



Civil Resolution Tribunal

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Civil Resolution Tribunal

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B E T W E E N :

Xiang Xian Zhang

APPLICANT

A N D :

The Owners, Strata Plan BCS 1039

RESPONDENT

AMENDED REASONS FOR DECISION

Tribunal Member:

J. Garth Cambrey, Vice Chair

INTRODUCTION

1. The applicant, Xiang Xian Zhang (owner), owns strata lot 53 (unit 3) in a strata corporation known as The Owners, Strata Plan BCS 1039 (strata). The owner claims the strata is responsible for a \$5,000 insurance deductible that resulted from a common property plumbing leak.

2. The owner's insurer paid a portion of the strata's \$5,000 deductible leaving an unpaid balance of \$1,000.
3. The owner asks the Civil Resolution Tribunal (tribunal) for orders that the owner is not responsible to pay the insurance deductible, and that the strata a) remove the \$5,000 charge from the owner's account, and b) reimburse the applicant's insurance company or applicant any amount it has received in payment of the strata's insurance deductible. The owner also asks to be reimbursed for expenses of \$10.71 to provide a copy of the dispute notice to the strata. The owner does not ask for reimbursement of tribunal fees paid.
4. The strata disagrees with owner and says the owner is responsible to pay the portion of the strata's insurance deductible that was not paid by the owner's insurer.
5. The owner is self-represented. The strata is represented by an authorized member of the strata council.
6. For the reasons that follow, I find the owner is responsible to pay the \$5,000 insurance deductible and I order the owner to pay any amount that has not already been paid. The owner's claim for reimbursement of dispute-related expenses is dismissed.

JURISDICTION AND PROCEDURE

7. These are the formal written reasons of the 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.
8. 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.

9. 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. The burden of proof is on the applicant and the evidence must be established on the balance of probabilities.
10. The applicable tribunal rules are those that were in place at the time this dispute was commenced.
11. Under section 48.1 of the Act, in resolving this dispute, the tribunal may order a party to do or stop doing something, order a party to pay money to another party, and order any other terms or conditions the tribunal considers appropriate, in accordance with the tribunal's rules.

ISSUES

12. The issues in this dispute are:
 - a) Is the strata permitted to charge the owner's strata lot with the strata's \$5,000 insurance deductible?
 - b) Does the tribunal have the authority to order an owner to pay the amount of the insurance deductible?
 - c) Should the \$5,000 charge be removed from the owner's strata lot?
 - d) Should the strata reimburse the owner or owner's insurer the amount it received towards payment of the strata's \$5,000 insurance deductible?
 - e) Should the owner be reimbursed for expenses of \$10.71 paid to Canada Post for providing a copy of the dispute notice to the respondent by registered mail?

POSITION OF THE PARTIES

13. The owner submits that a leaking plumbing pipe that resulted in an insurance claim against the strata's insurance policy was common property of the strata as it was located within a dividing wall between the owner's strata lot and a next-door neighbour's strata lot. As such, the owner submits the insurance deductible is the strata's responsibility. The owner asks the tribunal to remove the \$5,000 charge from their strata lot and reimburse the owner or owner's insurer the amount the strata received for payment of its insurance deductible. The owner also asks that the strata reimburse them for expenses relating to providing the strata a copy of the dispute notice.
14. The strata submits that the leaking plumbing pipe was located within the owner's strata and therefore, the owner is responsible to pay the \$5,000 insurance deductible. The strata also submits the owner should not be reimbursed for dispute-related expenses paid.

BACKGROUND AND EVIDENCE

15. The building containing the owner's strata lot (unit 3) is a four level building. Unit 1 is located at ground level and is 1 floor in height. Units 2 and 3 are next to each other and located above unit 1. Units 2 and 3 are each 3 levels. In unit 3, there is a bathroom located above the kitchen.
16. The relevant strata bylaws are:
 - a) Bylaw 8 (1) (b): The strata must repair and maintain common property that has not been designated as limited common property.
 - b) Bylaw 30 (2): If loss or damage to a strata lot, common property including limited common property results in a valid claim under the strata's insurance policy, the owner of the strata lot "where the damage originated is responsible" for the strata's insurance deductible relating to the loss or damage.

17. On February 17, 2016, the resident of unit 1 reported a leak in their kitchen ceiling. The resident reported the leak to the strata which dispatched Northwest B.C. Mechanical 2015 Ltd. (Northwest). Northwest removed pieces of drywall from the kitchen ceiling of unit 1 exposing the insulation which was found to be saturated with water. Northwest inspected units 2 and 3 and in reports dated March 2 and 4, 2016 reported that all drains on the floor directly above unit 1 were tested and the leak could not be reproduced.
18. On February 19, 2016, the owner observed a watermark on the kitchen ceiling bulkhead located on the second floor of unit 3 which they reported to the strata. The strata retained a roofing company (Roofix) which investigated the roof of the building for possible sources of water ingress. Roofix provided an undated report with photographs showing no visible roof deficiencies or evidence of pooling water on the roof decks of units 2 and 3. Further, the report indicated no evidence of any leak in unit 2 nor water ingress or condensation in the attic space of unit 3. Roofix cut inspection holes in the kitchen ceiling bulkhead of unit 3 and identified water dripping from pipes located in the bulkhead and water staining “up the wall from plastic piping.” The report also noted that the toilet in the bathroom above the kitchen of unit 3 had significant condensation issues.
19. On February 22, 2017, at the strata’s request, Northwest returned to Unit 3 and ultimately determined the leak to be from a plumbing supply line to the upstairs bathroom of unit 3. A section of pipe was removed and replaced without further reports of leaks. In its reports, Northwest identified that it found the section of piping it removed to have been penetrated by a screw and wrote “when the framing or drywall was being installed a screw had penetrated the supply line. Over time the screw corroded and a leak began causing water to pool. This water then penetrated the wood backing and drywall and traced down [the] piping and over time became visible on the walls and into the unit below.” The wall construction, location of the leak and which supply line was leaking is in dispute, as discussed further below.

20. The timing of the investigation and repair of the plumbing line varies between the submissions of the owner and the reports received from Northwest. I find these differences are not relevant as it is undisputed that the leak was caused by a drywall screw or nail penetrating the supply line to the bathroom located above the kitchen in unit 3.
21. The owner submits that the leaking supply line was the hot water supply to unit 3's bathroom sink. That there were two reports provided to the strata by Northwest is of significant concern to the owner as changes were made and additional information was included in the second report of March 4, 2016. The owner notes that the March 2, 2016 report identifies the source of leak as a cold water supply line while the March 4, 2016 report identifies the source of the leak as a hot water supply line. Further, the owner notes that the March 4, 2016 report contains the following additional information:

“As this unit [unit 3] has its own hot water tank, the supply line does not feed any other unit. This damaged pipe was inside unit#3 ceiling and no part of this pipe was in a wall that borders another unit and therefore is the responsibility of the unit owner.”
22. A large amount of evidence was provided regarding the differences in the two reports submitted by Northwest and the actions of taken by the strata and its property manager, including emails on March 2 and 3, 2016, asking Northwest to clarify the location of the pipe leak. The March 4, 2016 report from Northwest is the result of those discussions. I see no reason to elaborate on the evidence here as I am satisfied that there was no wrongdoing or ill will on the part of the property manager in requesting Northwest to amend its report to include additional information.
23. The damage to units 1 and 3 resulting from the leaking pipe was covered by the strata's insurance policy, subject to a \$5,000 water damage deductible.
24. On July 5, 2016, the strata's property manager advised the owner that \$5,000 had been charged to the owner's account, for work done by Canstar Restorations “due to a

ruptured copper line in the kitchen of your unit”. The reference to a copper line is clearly an error as is the location of the pipe, as discussed below. Attached to the letter were an invoice from the property management firm to the owner for \$5,000 and an invoice from Canstar Restorations (Canstar) addressed to the strata for \$5,000 noting it was the “insurance deductible payable by the Policyholder.” The letter indicated that the strata had paid the invoice on behalf of the owner and subsequently posted the charge back to the owner’s strata lot account. The letter did not indicate that the damage was caused by the owner nor did it indicate what authority the strata relied on when it charged the Canstar invoice back to the owner. The letter did not reference the *Strata Property Act* (SPA) or any strata bylaws.

25. On July 6, 2016, the owner, by email to the property manager, requested a hearing with the strata council. Further discussions continued between the owner and the strata regarding the location of the section of leaking pipe that was replaced, the construction of the bathroom wall between unit 3 and unit 2, and whether the leaking pipe was common property or part of the owners of strata lot.
26. On September 27, 2016, the owner was invited to attend a strata council meeting.
27. On September 28, 2016, the owner provided the strata photographs with explanatory notes and written submissions on why they believed the strata was incorrect in deciding the owner was responsible for paying the insurance deductible. It is apparent from the emails that were exchanged that the strata was as yet unclear about the location of the pipe that was replaced.
28. On October 4, 2016, the strata wrote the owner, following its meeting with the owner on September 27, 2016 and further investigation including a visit to the owners unit by a council member. The strata advised the owner it had determined that the leak occurred in a pipe that is part of the owner’s strata lot and thus the strata would not remove the \$5,000 charge from the owner’s account. In its letter the strata asked that the \$5,000 be paid.

29. Based on the emails and additional photographs provided by the owner, the resulting insurance claim involved partial removal and replacement of unit 3's bathroom wall behind the vanity and toilet. Photographs provided by the owner when the wall was removed clearly show the interior wall cavity between unit 2 and unit 3 and the installation of the new section of pipe. In my view, the section of leaking pipe that was replaced was within the wall cavity between units 2 and 3.
30. Based on the strata's submissions, the owner carried a homeowner insurance policy that covered the strata's deductible in situations where the owner was found responsible to pay the strata's insurance deductible, such as the strata alleges here. The owner's insurer paid \$4,000 towards the strata's \$5,000 insurance deductible that was charged to the owner's strata lot leaving a balance of \$1,000 unpaid. The unpaid balance is equivalent to the owner's deductible on their homeowner policy. It is unclear if the owner has paid the strata the remaining \$1,000 balance that was not covered under their homeowner insurance policy.
31. Based on emails exchanged, it appears the repairs to unit 3 were not completed under the strata's insurance policy until sometime in February or March 2017.

ANALYSIS

Is the strata permitted to charge the owner's strata lot with the \$5,000 insurance deductible?

32. The owner says the pipe is located within a dividing wall between units 2 and 3 and is therefore common property as defined under the SPA. Conversely, the strata says the pipe is not located within a dividing wall thus making it part of the owners strata lot and therefore the owner's responsibility.
33. The strata relies on the Northwest reports in reaching its conclusion on the responsibility of the repair and, in its submission states "the council considers the [Northwest] report the best evidence we have to base our decision on".

34. It is unclear which Northwest report the strata relies on. As noted above, two reports were produced by Northwest and both reports indicate the location of the leaking pipe to be within unit 3. The two Northwest reports are not submitted as expert evidence and I do not consider the contents of the reports to be sufficiently detailed so as to rely upon them as expert opinion. While Northwest may be experts in the plumbing field, I attach little weight to its reports because, as observed below, I do not consider it properly identified the location of the leaking pipe. Particularly in the revised March 4 report that was originally provided to the owner in which Northwest concludes no part of the leaking pipe was in a wall that borders another strata lot.
35. Both the owner and the strata appear to link the responsibility of repairing the resultant damage caused by the leaking pipe to the responsibility of repairing the leaking pipe. That is not the case. Under the SPA, the duty to repair the leaking pipe is determined by the location of the pipe and whether it is common property or part of a strata lot. When determining the obligation to repair resultant damage, the strata's bylaws, factors relating to negligence and whether the strata's insurance policy responds to the claim must be taken into consideration.
36. Here, the strata has repaired the leaking pipe and who is responsible for the leaking pipe repair is not at issue.
37. The strata's insurance policy has responded to cover the cost of the resultant damage except for the amount of the \$5,000 insurance deductible. The strata says the owner is responsible to pay it.
38. Section 158 of the SPA addresses insurance deductibles and reads in part (my emphasis added)

*(1) Subject to the regulations, the **payment of an insurance deductible in respect of a claim on the strata corporation's insurance is a common expense to be contributed to by means of strata fees calculated in accordance with section 99 (2) or 100 (1).***

(2) Subsection (1) does not limit the capacity of the strata corporation to sue an owner in order to recover the deductible portion of insurance claim if the owner is responsible for the loss or damage that gave rise to the claim.

39. There are no regulations enacted pursuant to section 158(1) so the strata must first pay the insurance deductible as a common expense and then seek to recover the insurance deductible under section 158(2) if the owner is responsible for the loss or damage that gave rise to the insurance claim which is the case here.
40. Section 158(2) of the SPA has been interpreted in B.C. Supreme Court decisions to hold an owner liable for the strata's insurance deductible if the owner is responsible for the loss giving rise to the insurance claim by the strata. [see *The Owners of Strata Plan LMS 2835 v. Mari* 2007 BCSC 740 and *Strata Plan KAS 1019 v. Kieran* 2006 BCPC 360 (affirmed in *Wawanessa Mutual Insurance Co. v. Kieran*, 2007 BCSC 727)]
41. In *Mari*, water damage was sustained to a strata corporation building caused by a faulty water level switch of a washing machine situated in a strata lot resulting in an insurance claim being filed by the strata corporation. The owner was found to be responsible for the washing machine overflow and the strata corporation recovered the amount of the \$5,000 insurance deductible from the owner.
42. In *Kieran*, the strata corporation claimed against the owners for damages which occurred as a result of a burst pipe behind a bedroom wall of a strata lot where the water damage was caused by the failure of a "coupling" within the wall. The failure was due to high acid levels in the local water and not to any negligent act or omission of the owners. There was no common property damage and the cost of the repair of the damage was paid by the strata as it was below the deductible amount of the insurance maintained by the strata corporation. The Provincial Court judge found that because damage occurred within the strata lot and not to common property it was a situation where the owner had the duty to repair and maintain and was therefore responsible for the loss regardless of absence of fault or negligence on the owner's part. The court also noted that whether the repairs were paid as part of the deductible under an insurance

policy or otherwise, they related to damage for which, under the SPA and bylaws, the owner was responsible.

43. In finding for the strata in both *Mari* and *Kieran*, the court held that the phrase “responsible for” should be given a broad interpretation because “owners are responsible for what occurs within their strata lot” and that a strata may look to an owner to recover the strata’s insurance deductible even where the owner’s responsibility for the loss falls short of establishing negligence.
44. In *Strata Plan LMS 2446 v. Morrison*, 2011 BCPC 0519, the court considered the findings of *Mari* and *Kieran* and also looked to the strata corporation’s bylaws before determining if the strata corporation could recover its insurance deductible from an owner. In *Morrison*, the relevant bylaw contained an indemnity clause that referred to carelessness or negligence, which the court found imported a negligence standard that was narrower than simply finding the owner was ‘responsible’. Under the narrower bylaw at issue in *Morrison*, the court found that the strata must prove an owner was negligent in order to hold them responsible to pay the strata’s insurance deductible.
45. Following the principles of *Morrison*, I must look to the strata’s bylaws. The applicable bylaw here, bylaw 30(2) as quoted above, does not contain a negligence standard and simply holds the owner “responsible” for the strata’s deductible if the damage originated from their strata lot.
46. From the photographs provided, it is clear that the pipe in question runs horizontally within the kitchen ceiling bulkhead of unit 3 and turns up into a wall cavity behind the fixtures in the bathroom of unit 3. It is undisputed that the bathroom wall of unit 3 backs onto the wall of unit 2. Photographs also indicate the section of pipe that was replaced was approximately 3 feet in length and that the new section of pipe was joined to the old section of pipe at a location in the kitchen ceiling bulkhead immediately before the pipe turns up into the wall cavity behind unit 3’s bathroom. It is also clear that the new section of pipe connects to a shut off valve for a supply line to the bathroom vanity sink.

47. Also from the photographs, the wall cavity where the piping is located consists of a double stud wall. That is, there is a 2" x 4" wood floor plate and a 2" x 4" wood stud wall forming the wall of unit 3 and an identical wall forming the wall of unit 2 such that the thickness of the wall is approximately double the 4" thickness. The interior wall on unit 3 was finished with wooden backing and then drywall which forms the interior of the bathroom of unit 3. The photographs show the wall cavity containing only pipes and wires, although it was also presumably filled with insulation for soundproofing between units 2 and 3.
48. A hole was drilled through the wooden floor plate between the studs to allow the plastic piping to come up from the kitchen ceiling bulkhead into the wall cavity to service the bathroom fixtures. The section of pipe that was removed shows a hole that, in my view, aligns with the floor plate of the bathroom wall. The photographs show another hole horizontally through the floor plate in the exact location where the pipe comes through it (possibly from a drywall screw).
49. Considering my observations of what is shown in the photographs, I find that the section of leaking pipe that was replaced was the section that runs from the kitchen ceiling bulkhead to the upstairs bathroom vanity shut off and the section of pipe that leaked is within the wall cavity between units 2 and 3 as suggested by the owner. It is undisputed that the leaking pipe only serviced unit 3.
50. However, based on section 68(1) of the SPA, the boundary of the strata lot comprising unit 3 is the midpoint of the wall dividing unit 2 and unit 3. The section of wall where the pipe entered from the kitchen bulkhead below is the stud wall that forms the bathroom wall of unit 3 and is located past the midpoint of the dividing wall and within unit 3. I find the pipe, although located within the dividing wall, is also located within the owner's strata lot.
51. Applying the principles established in *Morrison* and given the strata's bylaw 30(2) that holds the owner "responsible" for damage that originated in his strata lot, I find the strata is permitted to charge the insurance deductible to the owner's strata lot.

Does the tribunal have the authority to order an owner to pay the amount of the insurance deductible?

52. In the cases cited earlier, the strata corporations involved were successful in suing to collect their insurance deductible under section 158(2) of the SPA. The jurisdiction of this tribunal to order an insurance deductible to be paid has not been raised by the parties but I find it is important to do so given the claims before me.
53. Jurisdiction of the tribunal is set out in sections 3.5 and 3.6 of the Act. Section 3.6(1)(a) and (d) of the Act says the tribunal has jurisdiction over a claim involving money owing or the interpretation or application of the SPA or a regulation, bylaw or rule under the SPA. As noted earlier, under section 48.1 of the Act, in resolving this dispute, the tribunal may order a party to do something or pay money to another party.
54. Section 158(2) of the SPA says section 158(1) does not limit the strata's ability to sue to recover an insurance deductible. Although "sue" is defined under the SPA to include a court proceeding, there is nothing under the SPA or the Act that restricts the tribunal from ordering an owner to pay an insurance deductible. As a result, I find tribunal has the authority to order the owner to pay the insurance deductible.

Should the \$5,000 charge be removed from the owner's strata lot?

55. In its submissions, the strata disagrees with the owner and says it was in the right when it charged the deductible to the owner's strata lot. I agree with the strata as set out above. Having found the strata has the authority to recover the amount of the insurance deductible and that the tribunal has the authority to order it paid by the owner; I find the \$5,000 charge should not be removed from the owner's strata lot.

Should the strata reimburse the owner or owner's insurance company the amount it received towards payment of the strata's \$5,000 insurance deductible?

56. The strata submits that the owner's insurance company paid \$4,000 toward the strata's \$5,000 insurance deductible and that the owner is only required to pay the remaining

balance of \$1,000. The owner does not comment on this submission but does seek reimbursement of any money paid by their insurer. It is unclear if the owner has paid the \$1,000.

57. Having found the owner responsible to pay the \$5,000, I find that any money paid to the strata as a result of the insurance deductible chargeback, either indirectly by the owner's insurer or directly by the owner, must not be reimbursed.
58. I deny the owner's request that the strata reimburse the owner or owner's insurance company the amount it has received in payment of the deductible.
59. Further, I accept the strata's submission that the owner is responsible to pay the remaining balance of the unpaid insurance deductible. I order that if the owner has not paid the remaining \$1,000 balance of the strata's insurance deductible, they do so within 30 days of the date of this order.

Should the owner be reimbursed for expenses of \$10.71 paid to Canada Post for providing a copy of the dispute notice to the respondent by registered mail?

60. The tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable expenses related to the dispute resolution process. The strata has been the successful party in this dispute but has not claimed any tribunal fees or expenses. Accordingly, I make no order with respect to tribunal fees and expenses. The owner's claim for dispute-related expenses is dismissed.

DECISION AND ORDERS

61. The owner's claims are dismissed.
62. The owner is responsible to pay the strata's \$5,000 insurance deductible charged to their strata lot. The owner's insurer has paid a portion of the strata's deductible. I order the owner pay to the strata any remaining unpaid portion of the \$5,000 insurance deductible within 30 days of the date of this order.

63. 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.
64. 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.

J. Garth Cambrey, Vice Chair