



Civil Resolution Tribunal

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Type: Strata

Civil Resolution Tribunal

Indexed as: *Shura v. The Owners, Strata Plan LMS 1104, et al*, 2018 BCCRT 339

B E T W E E N :

Kevin Shura

APPLICANT

A N D :

The Owners, Strata Plan LMS 1104, Ron Chiu and Ginger Hsu Tan

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Michael J. Kleisinger

INTRODUCTION

1. The applicant Kevin Shura (applicant) owns the unit below the respondents Ron Chiu and Ginger Hsu Tan (respondent owners) in the respondent strata corporation (strata). Water leaked through the ceiling into the applicant's unit and

damaged his bathroom. He asks for the strata and respondent owners to pay for the repairs.

2. For the reasons that follow, I find that the respondent owners must pay the applicant owner the costs of repair. I dismiss the claim against the strata.
3. The parties represent themselves with a council member appearing on behalf of the strata.

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. I decided to hear this dispute through written submissions, because I found that there were no significant issues of credibility or other reasons that might have required 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. Under section 48.1 of the Act and the tribunal rules, in resolving this dispute the tribunal may make order a party to do or stop doing something, order a party to pay money, order any other terms or conditions the tribunal considers appropriate.

ISSUES

8. The issues in this dispute are:
 - a. Where did the leak originate?
 - b. Who is responsible for the leak?
 - c. Is the applicant entitled to damages?

BACKGROUND AND EVIDENCE

9. Since January 8, 2014, the applicant has been the registered owner of unit 603 in the strata. Unit 702 is directly above unit 603.
10. At some point prior to August 26, 2016, water escaped from unit 702 and damaged the bathroom of unit 603. The owner of unit 702 agreed to pay \$493.50 for repairs. The strata was aware of the resolution. The parties did not provide further details about any investigations into this leak.
11. On October 31, 2016, the respondent owners became the registered owners of unit 702. It is unknown whether the respondent owners knew of the previous leak and the resolution reached with the previous owner.
12. On January 12, 2017, the applicant reported to the strata that his bathroom ceiling was leaking water from the same locations as the previous leak. A few days later, he paid \$393.75 to repair the initial water damage.
13. On January 16, 2017, the strata informed the applicant that it would investigate the cause of the leak. It informed the owner that the bylaws make owners responsible for repairing and maintaining the strata lot.
14. Between January 19 and February 9, 2017, the strata's restoration contractor (inspector) attended units 603 and 702 on 3 occasions to inspect the damage and determine the cause of the leak. To assess the damage and cause of the leak, the inspector cut large holes in the applicant's bathroom ceiling to access the area.

15. On the February 9, 2017, the inspector concluded:
 - (a) The toilet in unit 702 was leaking, but that leak was not related to the damage in unit 603.
 - (b) The water tests performed on the toilets, shower, and bathtub drains in the bathroom of unit 702 showed no leaks.
 - (c) The water damage on ceiling in unit 603 was caused by an accidental water escape event from unit 702.
 - (d) The repairs to unit 603 would cost approximately \$750 plus tax.
16. The inspector did not repair the large holes left in the applicant's bathroom ceiling.
17. On February 14 and 17, and April 27, 2017, the strata informed the applicant it would not pay for repairs because the leak did not arise from common property. It informed the applicant that he would need to pay for the repairs of his unit and that the strata would no longer be involved in the matter.
18. On July 19, 2017, the applicant paid \$787.50 for the repairs to his bathroom.

POSITION OF THE PARTIES

19. The applicant wants the strata or the respondent owners to pay him \$1,181.25 for the repairs to his unit.
20. The strata says that it is not responsible for the damage to the applicant's unit. It relies on the investigator's opinion that the leak did not come from areas for which it is responsible, namely, pipes located in common property. It relies on the bylaws which state an owner is responsible for the repair and maintenance of the strata lot. It suggests that, if anyone, the respondent owners should pay for the damage because the water escaped from their unit.
21. Ms. Tan participated in the process. In her brief response, Ms. Tan says that the inspector found that "the leak has 'absolutely' nothing to do with" unit 702. She

invites the tribunal to rely on the inspector's report and not the applicant's opinion of the cause of the damage.

22. Mr. Chiu has not participated in this process. On October 16, 2017, the applicant properly served Mr. Chiu in accordance with the direction of a Tribunal Member made October 13, 2017. Given he has been properly served, and because he is a joint owner of the unit 702, I find that Mr. Chiu may be jointly responsible with Ms. Tan in the event I find them liable.

ANALYSIS

Where did the leak originate?

23. All parties confirmed and relied on the investigator's findings in support of their respective positions.
24. Ms. Tan reads the inspector's findings to support her view that her unit was not involved in the leak. I find that the inspector's findings suggest the opposite. While the inspector found that the toilet, sink, bathtub and pipes of the respondent owners' unit did not cause the leak, the inspector concluded that the water escaped from unit 702.
25. I accept the inspector's opinion and find that the water escaped from unit 702 and not from the common property.

Who is responsible for the leak?

Applicable Bylaws

26. Bylaw 3.1 states an owner must repair and maintain the owner's strata lot, except for repair and maintenance that is the responsibility of the strata.
27. Bylaw 4.1 states an owner, tenant, occupant or visitor must not use a strata lot in a way that causes a nuisance or hazard to another person.

28. Bylaw 4.3 makes an owner responsible to indemnify the strata from the expenses of any maintenance, repair or replacement rendered necessary to the common property, common assets or to any strata lot by the owner's act, omission, negligence or carelessness or by that of an owners visitors, occupants, guests, employees, agents, tenants or a member of the owners family, but only to the extent that such expense is not reimbursed from the proceeds received by operation of any insurance.
29. Bylaw 10.1 requires the strata to repair and maintain the common property and assets of the strata. The bylaw also requires the strata to repair and maintain strata lots, but limits that responsibility. The strata is responsible for the parts of a strata lot that include the structure and exterior of the building and other parts of a strata lot that are not relevant to this dispute, such as chimneys, doors and fences.

Claim against the Strata

30. Under the bylaws, the strata is responsible for common property. As found above, the water escaped from unit 702 and not from the common property. The strata's responsibility to repair and maintain common property is not engaged in this case. Nor are the damages to unit 702 the strata's responsibility. As such, I find that the strata is not liable to the applicant for the damage to his unit. I dismiss the claim against the strata.

The Law of Nuisance

31. Unlike the law of negligence, the law of nuisance focuses on the harm suffered rather than the prohibited conduct. Nuisance is defined as unreasonable interference with the use of land. Whether the interference results from intentional, negligent or non-faulty conduct is of no consequence provided that the harm can be characterized as a nuisance (*St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64 at paragraph 77).
32. A nuisance occurs when a person substantially and unreasonably interferes with a property owner's use or enjoyment of their property. A substantial interference with

property is one that is non-trivial. Compensation will not be awarded for trivial annoyances. Once the interference is found to be non-trivial, the court or tribunal will then decide whether the interference was reasonable in the circumstances. Where the interference causes physical damage to the property in question, the interference will almost always be unreasonable (*Antrim Truck Centre Ltd. V. Ontario (Transportation)*, 2013 SCC 13 at paragraphs 19 and 50; *Royal Ann Hotel Co. Ltd. V. Village of Ashcroft* (1979), 95 D.L.R. (3d) 756 (BCCA) at page 760).

33. If a person does not create a nuisance, ignorance of the facts constituting the nuisance may be an excuse unless he or she ought to have discovered the facts using reasonable care (*Wayen Diners v. Hong Yick Tong Ltd.* (1987), 35 DLR (4th) 722; *Kayne v. Owners, Strata Plan LMS 2374*, 2013 BCSC 51 at paragraph 223). That excuse will not be available to a party who is responsible for the creation of the nuisance (*Halifax (Regional Municipality) v. Willis*, 2010 NSCA 76 at paragraphs 56 to 58).
34. Ms. Tan has interpreted the inspection report to say that the leak had “absolutely nothing to do with” her unit. In my view, Ms. Tan mischaracterized the inspection report. The report clearly says that the water came from her unit. The respondent owners did not provide any evidence from themselves or anyone else to refute the inspector’s opinion that the water escaped from their unit.
35. The inspector’s opinion, which all parties have accepted and relied on, determined that the damage caused to unit 603 came from an accidental water escape event from unit 702. I accept the inspector’s findings that there were no mechanical problems with the pipes or fixtures in unit 702 which would lead to a leak. With mechanical failures ruled out, I find it is more likely than not that the action or inaction of someone in unit 702 led to the water’s escape from the unit that damaged unit 603.
36. Given the damage to unit 603, I conclude that the escaped water constituted a nuisance. By allowing water to escape their unit, the respondent owners, or someone under their charge, substantially and unreasonably interfered with the

applicant's use and enjoyment of his property. As such, I find the respondent owners liable to the applicant in nuisance.

The Law of Negligence

37. To find negligence in this case, the applicant must prove each of the following on a balance of probabilities:
- (a) The respondent owners owed the applicant a duty of care;
 - (b) The respondent owners breached the standard of care;
 - (c) The applicant sustained damage; and
 - (d) The respondent owners' breach of the standard of care caused the damage, in fact and in law.

Mustapha v. Culligan of Canada Ltd., 2008 SCC 27 at paragraph 3

38. In cases such as this, where the precise event that caused the water to escape is unknown, the applicant must adduce sufficient direct and circumstantial evidence to establish a *prima facie* case that the respondent owners have acted negligently. A *prima facie* case means that the applicant's version of events is accepted as correct until and unless the respondent can prove otherwise. If the evidence supports a *prima facie* case of negligence, the respondent owners must then offer evidence to refute or neutralize the applicant's evidence, or the tribunal may find them liable for the damages (*Fontaine v. ICBC*, 1997 SCJ No. 100). While negligence cannot be inferred as a matter of law whenever water escapes a unit, such an inference may be drawn as a matter of fact in a particular case (*Rhodes v. Surrey (City)*, 2018 BCCA 281 at paragraph 42).
39. Being the upstairs neighbour to the applicant, I find the respondent owners owed a duty of care to the applicant. They were required to ensure that their use of their unit did not interfere with the applicant's use of his property. To that end, the standard of care expected of the respondents or any other strata lot owners is to

use and maintain their property in a reasonable manner so as to not cause damage to other units. These basic duties and standards are reflected in the bylaws that make owners responsible to repair and maintain their units (bylaw 3.1) and not to use their unit in such a way that causes a nuisance or hazard (bylaw 4.1).

40. As noted, I accept the inspector's finding that there was no mechanical failure of the pipes or fixtures in unit 702 that led to the water's escape, such as a leaky toilet, shower or pipe. Further, I accept the inspector's opinion that the damage caused to unit 603 was caused by an unknown isolated water escape event originating in unit 702. Without evidence of a mechanical failure or any evidence from the respondent owners as to the cause of the escape, the only reasonable inference is that someone in the respondent owners' unit turned on the water in the unit and did not properly supervise its progress. By failing to track the water after turning the water on- whether that be an overflowed sink, toilet or bathtub- I find the respondent owners, or someone under their charge, breached the standard of care.
41. As noted in the applicant's evidence and in the photographs provided, the amount of water that was allowed to seep into his unit was not a trivial amount. I find that it was reasonably foreseeable that allowing such an amount of water to escape the sink, bathtub or toilet in unit 702 could cause damage to the unit below.
42. With all of the necessary factors satisfied, I find that the respondent owners are liable to the applicant in negligence.

What are the applicant's damages?

43. The damages that flow from a finding of negligence and nuisance are the same. The applicant is entitled to be compensated for all of the costs that flow from the respondent owners' wrongful acts. I find that the respondent owners must pay for the damages that the applicant incurred as a result of their negligence and for the nuisance.

44. The applicant has incurred \$1,181.25 to assess and repair the damage to his bathroom. I order the respondent owners to pay him that amount.
45. The applicant has also sought \$35 for his “expenses.” I am unable to determine what these expenses relate to or any evidence that justify this claim. As such, I decline to grant the applicant his claim for “expenses.”
46. The applicant also seeks recovery of the \$225 he paid for the tribunal fees. As he was successful this dispute against the respondent owners, he will have these expenses against them.
47. I also note that the strata seeks reimbursement from the applicant for the investigation costs. The strata did not file a counterclaim in this dispute. I decline to grant the strata’s request for reimbursement. As I have found, it is the respondent owners who are responsible for the water’s escape and the costs associated with assessing and fixing the damage. Even if the counterclaim was properly brought, I would not have found the applicant responsible to reimburse the strata for these expenses.

ORDER

48. I order that:
 - a. The claim against the respondent strata is dismissed.
 - b. Within 30 days, the respondent owners must pay to the applicant \$1,419.16 representing the following amounts:
 - a. \$1,181.25 representing the costs to repair his unit;
 - b. \$12.91 in pre-judgment interest pursuant to the *Court Order Interest Act* (COIA); and
 - c. \$225.00 for tribunal fees.
 - c. The applicant is entitled to any post-judgment interest pursuant to the COIA.

49. Under section 189.4 of the SPA, an owner who brings a tribunal claim against a strata corporation is not required to contribute to any monetary order issued against the strata corporation or to any expenses the strata corporation incurs in defending the claim. I order the respondent strata not to allocate to the applicant owner any expenses that the respondent strata incurred in defending this dispute.
50. 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.
51. 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.

Michael J. Kleisinger, Tribunal Member