



Civil Resolution Tribunal

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Type: Strata

Civil Resolution Tribunal

Indexed as: *Shaw v. The Owners, Strata Plan BCS 815*, 2020 BCCRT 809

BETWEEN:

EMMA SHAW, DUSTIN NADEAU, SUSAN LEESON, COLLEEN
BALEZ, BRONIC BALEZ, and DYLAN SMITH

APPLICANTS

AND:

The Owners, Strata Plan BCS 815

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Sherelle Goodwin

INTRODUCTION

1. The respondent strata corporation, The Owners Strata Plan BCS 815 (strata), is a mixed use strata corporation. The strata is represented by the strata council president, CD.

2. The applicants Emma Shaw, Dustin Nadeau, Susan Leeson, Colleen Balez, Bronic Balez, and Dylan Smith, are all residential strata lot owners. The applicants are self-represented.
3. The applicants say the strata council did not have the authority to pass a resolution on July 10, 2019 as the resolution amends the strata's standard bylaw 3 or exempts commercial strata lot (SL) 1 from the bylaw. The applicants also allege the strata council president acted in a conflict of interest in voting on the resolution, as he owns SL 1. The applicants ask for an order rescinding the July 10, 2019 resolution and requiring the strata council to comply with the *Strata Property Act* (SPA). The applicants also ask for reimbursement of \$771.17 for legal advice on the resolution and the alleged conflict of interest.
4. The strata says the resolution does not exempt anyone from the noise bylaw and says it acted in accordance with the SPA at all material times. It asks that this dispute be dismissed.

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. It must also recognize any relationships between dispute parties that will likely continue after the CRT's process has ended.
6. The CRT has discretion to decide the format of the hearing, including in writing, by telephone, videoconferencing, or a combination of these. I am satisfied an oral hearing is not required as I can fairly decide the dispute based on the evidence and submissions provided.
7. The CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in court. The

CRT may also ask the parties and witnesses questions and inform itself in any way it considers appropriate.

8. Under section 123 of the CRTA and the CRT rules, 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. Does the CRT have jurisdiction over the alleged conflict of interest?
 - b. If so, did the strata council members act in a conflict of interest by voting on the resolution?
 - c. Does the July 10, 2019 resolution effectively change bylaw 3 or exempt SL 1 from the bylaw?
 - d. Must the strata rescind the July 10, 2019 resolution?
 - e. Must the strata reimburse the applicants \$771.17 in legal fees?

EVIDENCE AND ANALYSIS

10. In a civil claim such as this one the applicants must prove their claims on a balance of probabilities. While I have read all the submissions and evidence provided, I only refer to that necessary to explain and give context to my decision. While the strata provided submissions, I note it did not provide any evidence supporting its position.

Background

11. The strata consists of 10 strata lots; 4 commercial strata lots on the first floor of the building (SL 1 to 4) and 6 residential strata lots on the second floor (SL 5-10). CD and his partner own commercial strata lot 1 which includes a large patio designated

as limited common property (LCP) for the use of SL 1. CD and his partner run a general store and café in SL 1, including the patio. The café holds a liquor licence.

12. Ms. Shaw and Mr. Nadeau own strata lot 9 (SL 9), which is located directly above half of SL 1. Ms. Leeson owns SL 5, the Balezes own SL 7, and Mr. Smith owns SL 6. While SL 5, 6 and 7 are not directly over SL 1, they all have front facing balconies which afford a view of the SL 1 patio.

13. Section 53(1) of the SPA and the strata's May 19, 2004 schedule of voting rights allots 1 vote for each residential strata lot, for a total of 6 residential votes. SL 1 and SL 4, both owned by CD and his partner, have a total of 4 votes. It is undisputed that the other 2 commercial strata lot votes are not used as those strata lots are owned by the strata and leased to other companies.

14. From the evidence and submissions before me it is clear that there is a history of conflict between the applicants and the current strata council, particularly CD. The strata council, as it was prior to July 10, 2019, consisted of CD, Ms. Leeson, the owner and resident of SL 8 and the owner of residential SL 10 (RW). It is undisputed that RW rents SL 10 to CD.

15. It is undisputed that the municipality has a noise bylaw which precludes amplified music. According to the June 18, 2019 municipality council meeting minutes, the council relaxed the bylaw to allow live amplified music on the café patio on weekends, noon and 8 pm until the end of the summer. On July 16, 2019 the municipality amended the details of when and how the café could provide live, amplified music.

16. The applicants say the café held outdoor events with amplified live music on three occasions in June 2019. Based on the applicants' videos, I find 2 such events occurred. There is no evidence supporting the third event.

17. In a June 24, 2019 notice the applicants complained to the strata that the events' loud amplified music contravened the strata's bylaw 3 and disrupted their quiet enjoyment of their homes. The applicants requested a strata council hearing.

18. The SPA Schedule of Standard Bylaws apply to the strata. Bylaw 3 states that an owner must not use a strata lot, or common property (which includes LCP) in a way that:
- a. Causes a nuisance or hazard to another person,
 - b. Causes unreasonable noise
 - c. Unreasonably interferes with the rights of other persons to use and enjoy their own strata lot, or common property,
 - d. Is illegal, or
 - e. Is contrary to the intended purpose of the strata lot or common property.
19. On July 10, 2019, the strata council passed a resolution that the owner of SL 1, “has not and will not be in breach of By-Law 3” by virtue of holding events with live music, amplified or not, within SL 1 or on the patio, or by virtue of running the business generally, on the basis that those events are held, or the business run, within the terms of the café’s business licences and/or the terms of local municipal legislation.

Conflict of Interest

20. The July 10, 2019 strata council meeting minutes show that all council members voted on the resolution, including CD and RW. Both CD and RW voted in favour of the resolution, along with the owner of SL 8, while Ms. Leeson voted against the resolution
21. The applicants say that CD should not have voted on the resolution due to a conflict of interest between his business interests and the interests of the strata as a whole. They also say RW may be in a conflict of interest, as he has a business relationship with CD by renting him SL 8. The strata denies CD or RW has a conflict of interest and says the council, at all times, acted honestly and in good faith in represented the majority of the strata lot owners.
22. Section 32 of the SPA addresses conflict of interest by strata council members. It says that when a strata council member has a direct or indirect interest in a contract

or transaction with the strata, or a matter that is or is to be the subject of consideration before the council, that council member must disclose their interest, abstain from voting, and leave the strata council meeting during the discussion and subsequent vote.

23. Section 33 of the SPA sets out available remedies for section 32 breaches relating to strata transactions and contracts (see *Dockside Brewing Company Ltd. v. The Owners, Strata Plan LMS 38371*, 2007 BCCA 183). Those remedies are specifically excluded from CRT's jurisdiction, under section 122(1)(a) of the CRT Act. This results in SPA section 32 breaches also being excluded from CRT jurisdiction (see, for example, *The Owners, Strata Plan NW 177 v. Martin*, 2020 BCCRT 285).
24. It is arguable that section 33 remedies do not apply where the alleged conflict relates to a strata council decision unrelated to a strata contract or a strata transaction, as is the case in this dispute. In such cases, the CRT would maintain jurisdiction over findings of conflicts of interest. However, given my findings below, I find I need not make a final determination on this matter.
25. Section 32 of the SPA refers to a direct or indirect interest in the subject that could result in the creation of a duty or interest that materially conflicts with the council member's duty or interest as a council member. Section 31 of the SPA states that each council member must act honestly and in good faith with a view to the best interests of the strata corporation by exercising the care, diligence and skill of a reasonably prudent person in comparable circumstances. The duties of strata council members under SPA section 31 are due to the strata corporation, and not to individual strata lot owners (see *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc.*, 2016 BCSC 32).
26. Decisions interpreting the SPA conflict of interest provisions recognize that almost all council members are also owners and may benefit from council's decisions. To establish a conflict of interest, "something more" is required beyond the fact that a council member may have received some benefit from a council decision (see *Page*

v. Section 1 of the Owners Strata Plan NW 2009, 2017 BCCRT 84, which is not binding on me but I find helpful).

27. I find CD directly benefits from the strata's July 10, 2019 decision to endorse live and amplified music and events at the café. As the owner of the café, CD has a financial interest in widening the scope of café events and entertainment. Further, as the owners of SL 1, CD and his partner are the sole beneficiaries of the strata's July 10, 2019 decision. I find that CD's interests as café owner and SL 1 owner directly conflict with his duty to act in the best interests of the strata in regard to the July 10, 2019 resolution. I find that CD had a direct interest in the July 10, 2019 resolution and, as such, should have abstained from voting on the resolution in accordance with SPA section 32.

28. I do not make the same finding about RW. I do not agree with the applicants that RW is in conflict because CD rents RW's residential strata lot. While RW has a business relationship with CD, it does not relate to the café. I find RW does not have a direct interest in the July 10, 2019 resolution which conflicts with his duty to act in the best interests of the strata.

29. Although I find CD was in a conflict, I find nothing turns on it. If CD had abstained from voting on the resolution, as required, the resolution still would have passed with 2 votes for (RW and SL 8 owner) and 1 against (Ms. Leeson). I find the resolution is not invalid due to the invalidity of the voting procedure.

Effect of the July 10, 2019 resolution

30. The July 10, 2019 strata council meeting minutes indicate that CD presented the resolution at the meeting for the purpose of getting the strata's support for live music at the café. At the meeting CD said that Bylaw 3 did not preclude amplified music, unless the music was unreasonable.

31. The applicants say the strata should have obtained a $\frac{3}{4}$ vote from all residential, and all commercial, strata lot owners as the resolution essentially amends bylaw 3 or provides an exemption from the bylaw for SL 1. They say the strata would not be

able to obtain the needed votes to amend the bylaw so, instead, the council drafted this resolution to effectively amend the bylaw without authorization. The strata says the resolution does not, and is not intended to, amend bylaw 3 and that it does not fetter the strata council from enforcing the bylaw against owners acting unreasonably.

32. I find the July 10, 2019 resolution does not effectively amend bylaw 3 as it does not effectively expand or restrict the ways all owners can, or cannot, use their own strata lots and common property. The resolution applies only to the owner of SL 1, rather than the strata owners collectively. Rather, I find the resolution clearly exempts the owner of SL from bylaw 3 by finding the owner “has not and will not be” in breach of the bylaw by holding events with live music. Essentially, the strata has decided on past and future potential complaints of bylaw breaches without investigating the complaints, or potential complaints.

33. Section 26 of the SPA says that the strata must enforce its bylaws, subject to some limited discretion, such as when the effect of the breach is trivial (see *The Owners, Strata Plan LMS 3259 v. Sze Hang Holdings Inc.*, 2016 BCSC 32). A strata council is permitted to deal with complaints of bylaw violations as it sees fit, so long as it complies with the principles of procedural fairness and is not “significantly unfair” to any person who appears before the council (see *Chorney v. Strata Plan VIS 770*, 2016 BCSC 148).

34. It is the obligation of the strata council, on behalf of the strata, to address any potential future complaint about SL 1’s use of live or amplified music and enforce bylaw 3 against SL 1, if necessary. In this case I find the strata has fettered its discretion to deal with bylaw violation complaints, both past and present, by passing the July 10, 2019 resolution.

35. On July 17, 2019, a member of the strata council asked the applicants whether they wished to proceed with the hearing requested on June 24, 2019. The member asked the applicants to clarify their complaint in light of the July 10, 2019 strata council resolution and the Village council’s decision to allow amplified live music. This

supports my finding that the strata intended the July 10, 2019 resolution to exempt the owner of SL 1 from bylaw 3 in relation to complaints about the amplified music.

36. Section 123(2) of the CRTA gives the tribunal the power to make an order directing the strata to do something, if the order is necessary to prevent or remedy a significantly unfair action, decision or exercise of voting rights. This is similar to the Supreme Court's power under SPA section 164.

37. The BC Court of Appeal considered the language of SPA section 164 in *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44. The test established in *Dollan* was restated in *The Owners, Strata Plan LMS 1721 v. Watson*, 2018 BCSC 164 at paragraph 28:

- a. What is or was the expectation of the affected owner or tenant?
- b. Was that expectation on the part of the owner or tenant objectively reasonable?
- c. If so, was that expectation violated by an action that was significantly unfair?

38. Apply the test to the facts before me, I find the applicant owners have an expectation that the strata will investigate bylaw complaints, including complaints about SL 1 breaching bylaw 3 by playing live or amplified music, as such complaints arise. Given the obligation of the strata, and the strata council, to investigate and enforce the bylaws set out in the SPA, I find the applicants' expectation is objectively reasonable. I further find the strata violated that expectation by passing the July 10, 2019 resolution which effectively determines SL 1 has not, and will not, breach bylaw 3 by playing live or amplified music. This decision is obviously made without investigating past complaints or any future potential complaints and, as such, is significantly unfair to the applicants.

39. As I find the July 10, 2019 resolution is significantly unfair, I order that it be rescinded.

40. The applicants ask for an order directing the strata council to follow the SPA. As a general rule, everyone is expected to follow the law. I find it unnecessary to make an order requiring the strata to comply with the SPA because it is already legally obligated to do so. I decline to make the requested order.
41. I pause here to note that the strata convened a hearing on July 17, 2019 to hear the applicants' June 24, 2019 complaint. While the applicants described their concerns with the manner in which the hearing was conducted, they have not requested any remedy such as a new hearing. For that reason, I will not further address the July 17, 2019 hearing.

Legal Fees

42. The applicants say the strata refused to obtain legal advice about the July 10, 2019 resolution so the applicants were left with no choice but to pay for it on their own. From the July 10, 2019 strata council meeting minutes, I find the strata told Ms. Leeson that, if she wished to pursue legal advice on the matter, she could do so at her own expense.
43. The lawyer's first invoice on October 11, 2019 is for a telephone call regarding a potential CRT action. The second invoice is for time spent reviewing strata documents and drafting a complaint letter to the strata about the July 10, 2019 resolution. Based on these invoices I find the legal fees relate solely to this dispute.
44. As set out in CRT rule 9.5 the CRT will not order reimbursement of legal fees except in extraordinary circumstances, which I find do not exist here. I decline to order reimbursement of the applicants' legal fees.

CRT FEES AND EXPENSES

45. 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 find no reason not to do so in this case. I order the strata to reimburse the applicants \$225 in CRT fees. Other than legal fees, which I

addressed above, neither party has requested reimbursement of any dispute-related expenses.

ORDERS

46. I order the strata to:

- a. immediately rescind the July 10, 2019 strata council resolution, and
- b. within 14 days of this decision, reimburse the applicants a total of \$225 in CRT fees.

47. The remainder of the applicants' claims are dismissed.

48. Under sections 57 and 58 of the CRTA, a validated copy of the CRT's order can be enforced through the Supreme Court of British Columbia. The order can also be enforced by the Provincial Court of British Columbia 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.

Sherelle Goodwin, Tribunal Member