



# Civil Resolution Tribunal

Date Issued: May 22, 2018

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Type: Strata

Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan VR 2266 v. 228 Chateau Boulevard Ltd.*, 2018  
BCCRT 198

B E T W E E N :

The Owners, Strata Plan VR 2266

**APPLICANT**

A N D :

228 Chateau Boulevard Ltd.

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Susan MacFarlane

## INTRODUCTION

1. This is an application by The Owners, Strata Plan VR 2266 (strata). The strata includes both commercial and residential sections.

2. The respondent 228 Chateau Boulevard Ltd. (owner) owns strata lot #34, suite #228, in the strata's residential section. The owner is a corporation based in Australia and directed by Benjamin Killerby.
3. This application concerns a leak from a water tank (water leak). Damage occurred in 3 locations: in the owner's strata lot, on common property, and in a strata lot in the commercial section. The strata made repairs then charged the repair costs back to the owner. The owner disputes those charges.
4. Legal counsel represents both parties. The strata's lawyer is Eric Ito. The owner's lawyer is Aneka Jiwaji.
5. For the following reasons, I dismiss the strata's application.

## **JURISDICTION AND PROCEDURE**

6. 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.
7. 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.
8. 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.
9. The applicable tribunal rules are those that were in place at the time this dispute was commenced.

10. Under section 48.1 of the Act and the tribunal rules, in resolving this dispute the tribunal may order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.

## **ISSUES**

11. The basic issue is, does the owner owe the strata for costs of repairing damage from the water leak?
12. Answering that question depends on the answers to these questions:
  - a) Did the owner “cause” the damage?
  - b) Did the strata need to repair the damage?
  - c) Are the chargebacks proper?
  - d) What is the effect of partial payment?

## **BACKGROUND AND EVIDENCE**

13. I have read and considered all the material submitted by the parties. I refer only to those facts that affect the outcome of this dispute.
14. On May 15, 2016 water leaked into strata lot #103, a commercial strata lot operating as a ski shop (ski shop). The ski shop is owned by the strata.
15. The strata investigated and found a ruptured water tank directly above the ski shop, in the owner’s strata lot. There was water damage to the ski shop and the owner’s strata lot, as well as a hallway outside the owner’s strata lot.
16. The parties agree the hallway is common property. This is confirmed by the strata plan.
17. The strata provided me with its bylaws. The owner does not dispute that those are the correct bylaws. The owner has also cited those bylaws. I have summarized the bylaws that apply:

- Bylaw 3(1) says an owner must not use a strata lot in a way that
  - a) causes a nuisance to another person, or
  - b) unreasonably interferes with other people enjoying the common property or common assets.
- Bylaw 3(2) says an owner must not cause damage, other than reasonable wear and tear, to the common property, common assets, or those parts of a strata lot that the strata must repair.
- Bylaw 8 says the strata must repair and maintain the common property and common assets. The strata must also repair parts of strata lots that affect the building structure, such as doors, windows, and balconies.
- Bylaw 3000 says if the strata makes an insurance claim for damage caused by an owner, and the strata pays the deductible, then the strata may charge that owner up to the amount of that deductible.

18. In May and June 2016, the strata repaired the water leak and resulting damage. From June 14 to July 21, 2016, the strata sent letters to the owner enclosing the repair invoices. The strata charged the invoice amounts to the owner's account.

19. The strata paid \$31,397.26 to repair damage from the water leak. I have summarized the invoices:

Provider	Services	Amount
Summit Property Services	Leak investigation on May 15, 2016. Charge back to apartment #228. Burst water tank in #228 into ski shop below.	\$189.00
Summit Property Services	Repairs and maintenance. Charge back to apartment 228. Check #228 and flooded ski shop.	\$84.00
Tephra Renovation	Finishing in apartment 228 (\$3,900), the hallway (\$1,000), and the ski shop (\$10,500), plus overhead and profit billed separately (\$2,618), and GST (\$900.90).	\$18,918.90
Summit Property Services	Repairs and maintenance, charge back to apartment 228. Services include meeting with Tephra and checking repairs for water damage in apartment 228 and the ski shop.	\$210.00
Walsh	Services, parts and labour, related to water tank in	\$11,677.42

Restoration Services	apartment #228. Includes moisture readings, water extraction, removing baseboards, applications of microbials, and test cuts. Equipment used includes dehumidifiers, fans, and extractors.	
Summit Property Services	Checking on repairs in 228 and replacing contents and racks in ski shop. Charge back to apartment #228.	\$168.00
Walsh Restoration Services	Moving and re-installing racks in ski shop. Service providers include a flood tech. The source of work is listed as loss on May 15, 2016 from water tank in #228.	\$149.94
		\$31,397.26

20. The owner received the strata's letters containing the invoices and responded to them disputing liability. I have summarized the owner's letters:

- a) On August 26, 2016 the owner disputed charges of \$189.00, \$84.00 and \$18,918.90. The owner cited specific bylaws and sections of the *Strata Property Act* (SPA), saying the strata was not allowed to unilaterally impose these charges. The owner asked that the charges be reversed. The owner also asked the property manager to arrange for a call to discuss the matter. The owner asked for a call after 4:30 pm, since the owner resided in Australia.
- b) On September 12, 2016 the owner disputed additional charges of \$11,995.36. The owner said again the strata was not allowed to impose these charges, and asked that they be removed from the owner's account. The owner said that he had spoken to the strata council president, who referred him to the property manager. The owner proposed a call late that same afternoon.
- c) On September 19, 2016, the owner wrote to the strata council president asking that his letter be presented to the next strata meeting. The owner wrote 7 pages covering the facts and the law. The owner cited bylaws 3000 and 3(2), and several SPA sections. The owner asked that the strata appoint a representative to discuss the matter by phone after 4:30 pm.

21. On January 30, 2017 the strata wrote to the owner. The strata said the owner must pay the charges on or by February 20, 2017, or the strata would register a lien on the owner's strata lot.

22. On February 1, 2017 the owner's former lawyer Wes McMillan asked for a hearing before the strata council. The strata offered a hearing February 15, or another date convenient to the owner.
23. On February 23, 2017 Mr. McMillan said a hearing was not required and written response would be enough. He also said the owner was making a claim on its own insurance that could delay the matter.
24. On February 26, 2017 the owner sent e-mail to the strata's property manager. The owner said the strata's letter dated January 30 had only been received in Australia on February 24. The owner said the strata had no right to register a lien, and the owner had filed a complaint about the property manager with the Real Estate Council of British Columbia.
25. On March 8, 2017 the strata offered a hearing on March 30. Mr. McMillan replied that the owner might be available on March 31, depending on the lawyer for the owner's insurer.
26. On May 11, 2017 Mr. Killerby and Ms. Jiwaji, as lawyer for the owner, attended a council hearing. Ms. Jiwaji attended in person and Mr. Killerby by telephone. Ms. Jiwaji said the strata had not followed the correct chargeback procedure, and the strata bylaws the strata relied on did not apply. Mr. Killerby and Ms. Jiwaji said the strata must sue to recover the repair costs. The council voted to sue the owner.
27. After the council hearing the strata sent its decision by letter to the owner. The strata council decided that the owner had contravened bylaw 3(2) and caused damage, which the strata repaired at a cost of \$31,397.26. The strata demanded payment. That letter is undated, but it contains a ledger dated May 26, 2017. The owner's tribunal submission dates it as "on or about May 26, 2017."
28. That ledger shows charges to the owner's strata account related to the water leak. The charges date from June 14, 2016 to July 21, 2016. The owner did not pay.
29. On July 17, 2017 the strata applied to the tribunal for a resolution.

30. As of November 15, 2017, there was no lien on the owner's strata lot.
31. The strata has insurance, but the policy's deductible for water damage is \$50,000.
32. The owner filed a claim with its insurer, who paid \$6,719.66. The owner's insurer forwarded the \$6,719.66 to the strata by cheque dated September 6, 2017. This payment appears to cover repairs to the owner's strata lot and the owner's share of the common property. It also reimburses the \$84.00 fee for checking the owner's strata lot and the ski shop.
33. The letter enclosing the \$6,719.66 says the insurer paid the amount to the owner, but the owner directed it to be paid to the strata. Ms. Jiwaji wrote to Mr. Ito on November 16, 2017 that the amount represents "settlement of the portion of the damages that the policy will respond to."
34. The strata now claims \$31,397.26, less \$6,719.66, which amounts to \$24,677.60.

## **POSITION OF THE PARTIES**

### **The Owner**

35. The owner asks that I dismiss the strata's claim.
36. The owner says it was not occupying its strata lot at the time of the water leak, so did not "cause" the leak. As it did not cause the leak, it did not breach the strata bylaws.
37. The owner says the strata did not need to repair the strata lots. The owner cites sections 72 and 149 of the (SPA) on the duty to repair.
38. The owner says the strata has improperly charged amounts to its strata account. The owner also says the strata bylaws only permit the strata to charge costs of repairs if the strata pays its insurance deductible. The owner cites bylaw 3000.
39. The owner also says the strata has not provided details of why and how the water tank burst. The owner says failing to provide details violates the SPA and deprives

the owner of an opportunity to answer the complaint. The owner suggests an engineer's report is needed.

40. The owner denies liability, but through its insurer paid part of the amount claimed.

### **The Strata**

41. The strata says the owner owes \$24,677.60, plus tribunal fees and other amounts allowed under the Act and tribunal rules.

42. The strata says that it needed to repair the damage caused by the water leak. The strata cites its bylaw 8 and SPA section 72.

43. The strata says that under its bylaw 3 damage to property does not require proof of fault.

44. The strata says that sufficient particulars of the repairs and charges were provided.

45. The strata's original claim was for reimbursement of \$31,397.26, the total cost of repairing the damage. The owner's insurer paid \$6,719.66 for damage to the owner's strata lot and the owner's proportionate share of the common property repairs. The strata says the owner caused all the damage to the common property and the ski shop. The owner cannot pay only its proportionate share for damage to the common property and nothing for the ski shop.

46. The strata's remaining claim is for \$24,677.60.

## **ANALYSIS**

### **Cause of the Water Leak**

47. Strata bylaw 3(1) says that an owner must not "use" a strata lot in a way that causes nuisance or hazard to another person, or unreasonably interferes with people enjoying the common property or common assets.



48. Bylaw 3(2) says that an owner must not “cause” damage, other than reasonable wear and tear, to the common property, common assets, or those parts of a strata lot that the strata must repair.
49. Black’s Law Dictionary says that “use” may simply mean serving a purpose. Having the ruptured water tank on the property is a “use” of the property. That “use” produced a water leak in the owner’s strata lot. It was a nuisance and a hazard, and it interfered with people enjoying the common property and common asset. For those reasons, I find the owner contravened bylaw 3(1).
50. Bylaw 3(2) also imposes liability if the owner “causes” damage to the common property, common assets, or parts of the strata complex that the strata must repair.
51. Black’s Law Dictionary defines “cause” as simply a reason why an event occurs. “Cause” need not imply wrongdoing. In this dispute, the bylaws do not say an owner must be careless or negligent to be liable.
52. Strata bylaws may forgive an owner who is not negligent or careless, as discussed in *The Owners, Strata Plan VR 194 v MacKinnon*, 2017 BCCRT 46. That decision considered a bylaw identical to bylaw 3(2) and found that, under the bylaw wording, an owner did not need to be negligent to be liable. While *MacKinnon* is not binding on me, I accept that tribunal decision and find the circumstances apply here.
53. The “cause” of the damage is not disputed: it is the owner’s ruptured water tank. The water tank is the owner’s property and the owner’s responsibility. Being “responsible” need not mean being negligent, according to *Wawanesa Mutual Ins. Co. v. Keiran*, 2007 BCSC 727, at para. 12, and *Mari v. Strata Plan LMS 2835*, 2007 BCSC 740, at para. 12. As found in *Strata Corporation LMS 2723 v. Morrison*, 2012 BCPC 300, an owner is responsible for what happens in that owner’s strata lot. It does not matter if the owner was absent at the time.
54. I find that the water leak was caused by the owner’s property, for which the owner is responsible. The owner caused damage to the common asset and the common

property, in breach of bylaw 3(2). The owner also created a nuisance or hazard to other people from the water leak in the owner's strata lot, in breach of bylaw 3(1).

### **Obligation to Repair**

55. SPA section 72 says that the strata must repair and maintain common property and common assets. It also says that a strata corporation may make bylaws taking responsibility for repair and maintenance of specified portions of a strata lot.
56. "Common asset" is defined in SPA section 1 as land held in the name of the strata. The ski shop is a strata lot owned by the strata. I find that the ski shop is a common asset.
57. The hallway adjacent to the owner's strata lot is common property. This is confirmed by the strata plan.
58. I find that the strata was required by SPA section 72 to repair the damage from the water leak in the ski shop and in the hallway.
59. SPA section 129(1) says that the strata may remedy a bylaw violation. SPA section 133 says that the strata's remedy might include doing work in the strata lot and charging the cost to the owner.
60. The invoices for repair work identify water damage in the owner's strata lot, although much more work was done in the ski shop. The repairs included removing baseboards, making test cuts, water extraction, and applying microbials.
61. I find that repairs of this sort aim at health hazards from mould and the nuisance of escaping water. I have found that the water leak contravened bylaw 3(1). I further find that the strata was entitled under SPA sections 129(1) and 133 to remedy the contravention by doing work in the owner's strata lot, and it was proper to do so.

### **Charges to Owners**

#### ***SPA Section 135***

62. SPA sections 129 and 133 permit a strata to make repairs to remedy a bylaw contravention, and to charge reasonable repair costs to the owner. A strata may

deal with bylaw contraventions as it sees fit, so long as it complies with the principles of procedural fairness and does not act in a way that is significantly unfair (*Chorney v. The Owners, Strata Plan VIS770*, 2016 BCSC 148, at para. 52).

63. SPA section 135 says a strata must not make an owner pay for contravening a bylaw unless the strata gives the owner notice and an opportunity to respond, including at a hearing, if the owner wants one.
64. In *Terry v. The Owners, Strata Plan NW 309*, 2016 BCCA 449 the strata levied fines without satisfying SPA section 135. The strata made repeated accounting errors over many years, imposed late fees for failing to pay erroneous fines, and failed to provide enough detail for the owner to understand the charges. Sometimes the strata gave the owner no notice at all that it was imposing fines. That was significantly unfair, and the fines were invalid. The Court of Appeal said a strata cannot levy a fine until the owner has been told of the complaint, with enough detail to understand the complaint. Then the strata must give the owner a reasonable opportunity to answer the complaint before registering a charge.
65. A strata corporation can cure a violation of SPA section 135. In *Cheung v. The Owners, Strata Plan VR 1902*, 2004 BCSC 1750, a strata violated SPA section 135 by registering charges for bylaw violations before giving the owner an opportunity to be heard. Then the strata reversed the charges, held a hearing, found the charges were valid, and re-registered the charges. The court found the strata had remedied its non-compliance with SPA section 135 and was entitled to re-register the charges.
66. *Cheung* is considered in *S.M. v. The Owners, Strata Plan ABC*, 2017 BCCRT 23, at paras. 18-20. Although *S.M. v. The Owners* is not binding on me, I accept that decision and find the reasoning applies here. In *S.M. v. The Owners, Strata Plan ABC*, the strata fines for bylaw contraventions did not comply with SPA section 135, but the tribunal held this was an irregularity that the strata cured. The strata did not reverse the fines, but held off demanding payment, giving the owner an opportunity to respond and to attend a hearing. After the hearing the strata

demanded payment, and the tribunal found that the requirements of SPA section 135 had then been met.

67. All the charges in this dispute were registered on the owner's account in June and July 2016, before the owner responded in August 2016. The strata told the owner of the bylaw contravention, cited the bylaw, and provided invoices for the repair work done. The strata did not, however, give the owner a chance to respond before charging the owner's account.
68. The owner responded in August 2016 to the strata's letters about the water leak and bylaw contraventions. The owner asked to discuss the matter by phone. By late September 2016 the owner had spoken to both the strata council president and the property manager, and had submitted more than one detailed response in writing.
69. The strata did warn the owner in January 2017 that it was planning to register a lien, but never did. At that point the owner asked for a hearing, but when one was offered in February 2017 the owner withdrew the request, saying that a written response would be enough.
70. The strata offered further dates for a hearing, while holding off on demands for payment or its proposed lien. I find that at the strata council meeting on May 11, 2017 the strata council heard the owner's concerns and provided a response, as required by section 135 and in keeping with principles of procedural fairness. I further find that the strata council sent the owner its decision in writing on May 26, 2017, which is a reasonable time after the hearing.
71. I find that the strata violated SPA section 135 by charging the owner's account before the owner had an opportunity to respond. I also find that the strata took steps to cure the violation of SPA section 135 by giving the owner a hearing then providing its decision in writing. I further find that the strata did not fully cure the violation of SPA s. 135, which would involve reversing the charges relating to the water leak that were registered in June and July 2016, and then re-registering them on or after the date of the council's written decision, May 26, 2017.

72. Nothing in this decision prevents the strata from reversing the charges registered in June and July 2016 relating to the water leak and re-registering them on or after May 26, 2017.

### ***Bylaw 3000***

73. The owner says that the strata cannot charge back repair costs to owners if the strata has not paid its insurance deductible. The owner cites bylaw 3000.

74. Bylaw 3000 does not support the owner's position. Bylaw 3000 deals with damage by owners. It says that, if the strata makes a claim on its insurance policy and pays the deductible, then the strata may charge owners up to that amount.

75. The strata has not made a claim on its insurance policy. For that reason, I find that bylaw 3000 does not apply.

### ***Particulars***

76. The owner also says that the invoices need more detail. The owner says that detail as to how and why the water tank burst is missing.

77. The invoices identify the dates when work was done. They set out who did work to address what defects. They specify work locations and tools used. The tasks and costs seem reasonable, and relate directly to the water leak.

78. As for an expert report, I have already found the owner responsible for the water leak. The strata does not need to study why the water tank burst.

79. I find the detail in the invoices is adequate.

### ***Partial Payment***

80. The owner made an insurance claim against its own policy. The owner's insurer made a payment to the strata. That payment seems to cover damage to the owner's strata lot and to the owner's share of the common property. It also covers checking the ski shop.

81. Ms. Jiwaji said the payment was for a “portion of the damages” the owner’s policy will respond to. At no time did either the owner or the strata say the payment was full settlement of the strata’s claim against the owner.
82. I have already found that the owner violated the bylaws causing all the damage to the ski shop, the common property, and its own strata lot. I find that the insurer’s decision on liability under its policy does not matter to the dispute between the parties.

## **DECISION AND ORDERS**

83. I dismiss the strata’s application. Although I find that the owner violated the bylaws and would have been liable for the repair costs, I also find that the strata registered its charges on the owner’s account in a way that violates SPA section 135, a violation that has not been fully cured.
84. Under section 49 of the Act, and the tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. In this case the applicant strata was not successful, so I am not awarding tribunal fees. The respondent owner claimed no other expenses.
85. 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.

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Susan MacFarlane, Tribunal Member