



Civil Resolution Tribunal

Date Issued: November 14, 2024

File: ST-2023-002541

Type: Strata

Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan LMS2602 v. Gebauer*, 2024 BCCRT 1153

B E T W E E N :

The Owners, Strata Plan LMS2602

APPLICANT

A N D :

FAYE GEBAUER

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

David Jiang

INTRODUCTION

1. The respondent, Faye Gebauer, owns strata lot 26 (SL26) in the applicant strata corporation, The Owners, Strata Plan LMS2602 (strata). The strata says that Ms. Gebauer smoked or allowed others to smoke in SL26 in breach of the bylaws. The strata seeks orders for Ms. Gebauer to 1) pay \$14,400 in bylaw fines, 2) stop smoking

in SL26, the balcony, and near the entrances of the building, 3) install a nicotine detecting, monitored smoke detector, and 4) pay \$20,000 in legal fees.

2. Ms. Gebauer denies liability. She admits to only a few prior smoking infractions and none since 2021. She also denies any recent smoking in SL26. She calls the strata's claim for legal fees "absurd".
3. A strata council member represents the strata. Ms. Gebauer represents herself.
4. For the reasons that follow, I find the strata has partially proven its 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). 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.
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. Some of the evidence in this dispute amounts to a "she said, they said" scenario. The credibility of interested witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or tribunal proceeding appears to be the most truthful. The assessment of what is the most likely account depends on its harmony with the rest of the evidence. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. This includes a wealth of consistent affidavit evidence that I refer to below.
7. Further, bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary. I also note that in *Yas v. Pope*, 2018 BCSC 282, at paragraphs 32 to 38, the British Columbia

Supreme Court recognized the CRT's process and found that oral hearings are not necessarily required where credibility is an issue.

8. 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.
9. 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

10. The issues in this dispute are as follows:

- a. Did Ms. Gebauer breach the strata's smoking bylaws?
- b. Must Ms. Gebauer pay fines of \$14,400?
- c. Should I order that Ms. Gebauer stop smoking in SL26, the balcony, and near the entrances of the building?
- d. Must Ms. Gebauer install a nicotine detecting, monitored smoke detector?

11. I will discuss whether Ms. Gebauer must pay \$20,000 in legal fees under this decision's section on dispute-related expenses and fees.

BACKGROUND, EVIDENCE AND ANALYSIS

12. In a civil proceeding like this one, the applicant strata must prove its claims on a balance of probabilities (meaning more likely than not). I have read all the parties' submissions and evidence but refer only to the evidence and argument that I find necessary to explain my decision.

13. The strata plan shows the strata consists of a low-rise building with 39 strata lots. SL26 is on the third floor and has a deck designated as limited common property for its use.
14. The strata filed a complete set of bylaws in March 2017. It filed an amended smoking bylaw 8.9 in August 2018. Bylaw 8.9 says that a resident or visitor must not smoke or vape in various places. These include a strata lot, common property within a building, a balcony, patio, or deck, or anywhere on the exterior common property that is within 5 meters of a door, window, or air intake.
15. The bylaws define smoke and smoking to include inhaling or carrying a lighted cigarette or other lighted smoking equipment that burns tobacco or weed substances. Vape or vaping are defined to include inhaling an active e-cigarette.
16. Bylaw 9.2 says that the strata may fine an owner a maximum of \$200 for each bylaw contravention.
17. I turn to the history of this dispute. The strata manager sent an April 6, 2021 letter to Ms. Gebauer. The letter said the strata had received complaints about tobacco smoke coming from SL26. In particular, it said a strata council member smelled smoke while visiting SL26. The strata warned Ms. Gebauer that a contravention of the smoking bylaws could lead to a fine of \$200 per incident. The strata provided Ms. Gebauer an opportunity to respond in writing or to request a hearing within 14 days.
18. Ms. Gebauer says that on August 5, 2021, the strata sent her a letter that enclosed her strata lot account. The account showed a \$200 fine for smoking. The strata does not dispute this, so I find this was likely sent, and sent in connection with the April 6, 2021 incident. The evidence before me lacks any specific decision letter about the smoking incident outlined in the April 6, 2021 letter. So, I find this was how she first learned of it. I will comment on the significance of this below.
19. The strata manager sent another letter to SL26 on September 3, 2021. The letter said it had received complaints from an unnamed person or persons on August 5, 13, 14, 30, 31, and September 1, 2021. As before, the strata warned Ms. Gebauer about the

possibility of a \$200 fine per incident and provided Ms. Gebauer an opportunity to respond in writing or request a hearing.

20. Ms. Gebauer emailed a reply on September 8, 2021. She denied smoke came from SL26. The September 14, 2021 strata council meeting minutes show that the strata council decided to impose 11 smoking bylaw fines for a total of \$2,200. I find this was likely for the incidents outlined in the September 3, 2021 letter, though the letter only outlined 6 incidents and not 11. There is no indication the strata sent Ms. Gebauer a decision letter about these fines.
21. After this, Ms. Gebauer sent a handwritten September 17, 2021 letter to the strata manager. She said that to her knowledge there was no smoking in SL26.
22. The May 11, 2022 strata council meeting minutes show the strata council decided to impose 47 fines at \$200 fines each, for a total of \$9,400. There is no indication this decision was connected to the April or September 14, 2021 letters. I find the strata does not claim for this amount in this dispute. I say this based on 1) the strata's submissions, 2) the fact that the strata's claim amount is \$14,400, and 3) the vast majority of this amount is explained by the following letter.
23. The strata next sent Ms. Gebauer a July 25, 2022 bylaw contravention letter. It attached dates and times for the bylaw contraventions. It said that the potential fines were \$12,600 for 63 incidents. The strata provided Ms. Gebauer an opportunity to respond in writing or to request a hearing within 14 days. It said that she had to meet with the strata council on August 17, 2022, to resolve the matter.
24. The August 2022 hearing is documented in the August 17, 2022 strata council meeting minutes. The strata agreed in principle to the following. It would reduce Ms. Gebauer's fines to \$1,000. In return, Ms. Gebauer would install a smoke detector that would detect nicotine or other smoking in the apartment. Ms. Gebauer says she understood at the time that it would be monitored by the company that installed it.
25. The strata's lawyer prepared a draft written agreement in September 2022. Ms. Gebauer agreed to pay \$1,000 in fines, ensure that there would be no smoking in

SL26, and install a smoke or nicotine detector. Ultimately, Ms. Gabauer refused to sign the agreement. She proposed a revised agreement that did not require any nicotine-detecting smoke detector.

26. I note that settlement negotiations are typically protected by settlement privilege. However, no party claimed privilege here or objected to information about the proposed agreement. This information is largely for background purposes. So, I considered this information.
27. Despite ongoing negotiations, in a November 3, 2022 letter, the strata advised Ms. Gebauer that it had fined her a total of \$12,600 for 63 separate bylaw contraventions. It said it would proceed to the CRT. It also offered to meet with Ms. Gebauer on November 30, 2022.
28. I will note here that Ms. Gebauer says that her strata lot account reflected the \$200 fine in August 2021 and a \$12,600 fine in November 2022. The evidence and submissions do not explain what happened with the \$9,400 fine documented in the May 11, 2022 strata council meeting minutes.
29. In any event, Ms. Gebauer attended a second hearing on November 30, 2022. The strata council meeting minutes indicate that Ms. Gebauer admitted to smoking in SL26 in the past but denied smoking presently. The strata council voted to pursue this matter further at the CRT. The strata applied for dispute resolution on March 8, 2023.

Issue #1. Did Ms. Gebauer breach the strata's smoking bylaws?

30. I first consider whether Ms. Gebauer breached the bylaws. The strata issued 3 letters under SPA section 135 dated April 6, September 3, 2021, and July 25, 2022. I find these letters outline the smoking incidents at issue.
31. The April 6, 2021 letter said the single incident was specifically about a strata council member's visit to SL26. The September 3, 2021 letter outlines 6 complaints about smoking on these dates: August 5, 13, 14, 30, 31, and September 1, 2021. The July 25, 2022 letter outlines 58 complaints from 2 different owners. They consist of 1) 27

complaints spanning from December 24, 2020, to July 15, 2022, and 2) 31 complaints spanning from June 4 to December 10, 2021. Ms. Gebauer says that this letter lacked detail. However, the strata provided dates and, for most incidents, exact times as well.

32. I find the affidavit evidence proves that someone in SL26 smoked during these times in breach of bylaw 8.9. According to the affidavits of strata council members CB, JR, and MJ, and the strata manager CT, the strata council received over 70 complaints about smoking. They are in the emails, logs, and text messages attached to the affidavits from renters and other occupants in the strata. Many of these occupants list multiple dates in their written complaints.
33. CB also says they received verbal complaints in addition to these. CB summarized all the dates of the complaints in their affidavit. The complaints are too numerous to summarize individually. In general, they complain of smoke coming from SL26. They outline by my count over 100 different separate incidents, each on different dates, from June 4, 2020 to August 21, 2022.
34. Notably, all the affidavits state Ms. Gebauer admitted at the November 30, 2022 hearing that her family member smoked in SL26. While technically hearsay, such evidence may be admissible in CRT proceedings. I admit and place weight on her admission. This is because I find them relevant, reliable, and admissible given the sheer number of affidavits confirming the evidence, and the fact that the admissions are against Ms. Gebauer's own interests. I say this even though the strata council meeting minutes did not mention this admission.
35. Further, Ms. Gebauer's submissions are vague on when or how much her family member smoked in SL26. She did not provide any evidence from her family member, such as a written statement, denying that they smoked. So, I also make an adverse inference against Ms. Gebauer and find her family member smoked in SL26.
36. My conclusion is reinforced by the fact that CB also says in their affidavit that they personally witnessed the family member smoking.

37. In summary, I am left with the fact that Ms. Gebauer's family member, who Ms. Gebauer acknowledges has smoked, and has been seen smoking, does not deny smoking on any of the dates complained of. Given this, I find it proven that Ms. Gebauer or her family member smoked in SL26 in breach of the bylaws as detailed in the letters. I also find the total number of incidents was approximately 100 based on CB's affidavit evidence. This is more than what the letters alone outline.

Issue #2. Must Ms. Gebauer pay fines of \$14,400?

38. I will first outline the procedural requirements for levying a fine. Section 135(1) of the *Strata Property Act* (SPA) says a strata corporation must not fine a person or require a person to pay the costs to remedy a bylaw contravention unless the strata has received a complaint about the contravention, given the owner the written particulars of the complaint in writing, given the owner a reasonable opportunity to answer the complaint, and given the owner notice in writing of its decision to impose the fine. SPA section 135(2) says that the strata must give the owner written notice of its decision to impose fines "as soon as feasible".
39. The BC Court of Appeal has found that strict compliance with SPA section 135 is required before a strata corporation can impose bylaw fines. The court has also determined that bylaw fines may be found to be invalid if the procedural requirements set out in section 135 are not followed. See *Terry v. The Owners, Strata Plan NW 309*, 2016 BCCA 449.
40. Strata bylaws 9.1(a) and (b) essentially duplicate the requirements of SPA section 135(1) and (2), respectively.
41. I next consider whether the strata complied with SPA section 135. I find that the strata received complains as required. Some of these are attached to the affidavits in evidence. I also accept CB's evidence that some of the complaints were verbal, and the complaints as a whole were about the dates listed in the affidavits and in the letters at issue.

42. I also find the strata provided written particulars of the complaints and a reasonable opportunity to respond. As noted above, the strata provided specific dates and said the contravention was about smoking. The strata did not identify the bylaw number in its 3 letters. I find this would have been preferable. However, it otherwise quoted bylaw 8.9(b) in full in all 3 letters, which was the key part of the bylaw 8.9. I might have reached a different decision had it not done so.
43. I find the strata provided Ms. Gebauer a reasonable opportunity to respond, in writing or through a hearing, in each of the letters dated April 6, September 3, 2021, and July 25, 2022. I find Ms. Gebauer took advantage of this opportunity as she attended the August 17, 2022 hearing.
44. However, I find the strata poorly documented its decisions to impose the fines and at times failed to provide Ms. Gebauer notice of its decision in breach of SPA section 135(2).
45. As stated earlier, I have found that the strata did not provide a decision letter about the incident outlined in its April 6, 2021 letter. I find the strata imposed the \$200 fine without providing a decision letter. So, I dismiss this part of the claim.
46. I have also found that the strata did not provide Ms. Gebauer a decision letter about fines of \$2,600 documented in the strata council meeting minutes. So, I dismiss this claim as well.
47. I have already said that I am not considering the \$9,400 in fines shown in the May 11, 2022 strata council meeting minutes. In the event that I am wrong, and this claim is properly before me, I would have dismissed it based on a lack supporting documentation. This includes a lack of any indication that the strata sent a decision letter about these fines.
48. In summary, I find the strata failed to comply with SPA section 135(2) for the above-described incidents. I must dismiss the strata's claim for those fines.
49. This leaves only the incidents outlined in the July 25, 2022 letter. I find the strata essentially made 2 decisions about the fines. As noted earlier, the strata council

decided on August 17, 2022, to pursue negotiations. It then subsequently made a second decision to levy the fines as shown in a decision letter.

50. I considered whether the strata provided its decision to fine Ms. Gebauer “as soon as feasible” as required under SPA section 135(2). The CRT has considered what this means in other decisions. In *The Owners, Strata Plan VR 2213 (Re)*, 2021 BCSC 905, the BC Supreme Court reviewed several CRT decisions and wrote, “Understandably, those decisions all suggest an owner should be told as promptly and expeditiously as possible if the strata is going to impose a fine”. What is “as soon as feasible” will vary with the circumstances. See *The Owners, Strata Plan VR 2213 (Re)* at paragraph 244.
51. In *The Owners, Strata Plan KAS 933 v. Jacobsen*, 2019 BCCRT 915, the CRT found that over a month for written notice of a fine was not “as soon as feasible”, particularly as the evidence showed the strata met quickly to address other matters concerning the owner. The CRT also said that if the strata had decided to fine the owner closer in time to written notice, this was still not “as soon as feasible” in the circumstances. See *Jacobsen* at paragraph 33.
52. In *Hamaguchi v. The Owners, Strata Plan LMS 3146*, 2018 BCCRT 307, the CRT found that almost 2 months between deciding a bylaw complaint and providing a written decision did not comply with SPA section 135(2). In *Collins v. The Owners, Strata Plan NES 2865*, 2023 BCCRT 577, the CRT found that an unexplained and nearly 3-month delay between the strata council decision to impose a fine and its letter advising the owners of that decision breached SPA section 135(2).
53. Here, 102 days passed between the strata’s July 25, 2022 letter and the November 3, 2022 decision letter. This is nearly 3 months, even when accounting for the 2 weeks Ms. Gebauer had to provide a reply to the bylaw infraction letter.
54. I find it unproven that the strata made its decision as soon as feasible. I say this because the documentary evidence does not show when the strata first decided to fine Ms. Gebauer for the incidents outlined in the July 25, 2022 letter. As noted earlier, the strata council decided on August 17, 2022, to pursue negotiations. There is no

indication that the strata council held any meeting prior to the November 3, 2022 letter to appropriately decide to levy the fines.

55. In summary, if the strata decided to levy the fines at the August 2022 meeting, then I find this would be too long to decide the matter. If it decided to levy the fines later, then there is no documentation to show that it properly held another strata council meeting to reach this decision.
56. Given the above, I must conclude that the strata breached SPA section 135(2). I say this even though I have found that Ms. Gebauer or her visitor family member breached the smoking bylaw, as discussed above. I must dismiss the strata's claim for payment of \$14,400 in bylaw fines. Ms. Gebauer did not file a counterclaim, so I need not make any specific orders about reversing the fines on SL26's account.

Issue #3. Should I order that Ms. Gebauer stop smoking in SL26, the balcony, and near the entrances of the building?

57. The strata says Ms. Gebauer failed to address the smoking complaints and continues to breach the bylaw "on an all but daily basis". The strata seeks an order for Ms. Gebauer to stop smoking in SL26, on its balcony, or near the entrance to the strata's building. Ms. Gebauer denies this is an ongoing issue.
58. I have already found that Ms. Gebauer or her visitor family member breached the smoking bylaws. I also take notice of the fact that secondhand smoke is a health hazard.
59. CB's affidavit evidence shows that after August 21, 2022, there was only 1 reported complaint about smoking on March 10, 2024. Although only 1 incident, I find it concerning that smoking continues to persist. I find the strata should not have to rely on mere promises by Ms. Gebauer that she or her visitors will stop smoking. This is particularly so, given that owners and occupants in the strata have made many dozens of complaints since April 2021. I note that under SPA section 130 the strata may fine an owner, visitor, or occupants. So, I find an order that requires Ms. Gebauer to monitor her visitors is appropriate.

60. I order Ms. Gebauer to immediately comply with bylaw 8.9 by refraining from smoking and ensure her visitors refrain from smoking in the prohibited areas of the strata, including SL 26, the SL26 balcony, and near the entrances of the strata's building.

Issue #4. Must Ms. Gebauer install a nicotine detecting, monitored smoke detector?

61. The strata seeks an order for Ms. Gebauer to install a nicotine detecting, monitored, smoke detector. It did not specify who should pay for it. I note that August 2022 strata council meeting minutes show that the strata originally proposed paying for the detectors and for Ms. Gebauer to reimburse the strata.

62. Ms. Gebauer says this remedy is unnecessary and an unwarranted intrusion.

63. Under SPA section 133, a strata corporation may do what is reasonably necessary to remedy a contravention of its bylaw or rules, including doing work on or to a strata lot. Under SPA section 133(2), the strata may require that the reasonable costs of remedying the contravention be paid by the person who may be fined from the contravention under SPA section 130.

64. I find that under SPA section 133, I may make the order requested. For essentially same reasons as above, I find the strata's requested order is warranted. The smoke detector provides the strata a reasonable, rationally connected method to ensure Ms. Gebauer and any of her visitors are not smoking in SL26. While somewhat intrusive, I find the monitored smoke detector is reasonably necessary given the duration, frequency, and severity of the complaints in evidence.

65. The strata did not present evidence of how much it would be to install the smoke detector it seeks, or what ongoing costs may be. So, I will specify in the order that the costs must be reasonable.

66. I order that Ms. Gebauer provide the strata, on 48 hours' written notice, access to SL26 to install, repair, and maintain, as the case may be, a nicotine detecting, monitored, smoke detector, at reasonable cost and at Ms. Gebauer's expense.

CRT FEES AND EXPENSES

67. Under section 49 of the CRTA, 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. I see no reason in this case not to follow that general rule.
68. I find the strata was partially successful. So, I order Ms. Gebauer to reimburse the strata \$122.50 in CRT fees. As I find it was reasonably necessary for the strata to start a claim, I dismiss Ms. Gebauer's claim for reimbursement of \$25 in CRT fees.
69. The strata claims \$20,000 in legal fees as a dispute-related expenses. Ms. Gebauer denies liability for the fees.
70. Under CRT rule 9.5(3), the CRT will not order one party to pay another party's legal fees except in extraordinary circumstances. Rule 9.5(4) says that to determine whether a party must pay lawyer fees charged to another party, the CRT may consider the complexity of the dispute, the degree of the lawyer's involvement, whether the conduct of a party has caused unnecessary delay or expense, and any other factors the CRT considers appropriate.
71. In *Parfitt et al v. The Owners, Strata Plan VR 416 et al*, 2019 BCCRT 330, the CRT found its authority to order legal fees was also analogous to an order of special costs and considered the claim on that basis. In *Garcia v. Crestbrook Forest Industries Ltd.*, 1994 CanLII 2570 (BC CA), the Court of Appeal said that special costs should be ordered against a party when their conduct in the litigation was reprehensible, in the sense of deserving of rebuke or blame.
72. Here, the strata did not provide documentary evidence to support the claimed legal fees. For example, there are no invoices or statements of account from the strata's lawyer. So, I find this claim is unproven by evidence.
73. Alternatively, I also find it unproven that this dispute involved extraordinary circumstances. Although it involved a great deal of evidence, I do not find the issues were particularly complex. There is little evidence that shows the strata's lawyer was highly involved. There is also little evidence that Ms. Gebauer caused unnecessary

delay or expense, aside from persistently breaching the bylaw. I also do not find her conduct reprehensible as there is no evidence of improper motive, abuse of process, or misleading the CRT. See *Hirji v. Owners Strata Corporation VR44*, 2016 BCSC 548.

74. For both those reasons, I dismiss the strata's claim for reimbursement of legal fees.

75. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against Ms. Gebauer.

ORDERS

76. I order Ms. Gebauer to immediately comply with bylaw 8.9 by refraining from smoking and ensuing her visitors refrain from smoking in the prohibited areas of the strata, including SL 26, the SL26 balcony, and near the entrances of the strata's building

77. I order that Ms. Gebauer provide the strata, on 48 hours' written notice, access to SL26 to install, repair, and maintain, as the case may be, a nicotine detecting, monitored, smoke detector, at reasonable cost and at Ms. Gebauer's expense.

78. I order Ms. Gebauer to, within 30 days, reimburse the strata \$122.50 in CRT fees.

79. The strata is entitled to post-judgment interest under the *Court Order Interest Act*.

80. I dismiss the strata's remaining claims.

81. 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.

David Jiang, Tribunal Member