



Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Burton v. The Owners, Strata Plan NW 2166 et al*, 2018 BCCRT 588

B E T W E E N :

Susan Burton

APPLICANT

A N D :

The Owners, Strata Plan NW 2166 and William Hick

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Karen Mok

INTRODUCTION

1. The applicant, Susan Burton (owner), owns strata lot 13, also known as unit 1-1680, in a four-building strata corporation known as The Owners, Strata Plan NW 2166 (strata).
2. In addition to the strata, the owner named 6 individual owners, including Mr. Hick, as respondents in this dispute. The parties agreed that the claims against the 5

respondent owners other than Mr. Hick would be abandoned and as a result, the style of cause reflects only the existing parties.

3. The owner's primary dispute is that the strata failed to investigate water ingress in her strata lot and repair the common property that she says was the source of the water ingress. The owner seeks compensation for costs she incurred as a result of the strata's alleged failure to resolve the water ingress issue, including her insurance deductible and the cost of an engineering report. She further claims damages for the loss of use and enjoyment of her strata lot, and for loss of enjoyment of life.
4. This dispute was purportedly resolved in part by way of the Civil Resolution Tribunal's (tribunal) facilitation process on July 11, 2017, which resulted in a settlement agreement between the parties and a release of some of the owner's claims prior to August 14, 2017. The tribunal did not issue a consent resolution order as a result of the purported settlement reached. The owner now says that the strata breached the settlement agreement and as such, she is entitled to pursue her original claim against the strata, but only for damages occurring after August 14, 2017. The strata argues that the settlement agreement resolved the dispute and in any event, it did all that it was obligated to do to investigate and repair the cause of the water ingress.
5. In addition to the reimbursement of tribunal fees of \$225.00, the owner seeks recovery of \$266.52 for dispute-related expenses and \$1,722.18 for furniture and drapery storage charges. In turn, the strata seeks reimbursement of \$8,729.25 for the cost of obtaining expert evidence from its engineer.
6. The owner and strata were both represented by counsel in this dispute although the owner says she was at times unrepresented to minimise her legal expenses.

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.
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 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

12. The parties reached an agreement on certain issues prior to this adjudication, and those issues are not before me in this decision.
13. The issues in this dispute are:
 - a. Can the owner continue her dispute in this forum?
 - b. If so,
 - (i) should the dispute against Mr. Hick be dismissed?

- (ii) has the strata acted, at any time since August 14, 2017, in breach of its obligation to repair and maintain common property?
- (iii) what remedies are available to the owner?
- c. Is the owner entitled to reimbursement of tribunal fees and dispute-related expenses?
- d. Is the strata entitled to reimbursement of the cost of obtaining expert evidence?

BACKGROUND AND EVIDENCE

- 14. The owner bears the burden of proving her claim on a balance of probabilities.
- 15. I have reviewed all of the submissions and evidence but have addressed them only to the extent needed to explain my decision.
- 16. The strata's bylaws were filed June 27, 2001. The only relevant bylaw is bylaw 8, which states, in summary, that the strata must repair and maintain common property. This is an iteration of section 72 of the *Strata Property Act* (SPA).
- 17. The owner's strata lot is a 2 level townhouse. In the summer and fall of 2015, the owner noticed a musty odour in her strata lot and warping in her engineered bamboo floors at the ground level. She says that, following a period of heavy rainfall in February 2016, the warping in the floors had noticeably progressed.
- 18. The owner made an insurance claim and her insurer covered the loss on a one-time basis based on the lack of information about the source of the water ingress. Coverage was limited to the damaged areas only and did not include investigation or repairs to prevent further water ingress.
- 19. As a result of the water ingress, the owner had the floors in her strata lot removed. She noticed significant moisture in the underlay and the concrete floor slab such that she utilized drying equipment and an antimicrobial wash to combat it. She also noted cracks in the floor slab.

20. The owner reported the water ingress to the strata and the owner took steps to have various trades confirm that the cause was not the result of an interior plumbing issue, the icemaker in her refrigerator, or the renovations she had completed four years prior.
21. The strata took the position that the water ingress was related to drainage and in May 2016, retained SWR Drain Service Ltd. (SWR) to commence work on the perimeter drains. The inspection chambers and downspouts were unblocked and repaired, and a disconnected perimeter pipe was discovered and repaired.
22. The owner says that, following this work, the strata did not conduct the next anticipated stage of drainage work, to install a French drain and basins around her strata lot, because it did not have the \$10,000 required to complete the work.
23. In June 2016, the owner retained a structural engineer, Luiz Leon, P. Eng., to conduct a site visit and he opined that the water ingress was a result of inadequate on-site or foundation drainage. The owner shared her findings with the strata, who she says did not respond.
24. Carrie Baron, P. Eng., a drainage manager with the City of Surrey, visited the site in July 2016, it appears at the request of the strata. She observed that the landscaping was not consistent with the original site plans, in that the area behind the building in which the applicant's strata lot is located was not sloped, resulting in rainwater not being properly diverted.
25. In July 2016, the strata agreed to engage an engineer to further investigate the cause of the water ingress to the owner's strata lot.
26. In August 2016, the strata had Guillaume Vadeboncoeur, P. Eng., attend the strata lot for a site visit. He was of the view that it was impossible to determine at that time whether moisture wicked up through the floor slab to cause the flooring to warp. He suggested the strata and owner work through their dispute on their own.
27. Also in August 2016, the owner retained John Curran, P. Eng., to prepare a report on the drainage surrounding her strata lot. He concluded that a significant amount

of stormwater would accumulate in the area of lawn east of the applicant's strata lot, and that that the footing drains were not working correctly, allowing water to rise under the floor slab and cause ingress through the floor.

28. On August 31, 2016, the owner filed her Notice of Dispute with this tribunal. The owner named as respondents the strata, Mr. Hick and 5 other owners in the strata. As noted, the 5 other owners were subsequently removed as respondents by agreement.
29. On October 28, 2016, Richard Butler, P. Eng., an engineer from Golder Associates Ltd. retained by the strata, conducted a geotechnical assessment of the owner's strata lot and surrounding landscaping and patio area.
30. In December 2016, the owner retained her own engineer's report from Aqua-Coast Engineering Ltd. indicating that the cause of the water ingress was a crack that ran through the length of the floor slab, which was exacerbated by ponding water that had accumulated during heavy rainfall.
31. In March 2017, Mr. Butler issued his report confirming that the source of the water damage was likely the result of leakage from plumbing lines located underneath the floor slab (the Golder report). Although Mr. Butler was of the opinion that the water ingress was not a result of ponding water build-up on the patio and lawn, he nonetheless recommended exterior drainage improvement measures be taken around the building in which the owner's strata lot is located.
32. In May 2017, the owner obtained a quote to repair the crack in the concrete floor slab.
33. At some point between March 29, 2017 and July 11, 2017, the strata obtained a proposal (proposal) from an engineering consultant, Aplin & Martin, to prepare designs to perform drainage work in accordance with the recommendations in the Golder report (design).
34. The parties engaged in the tribunal's facilitation process and on July 11, 2017, reached a settlement of some of the owner's claims.

35. Below is an excerpt of the terms of settlement agreement dated July 11, 2017:

- (1) The Strata will pay to Ms. Burton the sum of \$15,000, payable to Hammerberg Lawyers LLP, in trust and delivered within 3 weeks of the date on which this agreement is signed.
- (2) Upon delivery of the sum referred to in #1, Ms. Burton hereby releases the Responding Parties from all claims for damages in respect of any act or omission which could have been the subject of this Proceeding before July 11, 2017, and further releases the Responding Parties from any claim relating to delay in the performance of any duty on account of the period between July 11, 2017 and August 14, 2017.
- (3) The Strata will call a Special General Meeting on August 14, 2017 to approve the Proposal by a $\frac{3}{4}$ vote resolution, and the Strata Council will recommend to the owners to vote in favour of such resolution.
- (4) The Strata Council will:
 - a. Request that Aplin & Martin include in the Design an estimate of the total cost of the works proposed (the "Works"); and
 - b. Cause Aplin & Martin to confer with Butler in order to ensure that the Design reflects the recommendations in the Golder Report.
- (5) Upon receipt of the Design, the Strata Council will:
 - a. Solicit names of contractors to carry out the Works;
 - b. Within 2 weeks of receipt of the Design, mail a notice of a Special General Meeting which includes a resolution to approve the Design and the Works by a $\frac{3}{4}$ vote resolution, and at the Special General Meeting the Strata Council will recommend to the owners that they vote in favour of such resolution;

- c. Within 2 weeks of approval of the Design and the Works by a $\frac{3}{4}$ vote resolution, forward the Design to the contractors and request bids to be returned within 6 weeks of such date (the last business date within such period being the "Closing Date"); and
 - d. Choose a bid and contractor and authorize the contractor to proceed within 2 weeks of the Closing Date.
- (6) The Strata Council will direct SWR Drain Services Ltd. to identify the locations of the manhole covers over sanitary sewers and storm drains indicated in the Strata's mechanical drawings and advise on the required clearance for the access and use of the same....
- (7) If Crack or Jack can propose sealant which is acceptable, in the professional opinion of Butler, for use in the Unit's slab, and for the price set out in the Quotation, the Strata will at its cost proceed with the application of that sealant by Crack or Jack.
- (8) The Strata will caulk along the patio doors and other areas as specified in the Golder Report.
- (9) On completion of the Works, and provided that the parties have otherwise fulfilled their obligations under this Agreement, Ms. Burton will withdraw the Dispute.
- (10) The owner will sign a release in a form agreeable to Ms. Burton and the Strata's insurer in respect of items 1 and 2 in this Agreement upon payment of the sum set out in item 1, and another release in respect of the Responding Parties upon satisfaction of item 9 in this Agreement.
- (11) In the event that any party breaches a term of this Agreement other than items 1 and 2, the aggrieved party may return this matter to the CRT for a final decision or order.

36. The special general meeting as contemplated in the settlement agreement was held on August 14, 2017 and the resolution to approve the proposal, Resolution A, did not pass.
37. The owner was present at the special general meeting. Her evidence is that the strata council failed to recommend to the owners that they vote in favour of Resolution A, pursuant to the settlement agreement. Her evidence is corroborated by her neighbour in the unit next door, who was also in attendance.
38. In contrast, a council member provided evidence that the strata council had recommended to the owners that they vote in favour of Resolution A. The president of the strata council submitted that it was his understanding that the strata council was to advise owners that Resolution A was a result of the settlement agreement and that it recommended voting in favour of the resolution.
39. Neither Resolution A nor the minutes of the special general meeting give any context to the resolution and there is no mention of the dispute before this tribunal or the settlement agreement.
40. In the fall of 2017, the strata took steps to have sealant applied to the owner's floor slab and caulking around the patio and other areas surrounding the owner's strata lot.
41. In a letter dated December 19, 2017, counsel for the strata provided to the owner's lawyer the settlement funds and a release the parties had signed on November 17, 2017, releasing the strata and Mr. Hick from any claims arising out of the facts alleged in the filed Notice of Dispute. Despite being dated July 17, 2017, the owner did not sign the settlement agreement until January 4, 2018. Her lawyer sent a copy to the strata's lawyer that same day.
42. The strata's annual general meeting was held on April 26, 2018 and again the resolution to approve the proposal was tabled, this time as Resolution B. The parties acknowledge that the strata was under no obligation pursuant to the settlement agreement to present the resolution again. The president of the strata

council's evidence is that Resolution B was tabled at the annual general meeting to "correct any misunderstandings" surrounding the earlier vote on Resolution A.

43. It is undisputed that the strata council recommended to the owners that they vote in favour of Resolution B. The owners were also provided with the background to this dispute before the tribunal. Resolution B did not pass.
44. To date, the owner had not installed her new flooring for fear that the water ingress will reappear. Consequently, she does not use the living and dining rooms on the main floor of her strata lot and much of her furniture is in storage.

POSITION OF THE PARTIES

45. The owner says that the water ingress in her strata lot was a result of the strata's failure to repair common property, namely the drainage system. She says that, had the strata gone ahead with SWR's second stage of repairs in the first place, or with the drainage work that was proposed to be designed by Aplin & Martin, as contemplated by the settlement agreement, the water ingress would have been addressed.
46. The owner claims the strata breached the settlement agreement by failing to recommend the owners vote in favour of Resolution A at the special general meeting. Despite the tabling of the resolution a second time, she says the strata council had already influenced the owners to vote against the resolution.
47. The owner says that, because of the strata's breach, she is entitled to carry on with her dispute through this process, given the wording of the agreement as described below. She accepts that her claims for damages prior to August 14, 2017 have been settled and that the strata's alleged breach entitles her to proceed with any claims she has against the strata for any of its acts or omissions occurring after August 14, 2017.

48. The owner argues that, because the resolution did not pass, the strata has not fulfilled its obligations to repair the drains and as a result, she continues to have limited use of her strata lot and incur expenses for storing her furniture and drapes.

49. The owner requests that I order the strata to:

- repair the defects in the common property;
- compensate her for all the costs she incurred as a result of the strata's failure to repair the common property, including the cost of her insurance deductible and the engineering report she obtained; and
- pay her damages for the loss of use and enjoyment of her strata lot and loss of enjoyment of life.

50. The strata says that:

- it acted reasonably on expert advice to maintain and repair defects that appeared to have caused the water ingress and, absent a resolution approving the proposal to design the work for drainage remediation, the strata does not have the authority to proceed with such work;
- it did not breach the settlement agreement and the strata council had recommended that the resolution be passed;
- the owner, with legal advice, elected to execute the settlement agreement and release, and cannot now hold the strata or Mr. Hick liable for any damages relating to any acts or omission damages that are the subject of this dispute; and
- the owner has not raised any claims against Mr. Hick specifically about his conduct in his personal capacity or in his capacity as a member of the strata council.

51. The strata requests that I dismiss the owner's claims against it and Mr. Hick.

ANALYSIS

Can the owner continue her dispute in this forum?

52. The settlement agreement stipulates that, should a party breach a term of the agreement, the other party may return the matter to the tribunal for a final decision or order.
53. The owner says that the strata breached the term of the settlement agreement requiring the strata council to recommend to the owners to vote in favour of Resolution A at the special general meeting, allowing her to bring this matter back before the tribunal. She says the dispute was only partially resolved.
54. I find I do not have jurisdiction to hear a claim that the strata failed to fulfill the settlement agreement, or to enforce the settlement agreement. That is not a matter that, on its face, would fall under the tribunal's strata property claim jurisdiction but rather, is a breach of contract claim that would fall either under the tribunal's small claims jurisdiction if it was within the monetary limit and a claim for debt or damages, or under the jurisdiction of the Supreme Court. Should the owner wish to enforce the settlement agreement she alleges the strata has breached, she is not barred from making a separate breach of contract claim under one of those two jurisdictions.
55. I find, however, that I do not need to make a determination that the strata breached the settlement agreement in order for the owner to continue her dispute here. Her original claim was not withdrawn and no consent order was made. It is also clear the tribunal did not close this dispute.
56. In any event, the owner's claims that are now before me purport to be ones that occurred after August 14, 2017, therefore falling outside the ambit of the settlement agreement and release such that I am able to consider them. I now turn to those matters below.

Should the dispute against Mr. Hick be dismissed?

57. The strata says that the owner has not articulated any claim against Mr. Hick in his personal capacity or in his capacity as a member of the strata council. The owner agrees that the claim against Mr. Hick can be abandoned.
58. I find that there is nothing in the evidence before me to support a claim against Mr. Hick and dismiss the claim against him.

Has the strata acted, at any time since August 14, 2017, in breach of its obligation to repair and maintain common property?

59. It is undisputed that the strata and Mr. Hick are released from the owner's claims for damages with respect to any act or omission that could have been the subject of this dispute before July 11, 2017 and released from any claim relating to delay in the performance of any duty on account of the period between July 11, 2017 and August 14, 2017.
60. Accordingly, the dispute before me relates only to the owner's claim for damages with respect to any act or omission occurring after August 14, 2017. The owner's claim is that the strata has continued, after August 14, 2017, to refuse to proceed with drainage remediation.
61. It is undisputed here that the drains and more generally, the drainage system, that are the subject of this dispute come within the definition of "common property" both under the bylaw and the SPA.
62. In addition to seeking an order that the strata repair the common property, the owners seeks compensation for all costs she incurred as a result of the strata's alleged failure to repair the common property, including the cost of the owner's insurance deductible and the engineering report she obtained. I note that many of these costs, such as the deductible and the engineering site visits and reports, were incurred prior to August 14, 2017 and accordingly, I cannot consider them.
63. The strata is not an insurer. Rather, it is required to act reasonably in its maintenance and repair obligations, and is entitled to rely on reasonable expert

evidence (*Wright v. Strata Plan No. 205*, 1996 CanLII 2460 (BCSC), affirmed 1998 CanLII 5823 (BCCA) and *Taychuk v. Owners, Strata Plan LMS 744*, 2002 BCSC 1638).

64. The strata argues that it took reasonable steps to obtain advice and follow that advice. More specifically, the strata says it acted reasonably in considering whether to make the drainage changes in light of what was recommended by Mr. Butler in the Golder report.
65. I agree with the strata. The strata took remedial action in May 2016 when it retained SWR to clean and repair the perimeter drains. No evidence has been provided to indicate that the installation of a French drain and basins was a necessary step in repairing the perimeter drainage system to prevent water ingress to the owner's strata lot. In any event, this omission took place prior to August 14, 2017 and therefore, is not a matter that I can consider.
66. I note that, since SWR's repairs, the owner has not indicated that there has been any further instances of water ingress in her strata lot.
67. The strata is entitled to accept and rely on Mr. Butler's advice in the Golder report. Mr. Butler concluded that the water ingress was likely the result of underslab leakage from the plumbing lines. I find that the strata reasonably addressed this concern in May 2016.
68. I also find that the strata acted reasonably on Mr. Butler's recommendation to repair other defects that may have attributed to the water damage. This included caulking around the outer areas of the owner's strata lot and applying sealant to the cracks in the floor slab.
69. The owner argues that 4 engineers have said that the landscaping needs to be graded away from the building in which her strata lot is located. I note that while 3 of the 4 engineers had recommended that such grading work be done, only Mr. Curran was of the view that it was necessary and the cause of the water ingress.

70. In addressing this grading issue, I find that the strata acted reasonably in tabling Resolution A and Resolution B for a vote. Whether the strata is obligated under the settlement agreement to proceed with the proposal and design is not a matter that I have jurisdiction to consider and as I stated above, the owner is not restricted from bringing a separate breach of contract claim.

What remedies are available to the owner?

71. Having found that the strata acted reasonably in its obligation to maintain and repair common property, I decline to order the remedies she has sought.

72. The owner claims, however, that the strata did not repair all the cracks in the floor slab and, in support of her claim, cites the discrepancy in the quote compared to the invoice. I accept the owner's evidence on this point that a portion of the crack running east-west in the floor slab has not been repaired.

73. Accordingly, I order the strata to proceed, at its cost, with the application of sealant to the east-west crack in the floor slab in the living and dining areas of the owner's strata lot.

Is the owner entitled to reimbursement of tribunal fees and tribunal-related expenses?

74. The strata was substantially successful in this dispute. Under section 49 of the Act, and the tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. I see no reason in this case to deviate from the general rule. I therefore decline to order the strata to reimburse the owner for tribunal fees of \$225.00 and dispute-related expenses of \$266.52.

Is the strata entitled to reimbursement of the cost of obtaining expert evidence?

75. As noted above, Rule 130 of the tribunal rules allows for one party to pay another party's reasonable expenses and charges that the tribunal considers directly related to the conduct of the tribunal dispute resolution process.

76. The strata submits that its cost of obtaining expert evidence for use in the tribunal dispute resolution process is a reasonable expense for which the owner, if she is unsuccessful in this dispute, should reimburse the strata.
77. The cost of an expert is not an expense or charge the strata incurred that is directly related to the conduct of the tribunal dispute resolution process. Rather, it is an expense the strata incurred in defending the tribunal claim against it. As noted below, section 189.4 of the SPA provides that an owner is not required to contribute to any expenses a strata corporation incurs in defending the claim.
78. Accordingly, I decline to order the owner to reimburse the strata for its costs of obtaining expert evidence.

DECISION AND ORDERS

79. I order that:
 - a. The strata proceed, at its cost, with the application of sealant to the east-west crack in the floor slab in the living and dining areas of the owner's strata lot.
 - b. The owner's remaining claims be dismissed.
80. 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 to ensure that no expenses incurred by the respondent in defending this claim are allocated to the applicant owner.
81. 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.

82. 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.

Karen Mok, Tribunal Member