Civil Resolution Tribunal

Date Issued: November 13, 2024

Files: ST-2023-004674
and ST-2023-009608

Type: Strata

Civil Resolution Tribunal

Indexed as: *Pinkney v. The Owners, Strata Plan VR 219*, 2024 BCCRT 1149

B E T W E E N :

CAROLYN PINKNEY

APPLICANT

A N D :

The Owners, Strata Plan VR 219

RESPONDENT

A N D :

CAROLYN PINKNEY

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member: Nav Shukla

INTRODUCTION

1. This decision is about 2 linked disputes that I find are a claim and counterclaim between the same parties about a fence and privacy screen. There is a third linked dispute, ST-2023-007716, that is related to these disputes but with a different party as applicant. Since the parties are not all the same, I have issued a separate decision for ST-2023-007716.

2. Carolyn Pinkney owns strata lot 30 (SL30) in the strata corporation, The Owners, Strata Plan VR 219 (strata). Ms. Pinkney says that SL30's previous owners lowered the fence on the west side of the common property deck attached to SL30 without the proper approvals. She says the current fence does not allow for adequate privacy, so she put up a movable privacy screen which the strata has told her to remove. Ms. Pinkney says that the privacy screen does not contravene any strata's bylaws, and the strata has improperly fined her. In ST-2023-004674, she seeks orders that the strata restore the fence to its "original height and design" and that it cancel all bylaw fines relating to the privacy screen. She also seeks an order that the strata disclose certain documents. Ms. Pinkney is self-represented.

3. The strata says Ms. Pinkney's privacy screen functions as a fence and she did not obtain the proper approvals before putting it up. It says that since Ms. Pinkney has refused to remove the unapproved screen, contrary to its bylaws, it has properly fined her. In dispute ST-2023-009608, the strata seeks orders that Ms. Pinkney remove the privacy screen at her own cost and pay all bylaw fines assessed to date. A strata council member represents the strata.

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). 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.

5. CRTA section 39 says the CRT has discretion to decide the hearing's format, 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 and that an oral hearing is not necessary.

6. 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.

7. Under CRTA section 123, in resolving disputes 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

8. The issues in these disputes are:

    a. Is Ms. Pinkney's privacy screen a significant change to the use or appearance of common property under *Strata Property Act* (SPA) section 71?

    b. Must Ms. Pinkney pay the assessed bylaw fines?

    c. Did the strata allow SL30's prior owner to change the fence's height without the proper approvals? If so, what remedy, if any, is appropriate?

    d. Must the strata disclose the requested documents?

EVIDENCE AND ANALYSIS

9. In a civil proceeding like this one, Ms. Pinkney must prove her claims on a balance of probabilities (meaning more likely than not). The strata must prove its counterclaim to the same standard. I have considered all the parties' submissions

and evidence but refer only to the evidence and argument that I find necessary to explain my decision.

Background

10. The strata is a 3-storey residential building with 33 strata lots. It was created in 1975 under the *Condominium Act* and continues to exist under the SPA. On December 20, 2004, the strata repealed all prior bylaws except for its rental bylaw and filed new bylaws with the Land Title Office. It has filed subsequent bylaw amendments over the years, but I find none of the later amendments are relevant here.

11. Strata lots 29 to 33 are all located on the building's third floor, with each having a fenced in common property roof deck attached to each respective strata lot. From the strata plan and photographs in evidence, I infer all 5 of these roof decks face north with ocean views straight ahead and views of downtown Vancouver to the east.

12. Ms. Pinkney purchased SL30 in February 2020. The common property roof deck attached to SL30 has a wooden fence on the east and west sides. The wooden fence is undisputedly common property and the strata's obligation to repair and maintain under the SPA and the bylaws. In 2018, SL30's previous owner obtained permission from the strata to reconstruct the roof deck and replace the fence. A December 1, 2018 alteration and indemnity agreement signed by SL30's former owner shows the new fence would be 6 feet by 12 feet on the southwest side, followed by a 42 inch high portion to the north edge. On the southeast side, the fence would be 6 feet by 8 feet and then 5 feet tall to the north edge. I infer these are the fence's current dimensions.

13. At the time Ms. Pinkney moved into SL30, SL29 was unoccupied. SL29's current owner, who is the applicant in the linked dispute ST-2023-007716, moved into SL29 in late 2021. Ms. Pinkney soon found the 42-inch portion of the fence bordering SL29 did not afford her enough privacy to enjoy the roof deck. After initially installing planters on top of the 42-inch-high section, Ms. Pinkney placed a wooden privacy screen constructed with wheels next to this lower section of the common property

fence. For some period of time, the privacy screen was nailed to the common property fence. However, Ms. Pinkney removed the nails after the strata sent her a December 19, 2022 bylaw infraction letter. Photographs and videos in evidence show that the privacy screen no longer has wheels but can be carried and moved aside by 2 people.

14. SL29's owner has repeatedly complained to the strata about the privacy screen, with the main complaint being that the 6 feet tall structure obstructs their view of downtown Vancouver. The strata issued bylaw infraction letters to Ms. Pinkney on November 16, 2022, and December 19, 2022, asking Ms. Pinkney to remove the privacy screen. Ms. Pinkney has refused to do so. A ledger document for Ms. Pinkney' strata lot account shows the strata has levied repeated $200 fines for the alleged continuing bylaw contravention since March 17, 2023.

Is Ms. Pinkney's screen a significant change under SPA section 71?

15. The strata argues Ms. Pinkney's privacy screen breaches SPA section 71.

16. SPA section 71 says that a strata corporation must not make a significant change in the use or appearance of common property unless the change is approved by a resolution passed by a 3/4 vote at an annual or special general meeting, or there are reasonable grounds to believe that immediate change is necessary to ensure safety or prevent significant loss or damage (see *Foley v. The Owners, Strata Plan VR 387*, 2014 BCSC 1333). As noted in *Foley*, the same test applies to owner changes.

17. There is no suggestion that the privacy screen is immediately required to ensure safety or prevent significant loss or damage. So, I will consider whether the screen is a significant change based on the following non-exhaustive criteria from *Foley* at paragraph 19:

    a. Is the change visible to residents and the general public?

    b. Does the change affect the use or enjoyment of a unit or an existing benefit of another unit?

c. Is there a direct interference or disruption because of the change in use or appearance?

d. Does the change impact the marketability or value of the strata lot?

e. How many units are in the strata and what is the strata's general use?

f. How has the strata governed itself in the past and what has it allowed?

18. The privacy screen is obviously visible to SL29's residents. Though it is made from wooden planks like the common property fence, the screen's planks are horizontal and not vertical, and the planks differ in width than the fence's planks. So, there is a lack of uniformity compared to the surrounding common property fence. From the strata plan and photographs in evidence, it appears the screen may also be visible to others using portions of the common property roof deck that are not fenced in.

19. Next, I find the privacy screen increases Ms. Pinkney's use and enjoyment of the common property roof deck and decreases SL29's residents' enjoyment of their strata lot and common property roof deck due to the loss of downtown views. Since the screen blocks SL29's residents view of downtown Vancouver, I find it likely that it has a negative impact on SL29's marketability and value. The screen also likely increases SL30's value somewhat due to the increased privacy it allows for.

20. As it is a residential building with desirable ocean and city views from certain vantage points, I find it likely that the owners with the attached roof decks likely paid more for these strata lots that offer better views than elsewhere in the building. Finally, it is clear from the evidence that while the strata has tried to govern itself in accordance with the SPA and its bylaws in the past, there have been multiple instances where the strata has allowed owners to change the height of constructed fences without first obtaining approval from ¾ of the owners.

21. As noted above, the list of criteria in *Foley* is non-exhaustive. So, there may be other additional factors to consider. The privacy screen here notably is not affixed to the common property deck or fence. So, I have considered whether the fact that it is

moveable weighs against a finding that it is a significant change under SPA section 71.

22. In *Reid v. The Owners, Strata Plan LMS 2503*, 2001 BCSC 1578, affirmed in 2003 BCCA 126, the Court of Appeal found that the placement of potted plants or trees, which could be removed from common property on request, were decorative and not a significant change. The British Columbia Supreme Court in *Reid* did note that the placement of some of the potted cedar trees may be significantly unfair to Mr. Reid because they obstructed his view. So, the court ordered the strata council to take steps to ensure the potted trees were placed in a location where there was no view obstruction.

23. I note that *Reid* was decided more than a decade before *Foley*, so the Court of Appeal in *Reid* did not have the benefit of considering the *Foley* criteria in coming to its decision. In any event, I find *Reid* distinguishable from the situation here. Ms. Pinkney's privacy screen is not meant to be decorative like the potted plants in *Reid*. Rather, its main purpose is to act as a barrier between SL29 and SL30. Further, unlike the plants in *Reid*, the screen only serves its purpose to Ms. Pinkney if it is placed where it currently is, which will always result in obstructing SL29's city view. In addition, although Ms. Pinkney says that the screen is moveable, the evidence suggests that it is typically left in place, obstructing SL29's view more times than not.

24. I find that the extent to which the permanent or temporary nature of a change means it is significant for the purposes of SPA section 71 is context and fact specific. It is a factor that must be weighed along with the other *Foley* criteria and some factors may be more significant than others depending on the circumstances. Here, I find the majority of the *Foley* criteria weigh in favour finding that Ms. Pinkney's privacy screen is a significant change to common property. While the screen is moveable, I find the direct impact it has on a desirable and valuable view is particularly significant.

25. For those reasons, I find Ms. Pinkney's privacy screen is a significant change in the appearance of common property under SPA section 71. As Ms. Pinkney undisputedly did not obtain approval from the owners with a 3/4 vote to place the screen on the common property roof deck, I order her to remove it.

Must Ms. Pinkney pay the assessed bylaw fines?

26. The strata argues that in addition to being a significant change, Ms. Pinkney's privacy screen breaches bylaws 3(1)(a),(c), and (e), 5(1)(e), 5(5), 6(1) and 7(1). As noted above, the strata has assessed continuing bylaw fines against Ms. Pinkney starting in March 2023. Ms. Pinkney argues that none of these bylaws apply to her privacy screen. She also says that the strata did not following SPA section 135's mandatory requirements before imposing the fines, so they are all invalid.

27. SPA section 135 sets out the process a strata corporation must follow before enforcing its bylaws, including imposing a fine. Section 135(1) says a strata corporation cannot fine an owner unless it has first received a complaint, given the owner written details of the complaint, and given the owner a reasonable chance to respond, including by holding a hearing if the owner requests one. The SPA does not specify exactly what a notice of complaint must include. However, in *Terry v. The Owners, Strata Plan NW 309,* 2016 BCCA 449, the court found notice that a strata is considering imposing a fine must include an identified bylaw or rule, warn of the possibility of fines, and provide sufficient detail of the nature of the complaint. Once a strata corporation has made its decision, SPA section 135(2) requires it to notify the owner in writing of its decision to impose a fine, as soon as feasible. These procedural requirements are strict, with no leeway. If the strata corporation fails to comply with them, the bylaw fines can be found invalid (see *Terry*, and *The Owners, Strata Plan NW 307 v. Desaulniers,* 2019 BCCA 343).

28. Although the strata relies on a number of bylaws in these disputes, it identified only bylaws 5(1)(e), 6(1) and (2), and 7(1) in its bylaw contravention letters to Ms. Pinkney. So, I find it unnecessary to consider bylaws 3(1)(a), (c) and (e) and bylaw 5(5) since the strata did not identify these as possible bylaws that Ms. Pinkney may be contravening, for the purposes of issuing fines under SPA section 135.

29. I turn now to consider whether the strata properly issued the continuing fines based on alleged violations of the bylaws identified in the strata's letters.

30. In the strata's November 16, 2022 letter, the strata said that Ms. Pinkney's privacy screen breached bylaw 5(1)(e). Bylaw 5(1)(e) says that an owner must obtain the strata council's written approval before making an alteration to a strata lot involving fences, railings or similar structures that enclose a roof deck. The privacy panel is undisputedly placed on common property. It in no way constitutes an alteration to a strata lot. So, I find bylaw 5(1)(e) does not apply here.

31. The strata sent Ms. Pinkney 2 letters on December 19, 2022. In one letter, the strata again referred to bylaw 5(1)(e). In the second letter, the strata said that by nailing the privacy screen to the common property fence, Ms. Pinkney had contravened bylaws 6(1) and (2) and bylaw 7(1). The letter said that Ms. Pinkney had 14 days to answer the complaint, including requesting a hearing and if she did not do so, the strata may issue fines against her for the contraventions.

32. Bylaws 6 and 7 both relate to common property alterations. Bylaw 6(1) requires an owner to obtain the strata's written approval before making an alteration to common property. Bylaw 6(2) says that as a condition of its approval, the strata may require an owner agree to take responsibility for any expenses relating to the alteration. Bylaw 7(1) says that where an owner has made an alteration without the strata council's written approval, the strata may require the owner to move the alteration at their own expense.

33. The strata argues that Ms. Pinkney's privacy screen is an alteration to common property, in particular, the common property fence, and so contravenes these bylaws since Ms. Pinkney put up the privacy screen without first obtaining the proper approvals.

34. Ms. Pinkney says that her movable privacy screen is not an alteration, relying on the British Columbia Supreme Court's decision in *The Owners, Strata Plan LMS 4255 v. Newell*, 2012 BCSC 1542. In *Newell*, an owner had placed a freestanding hot tub on limited common property. The court found that the hot tub was not

designed to be permanent and so was not an alteration that required strata approval.

35. Ms. Pinkney notes that following *Newell*, the CRT has found that sheds, spas or tents are not alterations so long as those items are unaffixed, portable, or freestanding (see *McBean v. Strata PlanEPS1766*, 2021 BCCRT 1288 and *Cupples v. Strata Plan LMS 2074*, 2024 BCCRT 395).

36. I agree with Ms. Pinkney that given the privacy screen is moveable and not affixed to the common property, it is not an alteration as that term is used in bylaws 6 and 7. However, the screen was undisputedly nailed to the common property fence for a period of time, during which it was not moveable. I find the screen was an alteration at that time, contrary to bylaw 6(1). The question then is whether the strata has properly imposed any fines for Ms. Pinkney's breach of bylaw 6(1) in December 2022.

37. Ms. Pinkney argues that the strata's fines are invalid because she received no notice of the strata's decision to fine her as required by SPA section 135(2) until the strata's June 30, 2023 letter. In the June 30 letter, the strata referenced only its November 16 infraction letter, not the later December 19 letter that said nailing the screen to the fence was contrary to bylaw 6(1).

38. The strata's evidence includes a February 10, 2023 letter referencing a December 16, 2022 unapproved fence alteration. This letter that the strata had decided to levy a $200 fine for the contravention. Ms. Pinkney correctly notes in her reply argument that the strata has failed to respond to her allegation that the strata did not comply with SPA section 135 before imposing the assessed fines.

39. Given Ms. Pinkney's assertion that the strata did not give her notice of its decision to assess fines until its June 30, 2023 letter, I infer that she alleges that she never received the strata's February 10 letter. The burden is on the strata to prove its entitlement to collect the fines. By failing to explain how or when it delivered the February 10 letter to Ms. Pinkney, I find it has failed to show that it satisfied SPA

section 135(2)'s requirement to give notice in writing "as soon as feasible" of its decision to impose fines.

40. Even if the strata did send this letter to Ms. Pinkney, I still find it failed to satisfy SPA section 135(2). This is because the February 10 decision letter does not specify whether the strata decided to fine Ms. Pinkney for her alleged violation of bylaw 5(1)(e) or bylaw 6(1). The December 16, 2022 complaint the strata refers to in the letter is not in evidence. As the strata issued two infraction letters on December 19, with each letter referencing different bylaws for the alleged fence alteration, it is unclear which bylaw the strata relied on for the basis of its decision in this letter. Given this ambiguity, even if the strata sent the February 10 letter, I find it unproven that it informed Ms. Pinkney of its decision to fine her for a breach of bylaw 6(1) specifically.

41. For these reasons, I find all of the fines are invalid and I order the strata to reverse them.

Did the strata fail to obtain proper approvals in 2018 before allowing the fence's height change?

42. As noted above, one of the orders Ms. Pinkney seeks is for the strata to restore the common property fence between SL29 and SL30 back to its "original height".

43. Ms. Pinkney says that in 2018 or 2019, the strata allowed SL30's previous owner to rebuild the fence at a lower height than it was previously. In particular, she says that the 42-inch-high section of the westside fence was higher prior to this rebuild. She argues this was done without the proper approvals, so the strata should restore that portion of the fence to its previous height at its own cost.

44. It is unclear exactly what height the now 42-inch-high section of the fence was prior to being rebuilt. However, it is undisputed that at least a portion of this section was lowered by the prior owners. A photograph of the fence from September 2011 shows the old fence with the disputed portion of the fence clearly lower than 6 feet, with views of downtown Vancouver still visible from SL29's roof deck. As noted above, Ms. Pinkney's 6-foot privacy screen obstructs SL29's downtown views. I am

satisfied that changing the 42-inch-high section of the fence to 6 feet as Ms. Pinkney wants the strata to do, would similarly block SL29's view.

45. Ms. Pinkney says that the strata failed to follow bylaw 5(5) when it approved the fence's height change in 2018. This bylaw says that for any proposed alteration in the size or use of patios, balconies or roof decks, or of the fences or railings that enclose them, in keeping with SPA section 71, the strata council must call a special general meeting to vote on the proposal, postpone the action until the annual general meeting, or deny the proposed alteration.

46. The strata says that more than 3/4 of the owners voted to allow the change to the fence's height at its September 25, 2018 special general meeting. However, Ms. Pinkney correctly notes that the owners did not specifically vote on any changes to the fence's height. In fact, the there is no evidence to suggest that the owners knew at the time of the vote that a section of the proposed new fence would be a different height than the fence being replaced. Rather, the owners passed a resolution authorizing $60,000 to be spent from the contingency reserve fund for removing and replacing the roof decks and surrounding fences for SL29, SL30, and SL31. Ms. Pinkney argues that since the strata did not follow the proper procedures set out in bylaw 5(5) for approving the height change, the strata should restore the fence back to its original height.

47. While I agree with Ms. Pinkney that it appears the strata at the time failed to obtain an owner's vote as required under bylaw 5(5) for the change in height, for the reasons that follow, I do not find it appropriate to order any remedy.

48. Both the court and the CRT undisputedly have authority to remedy a strata corporation's significantly unfair acts. 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, an owner's objectively reasonable expectations are a relevant factor but are not determinative.

49. As I found in *Stark v. The Owners, Strata Plan VR 2362*, 2024 BCCRT 607 at paragraph 33, this means that the strata has an obligation to treat all owners fairly. This means the strata, and by extension the CRT, must consider whether Ms. Pinkney's proposed resolution would be significantly unfair to any other owner.

50. Ms. Pinkney argues that the existing fence is significantly unfair to her as most of the other strata lots at the strata have higher fences, and thus more privacy. However, although the strata did not properly obtain the owner's approval before allowing SL30's previous owner to lower a portion of the westside fence, both Ms. Pinkney and SL29's current owner purchased their respective strata lots with the knowledge that this fence was lower on this side. I find it likely that they both purchased their strata lots with the assumption that the fence had been properly approved. So, given bylaw 5(5), I find that both Ms. Pinkney and SL29's owner had a reasonable expectation that the fence's height would not change from its current height without the owners' passing a resolution agreeing to the change. To order the strata to change the fence's height now, without any owner's vote, would be unjust and significantly unfair to SL29's owner given this reasonable expectation.

51. I also considered whether to order the strata to hold an owner's vote to retroactively approve the height change. In *Robinson v. The Owners, Strata Plan VR.2001*, 2023 BCCRT 161 at paragraph 44, the CRT noted a general proposition "that the CRT's (and court's) authority to remedy and prevent significant unfair acts and decisions can supersede mandatory SPA provisions in rare cases." While not binding, I agree with the CRT's reasoning in *Robinson* and find the same reasoning applies to strata bylaws. I find the situation here is one of those rare cases where the CRT must consider the strata's obligation to prevent significantly unfair acts and decisions when deciding whether to grant an order. I find ordering the strata to hold an owners' vote to attempt to retroactively approve the fence's height change would be significantly unfair for the reasons that follow.

52. First, there is the passage of time. It has been over 6 years since the owners' approved the deck and fence to be reconstructed, and just shy of 6 years since the new fence was installed. Second, the only two affected owners (Ms. Pinkney and

SL29's current owner) both bought their respective strata lots with the fence at its current height. The prior owners of SL29 and SL30 had also undisputedly agreed on the current height. Finally, and as noted above, it is not entirely clear in any event exactly how much the fence's height changed after the reconstruction in 2019. The downtown views that are visible from SL29 now appear to have also been visible with the fence at its previous height in 2011. This suggests that the change in height may not have been very significant. I find it would be unnecessarily burdensome to require the owners to vote to retroactively approve a change when the extent of the change itself is unclear.

53. Given all of these reasons, I find this is one of those rare cases where it is not appropriate to order the remedy of a retroactive vote. So, I decline to make any order to remedy the strata's breach of bylaw 5(5) and I dismiss this part of Ms. Pinkney's claim.

Ms. Pinkney's request for documents

54. Finally, in ST-2023-004674, Ms. Pinkney seeks an order that the strata disclose certain documents. Ms. Pinkney did not elaborate on this requested remedy in her written argument. The strata says that it has provided all requested documents that it has in its possession, and it appears at least some of the requested documents are in evidence. It is unclear whether there are any additional documents that Ms. Pinkney requested that have not been disclosed by the strata. As Ms. Pinkney did not indicate in her written argument that there are still documents outstanding, I find it likely that the strata has satisfied her document requests. So, I dismiss this part of Ms. Pinkney's claim as well.

CRT FEES AND EXPENSES

55. 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. Both parties were partially successful in their respective

disputes. So, I find it appropriate for each party to bear the cost of their own CRT fees and any dispute-related expenses.

56. The strata must comply with SPA section 189.4, which includes not charging dispute-related expenses against Ms. Pinkney.

ORDERS

57. I order that within 14 days of this decision:

    a. Ms. Pinkney remove the privacy screen from the common property roof deck, and

    b. The strata reverse all bylaw fines assessed to Ms. Pinkney's strata account relating to the privacy screen.

58. I dismiss the parties' remaining claims.

59. 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.

Nav Shukla, Tribunal Member