



# Civil Resolution Tribunal

Date Issued: August 20, 2020

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Type: Strata

Civil Resolution Tribunal

Indexed as: *Mosicki v. The Owners, Strata Plan KAS 1424*, 2020 BCCRT 932

B E T W E E N :

RANDY MOSICKI

**APPLICANT**

A N D :

The Owners, Strata Plan KAS 1424

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Kate Campbell, Vice Chair

## INTRODUCTION

1. The applicant, Randy Mosicki, lives in the respondent strata corporation, The Owners, Strata Plan KAS 1424 (strata).

2. Mr. Mosicki bid on a project to rebuild 2 outdoor pergolas located in the strata. He says *the* strata wrongly awarded the contract to another contractor, Kelowna Deck and Rail (KDR). Mr. Mosicki says the awarded contract is inferior to his quote in both price and quality, and that the strata failed to perform due diligence and make a prudent decision. He seeks damages of \$25,000.00 for wrongful loss of work, an order that the strata stop work on the pergolas, and an order that KDR supply quality solid cedar lumber matching that in Mr. Mosicki's bid.
3. The strata denies Mr. Mosicki's claims. It says its decision to award the pergola contract to KDR was reasonable, it complied with legislation and strata bylaws in awarding the contract, and it had no duty to hire Mr. Mosicki.
4. Mr. *Mosicki* is self-represented in this dispute. The strata is represented by a strata council member.
5. *For* the reasons set out below, I dismiss Mr. Mosicki's claims.

## **JURISDICTION AND PROCEDURE**

6. 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.
7. The CRT has discretion to decide the format of the hearing, including in writing, by telephone, videoconference, 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.
8. 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.

9. 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.
10. In his submissions, Mr. Mosicki describes himself as a strata lot owner. However, the Land Title Office documents show that his strata lot is actually owned by a corporation. The strata has not disputed that Mr. Mosicki is a strata lot owner, so I accept for the purpose of this decision that he is the owner or director of the company that owns the strata lot he lives in.

## ISSUES

11. The *issues* in this dispute are:
  - a. Was the strata obligated to award the pergola contract to Mr. Mosicki?
  - b. If so, what remedies are appropriate?
  - c. Must the strata use cedar lumber for the pergolas?

## BACKGROUND AND EVIDENCE

12. I have read all the evidence provided but refer only to evidence I find relevant to provide *context* for my decision. In a civil proceeding like this one, Mr. Mosicki, as applicant, must prove his claims on a balance of probabilities.
13. The strata was created in 1994, and consists of 74 apartment-style strata lots. The strata says, and Mr. Mosicki does not dispute, that the subject poolside pergolas are *located* on common property. Since they are not shown on the strata plan, I find the pergolas are common assets, as defined in section 1 of the *Strata Property Act* (SPA).

14. Mr. Mosicki says that upon learning in 2017 that the pergolas needed replacement, he initiated discussions about the work with the strata council. He says the council had no scope of work or project specifications, and had not yet arranged funding for *the* work. Mr. Mosicki says council invited his quote and said he should continue to inquire about the project and when funds might become available.
15. Mr. Mosicki says he provided a quote in October 2017. He says that he later attended several council meetings, and explained why cedar lumber with metal beam capping was the best materials choice. He says he explained that laminated veneer *lumber* (LVL) and similar engineered wood products were not a good choice, as they cannot be exposed to the elements.
16. Mr. Mosicki says he continued to inquire about the project, and learned in October 2019 that the strata had funds for the work. He confirmed that the council and the *strata's* property manager had copies of his October 2017 quote. Shortly after the October 30, 2019 council meeting, he learned the contract had been awarded to KDR. This is confirmed by the October 30, 2019 meeting minutes, which show that the council members considered 3 quotes, including Mr. Mosicki's, and voted unanimously to hire KDR.

## **REASONS AND ANALYSIS**

17. For the following reasons, I find the strata was entitled to award the pergola contract to KDR, and did not breach any duty in doing so.
18. Mr. Mosicki submits that the strata's decision to award the work to KDR was *contrary* to public procurement laws in Canada. I find it is not necessary to summarize or analyze this legislation, as it does not apply to the strata. A strata corporation is a private body, similar to a business corporation. It is not a public organization, such as a government or crown agency.
19. The actions of a strata corporation are governed by the SPA, and the strata's bylaws. The strata repealed and replaced all of its previous bylaws by filing new bylaws at the Land Title Office in January 2019. I find these are the bylaws

applicable to this dispute. There are no bylaws about how the strata must obtain bids or award contracts for work.

20. *SPA* section 3 says the strata is responsible for managing and maintaining the strata's common property and common assets for the benefit of the owners. *SPA* section 72 says the strata is responsible to repair and maintain common property and common assets. The *SPA* also does not specify any requirements for obtaining bids or awarding repair or maintenance contracts.
21. *Aside* from his submission about procurement law, which I have addressed above, Mr. Mosicki has 2 primary arguments in this dispute. First, he says the strata treated him unfairly by denying him the contract because he is an owner in the strata. Second, Mr. Mosicki says the strata acted unreasonably by agreeing to use LVL rather than cedar lumber for the pergolas. I will address these arguments in turn.

### ***Unfair Treatment of Owner***

22. Mr. Mosicki says the strata acted unfairly by refusing to award him the pergola *contract* because he is an owner. He says that on November 3, 2019 council president JG told him he did not get the contract was because he was an owner in the strata.
23. I find that the evidence before me establishes that there were several reasons why the strata hired KDR rather than Mr. Mosicki. JG documented his conversation with Mr. Mosicki in a November 4, 2019 email to the other council members. He said the *discussion* was "heated". JG wrote that he told Mr. Mosicki that the council had a strong level of comfort with KDR, and wanted it to handle the work. JG wrote that he also told Mr. Mosicki he personally had concerns about hiring an owner for a large contract because it would be tough to live next to each other and deal with any problems with the work.
24. I *place* significant weight on JG's email, as it was written immediately after the conversation in question. I also place some weight on the written notes of council *member* LS, which were made a few weeks after October 30, 2019 council meeting.

These notes say the council was confident that KDR would meet its construction deadline, and was in favour of using LVL because it would not warp and would be protected from water damage if the exposed beams were capped.

25. Based on JG's email, LS's notes, and the evidence that the council reviewed each written quote, I accept that the council considered the relative merits of LVL, as proposed by KDR, versus the cedar proposed by Mr. Mosicki.
26. SPA section 31 sets out the standard strata council members must meet in *performing* their duties. It says council members must act honestly and in good faith, with a view to the best interests of the strata, and exercise the care, diligence, and skill of a reasonably prudent person in comparable circumstances. In *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc.*, 2016 BCSC 32 at paragraph 267, the BC Supreme Court (BCSC) found that the duties of strata council members under SPA section 31 are owed to the strata corporation, and not to individual strata lot owners. This means that a strata lot owner cannot be successful in a claim against a strata corporation for duties owed by its strata council members under section 31. I therefore find Mr. Mosicki, as a strata lot owner, cannot succeed in a claim about section 31.
27. Under CRTA section 123(2), the CRT may make an order directed at the strata corporation, the council or a person who holds 50% or more of the votes, if the order *is* necessary to prevent or remedy a significantly unfair action, decision or exercise of voting rights. This is similar to the BCSC's power under SPA section 164. Although not specifically argued, I find the essence of Mr. Mosicki's argument is that the strata treated him significantly unfairly by awarding the contract to KDR.
28. The BC Court of Appeal considered the language of section 164 of the SPA in *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44. The test established in *Dollan* was restated by the BCSC 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?
29. In other cases, such as *Radcliffe v. The Owners, Strata Plan KAS1436*, 2015 BCCA 448, courts have held that the sole question to be determined is whether the disputed action was significantly unfair, such as defined in *Chan v. Strata Plan VR 151*, 2010 B.C.J. No. 2425, meaning oppressive, or unfairly prejudicial, burdensome, harsh, wrongful, lacking in probity or unfair dealing, or done in bad faith.
30. *Under* either test, I find Mr. Mosicki has not proven that the strata's decision to hire KDR was significantly unfair. Specifically, I find his expectation that the strata would hire him to do the work was not objectively reasonable. First, the strata had no obligation under the SPA or bylaws to hire Mr. Mosicki. Second, the BC Supreme Court (BCSC) has published a number of decisions that say the standard that a strata must meet in fulfilling its repair and maintenance duties under SPA section 72 is reasonableness: see for example *Hirji v. The Owners Strata Corporation Plan VR 44*, 2015 BCSC 2043 at para. 146 and *Oldaker v. The Owners, Strata Plan VR 1008*, 2007 BCSC 669 at para. 54.

### ***Use of LVL***

31. Mr. Mosicki says, and I agree, that the price difference between his quote and KDR's was minor. He says the strata's decision to use KDR's bid, and replace the pergolas using LVL, was unreasonable. I do not agree. Mr. Mosicki provided copies of 3 articles from the internet about why engineered wood products may be inappropriate for outdoor use. However, I am not persuaded by these articles because they did not address the specific type and brand of LVL used by KDR, they did not address the capping material and method proposed by KRD, and did not address the specific site, climate, and building application of the strata's pergolas.

32. Mr. Mosicki also gave his own opinion that cedar lumber was strongly preferable to LVL, and that his pergola design would provide the best value to the strata. However, I do not accept Mr. Mosicki's opinion as expert opinion evidence, as contemplated in CRT rule 8.3. First, he is not a neutral or objective witness, as he stands to benefit from the outcome of the dispute. Second, he did not provide evidence of his qualifications, as required in rule 8.3(2). For these reasons, I place no weight on Mr. Mosicki's opinion that LVL was an unreasonable or improper choice for pergola material.
33. Even if Mr. Mosicki had provided an opinion from an objective expert that cedar lumber was preferable, I find the strata still had the discretion to choose the KDR quote. The following passage from the BCSC's decision in *Weir v. Owners, Strata Plan NW 17*, 2010 BCSC 784 is relevant:

[28] In resolving [repair and maintenance] problems...there can be "good, better or best" solutions available. Choosing an approach to resolution involves consideration of the cost of each approach and its impact on the owners, of which there is no evidence before the court. Choosing a "good" solution rather than the "best" solution does not render that approach unreasonable such that judicial intervention is warranted.

[29] In carrying out its duty, the [strata] must act in the best interests of all the owners and endeavour to achieve the greatest good for the greatest number. That involves implementing necessary repairs within a budget that the owners as a whole can afford and balancing competing needs and priorities: *Sterloff v. Strata Corp. of Strata Plan No. VR 2613*, 38 R.P.R. (3d) 102, [1994] B.C.J. No. 445 and Browne.

[30] The course of action chosen by the [strata] may or may not resolve the problems. If it does not, further remedial work, including separation of the two drainage systems, may be required. The respondent acknowledges that it will undertake that remedial work if it proves reasonably necessary.



[31] It may even prove to be the case that the approach of the petitioner is the wiser and preferable course of action. Again, that does not render the approach of the respondent unreasonable.

[32] Disagreements between strata councils and some owners are not infrequent. However, courts should be cautious before inserting itself into the process, particularly where, as here, the issue is the manner in which necessary repairs are to be effected.

34. Mr. Mosicki submits that this reasoning from *Weir* does not apply in this case, because *Weir* was about whether a strata acted to adequately fix a drainage problem where the repair options were unclear and abstract and the problem had not yet been totally discovered. Mr. Mosicki says that in contrast, the pergola replacement is a one-time project, with no chance to rebuild later. While I agree that the repair problem in *Weir* was more complex and unknown, I find the general principle set out in *Weir* at paragraph 32 that stratas should be granted deference in repair and maintenance decisions still applies. As stated in *Leclerc v. The Owners, Strata Plan LMS 614*, 2012 BCSC 74 at para. 61, the strata council's decision is not required to be perfect. Rather, it must be reasonable, with fair regard for the interests of all concerned.
35. I find the strata's decision to hire KDR and use LVL for the pergolas was reasonable in the circumstances. JG's email and LS's notes set out the factors considered, and show the council concluded that LVL was acceptable as long as the exposed beams were capped. I find Mr. Mosicki has not provided expert evidence establishing otherwise. Even if cedar would have been better, which I find is not *proven* by the evidence before me, cases such as *Weir* and *Leclerc* establish that the strata is not unreasonable even where it chooses a poorer materials option. I also note that Mr. Mosicki provided no evidence, other than his own opinion, to address the strata's concerns about potential warping of cedar.
36. For all of these reasons, I find Mr. Mosicki's expectation that the strata would hire him to *replace* the pergolas was not objectively reasonable. I therefore find the

strata's decision was not significantly unfair to Mr. Mosicki. Finally, I find the strata's decision to award the contract to KDR, and to use LVL, was reasonable in the circumstances, and met the strata's repair and maintenance duties under the SPA.

37. For all of *these* reasons, I dismiss Mr. Mosicki's claims.

38. Mr. Mosicki *requested* an order that KDR supply cedar lumber for the pergolas, rather than LVL. KDR is not a party to this dispute, so I could not make any order against it in any event.

## **CRT FEES AND EXPENSES**

39. Mr. Mosicki was unsuccessful in this dispute. In accordance with the CRTA and the CRT rules I find he is not entitled to reimbursement of tribunal fees or dispute-related *expenses*. The strata did not pay fees or request reimbursement, so I order none.

40. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-*related* expenses to Mr. Mosicki.

## **ORDERS**

41. I dismiss Mr. Mosicki's claims and this dispute.

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Kate Campbell, Vice Chair