



# Civil Resolution Tribunal

Date Issued: January 11, 2018

File: ST-2017-00374

Type: Strata

Civil Resolution Tribunal

Indexed as: *Gauthier v. The Owners, Strata Plan LMS 2768*, 2018 BCCRT 6

**BETWEEN:**

Rene Gauthier

**APPLICANT**

**AND:**

The Owners, Strata Plan LMS 2768

**RESPONDENT**

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## **AMENDED REASONS FOR DECISION**

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Tribunal Member:

Maureen Abraham

### **INTRODUCTION**

1. This claim is about whether an owner is responsible for reimbursing the strata corporation an insurance deductible it paid.
2. The applicant, Rene Gauthier (owner) owns strata lot 132 (unit 406). The applicant is self-represented.

3. The respondent, The Owners, Strata Plan LMS 2768 (strata) is represented by a member of strata council.

## **JURISDICTION AND PROCEDURE**

4. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over strata property claims brought under section 3.6 of the *Civil Resolution Tribunal Act (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.
5. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to hear this dispute through written submissions because I find that there are no significant issues of credibility or other reasons that might require an oral hearing.
6. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
7. The applicable tribunal rules are those that were in place at the time this dispute was commenced.
8. Under section 48.1 of the Act and the tribunal rules, in resolving this dispute the tribunal may make one or more of the following orders:
  - a. order a party to do or stop doing something;
  - b. order a party to pay money;
  - c. order any other terms or conditions the tribunal considers appropriate.

## **ISSUES**

9. The issues in this dispute are:
  - a. Is the owner responsible for reimbursing the strata the cost of its insurance deductible?
  - b. Did the strata breach its obligations to disclose documents and provide information when requested by the owner?
  - c. Is the owner entitled to reimbursement of his expenses by the strata?
  - d. Is the owner entitled to reimbursement of his CRT fees by the strata?

## **BACKGROUND AND EVIDENCE**

10. On the morning of December 24, 2016, the owners of strata suite 308 (308) discovered water in the kitchen area of their property. There was visible water damage to the ceiling, walls and countertops, and water had pooled in various spots.
11. The water had also reached and caused damage to the strata lot below 308, suite 210 (210).
12. The owners of 210 and 308 each went to the applicant owner and told him there was water damage in their suites. The owner turned off the water to his suite in case there was a leak coming from his property.
13. The owner says that he was told by the owner of 210 that the owner of 308 had shown her that the soffits over the owner's deck were full of water, and that a surprising amount of water came out of the soffits when he pushed on them.
14. The strata's property manager contacted a restoration company (contractor) and had them come to the strata on December 24<sup>th</sup>. The contractor checked 210 and 308 and noted the visible damage. The contractor noted that water had run

through the kitchen exhaust fan in 308. No active leak source was found in either suite.

15. The contractor tried to check 406 around the same time, but the owner was not at home. When the contractor returned to check 406 later that day, the owner was home and let him inside the suite.
16. The contractor did not find any water or signs of moisture inside the owner's suite. The owner says the contractor's thermal camera inspection at that time showed a cold spot by his kitchen window, and which extended to the ceiling. The contractor pulled the baseboards off from the area by his kitchen sink, and the owner says the contractor promised to return and fix the baseboard at no cost to the owner. There was no water damage to the particleboard baseboard. The water was turned back on in 406 and the contractor ran the water for about 45 minutes to check the plumbing for leaks. No leaks were found. The owner said the contractor's representative told him that they no longer thought the leak came from the owner's unit after doing the investigation.
17. Moisture was found in the kitchen ceiling, exterior wall and window return of 210. Moisture was found in the ceiling, exterior wall, and window return of 306. Water had also passed through the kitchen's ventilation fan. The drywall and wet insulation were removed from the ceilings of 210 and 308, but no active leaks found.
18. The contractor says there were a few days of heavy rain after the ceilings areas were exposed, but no leaks from the exterior could be seen. The contractor's project manager states his professional opinion is that there was a one-time spill in the owner's unit which caused the water leak into the suites below.
19. Thermal imaging camera inspections and moisture meters tests to the owner's unit around this time confirmed that the walls and floor in the owner's unit were dry. The owner says that the imaging of unit 308 showed a cold spot on the damaged wall.

20. On January 4, 2017, the strata wrote the owner and told him that there had been a water leak originating from his strata unit and that he should contact his insurance provider immediately. The strata also referred him to strata bylaw 39, copying it into their letter. Bylaw 39 talks about holding owners responsible for repayment of strata insurance deductibles and limits on the strata's own liability. The letter also enclosed a legal opinion dated July 27, 2014, discussing owner liability for damage to strata lots.
21. On January 6, 2017, the representatives from the contractor and strata's insurer visited 406 to investigate for the source of the water into 308 and 210.
22. The insurance adjuster also states in her email that she and the contractor had looked into many possible sources for the leak. She noted that they looked at whether the exterior decks, venting, ducting, ice damming, sink overflow, dishwasher, drain or supply leak or any other possible exterior ingress, such as window leaks, could have been the source. She states that the leak was sourced from no higher than the owner's kitchen and the result of an overflow or drain escape.
23. The contractor provided the strata a summary wrongly dated December 23, 2016, setting out the initial events and an invoice dated December 28, 2016. Both state that the leak "happened over a week before it was reported" and that the source is believed to be plumbing work in the owner's unit.
24. The contractor's report to the strata dated January 9, 2017, stated that the loss source was "believed to be a one-time spill". It confirms that the common hallways and stairwells were checked for moisture and found dry. It also states that a moisture test of the owner's unit found it was dry. It says the owner had two small spills recently in his kitchen, but there were no affected materials and would not have had enough water to cause the damage in the units below. It notes that the exterior walls of the affected areas in 210 and 306 were still retaining moisture as of January 4, 2017.

25. On January 12, 2017, the owner told the strata his insurance company couldn't begin a claim without "certified plumbers' and restoration experts' reports confirming [his] unit is the origin of the water source". The strata sent the contractor's report to the owner on January 13, 2017. The owner provided an email from his insurance representative referring to the need for a valid assessment, but did not provide the strata with written proof that the owner's own insurance claim had been denied.
26. The contractor provided the strata an updated report dated February 1, 2017, detailing the work done to fix 210 and 306.
27. The strata made an insurance claim and paid a \$10,000 deductible in February 2017.
28. On February 7, 2017, the strata wrote the owner and told him it was charging back the deductible to him (the chargeback). The strata said it was the owner's responsibility because it was "an insurance deductible for a leak that originated in your unit".
29. The owner disputed the demand and requested a hearing about the chargeback. He attended a council meeting and a hearing was held March 13, 2017. The strata relied on the contractor's report to justify the chargeback. The owner criticized the contractor's report and said that the report states that the source of the leak is unknown. He asked council questions about the investigation done to find the leak source. The source of leaks in other buildings were discussed. The owner told the strata council members that he thought the leak may have come from the roof or attic of his building. He told them that the report was not a valid assessment and that his own insurance company required evidence proving the leak came from his strata lot.
30. On March 16, 2017, the strata wrote the owner and said that council had discussed and decided to pursue him for the chargeback on his strata lot account.

31. The owner demanded the strata provide him with the records showing the fob entry/exit access of the strata owners for the time leading up to the leak. The strata responded to him that they did not have to keep fob access records.
32. The owner says that there was no large spill and that the water leak did not come from his property. He says that no one looked in the building's attic to check for the leak source or considered the deck soffits as the source. He says water had come through the stove exhaust vent. He says that there are building envelope leaks elsewhere in the strata complex dated August 29, 2017. The owner did his own research and thinks that the water must have come from the building's exterior. He thinks that the most likely cause was "ice damming" of the building's wall underneath a common property deck, which forced water into the soffits and which then seeped into the building. He says that when the owner of 308 pressed on the soffit and water came out, this drained the area so as to stop the active leak and eliminated the evidence of the water buildup. Ice damming happens when there is buildup of ice in building exteriors caused by the thawing and re-freezing of water.
33. A representative of the contractor fixed the kitchen baseboards for the owner and mentioned to him that there were other leaks in the building. In a telephone call between the insurance adjuster and owner, the adjuster told him that they had considered the soffits and ice damming and had ruled them out.
34. The owner wrote a report setting out his theory attaching as evidence various articles and information he found online, and sent it to the strata. He also sent the strata an invoice in the total amount of \$4,685.93 for the time he says spent researching the potential other causes of the water leak.
35. The strata did not pay his invoice, and hired a building science engineer to review the owner's report and provide a response. In July 2017, the engineer provided a response report setting out his opinion that it was extremely unlikely that ice damming was the source of the water leak. He reviewed weather data, the wall structure and exterior features of the strata building, and observations of the contractor in order to reach his opinion. The strata paid the engineer a total of

\$1,995 for his report. The owner was critical of the engineer's report and that it did not address factors such as the failure to have checked the building's attic or within the deck soffits.

36. The owner retained the proprietor of what appears to be a renovation company to review and comment on the shortcomings in the engineer's report. The proprietor's comments reiterate the owner's critiques of the engineer's report, and do not set out his professional qualifications. The proprietor issued a \$315.00 invoice to the owner for his services. The owner referred to another invoice, but it was not included with the evidence submitted.

## **POSITION OF THE PARTIES**

37. The applicant argues that the chargeback is not valid because there is no evidence that the source of the water was his strata lot and says;

- The contractor's reports state that the source of the leak is unknown;
- Not all potential sources for the leak, such as the attic, were investigated and ruled out;
- The moisture testing showed the owner's unit was dry and there was no damage, such as to baseboards, to evidence a spill in the owner's suite;
- Other parts of the strata complex were experiencing leaks from their building exterior, including leaks in the roof of the owner's building;
- A light fixture in the owner's suite appeared to be wet after shorting out sometime after the initial water leaks;
- The water leak may have been caused by ice damming over time, as the owners of 308 were away before discovering the damage;
- Evidence of an exterior leak was the large amount of water in the deck soffits and this was not addressed by the contractor;



- The onus of proof is on the strata, and it cannot prove negligence because it can't even prove the water came from the owner's property;
  - His ability to prove his claim has been affected by the strata's failure to provide documents to him to support their decision to issue the chargeback and for the fob access, as well as a more detailed hearing decision.
38. The applicant requests that I order the respondent to reverse the \$10,000 chargeback against his strata account, that the strata provide other documents showing what areas were checked for leaks, and pay him \$5,625.63 for his expenses plus \$225.00 for his tribunal fees.
39. The respondent argues that the strata validly charged back the \$10,000 deductible to the owner because:
- The contractor's professional opinion is that it is more probable than not that the leak was caused by a one-time spill in the owner's strata unit;
  - The owner initially denied access to his strata unit when the damage was discovered;
  - As water works with gravity and moves downwards, the water in the ceiling of 308 must have come from the owner's strata lot above;
  - It is extremely unlikely that ice damming could have occurred and the owner's theories are just speculation;
  - There are no other reasonable explanations for the leak other than it came from a spill in the owner's strata lot;
  - The evidence is circumstantial, but as a whole makes it more probable than not that the damage was caused by water from the owner's strata lot;
  - That negligence can be inferred from the strata's evidence, and the owner's evidence and theories are speculative and not a reasonably likely alternative explanation for the damage;

- The owner's own home insurer would have paid the deductible, and so the owner should have involved his own insurer and let them resolve the issue of liability with the strata.

40. The respondent requests that I dismiss the applicant's claim and order the applicant owner to pay the strata's expenses in the amount of \$2745.00.

## **ANALYSIS**

### **Issue: Is the owner responsible for reimbursing the strata the cost of its insurance deductible?**

41. Strata bylaw 3.1 says an owner must repair and maintain their own strata lot. Bylaw 4.1 says that owners must not use their strata lot or the common property in a way that caused a nuisance or hazard. Bylaw 4.3 makes an owner responsible for any damage caused by the owner's visitors.
42. Section 158(2) of the *Strata Property Act* (SPA) states that a strata can sue an owner for repayment of an insurance deductible if the owner is "responsible" for the loss or damage causing the insurance claim. The strata doesn't have to prove negligence under the SPA in order to be entitled to repayment of a deductible from an owner, unless the strata has amended its bylaws in a way that changes the standard from 'responsibility' to 'negligence'.
43. The strata does have an amended bylaw. Strata bylaw 4.4 states that an owner must repay the strata for any expense it pays to maintain, repair or replace common property or another strata lot for damage caused by the owner's "act, omission, negligence or carelessness" which is not covered by the strata's insurance. It also says that an insurance deductible paid by the strata is included as an expense not covered by insurance which can be charged back to the owner.
44. Bylaw 4.4 uses the same language as a bylaw which was considered by the court in the case *Strata Plan LMS 2446 v. Morrison*, 2011 BCPC 519. The court found that the wording in the bylaw must be read as a whole. Including the words

'negligence' and 'carelessness' means that the strata must prove the owner was actually negligent in order for the owner to be liable for the strata's expense.

45. In order to prove negligence, the strata must prove:
  - (a) It was owed a duty of care by the other person;
  - (b) A breach of the duty by the owner not meeting the standard of care; and,
  - (c) Damage or loss was caused by that person not meeting the standard.
46. The strata proves two of these requirements without an issue. A strata is generally owed a duty of care by owners that the owners will maintain and repair their strata units so as to avoid causing damage to the strata or its common property. The damage or loss caused to the strata was the cost of the insurance deductible paid to repair the water damage.
47. The strata must prove that it is more likely than not that the owner breached his duty to the strata. The language used in Bylaw 4.4 means the strata must prove that the owner caused the water leak through his (or his visitor's) negligence or carelessness.
48. In order to find the owner negligent, I must find that he acted unreasonably in the circumstances, in either causing an initial large water spill or failing to take reasonable steps to contain such a spill within his strata lot. Evidence of the spill within the owner's unit could be evidence that he was negligent. The difficulty is that there is no evidence that there ever actually was a water spill within the owner's suite.
49. The strata's argument on liability is based entirely on the fact that the owner's strata lot is above the two damaged strata lots. It is essentially arguing that the owner is not being truthful about a spill within his strata lot. The onus is not on the owner to prove the source of the leak, only that there is a reasonable potential other source.

50. The strata points to the owner not letting the contractor inside his suite as evidence that the owner was hiding a water spill. The owner says he was not at home when the contractor initially came by, and that he let the contractor inside his suite later that same day. The owner's floor was dry when tested for moisture. There were no signs, such as swollen baseboards or water damage to the floor, to evidence that a large spill had occurred and been cleaned up.
51. The water damage in the units below was over a large area, and the interior of the walls took days to dry even once opened by the contractor. I find the contractor's lack of immediate access to the owner's suite is a neutral factor overall, and did not prevent the contractor from finding evidence of a spill within the suite.
52. The contractor only noted that the water had penetrated a large area of ceiling and wall, as well as an exhaust duct, and that no active leak was found. The contractor was not able to find where the earliest water damage had occurred in order to pinpoint a leak source. If for example, it spread to the walls from the centre of the ceiling, this would support the strata's argument that it could only have come from the unit above might be stronger. The contractor is a restoration company. Their focus, quite properly, appeared to have been whether there was an active leak and remediation, not investigation for the purpose of proving liability.
53. The strata relies entirely on the insurance adjuster's comments that she and the contractor had looked at and ruled out other sources (including all exterior sources) for the water leak. The difficulty is that there is very little evidence of what steps the adjuster and contractor took in their investigation. The evidence is uncontroverted that the attic was not inspected as a potential source. Although the evidence is that the adjuster acknowledged ice and moisture in the soffits, no explanation as to why the leak could not have come from those sources has been provided. The owner has said that the soffits were emptied of water by another owner, but this is not addressed in the contractor's report.
54. The strata has provided an expert's report which indicates that it is extremely unlikely that ice damming caused the leak. This may be true, but the report does

not rule out other exterior sources for the leak. The strata has provided the contractor's report, which states that the source is unknown but likely a one-time spill.

55. It is not enough for the strata to state that other sources were ruled out, without providing an explanation as to how that conclusion was reached. The owner is entitled to know, and the strata is obligated to prove, why other potential sources for the leak are not reasonable.
56. I find that the strata has not proven the owner was negligent and that his negligence caused the water damage to other strata lots, and so it cannot charge the owner the cost of the strata's insurance deductible. I order that the strata cancel the \$10,000 chargeback from the owner's strata account.

**Issue: Did the strata breach its obligations to disclose documents and information when requested by the owner?**

57. Section 35 of the SPA requires strata corporations to keep certain documents and kinds of records, and section 36 of the SPA requires the strata to provide access to those documents and records at an owner's request. If the strata is required to keep a document under section 35 and refuses to allow an owner access to the record, the strata will be breaching section 36 of the SPA.
58. The owner says the strata breached its obligations by refusing to provide him with documents such as the fob access history, and all the documents created by the contractor during its investigation.
59. The strata says it didn't keep records of the fob access to the building. Those records are also not ones the strata is required to keep under section 35 of the SPA. I find the strata did not breach the SPA by not retaining fob access records or by not providing fob access records to the owner.
60. The strata is also not obligated to obtain a copy of the internal file materials of a third party providing services to the strata under section 35 of the SPA. I find the

strata did not breach the SPA by not having those documents or by not providing them to the owner.

61. Given the above finding that the strata has not proved negligence by the owner, it is not necessary to deal with whether the owner's ability to prove his claim was affected by the strata's written decision after the hearing.

**Issue: Is the owner entitled to reimbursement of his expenses by the strata?**

62. The owner wants an order that the strata pay his expenses in the amount of \$5,625.63. The expenses consist of the owner's August 2017 invoice to the strata in the amount of \$4,685.93, the proprietor's \$315.00 invoice and the balance of \$624.70 for which no invoice or receipt was provided.
63. Under section 49 of the Act, the tribunal will generally order an unsuccessful party to reimburse a successful party for reasonable expenses related to the dispute resolution process. Other than as set out in the Act, there is no right to reimbursement.
64. The word "expense" would require an outlay of money. The owner's invoice is not for money he had to pay out, but payment for time spent. He says that the strata requested an explanation from him of how the leak might have occurred. His time was billed at \$175.00 per hour and his invoice indicates the time was spent consulting professionals, doing research and preparing his report. He says that although he is not qualified as an expert and does not hold any professional qualifications in the area, that his informal experience in the construction industry qualifies him to provide the report in the nature of a professional opinion.
65. Under section 49 of the Act, the amount claimed must be an expense and must have been reasonably incurred. I find that the amount of \$4,685.93 is a request for compensation for the time the owner spent preparing arguments and evidence in support of his claim and so it is not an expense eligible for reimbursement under the Act.

66. I also find that the amount of compensation sought by the owner for his report and his claim for reimbursement for the proprietor's opinion is not a reasonable expense.
67. The owner was obligated to present his case in support of his claim. It is not reasonable to claim compensation at a professional rate when the owner is not qualified as a professional with expertise in building envelope investigation. The owner had no agreement from the strata that he could charge them for responding to their request that he provide his theory.
68. The expense claimed for the proprietor's opinion also cannot be supported as a reasonable expense. The cost of getting a report from a person with specialized knowledge or skill will be reasonably incurred if, for example, the report is necessary in order to explain or make out a party's theory. The proprietor's qualifications to comment on the engineer's opinion are unknown, and the emails exchanged between he and the owner submitted as part of the owner's evidence suggests that the proprietor was acting like an advocate by adopting the owner's theories and opinions, rather than conducting an objective assessment or investigation. His opinion letter was of no assistance in dealing with the owner's claim.
69. Other than a reference in the owner's submissions to a further invoice paid to the proprietor, there is no evidence that the owner incurred further expense or that the expense was reasonably incurred for these proceedings.
70. I find the owner is not entitled to reimbursement of his claimed expenses by the strata.

**Issue: Is the owner entitled to reimbursement of his CRT fees by the strata?**

71. 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 related to the dispute resolution process. I see no reason in this case to deviate

from the general rule. I therefore order the strata to reimburse the owner for tribunal fees of \$225.00.

## **DECISION AND ORDERS**

72. I order that:

- a. The strata must cancel the insurance deductible chargeback of \$10,000.00 from the owner's strata account; and,
- b. The strata must reimburse the owner for tribunal fees of \$225.00.

73. Under section 167 of the *Strata Property Act* SBC 1998 c.43, an owner who brings a tribunal claim against the strata corporation is not required to contribute to the expenses of bringing that claim. I order the strata to ensure that no part of the strata's expenses with respect to this claim are allocated to the owner.

74. Under section 57 of the Act, a party 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 56.5(3) of the Act has expired and leave to appeal has not been sought or consented to. Once filed, a tribunal order has the same force and effect as an order of the Supreme Court of British Columbia.

75. Orders for financial compensation or the return of personal property can also be enforced through the Provincial Court of British Columbia. However, the principal amount or the value of the personal property must be within the Provincial Court of British Columbia's monetary limit for claims under the *Small Claims Act* (currently \$35,000). Under section 58 of the Act, the Applicant can enforce this final decision by filing in the Provincial 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 56.5(3) of the Act has expired and leave to appeal has not been sought or consented to. Once filed, a tribunal order



has the same force and effect as an order of the Provincial Court of British Columbia.

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Maureen Abraham, Tribunal Member