata's submissions likely articulate the apartment section's position on the merits of the applicants' claims.

ISSUES

11. The issues in this dispute are:

    a. Was the apartment section's rejection of the applicants' request to install a heat pump significantly unfair?

    b. If so, what remedy is appropriate?

BACKGROUND

12. In a civil claim such as this, the applicants must prove their claims on a balance of probabilities. This means more likely than not. While I have read all the parties' evidence and submissions, I only refer to what is necessary to explain my decision.

13. The strata consists of 33 residential strata lots. Of those, 24 are in a five-storey apartment building. The applicants own strata lot 31, which is on the top floor.

14. The strata filed a complete set of bylaws on August 1, 2008, which repealed all previous bylaws. The strata filed amendments on April 25, 2019, which included a new bylaw 15 that sets out a detailed process for common property and strata lot alteration requests.

15. Bylaw 15 says that an owner must request approval from the section their strata lot is in if certain criteria are met. The applicants do not dispute that the installation of a heat pump on the strata building's roof required apartment section approval. I agree because the installation would modify the common property roof, among other things. To apply, an owner must provide detailed information about the proposed alteration. The apartment section could then request more information, approve the alteration, or reject the alteration.

16. Bylaw 15(7) says that the apartment section cannot unreasonably refuse an application to alter a strata lot. That same limitation does not exist for common property alterations. Other CRT decisions have found that when bylaws do not include a specific requirement not to unreasonably refuse an alteration request, the

only constraint on the strata corporation's discretion is that it cannot make a significantly unfair decision. I agree with those decisions and adopt the same approach here.[1] This means the apartment section has broad discretion when considering a common property alteration request.

17. The CRT has authority to make orders remedying a significantly unfair decision under CRTA section 123. Significantly unfair actions are those that are burdensome, harsh, wrongful, lacking in probity and fair dealing, done in bad faith, unjust, or inequitable. In applying this test, the owner's reasonable expectations are relevant, but are not determinative.[2]

EVIDENCE AND ANALYSIS

18. The apartment section first began considering the implications of heat pumps at its February 10, 2022 executive meeting. The apartment section set up a working group to explore new bylaws and options for building cooling systems. Section executive meeting minutes from May 2022 show that the working group was leaning towards a building-wide solution rather than heat pumps in individual units.

19. The applicants requested permission to install a heat pump on January 5, 2023. Their request letter is not in evidence but the apartment section's February 6, 2023 response is. The apartment section acknowledged that warmer summers meant that some units became uncomfortably hot. However, the apartment section said it was concerned about how to retrofit the building for cooling systems it was not designed to accommodate. The apartment section said it intended to present a resolution at the next annual general meeting (AGM) to fund a building-wide study that would address the feasibility of heat pumps. The apartment section said it was concerned about electrical load, noise, the integrity of the building envelope, and other considerations. The apartment section denied the applicants' request, but invited them to make a new request after the study was complete.

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[1] For example, see *MacPhee v. The Owners, Strata Plan LMS 2476*, 2022 BCCRT 1128.
[2] See *Dollan v. The Owners, Strata Plan 1589*, 2012 BCCA 44, *King Day Holdings Ltd. v. The Owners, Strata Plan LMS3851*, 2020 BCCA 342, and *Kunzler v. The Owners, Strata Plan EPS 1433*, 2021 BCCA 173.

20. At the apartment section's February 22, 2023 AGM, the owners approved a $15,000 expense for a "comprehensive whole building strategy for the future heating and cooling of the building". The apartment section sent out a request for proposals later that year. As of February 2024, an engineer was working on the project. The apartment section also hired a lawyer to draft a very detailed heat pump bylaw, which created a process for approving individual heat pumps that pierce the building envelope.

21. The applicants make several arguments about why the apartment section should not have rejected their heat pump proposal.

22. First, the applicants argue that heat pumps are extremely common in BC, including in multi-floor buildings. The applicants say that their building is relatively new and relatively small, so the apartment section's approach is overly cautious and contrary to common sense. The applicants point out that the installers who provided them with quotes would not have done so if the building could not handle heat pumps. They also note that none of the quotes contemplated any upgrades to the building's wiring or building envelope. However, I find that the installers would not necessarily consider the cumulative impact of multiple heat pumps when quoting on a single installation.

23. I note, as well, that in December 2023, the legislature amended the SPA and *Strata Property Regulation* to require strata corporations to obtain electrical planning reports, in part to plan for the electrical capacity required for anticipated future heating and cooling demands. This shows the apartment section's concerns about the electrical load were rational.

24. I also find that it was appropriate for the apartment section to consider the precedent-setting possibility of allowing a heat pump, since the applicants' request was the first. As noted, the law of significant unfairness requires strata corporations to treat owners equitably, so approving one heat pump has implications for future heat pump requests.

25. The applicants also argue that the apartment section lacked diligence and foresight by failing to proactively adopt a plan for heat pumps. The applicants say that the

apartment section should have anticipated a spike in demand for heat pumps after the 2021 heat dome and promptly prepared itself for the resulting alteration applications. They do not believe they should have to "pay the price" for this lack of foresight by waiting for a building-wide study. However, as noted above, the apartment section had started considering the issue almost a year before the applicants' request. As for the process itself, I acknowledge it has been slow. However, the apartment section's uncontested evidence is that it struggled to find an engineer to complete the study and the section executive member who was initially spearheading the project had health issues that slowed progress. While unfortunate, these delays do not demonstrate a lack of diligence or intentional inaction.

26. The applicants also argue that the apartment section treated a request for an electric car charger differently. They say that the apartment section permitted an owner to charge an electric car with no study of the building's electrical capacity. The applicants question why their request was treated so differently. The apartment section says that the applicants are mistaken about the electric car charging it permitted. The apartment section says it allowed an owner to use a standard plug-in to charge their car in the apartment building's parkade. It says there is no car charger installed, and therefore no alteration to common property. The applicants provided no evidence, such as a photo of a car charger, to prove that the strata allowed an alteration to common property. So, I find there is no proven inequitable treatment.

27. The applicants say that the strata's failure to promptly approve their heat pump installation has had significant effects on their quality of life. Theirs is a top floor unit with large floor-to-ceiling windows facing both east and west. They say that their strata lot is unique in this respect. They say it regularly reaches 40 degrees. The apartment section does not dispute this, but says that the applicants could have used portable, interior air conditioners to manage the heat. The apartment section advised residents of this option in its May 2022 section executive meeting minutes. I agree that a heat pump was not the only way for the applicants to cool their strata lot, at least temporarily, and so the strata's decision was not unduly burdensome.

28. Finally, the applicants argue that because the strata had no specific bylaw about heat pumps, and therefore no specific requirements for heat pump installations, it had no basis to reject their request. The applicants argue that the apartment section applied criteria from a hypothetical bylaw it hoped to pass in the future instead of the bylaws in place at the time. I disagree. As noted, the apartment section had broad discretion to consider their request under the existing bylaws about common property alterations. It did not need a specific bylaw about heat pumps to reject the applicants' request.

29. The facts of this dispute are similar to another CRT dispute, *Clarke v. The Owners, Strata Plan LMS1257*, 2023 BCCRT 799. There, the applicant wanted to install a heat pump on his balcony, which would have punctured the common property building envelope. It would have been the first in the strata. The strata said no, opting instead to embark on a comprehensive planning process for heat pumps. The owners of that strata passed a specific bylaw about heat pumps and hired an engineer to develop heat pump recommendations for the entire building. The applicant's request was still "on hold" when the CRT adjudicated the claim. The CRT found, among other things, that the strata's decision to consider the broader implications of heat pump installations was done in good faith.

30. I find the same reasoning applies here. The applicants might be right that the heat pump would have little or no impact on the building's envelope, on noise, or on the building's electrical load. The apartment section's caution may ultimately have been unwarranted. It may also also true that other strata corporations have taken a less cautious approach towards heat pumps. That does not necessarily make the apartment section's approach unreasonable or unfair. Based on the AGM vote, the apartment section's approach enjoys broad owner support. As noted, it is also based on rational considerations. I find the evidence shows the apartment section acted in good faith.

31. In summary, the apartment section's rejection of the applicants' request was not significantly unfair. I dismiss the applicants' claims.

TRIBUNAL FEES AND EXPENSES

32. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. The applicants were unsuccessful, so I dismiss their claim for CRT fees.

33. The apartment section must comply with the provisions in section 189.4 of the SPA, which includes not charging dispute-related expenses against the applicants.

DECISION AND ORDER

34. I dismiss the applicants' claims.

Eric Regehr, Vice Chair