



Civil Resolution Tribunal

Date Issued: August 2, 2018

File: ST-2017-00229

Type: Strata

Civil Resolution Tribunal

Indexed as: *Buschau v. The Owners, Strata Plan LMS 1816 et al*, 2018 BCCRT 413

B E T W E E N :

Sandra Buschau

APPLICANT

A N D :

The Owners, Strata Plan LMS 1816 and Ian Callaway

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Kate Campbell

INTRODUCTION

1. The applicant, Sandra Buschau (owner) owns a strata lot in the respondent strata corporation, The Owners, Strata Plan LMS 1816 (strata).
2. The other respondent, Ian Callaway, owns another strata lot in the strata. He is also a past member of the strata council.

3. The owner says the strata has failed to meet various duties under the *Strata Property Act* (SPA) and its bylaws. She seeks a number of remedies related to the expense of investigating and repairing drainage pipes, plus compensation for loss of use and enjoyment of her strata lot. The owner also seeks reimbursement of legal fees and expenses.
4. The owner originally sought disclosure of various documents from the strata, including financial statements, budgets, and information about legal disputes. The owner also sought orders that the strata spend money only in accordance with the SPA. The case manager reported that these matters were resolved through facilitation, so I have not addressed them in this decision.
5. The strata denies the owner's claims, and says it manages its affairs in good faith and makes best efforts to fulfill its obligations under the SPA.
6. Mr. Callaway says the owner's requested remedies are against the strata corporation, and not him personally. He adopts the strata's submissions.
7. The owner is self-represented. The strata is represented by a lawyer, Lisa Mackie, and Mr. Callaway is also represented by a lawyer, Robert Moore.

JURISDICTION AND PROCEDURE

8. 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.
9. 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.

10. 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.
11. The applicable tribunal rules are those that were in place at the time this dispute was commenced.
12. 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

13. The issues in this dispute are:
 - a. Must the strata repair or replace the drainage line, and must it do so under the direction of the owner's engineer?
 - b. Is the owner entitled to compensation of \$23,731 for expenses related to the drainage problem, including investigation, inspection, videotaping, professional reports, restaurant meals, and replacement of damaged kitchen items?
 - c. Is the owner entitled to \$10,000 for loss of use and enjoyment of her strata lot related to the drainage problems?
 - d. Should the owner be reimbursed for dispute-related expenses, including legal expenses?
 - e. Should the strata be reimbursed for dispute-related expenses?
 - f. Should Mr. Callaway be reimbursed for dispute-related expenses?

EVIDENCE, FINDINGS & ANALYSIS

14. I have read all of the evidence provided and submissions provided, which are extensive. In this decision I refer only to evidence I find relevant to provide context for my decision.
15. The owner says that since 2006, waste water has been backing up into the kitchen sink in her strata lot. She says the strata has been aware of this problem since then, but failed to properly investigate and repair it.

Drainage Problem – Background Facts

16. The evidence provided by the parties confirm that there have been intermittent problems with waste water backup in the owner's kitchen sink since 2006. The owner provided photos and videos showing water backed up into the sink, and other videos showing water gushing up from the drain with accompanying gurgling noises. The owner has also provided statements from neighbours confirming that they have witnessed waste water backing up into her kitchen sink.
17. An October 24, 2006 service report from Latham's, a plumbing contractor, says the owner's kitchen sink was plugged, and they had to cut open a wall in the strata lot above the owner's and auger 60 feet down the pipe into the parkade 3 times before they finally cleared the blockage.
18. The owner emailed the strata council in July 2010 stating that she still had problems with her kitchen drain, which she felt was blocked again. On December 31, 2010, Latham's again reported repairs to the owner's blocked sink. The service report says they cut an access hole in the owner's living room wall to access the area where the kitchen sink trap joined the main drain line. They said they augured the drain line multiple times and used a hydro-flusher to clear the line. They said they then inspected the line with a video camera and found it clear, and that operational testing was "okay".
19. On January 7, 2011, Latham wrote a memorandum to the strata property manager following an inquiry for further information about the recent service call. Latham's

said their technician found debris in the drainage line and “an abnormally long horizontal offset (27 feet).” The memorandum said the line was cleared, but they recommended inspection in 1 year to check for buildup. The memorandum also said the owner declined to have a drain cleanout installed in her suite for future inspection and cleaning.

20. In March 2012, the owner reported more air and water backups into her sink when the unit upstairs used their garburator. She asked when Latham’s was going to check the drain line again, further to the January 7, 2011 memorandum. She said she thought the horizontal line was filled with sludge again. She said the problem needed to be investigated by an engineering firm and fixed permanently.
21. In June 2012, the respondent Mr. Callaway emailed the owner in his capacity as strata council president and said he had reviewed the building’s mechanical drawings with an engineer to identify piping locations that might be involved in the owner’s kitchen sink drainage. He said they wanted to rule out a design limitation, settlement of debris, overload of debris from garburators, any combination of these factors, or other, currently unknown, factors. He said he would follow up with Latham’s and the engineer to determine possible approaches to investigate the owner’s described issues.
22. A work order from another plumbing contractor, Ashton, said that on November 2, 2012 they repaired the kitchen sink in another unit (102) in the owner’s building. The report said the trap arm was blocked with rice, and they snaked the drain line 10 to 12 feet and found the snake heavily coated with grease and hair. The work order said the common drain line seemed to be “very full of buildup.”
23. In January 2014, the owner’s lawyer wrote to the strata, asserting that the strata had failed in its duty to repair and to enforce bylaws in respect of the owner’s ongoing drainage problems. The letter urged the strata to investigate the problems and put a repair plan in motion, or face legal action. The letter said there had been 3 major waste water overflow incidents since October 2006, which typically occurred when the residents in the strata lot above the owner’s (unit 401) used

their garburator and that waste water and gas would fill the owner's kitchen sink. The letter said that since new owners moved into unit 401, the backups had occurred daily, and prevented the owner from using her sink or dishwasher or enjoying her strata lot.

24. The strata hired a mechanical engineering firm, CADA & Associates, to investigate the owner's kitchen drainage concerns. In a June 16, 2014 report, Carlo Ambito wrote that "two of CADA's engineers" were presented with floor plans and mechanical drawings at a site visit on May 21, 2014. The report said that the kitchen sinks in the owner's unit and unit 401 were "handled" by a 3 inch wet vent stack, where each kitchen sink is connected to the main drain stack. The report said the drain pipe in the parkade visually appeared to have adequate slope, and the plumbing appeared code-compliant. The report said one of the 2 kitchen sinks in the owner's unit appeared clogged, and the blockage was potentially "downstream" beyond the sinks.
25. The report said CADA recommended hiring an independent plumbing company to investigate the owner's kitchen sink drainage. This investigation was conducted by Bro Marv Plumbing on May 22 and 23, as part of an emergency service call after the owner's kitchen sink overflowed. Bro Marv installed a drain clean out in the owner's kitchen, then snaked 23 feet down the drain line and tested to ensure proper flow. The CADA report concluded that based on Bro Marv's investigation, there was no adequate evidence to determine the cause of the blockage in the 3 inch drain line service the owner's strata lot and unit 401. They recommended using strainers in the sinks, using hot water with the garburator, and not using the garburators for disposal of solids.
26. In August 2014, the owner hired plumbing contractor Allied to use a camera to inspect the drain line serving her strata lot and unit 401. Allied's August 26, 2014 report says the drain stack pipe was 2 inches wide, and was blocked by debris at 6 feet. At 7 feet the pipe was full of grease and debris, and at 11 feet standing water in the pipe indicated lack of slope. Allied reported a 45 degree offset in the pipe at 12 feet, and said the pipe was blocked with debris and water at 13 feet. The report

says they lost the picture between 12 and 16 feet because the pipe was full of water and could not be cleared with running water. Allied recommended cleaning of the entire drain line common to the owner's strata lot and unit 401 above, to avoid sewage backups into the owner's strata lot and to allow completion of the visual inspection of the entire drain branch.

27. The owner hired a mechanical engineer, Kenneth Newbert, to provide another expert opinion on her plumbing issues. Mr. Newbert reviewed the prior reports from Latham, Allied, and CADA, as well as the building's mechanical drawings. He also visited the site twice. He visually observed the pipes in September 2014, and in November 2014 he witnessed the cleaning of the horizontal offset below the owner's strata lot, and assisted with video work to determine the condition of the pipe after cleaning.
28. Mr. Newbert's report, dated May 21, 2015, says he believes the owner's drainage issue was a lack of slope in the offset of the drainage pipe under the floors of her strata lot. Mr. Newbert recommended exposing the 2 inch horizontal offset in the ceiling of the strata lot below the owner's to positively confirm the slope on the pipe, and if the slope was less than 2% it should be corrected to prevent further blockage. He said based on his discussions with the owner, he did not believe she or the owners of unit 401 plugged the drain due to grease cooking or other "lifestyle reasons".

Drainage Problem - Repairs

29. The owner seeks an order that the strata corporation repair and/or replace the drain pipe under her floor, under the direction of her engineer, Mr. Newbert.
30. The parties agree that the drain pipes in question are common property, as they are shared between several strata lots. Under section 1(1) of the *Strata Property Act* (SPA), drainage pipes are included in the definition of common property even if they are located "wholly or partially within a strata lot, if they are capable of being and intended to be used in connection with the enjoyment of another strata lot or the common property."

31. Section 72 of the SPA says a strata corporation must repair and maintain common property. In *Taychuk v. The Owners, Strata Plan LMS 744*, 2002 BCSC 1638, the Supreme Court of British Columbia regarded pipes inside a strata lot as common property because they were connected to other pipes that serviced other units in the building. The court said that since the pipes were common property, the strata corporation was responsible for their repair.
32. The strata does not deny that it is obliged to maintain the drain pipe in question. However, the strata says Mr. Newbert's expert opinion about the pipe's slope was not based on a physical inspection of the pipe, and is therefore inconclusive. Since such an inspection requires cutting a large hole in the ceiling of the downstairs unit, the owner had no authority to obtain that evidence. As noted, Mr. Newbert's report recommended cutting open the ceiling to inspect the pipe, and correcting it if the slope was less than 2%.
33. The strata says the tribunal should appoint a joint expert to review the disputed drain pipe through a physical inspection. The strata says this expert opinion is required in order to determine what has caused the water issues faced by the owner. The strata says the dispute should be placed in abeyance pending this opinion.
34. I do not agree that the dispute should be placed in abeyance pending another expert report. There are already 3 expert opinions in evidence. In January 2011, Latham's reported that there was an abnormally long horizontal offset of 27 feet, and the line should be inspected in 1 year to check for buildup. Mr. Newbert, a qualified engineer, produced a thorough report in May 21, 2015, based on video camera inspection of the pipes, plus 2 site visits and review of the building's mechanical plans and the earlier reports.
35. The strata obtained their own expert report from CADA in June 2014. Correspondence provided by the owner indicates that there are a number of problems with the CADA report. First, the subsequent reports from Allied and Mr. Newbert indicate that the CADA report incorrectly says the riser pipe serving the

sinks in the owner's strata lot and unit 401 are 3 inches, when they are really 2 inches wide. Second, the report was sealed by an engineer who never visited the jobsite, and who did not prepare the report. Third, the CADA report specifically says that 2 engineers visited the jobsite, but this is false. In fact no CADA engineer did so. In a December 23, 2014 letter the Association of Professional Engineers and Geoscientists of BC said CADA was in breach of the *Engineers and Geoscientists Act* for unauthorized practice of professional engineering based on the June 2014 CADA report. An April 27, 2016 letter from the Applied Science Technologists and Technicians of BC (ASTTBC) confirms that Mr. Ambito, who signed the CADA report, was found in breach of the ASTTBC Code of Ethics and Practice Guidelines in relation to the June 2014 CADA report, and was fined \$250 for his misconduct.

36. For these reasons, I am not persuaded by the CADA report, and place no weight on it. The strata could have obtained another expert opinion and provided it to the tribunal, but did not. Unlike the owner, the strata had authority to access the downstairs strata lot in order to view the pipe in question.
37. For all of these reasons, I decline to grant the strata's request to put this dispute in abeyance and obtain another expert report.
38. The strata's counsel asserted in a February 1, 2018 email to the tribunal facilitator, that if the tribunal did not order a joint expert, then the respondent should be permitted to retain its own expert to respond to the owner's allegations, and failure to do that deprived the strata of its right to produce evidence in support of its case. I do not agree. As previously stated, the strata had over a year to obtain its own expert report to rebut Mr. Newbert's, but chose not to do so. The owner's consent was not required to obtain such a report. I have considered all evidence provided by the strata, and nothing has prevented the strata from obtaining another expert report. I therefore find there has been no breach of procedural fairness on this basis. While the tribunal's rules permit me to order joint expert reports, there is no requirement to do so, and it is within my authority to determine all matters relating to the tribunal decision process.

39. The strata admits there are problems with the owner's drain, and does not dispute its obligation to maintain common property drain pipes. While the strata says the owner has caused the drain problems by introducing material into the pipes, I find the evidence does not support that conclusion. Mr. Newbert's clearly reasoned report says the drainage problem is likely due to a lack of slope in the offset of the drainage pipe under the floors of the owner's strata lot, and not due to materials introduced by the owner. Mr. Newbert is a qualified mechanical engineer, and I accept his expert opinion. His opinion is supported by specific reasoning, as set out in his report. His opinion is consistent with Latham's January 2011 report. For the reasons set out above, I find the only contrary report in evidence, that of CADA, unpersuasive. I prefer Mr. Newbert's opinion and rely on it.
40. I also note that Ashton's November 2012 plumbing report identified a blockage consisting of rice in the trap arm from unit 102, and said they snaked the drain line 10 to 12 feet and found the snake heavily coated with grease and hair. Ashton's work order said the common drain line seemed to be "very full of buildup." There was no suggestion in Ashton's report that the blockage and buildup were related to the owner's kitchen use. Thus, I find that the strata's assertion that the owner was responsible for the drain problems is inconsistent with the evidence.
41. Mr. Newbert recommended exposing the 2 inch horizontal offset pipe in the ceiling of the strata lot below the owner's to positively confirm the slope on the pipe, and if the slope was less than 2%, correct it to prevent further blockage. Mr. Newbert also said that Allied's November 2014 video inspection showed a 3 inch wye connection in the parkade that was "back sloped". He said this should be corrected.
42. Based on Mr. Newbert's expert opinion, I order that the strata, at its cost, engage a qualified contractor to expose the horizontal offset pipe below the owner's floor. A certified engineer selected and paid by the strata (who may or may not be Mr. Newbert) must inspect the pipe to determine if the slope is less than 2%, and if it is, the slope must be corrected at the strata's expense.

43. I also order that the “back sloped” 3 inch wye connection in the parkade must be corrected, in a manner specified by a certified engineer selected and paid by the strata (who may or may not be Mr. Newbert).
44. If the strata selects an engineer other than Mr. Newbert, the owner must have the opportunity to have her own engineer (who may or may not be Mr. Newbert) inspect the exposed pipes and any repairs. If the owner choses to have this inspection performed, the full cost of owner’s selected engineer shall be at the owner’s expense.
45. I note that in the event that the visual inspection shows that the pipe under the owner’s floor is already sloped 2% or more, this does not end the strata’s obligation to repair and maintain common property drain pipes. This includes diagnosing and repairing the waste water backups into the owner’s kitchen sink.

Section 34.1 Hearing

46. The strata says the owner did not request a hearing under section 34.1 of the Act, as required by section 189.1 of the SPA, so the strata was not provided with an opportunity to address the owner’s claims “in the manner required.”
47. Section 189.1(2) of the SPA says an owner or tenant may not request the tribunal to resolve a dispute unless they have requested a council hearing under section 34.1, or the tribunal, on request by a party, directs that this requirement does not apply.
48. The owner has essentially requested that I waive the hearing requirement, and I do so. While the owner did not technically request a formal hearing of the strata council under section 34.1 of the SPA, the evidence shows that she was on the strata council during some of the time periods in question. Page 3 of the January 22, 2013 strata council meeting minutes confirms that she raised her drainage concerns at a council meeting, the council members heard those concerns, and the matter was discussed. Accordingly, I find the strata was aware of and had sufficient opportunity to address the owner’s claims. I find it is unlikely that a

council hearing, if one was requested by the owner, would have resolved this dispute.

Compensation for Drain-Related Expenses

49. The owner claims reimbursement of \$23,731 for expenses relating to her kitchen drain problems, including investigations, inspections, videotaping, professional reports, restaurant expenses, and the cost of damaged kitchen items.
50. While I accept that the owner has likely incurred some of these expenses, she has produced no invoices or receipts to support the claimed amount. She has also provided no list or summary of costs, and no breakdown of the claimed total.
51. For that reason, I do not order reimbursement of the claimed expenses.

Loss of Use and Enjoyment

52. The owner seeks \$10,000 from the strata for loss of use and enjoyment of her strata lot due to ongoing noise, wastewater backups, threats of flood, and repairs.
53. While I accept the owner's evidence that the ongoing kitchen sink drainage problems were inconvenient, unpleasant, and frustrating, she has not provided evidence to support reimbursement for repairs.
54. Previous tribunal panels have granted damages for loss of use and enjoyment of a strata lot. For example, in *Chen v. The Owners, Strata Plan NW 2265*, 2017 BCCRT 113 an owner was awarded \$4,000 for loss of enjoyment of her strata lot after the tribunal found that the strata corporation had delayed noise testing for 2.5 years.
55. In this dispute, Mr. Callaway's June 2012 email to the owner said he would follow up with Latham plumbing contractors and the an engineer to determine possible approaches to investigate the owner's described plumbing issues. However, the evidence indicates that no further investigation was performed for at least 2 years,

when CADA was hired in June 2014. This occurred after the owner's lawyer wrote to the strata in January 2014 demanding action.

56. The owner's evidence is that she was unable to use her dishwasher during this period and beyond, due to fears of sink overflow, and that her use of the sink and the kitchen was also negatively impacted. She provided a letter from a relative confirming this loss of use. I accept this evidence, and find that the reasoning in *Chen* is applicable here. I find the owner has not established an entitlement to \$10,000, and has not provided evidence or submissions to support that amount. However, the evidence shows that the drain problems became more frequent in 2014 when new owners moved in upstairs, and after the CADA report.
57. After 2014, the strata apparently relied on the CADA report to justify its decision not to make any changes to the drain pipes. However, in its submissions to the tribunal the tribunal asserts that Mr. Newbert's 2015 report is not conclusive because he did no visual inspection of the pipe in question (because it was inside the ceiling). The same argument applies even more strongly to the CADA report, as it also involved no visual inspection, and unlike Mr. Newbert's report, did not consider any video footage taken inside the pipes. Thus, by its own argument, the strata relied on an inclusive report to justify not performing further repairs. I note that during this period the strata was already aware of the 2011 Latham report noting an abnormally long horizontal offset.
58. Following the reasoning in *Chen*, I conclude that the owner is entitled to \$6,000 in damages for the strata's failure to take steps toward a permanent repair of the drain problems after they became frequent rather than intermittent.

Reimbursement of Legal Fees

59. Each party to this dispute has requested that the tribunal reimburse its legal fees.
60. Tribunal rule 132 says that except in extraordinary cases, the tribunal will not order one party to pay another party's legal fees. This follows from the general rule in

section 20(1) of the Act that parties are to represent themselves in tribunal proceedings.

61. The strata requests that the owner reimburse it for \$13,686 in legal fees and related expenses. Mr. Callaway requests reimbursement of \$25,000 in legal fees. The strata submits that this dispute constitutes an “exceptional circumstance”, as contemplated in tribunal rule 132, and justifies an order of costs against the owner, as the owner’s claims are unsupported and/or exaggerated through her evidence and submissions. I do not agree, as set out the reasons above. I find that some of the owner’s claims related to the drain issue have merit.
62. The strata says the applicant has refused to accept the respondent’s numerous offers that would have addressed her complaints in part or in whole. Again, I do not agree. The strata has not fixed the drain problems shown on the video footage provided by the owner, and instead continued to rely on the CADA report even after it was proven to contain examples of professional misconduct. For these reasons, I do not find the circumstances of this case justify an order that the owner reimburse the strata for legal fees. I also find that Mr. Callaway has not established that extraordinary circumstances apply to his claim for legal fees. In any event, I would not order reimbursement because neither respondent has provided invoices or receipts confirming the amount or nature of legal fees paid.
63. The owner requests reimbursement of legal fees in the amount of \$12,245, plus another \$5,000 for unspecified expenses. I do not order this reimbursement pursuant to rule 132. Also, the owner has not provided particulars or evidence to support such expenses, some which may apply to her settled claims and therefore would not be appropriate for reimbursement in any event.
64. 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. As the owner was partially successful in this dispute, I order the strata to reimburse the owner \$225 for tribunal fees. I do not order Mr. Callaway to contribute to this

expense as the duty to repair and maintain common property lies with the strata, rather than the strata council president.

DECISION AND ORDERS

65. I order the strata to do the following within 30 days of the date of this decision:

- a. Pay the owner \$6,000 in damages for the loss of use and enjoyment of her strata lot.
- b. Reimburse the owner \$225 for tribunal fees.

66. I order the strata, at its cost, to do the following within 60 days of the date of this decision:

- a. Engage a qualified contractor to expose the horizontal offset pipe below the owner's floor. A certified engineer selected by the strata (who may or may not be Mr. Newbert) must inspect the pipe to determine if the slope is less than 2%, and if it is, the slope must be corrected.
- b. The "back sloped" 3 inch wye connection in the parkade must be corrected, in a manner specified by a certified engineer selected by the strata (who may or may not be Mr. Newbert).
- c. If the strata selects an engineer other than Mr. Newbert, the owner must have the opportunity to have her own engineer (who may or may not be Mr. Newbert) inspect the exposed pipes and any repairs. If the owner chooses to have this inspection performed, the full cost of the engineer selected by the owner shall be at the owner's expense.

67. The owner is entitled to post-judgment interest under the *Court Order Interest Act*.

68. 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 strata to ensure that no part of the amount ordered

to be paid by the strata, or any other expenses incurred by the strata in defending this claim, are allocated to the owner.

69. 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.
70. 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.

Kate Campbell, Tribunal Member