Civil Resolution Tribunal

Date Issued: September 18, 2020

File: ST-2019-008992

Type: Strata

Civil Resolution Tribunal

Indexed as: *Pedersen v. The Owners, Strata Plan LMS 1725*, 2020 BCCRT 1057

B E T W E E N :

LEANNE PEDERSEN and DARREN PEDERSEN

APPLICANTS

A N D :

The Owners, Strata Plan LMS 1725

RESPONDENT

REASONS FOR DECISION

Tribunal Member: J. Garth Cambrey, Vice Chair

INTRODUCTION

1. This is a strata property dispute about recovery of legal fees and expenses relating to a proposed alteration of common property (CP).

2. The applicants, Leanne Pedersen and Darren Pedersen, own a strata lot (SL94) in the respondent strata corporation, The Owners, Strata Plan LMS 1725 (strata). I

infer that Ms. Pedersen changed her surname as a different surname appears on Land Title Office (LTO) records as co-owner of SL94. In addition, correspondence provided as evidence matches the LTO records. Ms. Pedersen represents the applicants, and the strata is represented by a strata council member.

3. The applicants say the strata misled them about approving a proposed alteration they requested to a CP roof area located next to SL94. The applicants say they incurred design costs for their proposed changes to the roof area and were forced to incur legal costs to protect their rights.

4. The applicants seek orders that the strata reimburse them a total of $26,621.50, made up of $24,213.00 in design costs and $2,408.50 in legal fees.

5. The strata disagrees with the applicants and says it acted reasonably and in accordance with the *Strata Property Act* (SPA) and its bylaws. The strata says it has exclusive legal rights and control of the CP roof area and is responsible to repair and maintain it. I infer the strata denies misleading the applicants and requests the applicants' claims be dismissed.

6. For the reasons that follow, I dismiss the applicants' claims and this dispute.

JURISDICTION AND PROCEDURE

7. 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.

8. The CRT has discretion to decide the format of the hearing, including in writing, by telephone, videoconferencing, email, 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.

9. 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.

10. The applicable CRT rules are those in effect at the time the Dispute Notice was issued.

11. 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.

PRELIMINARY ISSUES

12. In their submissions, the applicants claim the property manager and a council member exhibited "duplicitous behaviour" which misled the applicants about their request to alter the roof area. Neither the property manager nor the council member are named respondents in this dispute so to the extent the applicants' claims are against these 2 individuals, or the property management firm, I dismiss them. This is because the CRT cannot issue an order against a non-party.

13. I also note that Section 31 of the SPA sets out the standard of care each council member must follow when exercising the powers and performing the duties of the strata. It says that each council member 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. I find a strata council member's standard of care would capture allegations of "duplicitous behaviour".

14. In *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc*., 2016 BCSC 32, at paragraph 267, the BC Supreme Court said that the duties of strata council members under section 31 of the SPA 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.

15. The court's decision in *Sze Hang* is a binding precedent, and the tribunal must apply it. Therefore, even if the applicants had named the strata council member as a respondent in this dispute, which they did not, following *Sze Hang* I would have found the tribunal has no jurisdiction to decide the owner's claim for "duplicitous behaviour" as it falls under section 31 of the SPA.

ISSUES

16. The issues in this dispute are:

    a. Did the strata approve the applicants' requested alterations to the CP roof area?

    b. Are the applicants entitled to use the CP roof area?

    c. Are the applicants entitled to reimbursement of design costs and legal fees? If so, what is an appropriate amount?

BACKGROUND, EVIDENCE AND ANALYSIS

17. In a civil proceeding such as this, the applicants must prove their claims on a balance of probabilities.

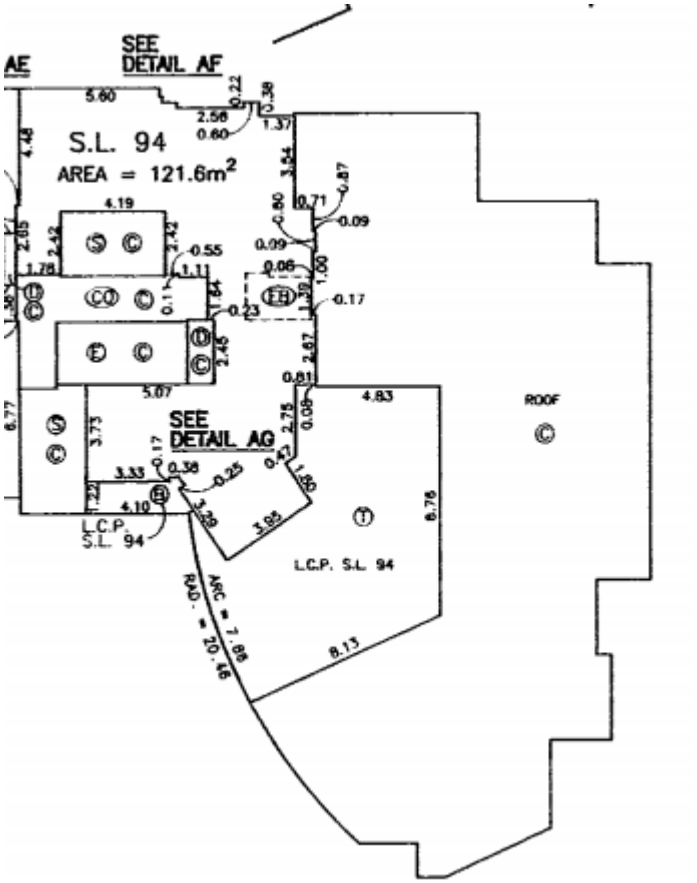
18. I have read all the submissions and evidence provided but refer only to information I find relevant to provide context for my decision.

19. The strata is a mixed-use strata corporation created in November 1994 under the *Condominium Act* and continues to exist under SPA. It consists of 257 strata lots in 3 buildings located in Vancouver, BC.

20. SL94 is located on the 9th floor of a high-rise building that abuts to an 8-storey building in the strata complex. The 8-storey building's roof is at the floor level of SL94.

21. The strata plan shows a limited common property (LCP) terrace designated for the exclusive use of SL94 (LCP terrace) is located on the 8-storey building roof. The

strata plan also shows the remaining 8-storey building's roof is CP (roof area). The roof area is the subject of this dispute and is only accessible from the LCP terrace. The roof area is covered with concrete pavers and has railings around its perimeter attached to the parapet walls. Below is an excerpt from page 20 of the strata plan that shows the locations of SL94, the roof area, and the LCP terrace.



22. A metal and glass divider or partition wall about 6 feet high separates the LCP terrace from the roof area. There are 2 gates in the divider that allow access between the LCP terrace and roof area. The parties disagree whether the gates are locked, but I find that information is not relevant to this dispute.

23. The strata filed bylaw amendments with the Land Title Office (LTO) on February 22, 2002 that repealed and replaced all registered bylaws and the Schedule of Standard Bylaws under the SPA. LTO records show 11 subsequent bylaw amendments were filed between February 22, 2002 and January 1, 2018. I find the bylaw amendments that are relevant to this dispute are those filed February 22,

2002, November 27, 2008, January 18, 2013, and January 28, 2019. I discuss the applicable bylaws in this dispute below, as necessary.

24. I note at the outset there is minimal relevant evidence about the applicants' claims.

25. The applicants purchased SL94 in July 2015.

26. It appears they then requested approval to make changes. In a November 3, 2015 letter from the strata to the applicants, the strata denied the applicants' request "to replace the metal and glass divider with planters and yew tree hedges". The letter stated the request had been denied because "the area behind the glass and metal divider is considered common property, not to be accessed by residents". I find the CP described as being "behind" the divider is the subject roof area. The applicant's letter requesting the alterations was not provided.

27. The strata's November 2015 letter also advised the applicants that a ¾ vote resolution must be approved at a general meeting of the strata to approve a short-term lease of the CP for the applicants to be permitted access to and use of the roof area.

28. By July 2016, the applicants had enquired of the strata council how to make alterations to the roof area. In a July 19, 2016 email from a strata council member, the applicants were advised to make a detailed plan of what they wanted to do with the roof area, including how much of the roof area they wished to use and what they wanted to place on it, such as Astroturf and planters. The council member advised the applicants to contact RDH Engineering (RDH), an engineering firm familiar with the strata, at their cost, once they had drafted their plan. I find the email implies RDH would need to approve the applicants' plan so they could then apply to the strata council for their alteration request to be placed on the agenda of an upcoming general meeting.

29. On September 13, 2016, the applicants emailed their plan to RDH with a copy to the strata council member. The council member acknowledged the email and replied that once RDH had given its approval, the matter could move forward.

30. On January 23, 2017, the strata wrote to the applicants asking that they ensure their child did not use the roof area to play for safety reasons. Photographs attached to the letter show planters were placed on the roof area although there was no mention of the planter alterations in the letter.

31. On May 28, 2018, the strata wrote to the applicants advising they were in contravention of bylaw 8.1 as they had placed "furniture, carpet and planters" on the roof area without prior written approval of the strata. No photographs were included with the letter but based on other photographs provided, I accept alterations had been made to the roof area as described by the strata.

32. On June 1, 2018, RDH emailed the applicants what appears to be a response to the applicants' September 13, 2016 letter. No explanation was provided for 20-month delay in correspondence. RDH advised that the extra weight on the roof as proposed by the applicants appeared to be insignificant. RDH expressed concern over other alterations that might have occurred to roof area and suggested it would be more efficient to clarify this with the strata than to have RDH research its records.

33. The June 18, 2018 strata council meeting minutes show the applicants attended the meeting to "request approval to use" the roof area with the goal of improving "the overall visual beauty and the outside space for all Residents". The minutes state the applicants agreed to maintain and clean the roof area if they were provided exclusive use on a short-term basis. The minutes also state the strata council recommended the applicants submit "details of their request along with the engineer's approval there would be no weight issues to install planters and the height of the railings is to code" for the strata council's approval. The minutes also state that if the strata council approved the request, the applicants would be asked to have appropriate resolutions prepared for approval at the upcoming annual general meeting (AGM). In the meantime, the applicants were requested not to use the roof area and to remove the "soccer net and movable items" until approval was given by the strata at the AGM.

34. The July 17, 2018 strata council meeting minutes show the applicants attended the meeting. The minutes state the strata council would review the applicants' proposal to use the roof area on a short-term basis and advise them in August. A copy of the applicants' request is not in evidence.

35. In a September 2018 email exchange between the applicants and the strata's property manager, the strata thanked the applicants for removing the items that had been placed on the roof area. It does not appear the full email exchange has been provided, but on September 6, 2018 the property manager states she did not personally see an issue with "sitting on the common [roof area]". The property manager believed the strata council's concerns were about their child playing soccer and skateboarding on the roof area. The email includes a statement that the property manager "is waiting to hear back from [the strata] council". The applicants appear to interpret the property manager's personal comment as approval for the alterations. I disagree. I find the only reasonable interpretation is that the strata had not yet made a decision on the applicants' request.

36. There is no evidence that shows the strata expressly denied the applicants' request. However, based on the entirety of the submissions, I find the strata did so for reasons that are not clear.

37. As stated in the October 30, 2018 strata council meeting minutes, the council decided to propose a bylaw amendment to expressly prohibit the use of the roof area (as well as other CP areas) to all residents. The proposed bylaw 4(2) was apparently approved at the November 27, 2018 AGM as it was registered at the LTO on January 1, 2018, before this dispute was started.

38. No relevant correspondence about the applicants' claims subsequent to the November 27, 2018 AGM is before me.

Did the strata approve the applicants' requested alterations to the roof area?

39. In the Dispute Notice, the applicants allege the strata told them, after they bought SL94, that it was their responsibility to remove debris left by on the roof area by

previous owners, and to "beautify and clean" the roof area. While it may be true that there were discussions between the parties about the roof area that led to the applicants' requested alterations, there is no evidence before me to support the applicants' allegation. I find the opposite is true in that the strata advised the applicants not to allow their child to use the roof area, or place items on it without the strata's consent. This is supported by the strata's November 2015 and September 2017 letters to the applicant that say the roof area is not to be accessed by residents or their child.

40. Bylaw 8.1, registered February 22, 2002 and amended on January 18, 2013, required the applicants to obtain the strata's prior written approval before altering the roof area. Bylaw 8.1 gives the strata council discretion to approve a request to alter CP. Based on the correspondence and photographs provided in evidence, I find the strata clearly did not approve the applicants' requested alterations. Rather, the evidence shows the strata advised the applicants on the process it required them to take to place items on the roof area as early as July 2016. The evidence also shows that the applicants went ahead and made at least some of their requested alterations in April or May 2018, without first receiving the written approval of the strata. This is confirmed in the photograph attached to the strata's May 28, 2018 letter to applicants and in the June 18, 2018 strata council meeting minutes.

41. To the extent the applicants argue the strata's actions were unreasonable, I find they were not. One of the strata's requirements was that the applicants confirm the weight load of the proposed planters would meet the design requirements of the roof area. I find this was a reasonable request given the size of the roof area and the unknown number of planters requested by the applicants.

42. Further, significant changes to the use or appearance of CP, including the roof area, require the strata owners to pass a ¾ vote under section 71 of the SPA, except in circumstances to ensure safety or prevent significant loss, which I find do not apply here. There is no direct evidence that the strata concluded the applicants' proposed alteration was significant, but I find the strata's determination that a ¾ vote was required to approve the requested CP alteration was reasonable.

43. As for the strata's reference to short-term use of the roof area, I find the strata's requirement for a ¾ vote is based on section 76 of the SPA. Section 76 says that the strata may give an owner or tenant exclusive permission or special privilege in relation to common property that is not LCP. Such permission or privilege may be given for up to 1 year, may be subject to conditions, and may be renewed for further terms of up to 1 year. The strata may also cancel the permission or privilege granted by providing the owner or tenant reasonable notice.

44. I find that section 76 of the SPA does not expressly state a ¾ vote is required. The CRT has found the strata council has authority to grant exclusive permission or special privilege over CP under section 76. See for example, *Hales v. The Owners, Strata Plan NW 2924*, 2018 BCCRT 91 and *Creasy v. The Owners, Strata Plan BCS 4064*, 2020 BCCRT 724. However, that does not mean that the strata may not seek a ¾ vote from its owners before granting exclusive permission or special privilege over CP. I find the strata's requirement that ¾ vote be passed was reasonable.

45. The applicants say they were not given the opportunity to present their request at a general meeting. However, given the strata did not approve the applicants' request to alter the roof area, I find there was no need for the applicants' alteration request to go before the strata owners at a general meeting.

Are the applicants entitled to use the roof area?

46. During the course of the applicants enquiring and applying for permission to alter the roof area, there were times when the strata asked them not to use the roof area or allow their child to use the roof area. For example the strata's January 23, 2017 and May 28, 2018 letters to the applicants mentioned above.

47. In their submissions, the applicants say they were not given a direct answer to their question about whether they could use the roof area, given it was CP. While I agree with the applicants there is no evidence to suggest the strata provided a direct answer to this question, I find the question is now moot. This is because the strata passed a new bylaw 4(2) at its November 27, 2018 AGM that expressly prohibits

access to or use of the roof area, as well as other CP areas, by any "owners, tenants or occupants". The bylaw was registered at the LTO on January 28, 2019 and became effective on that date.

48. The applicants raised no concern about the notice or voting procedure relating to passing bylaw 4(2), nor the validity of the bylaw. Therefore, I find the applicants, their tenants, or other occupants of SL94, including their child, are not permitted to access or use the roof area.

49. For all of these reasons, I find applicants failed to obtain proper approval to alter the roof area. I do not find they were in any way misled by the strata.

Are the applicants entitled to reimbursement of design costs and legal fees? If so, what is an appropriate amount?

50. As noted, the applicants seek reimbursement of $24,213.00 for what they refer to as "design costs" and $2,408.50 for legal fees. The strata says it is responsible for neither.

51. As for design costs, CRT rule 129 in place at the time this dispute was started (now CRT rule 9.5(1)) says the unsuccessful party will usually be ordered to pay the successful party's reasonable dispute-related expenses. Given the applicants were unsuccessful, I find they are not entitled to recover their design expenses and I dismiss the applicants' claim in this regard.

52. Even if the applicants were successful, I would not have ordered reimbursement of their claimed expenses. The reason is that the applicants submitted copies of order confirmations and estimates relating to materials, plants, labour, and deliveries, but did not provide copies of invoices. It is also unclear from the applicants' submissions what exactly they are claiming for. Based on the photographs and submissions, it appears the estimates provided are for items the applicants' purchased and placed on the roof area rather than costs associated with designing the proposed alterations. Given my finding the applicants did not obtain the strata's approval, I would not have ordered reimbursement of expenses relating the items placed on the roof area without approval.

53. As for legal fees, the applicants provided 2 invoices from their lawyer for time billed in September and October 2018. CRT rule 130 in place at the time this dispute was started (now rule 9.5(3) and (5)) stated that the CRT will not order one party to pay another party's legal fees in strata property disputes such as this, unless extraordinary circumstances exist.

54. In *Parfitt et al v. The Owners, Strata Plan VR 416 et al*, 2019 BCCRT 330, the CRT member, as she then was, set out a detailed review of what constitutes extraordinary circumstances. Although not binding on me, I find the reasoning in *Parfitt* persuasive and I accept it. Following the principles in *Parfitt*, I do not find extraordinary circumstances exit here. Therefore, I dismiss the applicants' claim for reimbursement of legal fees.

CRT FEES AND EXPENSES

55. As noted, 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. The strata was the successful party in this dispute, but it did not pay CRT fees or claim dispute-related expenses, so I order none.

56. I have already addressed the applicants' claim for legal fees and expenses above. They did not claim additional dispute-related expenses.

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

ORDER

58. I dismiss the applicants' claims and this dispute.

J. Garth Cambrey, Vice Chair