



Civil Resolution Tribunal

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File: CS-2023-001892

Type: Societies and Cooperatives

Civil Resolution Tribunal

Indexed as: *Kenning v. Residences at Spirit Ridge Owner Association*,
2024 BCCRT 189

B E T W E E N :

BARBARA KENNING and DAVID W. KENNING

APPLICANTS

A N D :

RESIDENCES AT SPIRIT RIDGE OWNER ASSOCIATION

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

David Jiang

INTRODUCTION

1. This society dispute is about repair and maintenance of property. The applicants, Barbara Kenning and David W. Kenning, are members in the respondent society, the Residences at Spirit Ridge Owner Association (RSROA). I wrote this decision while also considering the submissions and evidence in dispute numbers CS-2022-008854

and CS-2022-009323. I did this in order to avoid inconsistent findings of fact as these disputes both involve RSROA and Mrs. Kenning. That said, I wrote this separate decision because this dispute has slightly different parties.

2. The Kennings say that RSROA failed to repair their deck to a reasonable standard. They seek orders for RSROA to fully replace the vinyl deck covering membrane or permit the Kennings to repair it themselves to a reasonable standard, including a full replacement of the vinyl deck membrane, and reimburse the Kennings for that work. The Kennings also seek reimbursement of \$1,911 for an engineering report from Rider Engineering.
3. RSROA denies liability. It says repaired the deck to a reasonable standard. It also says it should not have to reimburse the Kennings for the report, partly because it did not ask them to obtain it.
4. Barbara Kenning represents the Kennings. A director represents RSROA.
5. For the reasons that follow, I find the Kennings are partially successful.

JURISDICTION AND PROCEDURE

6. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over certain society claims under section 129 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.
7. 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. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. 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 in the interests of justice and fairness.

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 131, 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. Must I order RSROA to repair or replace the vinyl deck membrane or reimburse the Kennings for that work?
- b. Must I order RSROA to reimburse the Kennings \$1,911 for the Rider Engineering report?

BACKGROUND, EVIDENCE AND ANALYSIS

11. In a civil proceeding like this one, the Kennings as applicants must prove their claims on a balance of probabilities. This means more likely than not. I have read all the parties' submissions and evidence but refer only to the evidence and argument that I find relevant to provide context for my decision.
12. I will repeat here some of the background from my decision for dispute numbers CS-2022-008854 and CS-2022-009323. Documents show RSROA incorporated on March 14, 2013. Its constitution, filed January 24, 2018, shows it is a member-funded society. Its purposes include operating specific lands under a lease and subleases as if RSROA was a strata corporation under the *Strata Property Act* (SPA), and that a strata plan had been registered for those lands. Documents show the RSROA manages 44 residential duplex homes.

13. The RSROA's bylaws strongly resemble those for a strata corporation. The bylaws in evidence are dated March 28, 2023. The relevant bylaws follow.
14. Bylaw 1.1(t) says that owners mean, in general terms, the members that sublease homes. It is undisputed the Kennings are owners as they sublease unit 6.
15. Bylaw 1.1(z) defines a residence to include a detached or semi-detached building intended for occupation as a residence.
16. Bylaw 1.1(e) defines common property (CP). CP is the portions of the property which are owned, leased or otherwise administered by RSROA and intended for the use in common by owners, and all improvements, common facilities and equipment on that land intended for owner use. I find this definition is very similar to the definition of CP under the SPA, though without reference to a strata plan.
17. Bylaw 1.1(n) defines limited common property (LCP) as CP that is designated for the exclusive use of an owner of a residence, including non-structural components of decks. It is undisputed that the Kennings' deck is LCP.
18. Bylaw 3.3(b) says RSROA must repair and maintain LCP. However, that duty to repair and maintain LCP is restricted to, among other things, repair and maintenance that occurs less often than once a year. I note this bylaw is very similar to bylaw 8 of the Schedule of Standard Bylaws under the SPA.
19. Bylaws 18.3, 18.6, and 18.7 together require owners to pay monthly fees to cover operating costs on the basis of the habitable square area of an owner's residence. I find this is very similar to the collection of strata fees under the SPA.
20. Finally, RSROA has a board of directors. Bylaws 6 through 9 outline their powers and responsibilities. These include controlling, managing, supervising, and administering the assets and affairs of RSROA for the benefit of all members. Again, I find board servers a similar function to a strata council under the SPA.
21. RSROA also registered bylaws on May 16, 2022, before the current March 2023 version. However, I find the differences are not relevant to this dispute.

22. I turn to the background. The Kennings purchased their sublease of unit 6 in 2014. A schematic shows unit 6 is attached to unit 5. Pictures show unit 6 has an elevated outdoor deck that is attached to unit 5's deck.
23. The evidence shows the following. The unit 6 deck is a wood-framed structure. It has a Tufdek-brand vinyl surface membrane. Photos show that the Tufdek membrane has a mottled grey appearance. The deck also has a front extension, or balcony, that was originally covered in the same Tufdek membrane. I will refer to this as the balcony area. A January 31, 2023 invoice shows the balcony area measures roughly 5 x 22 feet. A schematic indicates the deck, including the balcony area, is 473 square feet.
24. Some of the unit 6 deck history is outlined in an August 26, 2022 memo from RSRAO to its members, also called owners under the bylaws. According to the memo, in 2017 or 2018 the Kennings reported issues with the wood framing. In particular, the main support beam had twisted over time. This also twisted the balcony area railing and caused water to pool on the deck. RSROA's insurer paid for repairs in 2019. At the time, Ecora Engineering and Resource Group Ltd. (Ecora) conducted reviews and recommendations documented in an August 2019 report. A contractor conducted several deck framing repairs as shown in an October 10, 2019 report. The insurer then closed its file.
25. In a May 3, 2019 email the Kennings complained to RSROA that the repairs had stabilized but not resolved the twisting beam issue. The Kennings subsequently obtained the August 4, 2020 Rider Engineering report. An invoice shows the Kennings paid the claim amount of \$1,911.
26. The August 2020 report said that despite the repairs, there were still deficiencies affecting the long-term integrity of the deck framing material and safety. One concern was that the guardrail would not meet loading requirements. Rider Engineering recommended measures that included repairing or fully replacing the vinyl deck membrane after consultation with a specialist.
27. Approximately a year later, on August 3, 2021, the Kennings asked RSROA to repair the deck. They cited the August 2020 report. Around this time, the September 9, 2021

depreciation report said the unit 6 deck required repairs “ASAP” because of the crooked guardrail and tilted posts. The other evidence, noted above, indicated that the twisting beam contributed to these issues. The depreciation report estimated repairs would cost \$25,889. Ecora also provided a December 10, 2021 report that said the guardrail and twisted support beam needed repairs.

28. In late 2021 and through the early months of 2022, RSROA tried to have their insurer repair the deck. Claim documents show the insurer refused as it decided these were maintenance issues and not an insured structural issue.
29. RSROA hired Rider Engineering to complete drawings and plan for necessary repairs, as show in its February 6, 2022 proposal and a June 21, 2022 invoice. The recommendations included replacing the twisted beam. Rider Engineering did not provide specific advice on how to replace or repair the deck membrane, and I will return to this point below.
30. RSROA held a July 14, 2022 special general meeting (SGM) for owners to pass a 3/4 vote resolution to pay for repairs from the contingency reserve fund. The resolution failed to pass as only 53% of owners voted in favour.
31. The board wrote in its August 26, 2022 memo to the owners that it intended to proceed with the repairs in any event. RSROA said it could do so because of bylaw 18.9(f). In general terms, it said that RSROA could make necessary CRF expenditures without a 3/4 vote to ensure safety or prevent significant loss or damage. RSROA said the unit 6 deck required repairs to ensure the safety of its owners and guests and prevent further physical damage to the deck and the attached unit 5 deck.
32. RSROA obtained an estimate to fully replace the vinyl deck membrane for unit 6, including the balcony area. A July 11, 2022 estimate shows this would have cost \$15,697.50. RSROA ultimately decided to pursue the cheaper option to only replace the vinyl membrane on the balcony area, which cost \$2,920.05, as discussed below. RSROA provided vinyl samples to the Kennings from Tufdek and another brand, Deksmart. RSROA asked the Kennings to pick a sample for use on the balcony area.

33. The Kennings objected to RSROA's approach in October and early November 2022 emails to RSROA, a November 8, 2022 letter from their lawyer, and other correspondence. First, the Kennings said that a partial vinyl repair would breach Tufdek's recommendations. This would void the existing Tufdek warranty and provide no warranty about any failure of the seam between the new and old vinyl membranes. Second, they said that all the samples provided by RSROA did not match the colour or pattern of the existing vinyl membrane. They said that a partial replacement would result in a visually inconsistent and unappealing appearance. The Kennings also noted the preexisting deck vinyl was out of production.
34. RSROA or its installer eventually chose to use vinyl from Deksmart for the balcony area. On November 7, 2022, RSROA's contractor started repairs. A December 5, 2022 invoice from one contractor shows it cost \$10,920 to replace the twisted support beam with a new one. This work also required a crane rental for \$3,115.88, as shown in a separate November 24, 2022 invoice. A January 31, 2023 invoice shows RSROA paid Prime Exteriors Ltd. (Prime) \$2,920.05 to replace the balcony area vinyl membrane and reinstall the balcony railing. In total, the work cost \$21,050.93. In comparison, it would have cost \$33,828.38 to fully replace both the beam and the vinyl deck membrane.
35. Rider Engineering provided reports on December 10, 2022, and November 5, 2023. In the latest report, Rider Engineering found that all the structural repair work was complete.
36. Photos show that after the work, the balcony area appeared different from the pre-existing vinyl. I find that, objectively speaking, it was a much lighter grey. The Kennings complained to RSRAO about the colour discrepancy in a February 11, 2023 email.
37. Deksmart's vice president, Marshal McLellan, subsequently conducted a site visit. They wrote in a May 25, 2023 letter that the seams on the deck were lifting because the Tufdek membrane was too old to hot-air weld the Deksmart membrane to it. They said that "it is my professional opinion that the strata council cut corners on Mrs.

Kennings' sun-deck repair to save on costs, and Mrs. Kenning is now left with a now-failed sundeck flooring system.” They added that the “only option for Mrs. Kenning's sundeck to be repaired at this point is [to]... install a new vinyl decking system to the entire sundeck.”

38. In a June 19, 2023 email to Mrs. Kenning, Marshall McLellan also said the installation “does not meet our specifications, Tufdek’s specifications, or industry standards”. They added that Prime’s installer was a “good installer” but was likely “only doing what he was instructed to do” by RSROA.
39. I note that I find the letter and email from Marshall McLellan to be expert evidence under the CRT rules. This is because they provided their qualifications under CRT rule 8.3(2). They said they are both a waterproofing professional and the Vice President of Deksmart.
40. It is undisputed that Prime returned on July 5, August 8, and September 21, 2023, to conduct further repairs along the vinyl seam. These repairs consisted of rewelding the old and new vinyl. The evidence does not say how effective the newest repairs were.

Issue #1. Must I order RSROA to complete further repair the vinyl deck membrane or reimburse the Kennings for such work?

41. The Kennings say that RSROA breached its repair and maintenance obligations under the bylaws by deciding to replace only part of the deck vinyl. The Kennings say that a standard of reasonableness applies. The Kennings say that RSROA breached the standard by ignoring Rider Engineering’s advice, failing to seek advice from Deksmart, picking a replacement vinyl membrane that did not match the pre-existing membrane, and choosing an option that voided the pre-existing Tufdek warranty.
42. RSROA says it acted appropriately by basing its decision on 2 factors. First, it says it relied on Prime’s advice. Second, it says that it reasonably chose the lower-cost option. This is because a) the owners rejected funding a smaller amount than the higher-cost option at the July 2022 SGM, and b) it proceeded under bylaw 18.9(f), summarized above. As such, RSROA argues it could only make the necessary

repairs to ensure safety. RSROA also says that the warranty is RSROA's concern, and not the Kennings', given that it is responsible for repair and maintenance of the deck. RSROA also says Prime completed warranty work once it was apparent the seam was failing.

43. It is undisputed, and I find, that RSROA must repair and maintain the unit 6 LCP deck under the bylaws. I will first consider to what standard. I find that the law about strata corporations is relevant because RSROA has clearly structured itself to run in a manner similar to strata corporation under the SPA. I have identified the many similarities already in my review of the bylaws.
44. A strata corporation's obligation to repair and maintain property is measured by the test of what is reasonable in all circumstances and can include replacement when necessary. The standard is not one of perfection. The strata corporation has discretion to approve "good, better or best" solutions. The CRT will not interfere with a strata corporation's decision to choose a "good", less expensive, and less permanent solution although "better" and "best" solutions may have been available. See *Ricci v. The Owners, Strata Plan LMS 3940*, 2021 BCCRT 755 at paragraph 40, citing *The Owners of Strata Plan NWS 254 v. Hall*, 2016 BCSC 2363 and *Weir v. Owners, Strata Plan NW 17*, 2010 BCSC 784.
45. Generally, a strata corporation may rely on professional contractors' advice in completing repairs and maintenance. See *Wright v. The Owners, Strata Plan #205*, 1996 CanLII 2460 (BC SC) at paragraph 30.
46. The starting point for the analysis is deference to the decisions made by the strata council as approved by the owners. See *Weir* at paragraphs 23 to 32. Similarly, an owner cannot direct the strata corporation on how to conduct its repairs. See *Swan v. The Owners, Strata Plan LMS 410*, 2018 BCCRT 241 at paragraph 51.
47. I will reiterate again that RSROA is not a strata corporation under the SPA. So, I acknowledge the decisions cited above are not binding. However, the bylaws show that RSROA is meant to be run in a similar manner. So, I find the above-mentioned cases are useful and relevant.

48. I find the applicable standard is that of reasonableness, as submitted by the Kennings and shown in the case law for strata corporations. I find that the RSROA breached this standard for the following reasons.
49. I find the RSROA did not follow the advice of its professional contractors. In Rider Engineering's October 24, 2022 email to RSROA, it said the following about whether to replace the vinyl membrane fully or only partially. It said that the decision "needs to be by a vinyl membrane manufacture[r] as they are the experts in their product". It also said that choice should be made by RSROA in combination with the general contractor and vinyl membrane supplier and installer. Rider Engineering also said it was not responsible for the review and approval of the vinyl membrane.
50. There is no indication that RSROA contacted the manufacturer, which was Deksmart. Deksmart's May 2023 letter, cited above, and the fact that the seal failed, strongly suggest Deksmart would have advised against either a partial replacement or the method of hot air welding used on the seam. I find this means it was likely not a "good" but less permanent and less expensive solution, as discussed in the cases.
51. RSROA says it relied on the advice of the installer, Prime. I would normally put significant weight on such a submission. However, RSROA provided no evidence about what exactly Prime told RSROA. There is no statement, report, or opinion from Prime in evidence. So, I find it unclear if RSROA proceeded in accordance with or in spite of Prime's advice.
52. I acknowledge RSROA's submission that I should consider its actions in the context of bylaw 18.9(f). I find RSROA acted appropriately to ensure repairs of what was likely an unsafe area, as stated in Rider Engineering's report and the depreciation report. However, I find RSROA could not reasonably ignore Rider Engineering's advice to contact the manufacturer without justification. I acknowledge RSROA's submission that cost was a legitimate concern, but I find this is undercut by Deksmart's May 2023 letter that says RSROA will ultimately need to spend more by proceeding as it did.

53. I do not find the warranty issue to be determinative. This is because RSROA's undisputed submission is that Prime returned to conduct repairs, and I find that RSROA could reasonably void its warranty depending upon the circumstances.
54. I also do not find the issue of the inconsistent appearance of the vinyl to be determinative as I find a perfect visual match was not necessary for RSROA to act reasonably. That said, I find this factor favours the Kennings to a minor degree. This is because the October 2022 emails show RSROA did attempt to seek input from the Kennings about the choice of vinyl samples. However, I find it rushed this process. In the October 2022 emails, RSROA openly acknowledged that the sample it initially chose did not match the pre-existing deck vinyl. It then pressured the Kennings in an October 26, 2022 email to pick a sample by the end of the week. It did so even though in another October 26, 2022 email, the Kennings said they would be away until November 7, 2022. As such, they could not provide access or show up in person to compare vinyl samples with the pre-existing deck membrane.
55. Some of the parties' submissions in this dispute and in dispute numbers CS-2022-008854 and CS-2022-009323 focused on bylaw 23.1. Given the length of these submissions, I will explain why I did not find bylaw 23.1 relevant.
56. As of May 16, 2022, bylaw 23.1 says that there will be no additions or changes permitted to items like the deck without prior written approval from RSRAO's board of directors. A prior version, registered on January 24, 2018, says that there will be no changes to items like the deck without a special resolution.
57. The Kennings say that the prior version should apply and that RSROA should have passed a special resolution for the chosen repairs. They say this because the colour and appearance of the deck extension changed. RSROA disagrees. I find that the bylaw 23.1 does not apply to this situation, regardless of which version applies. This is because I find it clear that the RSRAO proceeded with repairs under bylaw 3.3 and bylaw 18.9(f). As such, the RSRAO's actions should be assessed as whether it was reasonably necessary in that context.

58. In summary, I find that this is one of the exceptions to the general rule that RSROA is entitled to deference. I find RSROA did not proceed reasonably. In particular, it did not seek out advice from Deksmart. I also find it unproven that Prime recommended the partial vinyl replacement.
59. That said, I find the evidence is unclear about the current status of the vinyl membrane and seam between the new and old material. Marshall McLellan said in the May 2023 letter that replacement is necessary. There is no evidence about the deck membrane's current status after Prime's July 5, August 8, and September 21, 2023 repairs, though the number of repairs suggests the seam may be a recurring issue. Given the uncertainty of the deck membrane's current status, I make the following orders, which fall somewhat short of what the Kennings requested.
60. I order RSROA to, within 60 days, obtain reports and quotes about the status of the unit 6 vinyl deck membrane and the cost of repairing or replacing it, if reasonably required as the case may be, and for RSROA to consider this information on how to prioritize and pay for such repairs or replacement.
61. I order RSROA to repair and maintain the unit 6 vinyl deck membrane as required, including replacement if necessary, within a reasonable period of time.

Issue #2. Must I order RSROA to reimburse the Kennings \$1,911 for the Rider Engineering report?

62. As noted above, the Kennings decided to pay for and obtain the August 4, 2020 report from Rider Engineering. The report was only for unit 6. The report said the guardrail presented a danger and the deck required further repairs. The Kennings paid \$1,911 for the report as shown in an August 4, 2020 invoice. The Kennings say the report was reasonably necessary to prove the deck required further repairs. They also say their claim is in time under the *Limitation Act*.
63. RSROA disagrees. It says it was unaware of the report until the Kennings' August 3, 2021 letter to request repairs. It says the Kennings never asked for reimbursement for the report until this dispute started. It also says the Kennings did not share the full

report and only provided some excerpts. RSROA did not comment on the *Limitation Act* issue.

64. Section 6 of the *Limitation Act* says that the basic limitation period is 2 years, and that a claim may not be started more than 2 years after the day on which it is “discovered”. Under section 8, a claim is discovered when the applicant knew or reasonably ought to have known they had a claim against the respondent and a court or tribunal proceeding was an appropriate means to seek a remedy. CRTA section 13.1 says the basic limitation period under the *Limitation Act* does not run after the applicant requests dispute resolution with the CRT.
65. Here, I find that the Kennings discovered their claim on August 4, 2020 as that is the date of the invoice. I therefore find that the Kennings had to make a claim by August 4, 2022. As the Kennings applied for dispute resolution on June 29, 2023, I find their claim for the report expired by several months.
66. The Kennings say they discovered their claim on August 30, 2021, when RSROA asked for access to the report. I disagree as the Kennings would have reasonably known before then that they could ask for reimbursement. I say this because of the report’s findings that showed outstanding repair issues. The Kennings also cite *Brouse v. The Owners, Strata Plan 493*, 2019 BCCRT 866, but I find this dispute is of limited relevance as it did not consider the *Limitation Act* issue.
67. I dismiss this claim.

CRT FEES AND EXPENSES

68. 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.
69. I find the Kennings were partially successful. I therefore order RSROA to reimburse the Kennings \$112.50 in CRT fees.

70. The Kennings asked for reimbursement of legal fees totaling \$6,218.57. The Kennings supported their reimbursement claim with invoices. RSROA disagrees with reimbursement.
71. CRT rule 9.5(3) says that the CRT will only order reimbursement of legal fees in extraordinary circumstances. CRT rule 9.5(4) lists several factors the CRT may consider, namely the complexity of the dispute, the degree of involvement of the representative, and whether the representative's conduct caused unnecessary delay or expense. I may also consider any other factor I consider appropriate.
72. The high bar set by the CRT's rules reflects section 20 of the CRTA, which creates a presumption that parties will represent themselves in CRT disputes. Several CRT decisions have noted that the CRT may apply the law of special costs in deciding whether to award legal fees. See, for example, *The Owners, Strata Plan VR 42 v. Learmonth*, 2023 BCCRT 400, citing *Parfitt et al v. The Owners, Strata Plan VR 416 et al*, 2019 BCCRT 330. I note that in *Parfitt*, one of the applicants engaged in reprehensible conduct that included threats of violence.
73. I find that this dispute lacks extraordinary circumstances. The dispute was more complex than average, but not extraordinarily so. There is no indication that RSROA or its representative caused any unnecessary delay or expense. I also find that RSROA did not engage in any reprehensible conduct, or other conduct that would attract an award under the law of special costs. For those reasons, I dismiss this claim for reimbursement.
74. The Kennings also asked for reimbursement of \$341.25 for relocating 2 cactus plants. They supported this reimbursement claim with an invoice dated November 6, 2022. I find it clear from the photos in evidence that the Kennings had 2 large cactuses on their deck prior to work starting. I also find the photos show someone moved the cactuses when work started. However, I find this is properly a claim that should have been included in the Dispute Notice, rather than a dispute-related expense. I also find that the cactus plants were not CP, so I find it unproven that they were RSROA's responsibility to move. So, I dismiss this claim for this reason.

75. Finally, the Kennings asking for reimbursement of \$21.11 in mailing fees. These amounts were not supported by evidence, such as a receipt, so I dismiss them.

ORDERS

76. I order RSROA to, within 60 days, obtain reports and quotes about the status of the unit 6 vinyl deck membrane and the cost of repairing or replacing it, if reasonably required as the case may be, and for RSROA to consider this information on how to prioritize and pay for such repairs or replacement.

77. I order RSROA to repair and maintain the unit 6 vinyl deck membrane, including replacement it necessary, within a reasonable period of time.

78. I order RSROA to, within 30 days of the date of this order, pay the Kennings \$112.50 in CRT fees.

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

80. I dismiss the balance of the Kennings' claims.

81. 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