



Civil Resolution Tribunal

Date Issued: December 15, 2016

File ST-2016-00227

Civil Resolution Tribunal

Indexed as: *James MacArthur v. The Owners, Strata Plan K588*, 2016 BCCRT 2

BETWEEN:

James MacArthur

APPLICANT

AND:

The Owners, Strata Plan K588

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Patrick Williams

INTRODUCTION

1. The applicant James MacArthur (Mr. MacArthur) is an owner in the respondent strata corporation, The Owners, Strata Plan K588 (the strata). Mr. MacArthur asks the Civil Resolution Tribunal (Tribunal) to make 2 default orders. First, an order that the strata allocate up to \$5,000 to obtain 1 to 2 additional engineer's assessments to address the potential remedies to the strata's foundation problems. Second, an order that each strata lot contribute \$25,000 to fund a special levy totaling \$100,000 to ensure that the strata's foundation problems are fixed.
2. Section 7 of the *Civil Resolution Tribunal Act* (Act) states that where no respondent files a

response by the deadline in the Tribunal's rules, the Tribunal must adjudicate the dispute in accordance with its rules. Under Tribunal Rule 74, a respondent must respond to a Dispute Notice by the deadline shown on a Dispute Response Form. The deadline on the Dispute Response Form says the response is due within 14 days of receiving the Dispute Notice. Under rules 79 and 80, an applicant can ask for a default order if a respondent does not respond to a Dispute Notice which has been properly delivered.

3. Under Tribunal Rule 62, a Dispute Notice to the strata must be provided by registered mail to the strata at its most recent mailing address on file in the Land Title Office or by delivery in person to a council member. Mr. MacArthur provided the Tribunal with a completed proof of notice form, dated September 29, 2016, certifying that the Dispute Notice was delivered in person to Annette Narcisse, a council member, on September 29, 2016.
4. Mr. MacArthur also provided completed proof of notice forms, dated September 18, 2016, that confirmed notice by registered mail to owners Kevin Dodd and Brian Murton on September 2, 2016. Delivery receipts from Canada Post confirmed that Mr. Dodd and Mr. Murton signed for receipt. These deliveries do not constitute proper notice under Rule 62. Mr. Dodd and Mr. Murton are not presently strata council members. The notices were not delivered in person. The delivery receipts confirm that owners Mr. Dodd and Mr. Murton are aware of this application to the Tribunal.
5. On October 20, 2016, Mr. MacArthur completed a request for default decision and order, certifying that he had received no response to the Dispute Notice. Tribunal staff confirmed that the Tribunal has received no response from the strata, as of the date of this decision.
6. I am satisfied, on the balance of probabilities, that the strata received the Dispute Notice and did not respond to it by the deadline set out in the Tribunal Rules. For this reason, Mr. MacArthur is entitled to apply for a default decision. A default decision in a non-monetary dispute, such as this one, means the Tribunal will make a binding decision without the strata's participation in the hearing. The Tribunal will send the strata a copy of the final decision and order.

JURISDICTION

7. These are the Tribunal's formal written reasons. The Tribunal has jurisdiction over strata property claims brought under section 3.6 of the Act. This jurisdiction includes orders under sections 3.6(1)(b) and 48.1 of the Act. The Tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the Tribunal must apply principles of law and fairness, and recognize any

relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.

8. Under the Act, the Tribunal may accept as evidence information it considers relevant, necessary, and appropriate, whether or not the information would be admissible in court. The Tribunal may also ask the parties and witnesses questions and obtain information in any other way it considers appropriate.

ISSUES

9. Mr. MacArthur's evidence refers to past conduct of the strata and its inability to recognize or acknowledge its statutory and bylaw obligations. Under section 72 of the *Strata Property Act* (SPA), the strata is required to repair and maintain the common property. Under Standard Bylaw 8 the strata is required to repair and maintain common property which includes the structure and exterior of the building.
10. The strata has allegedly suffered damage or failure to the foundation of the building, and the strata council has rejected Mr. MacArthur's requests to retain professionals to assess and recommend a course of remediation of the failing foundation.
11. Under section 3.6(1)(b) of the Act, the Tribunal has jurisdiction over a claim concerning the common property of the strata. Under section 48.1 of the Act, to resolve such a claim, the Tribunal may make one or more of the following orders:
 - a. order the strata to do something;
 - b. order the strata to refrain from doing something;
 - c. order the strata to pay money.
12. The issues in this dispute are:
 - Has the strata failed to perform a duty it owes under the SPA?
 - If the strata has failed to perform a duty, is Mr. MacArthur entitled to the following orders:
 - An order that the strata allocate up to \$5,000 to retain 1 to 2 additional engineer's assessments to address the potential remedies to the strata's foundation problems?
 - An order that each strata lot (the unit entitlement of each strata lot is identical) contribute \$25,000 to fund a special levy totaling \$100,000 to ensure that the strata's foundation problems are fixed?

BACKGROUND AND EVIDENCE

13. Neither the strata nor its council members and owners (excluding Mr. MacArthur) have responded to the Dispute Notice. The facts of this dispute are uncontested and I accept Mr. MacArthur's evidence. I summarize the facts below.

The Strata Governance and Physical Condition

14. The Strata comprises 4 strata lots. Mr. MacArthur resides in strata lot 1. He purchased it in 2011. Mr. Murton has owned and rented out strata lot 2 for the past 10 years. Mr. Dodd is the owner of strata lot 3, purchased in 2012 or 2013. Mr. Dodd's son represents strata lot 3 on council and at council and strata meetings. Ms. Narcisse is the owner of strata lot 4, purchased in 2012 or 2013. The residents of strata lots 3 and 4 are tenants.

15. The Schedule of Standard Bylaws to the SPA are the bylaws of the strata. The strata has filed no amendments to those bylaws.

16. Standard bylaw 9(1) provides that the council must be at least 3 and not more than 7. Standard bylaw 9(2) provides that if a strata plan has fewer than 4 strata lots, all the owners are on council. Since the strata has 4 strata lots, not all owners are necessarily on council. Mr. MacArthur states that in the past Mr. Dodd's son and the owners of strata lots 1, 2 and 4 have been on council. Due to health reasons, Mr. Murton (the owner of strata lot 2) was not elected to council at the AGM held August 20, 2016.

17. The strata has been governed very informally for many years. The strata fees have been minimal, sufficient to pay insurance and hydro expenses. Mr. MacArthur states that the culture of the Strata is one of indifference. There is no contingency reserve fund, capital planning or depreciation report.

18. The strata plan was deposited in the Land Title Office in 1984. The building, now 32 years old, is experiencing deterioration of the foundation. Mr. MacArthur states that strata lot 2 is in bad physical shape and could eventually be deemed uninhabitable. I have reviewed 31 photographs provided by Mr. MacArthur.

19. A number of those photographs depict foundation settling and damage. There is an infestation of ants entering through the 2 inch gap between the wall and the foundation slab of strata lot 2. A floor board in the kitchen of strata lot 1 has started to heave upward, and the kitchen cupboards under the sink have begun to buckle and crack.

20. Mr. MacArthur contacted Nader Gendy, a senior professional geotechnical engineer with

BC Foundation Specialties Ltd. (BC Foundations). Mr. Gendy inspected the strata on August 5, 2016 and estimated that the foundation slab had sunk 2 to 3 inches.

The Engineer's Report

21. BC Foundations provided a report (the engineer's report) dated September 6, 2016. The engineer's report addresses the interior foundation with respect to strata lots 1 and 2 because the owners of strata lots 3 and 4 have not permitted any inspection to take place. Soil differential settlement has caused cracks in the kitchen and living room walls of strata lot 1. Strata lot 2 showed several immoderate cracks in the walls from the ceiling to the floor, horizontally and vertically.
22. The engineer's report noted that from the outer walls, all units showed horizontal cracks at joints. Mr. Gendy stated that he expected to find similar symptoms of soil settlement in the interior walls of strata lots 3 and 4.
23. It is Mr. Gendy's opinion that settlement continues and the foundation needs to be repaired immediately. If the walls keep cracking and joints keep separating, the damage might increase beyond repair.
24. BC Foundations proposes a permanent solution to stabilize the soil (and therefore the building), by installing 54 helical piles under the foundation where the soil has settled. The total cost is estimated to be \$81,000 plus \$4,050 GST for a total cost of \$85,050. Mr. Gendy's estimate is dated August 9, 2016. BC Foundations would provide a 20-year warranty for pile workmanship and field installation defects. This estimate does not include the necessary site preparation work, such as the breaking up of patios if necessary and cosmetic repair to sidewalks and patios. All indoor repairs of each unit would be the responsibility of the individual owners.

KCR Construction Inc.

25. Ms. Narcisse requested a construction proposal from KCR Construction Ltd. (KCR). The proposal was more extensive than the BC Foundations estimate. It included site preparation and interior repair (likely just strata lot 4 as the proposal was provided only to Ms. Narcisse). It also included the installation of helical piles. The amount of the proposal was \$134,081 plus taxes.
26. The KCR proposal is dated October 30, 2016, essentially two months after the August 20, 2016 AGM and the August 30, 2016 Dispute Notice.

The August 20, 2016 Annual General Meeting (AGM)

27. Before the AGM, Mr. MacArthur emailed Mr. Dodd's son and Ms. Narcisse. He requested, among other things, that the annual budget include a capital expense of \$100,000 for foundation repairs and that a professional engineer be retained to design a remediation of the building's failing foundation.
28. The minutes of the AGM minutes (minutes) state that the motion to pass the annual budget passed without any funds allocated to obtain the additional quotes for the remediation of the foundation.
29. Mr. MacArthur moved to have the strata agree to repair the foundation and structural issues (there were no funds or special levy noted in the motion). Mr. MacArthur and Ms. Narcisse voted in favour of the resolution, Mr. Dodd's son and Mr. Murton (by proxy given to Ms. Narcisse) opposed it. The motion was defeated. The minutes note that Ms. Narcisse wanted get 2 more quotes before proceeding with the foundation remediation.
30. The strata council and owners have avoided routine maintenance. The minutes reflect motions to raise funds for repair to prevent the retaining wall leaning and water from leaking from eaves troughs and pooling in front of the units. These motions were defeated.

POSITION OF THE PARTIES

31. Mr. MacArthur argues that section 3 of the SPA designates the strata as responsible for managing and maintaining the common property and common assets of the strata for the benefit of the owners.
32. Mr. MacArthur argues that the strata's bylaws are the Schedule of Standard Bylaws. He refers to bylaw 8 stating that the strata must maintain and repair limited common property such as the structure and exterior of the building regardless of how often it occurs. This is somewhat inaccurate, as the structure and exterior is common property, not limited common property. This inaccuracy is immaterial since bylaw 8(b) states that the strata must repair and maintain common property that has not been designated limited common property. The building foundation is common property.
33. Mr. MacArthur argues that section 72(2) of the SPA requires the strata to repair and maintain the common property and common assets.
34. In summary, Mr. MacArthur argues that the strata is legally obligated to maintain its common property, and the slab foundation meets the criteria of being part of the structure of the building.

35. Mr. MacArthur requests that the strata be ordered to allocate up to \$5,000 to retain 1 to 2 additional engineer's assessments toward understanding the potential remedies to the foundation problems of the strata.
36. Mr. MacArthur requests that a special levy of \$100,000 be assessed with each of the 4 strata lots comprising the strata contributing \$25,000 to implement the most appropriate remedy to fix the foundation problems.

ANALYSIS

Has the strata failed to perform a duty it owes under the SPA?

37. I find, on the balance of probabilities, the strata has failed to perform a duty it owes under the SPA.
38. In making this finding, I put significant weight on the evidence from Mr. MacArthur that the strata, through the owners collectively, have not only avoided the duty to maintain and repair the building for the benefit of the owners, the strata has deliberately chosen to not conduct such repair and maintenance. The strata has made no efforts to ensure that the owners of strata lots 3 and 4 make their units available for inspection. That obligation is stated in bylaw 7.
39. There has been considerable case law that underscores the strata's obligation to repair and maintain common property, which includes the building and the structure. This obligation falls under section 72 of the SPA. (See paragraph 17 of *Royal Bank of Canada v. Holden*, 1996 BCSC 3440 and paragraph 6 of *Wright v. Strata Plan No. 205*, 1996 BCSC 2460). It is also an obligation under Standard Bylaw 8(b).
40. The engineer's report confirms that the foundation must be repaired immediately and if it is not repaired immediately, the damage suffered may be beyond repair.
41. Therefore, I find that the foundation forms the structure and exterior of the building. The repair of this foundation is an obligation of the strata pursuant to sections 3 and 72 of the SPA and the strata's bylaw 8. The strata must repair the foundation as soon as practicable.

Is Mr. MacArthur entitled to an order that the strata allocate up to \$5,000 to retain 1 to 2 additional engineer's assessments to address the potential remedies to the strata's foundation problems?

42. Under sections 48.1(1)(a) and 48.1(1)(c) of the Act, the Tribunal may make orders requiring the strata to do something and to pay money.

43. The engineer's report found significant damage to strata lots 1 and 2 and stated that from the outer walls, all units showed horizontal cracks at joints. Mr. Gendy expected to find similar soil settlement symptoms in the interior walls of strata lots 3 and 4.
44. There are 2 proposals to repair the foundation. BC Foundations estimated \$81,000 plus taxes which excluded site preparation, demolition, backfill and interior repairs. KCR proposed \$134,081 plus taxes. The KCR proposal included site preparation and demolition at a combined cost of \$22,800, plus backfill.
45. Obtaining additional assessments will increase the cost to the strata and will very likely find the same problems that have already been identified in the engineer's report. Obtaining additional assessments from engineers will also delay the remediation of the foundation that Mr. Gendy has stated must be done immediately.
46. I find that ordering the strata to allocate further funds to retain additional engineer's assessments or construction proposals is not necessary.

Is Mr. MacArthur entitled to an order that each strata lot contribute \$25,000 to fund a special levy totaling \$100,000 to ensure that the strata's foundation problems are fixed?

47. Under sections 48.1(1)(a) and 48.1(1)(c) of the Act, the Tribunal may make orders requiring the strata to do something and to pay money.
48. Section 108 of the SPA provides the mechanism for passing a strata's special levy. The strata has passed no resolution to fund the foundation's remediation. In some circumstances, that might prove fatal to a request that the Tribunal order such a special levy. In these circumstances, I find that if a $\frac{3}{4}$ vote to fund a special levy of \$100,000 were presented, based upon the past positions of the owners, such a vote would be defeated. The minutes confirm that only 2 out of 4 owners were in favour of repair of the foundation problems or even performing routine maintenance, at an insignificant cost.
49. Mr. Gendy of BC Foundations reports that the foundation settlement continues and the foundation needs to be repaired immediately. Under section 3.6(1)(b) of the Act, the Tribunal has jurisdiction with respect to a claim regarding common property, which includes the foundation.
50. I find that the need for remediation is immediate and the strata is required to remediate the building foundation. I order that a special levy be assessed.
51. I acknowledge that the BC Foundations estimate is less than the KCR proposal, and that

\$85,050 does not include site preparation and concrete disposal. In these circumstances, I find that the sum of \$100,000 is reasonable and appropriate.

DECISION

52. I find that the strata has failed to repair and maintain the common property (required under section 72 of the SPA).
53. Under sections 48.1(a) and 48.1(1)(c) of the Act, the Tribunal may make orders requiring the strata to do something and to pay money, in order to address a strata property claim. I find that the sum of \$100,000 shall be levied in order for the strata to perform its duty to maintain and repair common property.
54. Under section 49 of the Act, and Tribunal rules 14 and 15, the Tribunal will generally order an unsuccessful party to reimburse a successful party for Tribunal fees and reasonable expenses related to the dispute resolution process. I see no reason to stray from the general rule. Mr. MacArthur did not request the reimbursement of any expenses, aside from the Tribunal fees.

ORDER

55. I make the following orders:
- Pursuant to section 72 of the SPA the strata must perform its statutory obligation to repair and maintain the building foundation.
 - The strata must retain BC Foundations to commence repair of the building foundation by January 15, 2017.
 - In carrying out the repair, the strata must consider the observations and adhere to the recommendations contained in the engineering report.
 - To finance the building foundation repair work the strata is required to issue a special levy to the owners of \$100,000. The \$25,000 contribution of each owner is based on unit entitlement, payable by each owner in five equal installments of \$5,000 commencing January 1, 2017 and continuing on the first of each and every month thereafter until fully paid.
 - The strata shall immediately reimburse Mr. MacArthur the amounts paid by Mr. MacArthur to the Tribunal to commence and complete this within claim.
56. Under section 57 of the Act, Mr. MacArthur can enforce this final Tribunal decision by filing, in the Supreme Court of British Columbia, a validated copy of the order which is attached to

this decision. The order can only be filed if, among other things, the time for an appeal under section 56.3(3) of the Act has expired and leave to appeal has not been sought or consented to.

57. Once filed, a Tribunal order has the same force and effect as an order of the Supreme Court of British Columbia.

Patrick Williams, Tribunal Member