Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Ralph et al v. The Owners, Strata Plan 495* 2018 BCCRT 532

B E T W E E N :

Colin Ralph and Ashley O'Neill

APPLICANTS

A N D :

The Owners, Strata Plan 495

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Catherine Sullivan

INTRODUCTION

1. The applicants Colin Ralph and Ashley O'Neill (applicants) seek an order against The Owners, Strata Plan 495 (strata) for reimbursement of hotel and food costs and damage to personal items. The applicant Colin Ralph is the owner and the applicant Ashley O'Neill is the tenant of strata lot 14 (SL 14). The applicants say

they were forced to vacate SL 14 for 11 days and incurred expenses because a contractor hired by the strata damaged their strata lot.

2. The applicants seek an order against the strata of $1,986.13 for hotel accommodations, an order of $500.00 for replacing personal belongings and an order of $300.00 for the cost of meals. The applicants are self-represented and the strata is represented by a strata council member.

3. The strata says it acted with due diligence in hiring the contractor that the applicants say caused damage to their strata lot. It denies acting negligently and says it is not responsible for any payments to the applicants.

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 have 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. There was extensive documentation submitted by the parties in this dispute. I have read and reviewed all the evidence submitted by the parties. I have only referenced the specific materials and documents that have assisted me to decide the issues.

7. The applicable tribunal rules are those that were in place at the time this dispute was commenced in August 2017.

8. Under tribunal rule 126, in resolving a dispute, the tribunal may make one or more of the following orders:

   a. Order a party to do or stop doing something, or

   b. Order a party to pay money and/or

   c. Order any other terms or conditions the tribunal considers appropriate.

9. Under section 61 of the Act, the tribunal may make any order or give any direction in relation to a tribunal proceeding it thinks necessary to achieve the objects of the tribunal in accordance with its mandate. In particular, the tribunal may make such an order on its own initiative, on request by a party, or on recommendation by a case manager (also known as a tribunal facilitator). Tribunal documents incorrectly show the name of the respondent as The Owners, Strata Plan, VIS 495, whereas, based on section 2 of the SPA, the correct legal name of the strata is The Owners, Strata Plan 495. Given the parties operated on the basis that the correct name of the strata was used in their documents and submissions, I have exercised my discretion under section 61 to direct the use of the strata's correct legal name in these proceedings. Accordingly, I have amended the style of cause above.

ISSUES

10. The issue in this dispute is whether the strata is responsible for the damage to the applicants' strata lot caused by a contractor and whether the strata is responsible for the reimbursement costs claimed by the applicants?

BACKGROUND AND EVIDENCE

11. The strata is made up of 26 residential units in a 4-story building located in Victoria, British Columbia.

12. In April 2015, the strata council obtained quotes from 4 window installation companies to replace all the windows and patio doors in all 26 strata lots. In May 2015, after reviewing the 4 proposals, the strata council decided to enter into a contract with Centra Windows Inc. (contractor). Information about the decision and the details of the contract was provided to the owners. The strata council invited the contractor to attend and meet with the owners and to answer any questions about the window installation project and the contract at an information meeting on May 28, 2015.

13. On June 2, 2015, at a special general meeting, the strata council presented a ¾ vote resolution to the owners for the window installation project and the contract with the contractor. The resolution was approved with 21 owners voting yes (including the applicant Colin Ralph) and one owner voting no for the expenditure of strata funds up to $150,000.00 with a special assessment amount due from each owner by September 1, 2015.

14. In June 2015 the contractor provided a copy of the contract and some addendums to the strata council for their review and signature. The strata council forwarded the contract and the addendums to their lawyer for a legal review and opinion. Council asked the lawyer to answer some specific questions about the "Warranty and Limits of Liability" and the "Exclusion" clauses and whether the list of restrictions/exclusions were standard in the industry.

15. On July 13, 2015 the lawyer sent a reply email to the strata council providing answers to council's questions.

16. In answer to council's question about the warranty and the liability clause, the lawyer stated the language meant that if the installation work was performed improperly, the contractor would be responsible for the cost of replacing a window or the patio glass and would not be responsible for any other expenses (such as the costs of an injury or a claim for loss of earnings). The lawyer stated "this type of wording and limitation of liability is very common in construction/service contracts" and might or might not be capable of renegotiation. If a change was requested,

the contractor would want to consult their lawyer and might refuse to make any amendments relying on the general conditions clause that stated no changes or alterations will be made to any warranties.

17. Council met on July 14, 2015 and reviewed the contract and the lawyer's comments. On July 15, 2015 the council secretary sent another email to the lawyer advising that a final vote would be taken on July 21, 2015 before executing the contract. Council asked some additional questions about the language in other clauses. There were several emails back and forth.

18. In the last email dated August 12, 2015 the council secretary told the lawyer that council had recently met with the contractor's representatives who answered all of their questions and concerns about the liability clause. The contractor's representatives confirmed it would cover any problems arising from improper installation and provided examples of the circumstances where liability would be limited or denied. The council secretary told the lawyer that this additional information and the company's good customer rating made them feel confident that the contractor would respond to any issues. On that basis, the council had executed the contract earlier that day.

19. The contractor commenced the window installation project in mid-August 2015. The applicants' windows were scheduled to be replaced on September 4, 2015. The applicants were out of town and left their key to be provided to the contractor's staff for access to their unit.

20. On September 4, 2015, the council secretary visited the applicants' unit during the installation and again at the end of the day to retrieve their key. The council secretary viewed the new windows which looked fine and she observed a lot of dust around the base of the patio doors.

21. The applicants returned home in the evening hours on Monday September 7, 2015. They say all the surfaces and all their belongings in the unit were covered with a layer of powder. The powder irritated their eyes and throats. They contacted the strata secretary who told them to notify the contractor. They called and left a

voice mail message telling the contractor's installation manager about the powder and said they would be relocating to a hotel as they could not safely remain in their unit.

22. On September 8, 2015 the applicants met with the installation manager at their unit. The applicants say the installation manager told them the powder was silica dust and that they could not return to their home until it was professionally cleaned. The applicants say the installation manager confirmed the contractor would cover the cost for the professional cleaning of their unit and that they received a verbal approval for another night at a hotel.

23. The cleaning occurred on September 13, 2015 (no evidence was provided about who arranged the cleaning or why it was not scheduled for an earlier date). The applicants say they contacted the installation manager every day and were told their hotel costs would be covered by the contractor while they remained out of their unit.

24. The applicants' unit was cleaned on September 13, 2015. The applicants say were told by the cleaner that the dust needed 24-48 hours to settle and that an air filtration cleaning system should be installed in their unit. The applicants stayed at the hotel that night and returned to their unit on September 14, 2015. They say dust was still present. They contacted the installation manager and he agreed to ask his supervisor if the contractor would pay for a second cleaning.

25. The applicants received a phone call from the supervisor. They told the supervisor about the extent of the dust, that they were staying at a hotel approved by the installation manager and that a second cleaning needed to be done before they could move back to their unit. The supervisor said the installation manager did not have the authority to approve their hotel costs.

26. The supervisor said their unit was a construction zone and that dust was a normal occurrence. The applicants told the supervisor that the contractor's staff who came to their unit said they had never seen so much silica dust after an installation.

27. On September 16, 2015 the applicants emailed photos of the dust (which were also provided as evidence in this dispute) to the supervisor. The photos show a layer of powder on all flat surfaces including tables and, floors. After receiving the photos, the supervisor contacted the applicants and said an air scrubber would be installed in their unit and a second cleaning would be scheduled. The applicants say the supervisor also told them their stay would be approved at the hotel. The second cleaning was scheduled for September 17, 2015 and the applicants were told to meet with the installation manager on September 18, 2015 at their unit and to bring all of their receipts.

28. The applicants say the cleaner recommended that the sofas and carpets should be professionally cleaned but the contractor never approved those expenditures.

29. The applicants returned to their unit on September 18, 2015. The layer of dust was finally gone. They spoke with the installation manager about forwarding their hotel receipts. He said the supervisor would call them. Neither the installation manager or the supervisor returned their calls for the next few days.

30. On September 22, 2015, the supervisor told the applicants they would not be reimbursed for their hotel costs. The conversation was heated. The supervisor said there was a clause in the contract that meant the contractor was not responsible for their costs and if they had any questions, they should contact the strata council.

31. The applicants left messages for the the contractor's supervisory staff but their calls were not returned.

32. They say their hotel costs for 11 days were approved on a daily basis by the installation manager. The applicants asked about being reimbursed for the cost of their meals but never received an answer. They say they incurred other expenses for the cost of replacing their outdoor carpeting and many sentimental household items.

33. Based on the information from the supervisor about the contractor not being liable, the applicants contacted the strata council. They provided a written statement of the events and requested a meeting with the strata council to discuss their claim for reimbursement of their expenses.

34. The strata invited the applicants to attend the next council meeting on October 19, 2015. They were told to bring their receipts and details about any other expenses that they believed occurred as a result of the contractor's window installation. The applicants attended the meeting and presented receipts confirming their hotel bill was $1,986.13.

35. The strata council wrote to the applicants on October 25, 2015 stating that the strata would not be authorizing an expenditure of strata funds for their hotel costs and that council was seeking guidance about whether the strata had any financial responsibility for their request. Council suggested that the applicants open a claim with their insurers to ensure that all possible means of reimbursement were explored. The applicants informed council on November 7, 2015 that their insurance claim was not accepted because the damage to their unit occurred as a result of work being conducted to the applicants' personal property.

36. The strata council sent a letter dated November 9, 2015 to the applicants denying their request for reimbursement. The strata council told the applicants they met with the contractor's Vice President for Sales and consulted with an advisor from the Condominium Home Owners Association. The request was denied for a number of reasons.

37. First, council said the strata had no authority under the bylaws to approve an expenditure of any strata corporation money for damages or costs relating to a strata lot. The bylaws state it is only the owners who have the responsibility for their strata lots.

38. The second reason was the lack of any prior approval by the strata council that expenses could be incurred outside the scope of the contract with the contractor. The applicants never asked the strata to approved their hotel costs at any point

between the date of the discovery of the problem and the date that the applicants returned to their unit.

39. The strata acknowledged that a factor in its decision was the acknowledgement of responsibility by the contractor for the problem when it authorized the cost for 2 cleanings of the unit and its reimbursement to the applicants for one night of hotel accommodation ($160.00).

40. Lastly, the strata stated that all owners must be treated equally and no other strata lots were cleaned and no other residents were approved for hotel stays.

41. The strata subsequently issued a cheque for $160.00 to the applicants but it was not cashed.

42. The applicants commenced this action in August 2017.

POSITION OF THE PARTIES

43. The applicants say the strata council hired a contractor that damaged their unit and cause them financial losses. As the contractor refused to cover the cost of their losses, the applicants say the strata council is responsible as it hired the contractor and signed a contract with language that limited the contractor's liability. The applicants seek an order for reimbursement of expenses they incurred because of damage that prevented them from returning to their unit for 13 days. The applicants seek an order of $1,986.13 for hotel costs, an order of $500.00 for damage to personal items and $300.00 for meal costs.

44. The respondent denies any responsibility for the costs incurred by the applicants. They say the dispute is between the applicants and the contractor. The strata exercised all due diligence and acted in the best interests of all owners in executing a contract with the contractor that contained standard industry exclusion and liability language. The strata has no authority or obligation under the bylaws to pay for costs associated with a strata lot.

ANALYSIS

Did the respondent strata act improperly or negligently or in breach of its bylaw or legislative duties when it hired the contractor company that damaged the applicants' strata unit? If so, is the strata responsible for the applicants' costs?

45. For civil claims filed with the tribunal, the burden is on the applicant(s) to prove their claim on a balance of probabilities.

46. The applicants say the strata breached its obligations owed to them in 2 ways. First, the strata should not have approved a contract that contained an exclusion clause that limited liability for damage caused to an owner. The contractor was able to rely on that exclusion clause as a basis to avoid liability and any responsibility for the applicants' costs that flowed from the dust damage to their unit. Some personal items had to be destroyed because the dust could not be removed. The dust forced the applicants to leave their home for 11 days and to incur hotel and food expenses. If the strata had exercised proper due diligence and negotiated a proper contract that didn't contain a broad exclusion clause, the applicants' damage amounts would have been paid by the contractor.

47. The applicants say the strata allowed the contractor to include a broad exclusion clause in the contract and 'let" the contractor avoid liability. Because the strata signed the contract, and the contractor refuses to acknowledge any responsibility, the strata should step into the place of the contractor and be responsible for its damages. They say the real dispute should have been between the strata and the contractor as they were the parties who signed the contract. The applicants say they attended the information meeting with the contractors on June 2015 and asked a question about what would happen if the contractor caused any damage from their work and were told the company would be responsible and there was insurance for damages and costs.

48. The second argument advanced by the applicants is that the strata did not act in their best interest in a number of other ways including not calling a special general meeting with the owners and asking them to vote on whether the strata should

repay the applicants for their costs. The applicants also say the strata should have submitted a claim to their insurer. There was no evidence presented as to whether or not the strata explored this option but I find, it would not have resolved the question of liability.

49. I find the relevant bylaws for this dispute are those registered with the Land Title Office on November 18, 2008. Bylaw 3 states an owner has a mandatory duty to repair and maintain the owner's strata lot. Bylaw 10 states a strata corporation has a mandatory duty to repair the common assets, the common property, limited common property depending on the nature of the repair, and a limited restricted duty to repair the structure and exterior of a strata lot or building including certain building attachments (such as chimneys, stairs, balconies).

50. The bylaws clearly outline that an owner is responsible for repairs to their strata lot and a strata is responsible for repairs to the common property. I find the bylaws support the strata's position that it did not have either the obligation or the duty to repair the applicants' strata lot and secondly that it had no authority under the bylaws to spend strata funds for a repair to the applicants' strata lot.

51. To decide whether the strata breached its duties owed to the applicants I must consider what is the objective standard against which to assess the strata's actions or decisions. Previous tribunal decisions have identified the nature of the standard expected of a strata when it conducts repair work. The standard is not perfection and a strata is not expected to make a "best" decision: *Di Lollo v. The Owners, Strata Plan BCS 1470,* 2018 BCCRT 25 (CanLII) and *Kantypowicz v. The Owners, Strata Plan V1S 626,* 2017 BCCRT 29 (CanLII). The basis for evaluating a strata's conduct is "reasonableness" and whether a strata's actions or decisions were reasonable in all of the circumstances. There will be a finding that a strata breached its duties or was negligent or acted in bad faith only if there is objective evidence that a strata acted unreasonably in the context of and a review of all the circumstances.

52. In the context of this claim, I must determine whether the strata acted reasonably when it hired the window installation contractor and when it negotiated and executed a contract that included an exclusion clause upon which the contractor later relied to deny the applicants' claim for compensation.

53. The materials confirm the strata sought bids from 4 window installation companies. Although no details were provided about the proposals from the unsuccessful bidders, I find the strata's actions in seeking 4 competing proposals from 4 contractors was an exercise of due diligence and is clear evidence the strata was acting in the best interests of the owners at that stage of the project.

54. The strata reviewed all the proposals and decided to move forward with the contractor's proposal. Prior to making any final decisions, the strata scheduled an information meeting for the owners to meet the contractor's representatives and the opportunity to have their questions answered. The information meeting was scheduled one week before the special general meeting. I find the owners had sufficient time to review the contractor's proposal and to obtain enough information to make an informed voting decision.

55. The resolution to proceed with the window installation project and the contract was approved (21 to 1) by the owners at the special general meeting on June 2, 2015. The company concluded their preliminary preparation work in mid-July 2015.

56. The strata council spent several weeks reviewing, meeting, consulting with legal counsel and communicating back and forth with the contractor prior to executing the final version of the contract on August 12, 2015 that included exclusion and liability clauses.

57. Emails submitted into evidence confirm the strata forwarded the contract and the addendums to their lawyer on June 29, 2015. The strata identified a number of questions for the lawyer's review. The strata asked whether the liability clause contained standard language about the limits on liability and asked a second question about the exclusions clause and whether the lawyer had any concerns about both clauses.

58. The lawyer replied on July 13, 2015. Regarding the question of liability, the lawyer said that a limitation of liability clause is “very common in construction/service contracts” and that the specific language of the contract clause meant the company would be responsible for any loss as a result of their failure to install a window properly but they would not be responsible for any damages outside of replacing the window. The lawyer indicated that an attempt to change any of the language in the clause might be prohibited because of the general clause in the contract that said no changes or alterations could be made to the warranties. The lawyer recommended some changes to the language of the exclusion clause which were eventually incorporated into the contract.

59. The correspondence indicates that several emails passed between the strata council and the lawyer. Council sent a final email to the lawyer on August 12, 2015 advising that they had executed the contract that day. The email stated that council had another in-person meeting with the contractor and had received sufficient clarification about the meaning of the liability clause that they felt comfortable proceeding with the project.

60. The contractor provided some examples about how liability and the warranty would be limited if any new pre-existing problems were discovered during construction or if the strata brought in another company that caused damage to the windows. The strata’s email states “they [the company] said they would cover all other problems stemming from improper installation by their team. They have a good customer rating so we felt comfortable that they would follow through if there were any issues”. Having received that additional information, the strata signed the contract.

61. Based on the email correspondence, I find the record shows the strata council acted responsibly and with due care in gathering all available information and seeking advice prior to making its final decision.

62. Council gave the owners a full opportunity to interact with the company and to ask any questions prior to approving the project. Council conducted a review of the contract and forwarded their concerns and questions to their lawyer. They

reviewed the information and advice received from the lawyer and scheduled another meeting with the company to address their additional concerns. They conducted research, they asked questions and they received answers to those questions. They conducted a thorough review of the contract and sought professional legal advice.

63. I find the strata acted reasonably and with due care and regard for its responsibility to act in the best interests of all owners, throughout the bid and selection and negotiation process before finally executing the contract on August 12, 2015.

64. I find on this issue that the applicants have not established that the strata's conduct breached its obligations or duties or acted negligently when it entered into a contract that included an exclusion clause upon which the company later referenced to explain its denial of the applicants' compensation claim.

65. Regarding the second issue, I have already found and agree with the strata's position that the bylaws do not provide the authority or the ability for the strata to have compensated the applicants for their loss. The applicants say the strata should have taken the issue to a special general meeting and sought a mandate from the owners for the expenditure. I do not find there is any obligation or requirement that the strata should have taken this step. My review of the bylaws indicates that the applicants had the option and did not exercise it to request a special general meeting and to have asked for a vote on their request for compensation.

66. The applicants requested a meeting with the strata council that took place on October 19, 2015. The strata received the applicants' written request and send an initial email stating that it would not authorize an expenditure for the cost of their hotel accommodation but would seek guidance to clarify whether it had any financial responsibility. The strata sent a final letter dated November 9, 2015 confirming the request was denied because there was no basis in the bylaws for the expenditure; the applicants had made no prior request or sought approval by the strata to incur expenses outside of the original contract; no request was made

for any costs at any time during the period of the hotel stay; and lastly that the company had paid for the 2 cleanings and one nights hotel stay. I find the strata considered the applicants' request, it sought advice and direction and made, what I find was a reasonable decision in all of the circumstances to deny the applicants' request for compensation.

67. For all the above reasons, I find the applicants have not proven their claim that the strata council acted negligently or in breach of its duties when it executed a contract that contained a restricted liability clause. Secondly, I find the applicants have not proven the claim that the strata acted improperly when it did not call a special general meeting to ask the owners to authorize an expenditure to reimburse the applicants.

68. I do not doubt that the applicants were very inconvenienced personally and financially when dust was left in their unit that covered their belongings and all available surfaces and prevented them from remaining in their unit. There was no evidence presented about the origin of the problem or how or why only one unit in the building was affected. Regardless of the cause, the applicants suffered a loss and the result in this dispute is that the strata is not responsible for that loss.

69. The evidence showed that 2 of the contractor's staff made promises to the applicants about providing compensation to them for the cost of hotel stay. The applicants say they received verbal assurances every day and one email appears to support their version of the communications. Regardless of the existence of the exclusion or liability clauses in the contract, the contractor's staff made verbal promises to the applicants and they incurred expenses on the basis of those promises. It may be that the contractor was in breach of separate contractual obligations to the applicants based on the existence of an oral contract but that issue was not before me in this dispute.

70. For all these reasons, the applicants' claim against the strata is dismissed.

71. Because the applicants have not been successful in establishing a breach of the bylaws or statute, I do not need to consider their requested remedies.

72. Given the tribunal's mandate that includes being mindful of ongoing relationships, I make the following additional comment that nothing in this decision (and there appears to be no time deadline in the bylaws) prevents the applicants from making a future request to the strata that their request for reimbursement be presented as a ¾ vote resolution to the strata owners.

DECISION AND ORDERS

73. I order that the applicants' dispute is dismissed.

74. The applicants claimed $225.00 in tribunal filing fees. Given the outcome of the dispute, I decline to order reimbursement for this amount.

75. Under SPA section 189.4, an owner who brings a tribunal claim against a strata corporation is not required to contribute to the expenses of defending that claim. I order the strata to ensure that no part of the strata's expenses with respect to defending the claim are allocated to the owner.

Catherine Sullivan, Tribunal Member