



Civil Resolution Tribunal

Date Issued: December 4, 2018

File: ST-2017-007008

Type: Strata

Civil Resolution Tribunal

Indexed as: *Kotowska et al v. The Owners, Strata Plan BCS 2742*, 2018 BCCRT 802

B E T W E E N :

Grazyna (Grace) Kotowska, Calin Birsan, Janusz Przbylski, Hao Wang, Paul-Peter Zwierzewicz, Marissa Abay, Aelynne Santos, Mayra Yanely-Alejo, Feras Ghesen, Maria-Grace Llagas, Shahin Karamali, Maria Recilla, Georgina Gonzales and Elvira Gatus

APPLICANTS

A N D :

The Owners, Strata Plan BCS 2742

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

J. Garth Cambrey, Vice Chair

INTRODUCTION

1. The applicants, Grazyna (Grace) Kotowska, Calin Birsan, Janusz Przbylski, Hao Wang, Paul-Peter Zwierzewicz, Marissa Abay, Aelynne Santos, Mayra Yanely-Alejo, Feras Ghesen, Maria-Grace Llagas, Shahin Karamali, Maria Recilla,

Georgina Gonzales and Elvira Gatus, each own or co-own separate strata lots in the respondent strata corporation, The Owners, Strata Plan BCS 2742 (strata).

2. Originally there were 6 additional applicants who withdrew their claims during the facilitation phase of this tribunal proceeding on the basis the additional 6 applicants determined they had no standing to commence a claim under section 189.1(1) of the *Strata Property Act* (SPA). The names of these 6 applicants are not included in the style of cause above.
3. This dispute is about the applicants' allegation that the strata was negligent, and breached its duty of care, when it failed to carry out common property repairs of owner developer deficiencies and related warranty items.
4. The applicants request orders in relation to special levies assessed by the strata for correcting owner developer deficiencies, warranty items, and legal costs in pursuing related litigation. They ask that the strata be ordered to refund special levies they paid and/or grant relief from special levies due for the deficiencies, warranty items and litigation costs.
5. Ms. Kotowska represents the applicants. A lawyer, Lisa Mackie, represents the respondent.
6. For the reasons that follow, I dismiss the applicants' claims.

JURISDICTION AND PROCEDURE

7. 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.

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 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. Under section 13 of the Act, the *Limitation Act* (LA) applies to tribunal claims.
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 issues in this dispute are:
 - a. Are the applicants' claims out of time under the LA to bring their claims for reimbursement of special levies paid or relief from paying special levies due?
 - b. If not, was the strata negligent or did it breach its duty of care with respect to common property repairs?
 - c. Is the strata entitled to reimbursement of dispute-related expenses, namely legal fees or related disbursements?

POSITION OF THE PARTIES

13. As earlier noted, the applicants say that the strata breached its duty of care and was negligent when it failed to carry out common property repairs of owner developer deficiencies and related warranty items. They say that the strata obtained deficiency

reports from an engineering firm in 2009 and failed to attend to necessary repairs at that time.

14. The applicants request that I order the strata:

- a. to refund special levies they paid, and
- b. grant relief from special levies due

for the deficiencies, warranty items and litigation costs.

15. The strata denies the applicants' allegations stating the claims are vexatious and without merit. It also says the applicants are statute-barred by the *Limitation Act* from pursuing their claims.

16. The strata requests that I dismiss the applicants' claims and asks for reimbursement its legal fees in defending this dispute or, alternatively, its legal disbursements.

BACKGROUND AND EVIDENCE

17. I have read all the submissions and evidence provided but refer only to information I find relevant to provide context for my decision.

18. In this tribunal proceeding, the applicants must prove their claim on a balance of probabilities.

19. The strata was created in January 2008 and is made up of 231 residential strata lots in 3 4-storey buildings located in New Westminster, B.C.

20. It is undisputed that the deficiency and warranty items that form the subject of this dispute are common property of the strata.

21. The parties agree that construction deficiencies first surfaced in 2009 causing the strata to retain various professionals, including lawyers, engineers and other consultants, to assist in:

- a. documenting owner developer deficiencies,

- b. corresponding with the owner develop and warranty providers,
 - c. communicating with owners,
 - d. providing advice, including legal advice, and
 - e. being available to answer questions of owners at its general meetings.
22. The strata retained an engineer to complete warranty reviews for the 2 and 5-year warranty periods. It is unclear if a warranty review was completed for the 10-year warranty period.
23. In May 2012, the strata filed a Notice of Civil Claim in the BC Supreme Court against the owner developer, warranty provider and related insurers, and others, to protect its interests.
24. The December 5, 2012 strata council meeting minutes report that the strata council received a cheque from the City of New Westminster (City) to complete landscaping and other unfinished work of the owner developer. The amount of the cheque is not shown in the minutes but, based on earlier strata council meeting minutes, I infer this cheque relates to a Letter of Credit the City held pending the completion of the certain parts of strata property by the owner developer. The applicants do not dispute funds were received by the strata.
25. The strata was not successful in its efforts to have the owner developer or warranty provider attend to all the recorded deficiencies. At a special general meeting (SGM) held April 15, 2014 (April 2014 SGM) the strata passed a $\frac{3}{4}$ vote resolution authorizing it to borrow \$2,375,000 and assess a special levy for the same amount to fund estimated repair and litigation costs. The special levy was payable in instalments and passed by 93% of the owners present at the meeting voting in favour.
26. At an SGM held May 25, 2015 (May 2015 SGM), the strata passed a further special levy to raise additional funds for the repair work associated with the special levy passed at the April 2014 SGM. The minutes show the $\frac{3}{4}$ vote resolution passed

with 76% of the owners present at the meeting in favour. The special levy was payable in installments.

27. The repair work was declared substantially complete in November 2015 and did not include repairs related to exterior windows and doors, or the waterproof membrane over the underground parkade, which the strata estimated to be \$1,521,573 in April 2016. There is no evidence to suggest the completed repairs were not consistent with the resolutions passed by the strata.
28. On December 15, 2016, the strata held another SGM (December 2016 SGM) to consider a partial settlement about its Supreme Court civil claim. The strata passed three $\frac{3}{4}$ vote resolutions accepting partial settlement of the civil claim in exchange for \$850,000. The $\frac{3}{4}$ vote resolutions authorized the settlement funds to be used to pay down the loan approved at the April 2014 SGM by \$800,000 with the remaining \$50,000 to be used for legal fees relating to the strata's remaining civil claims. The $\frac{3}{4}$ vote resolutions passed with 84% or 85% of the owners present at the meeting in favour.
29. The applicants applied for dispute resolution on November 29, 2017 and the tribunal issued the Dispute Notice on December 17, 2017.

ANALYSIS

Are the applicants out of time under the LA to bring their claims for reimbursement of special levies paid or relief from paying special levies due?

30. The strata says the applicants' claims are statute-barred under the LA because, in the Dispute Notice, they say they became aware of their claims between October 2013 and April 2014. The applicants did not address the strata's argument in their reply. For the reasons that follow, I agree with the strata.
31. Section 6(1) of the LA says that the basic limitation period is 2 years, and that a claim may not be commenced more than 2 years after it is discovered. This version

of the LA came into effect on June 1, 2013, and therefore applies to the applicants' claims.

32. Section 8 of the LA says that, except for special situations referred to in sections 9 to 11 of the LA that do not apply here, a claim is discovered by a person on the first day on which the person knew or reasonably ought to have known all of the following:
- a. that injury, loss or damage had occurred;
 - b. that the injury, loss or damage was caused by or contributed to by an act or omission;
 - c. that the act or omission was that of the person against whom the claim is or may be made;
 - d. that, having regard to the nature of the injury, loss or damage, a court (or tribunal) proceeding would be an appropriate means to seek remedy for the injury, loss or damage.
33. Here, the loss or damage is the strata's failure to address common property repairs as alleged by the applicants.
34. The applicants admit they became aware of the strata's failure to repair common property by April 2014. This is supported by the fact the April 2014 SGM was held to raise funds for common property repairs.
35. Based on the above, I find that the date the applicants discovered the loss or damage was April 15, 2014, the date of the April 2014 SGM.
36. Even if I considered that the applicants erred in stating the date they first became aware of their loss or damage, I find the latest date the applicants ought to have been aware of the strata's efforts to repair the common property was May 25, 2015. This was the date of the May 2015 SGM, when additional funds were raised to complete the repairs. Based on this date, the 2-year limitation period would expire on May 25, 2017 at the latest.

37. Finally, the applicants should have known by May 25, 2017 that a court or tribunal proceeding would be an appropriate means to seek recovery of special levies paid and/or relief from special levies due. There is no evidence before me to suggest the applicants were waiting for the BC Supreme Court civil action to unfold before commencing this tribunal claim. Rather, the evidence is that the applicants feel the strata should have repaired its common property as early as 2009, when the first deficiency report was obtained.
38. The tribunal issued the Dispute Notice for this dispute on December 7, 2017, past the 2-year basic limitation, and for that reason, I find the applicants were out of time under the LA to commence their claim.
39. As noted above, the repairs completed to the strata's common property did not resolve all owner developer deficiencies. I do not consider any outstanding deficiencies remaining after November 2015, such as exterior windows and doors, or the waterproof membrane over the underground parkade, to form part of this dispute, given the applicants have requested reimbursement of, or relief from, the special levies assessed to date, which do not include those deficiencies.
40. Based on the strata's LA defence, I dismiss the applicants' claim for reimbursement of, or relief from, the assessed special levies.

Was the strata negligent or did it breach its duty of care with respect to common property repairs?

41. Even if I am wrong in my assessment of the limitation period, I would not have granted the applicants the relief they seek. My reasons follow.
42. In order to be successful in an action for negligence, the applicants must demonstrate that the strata owed the strata a duty of care, that the strata's behaviour breached the standard of care, that the applicants sustained damage, and that the damage was caused, in fact and in law, by the strata's breach. (See *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27.)

43. I agree with the applicants that the strata owed them a general duty of care regarding repair and maintenance of common property. This is clearly set out in section 72(1) of the SPA, which states the strata's obligation is mandatory.
44. The real issue is whether the strata breached the standard of care it owed the applicants. I find that it did not.
45. The law is clear that in performing its duty to repair and maintain, the strata must act reasonably in the circumstances. (See *Wright v. Strata Plan No. 205*, 1996 CanLII 2460, aff'd 1998 CanLII 5823 (BCCA)).
46. There is nothing in the evidence to support a conclusion the strata did not act reasonably. On the contrary, the evidence suggests that the strata took steps to investigate and document owner developer deficiencies and warranty items in a prudent and reasonable fashion. There is insufficient evidence the deficiencies or warranty items were urgent in nature or required immediate repair. The strata took advice from its legal counsel and presented its deficiency and warrantable items to the owner developer and warranty provider in an attempt to reach a negotiated settlement. When that proved unsuccessful, the strata filed a Notice of Civil Claim in the Supreme Court to protect its interest and ultimately received an \$850,000 partial settlement, which owners approved by a $\frac{3}{4}$ vote at the December 2016 SGM.
47. In addition, the strata reasonably pursued and received funds from the City based on the Letter of Credit security the City held to ensure the owner developer's completion of certain aspects of the strata development.
48. I recognize that the applicants believe the strata should have taken earlier action and that they do not agree with what some of the strata's consultants or legal counsel had to say, but that does not mean the strata acted unreasonably.
49. From my review of the strata council meeting minutes provided, I agree with the strata that it provided frequent updates to its owners to keep interested owners informed.

50. I find the applicants' claim of negligence must fail given my finding that the strata acted reasonably in the circumstances.

TRIBUNAL FEES AND EXPENSES

51. 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. Given the strata was the successful party but paid no tribunal fees, I decline to make any order for reimbursement of tribunal fees.

52. The strata requests that the applicant pay for its legal fees in defending this dispute or, alternatively, its legal disbursements.

53. As the strata accurately points out, tribunal rules 130 and 132 govern how it can address reimbursement of other reasonable expenses and legal fees.

54. As for legal fees, the tribunal's general rule is that parties are self-represented. Tribunal rule 132 permits me to award legal fees only in extraordinary circumstances, which I find do not exist here. While it may be that the applicants waited too long to make their claims, I do not find that they filed their claims purely to annoy or frustrate the strata. Nor do I find the applicants' conduct to be worthy of rebuke.

55. For these reasons, I dismiss the strata's request for reimbursement of legal fees.

56. The strata's disbursements total \$1,660.30 and consist of printing costs, on-line registry and land title search fees and charges. The printing costs include black and white copies as well as colour copies and total \$1,427.20, with the BC Online registry and land title search fees and charges making up the difference of \$233.10.

57. It is unclear what the printing costs relate to but given the online nature of the tribunal and that all submissions and evidence were provided in electronic format, I see no reason to order reimbursement of printing costs paid to legal counsel or otherwise.

58. I find the BC Online registry and land title search fees and charges of \$233.10 to be reasonable dispute-related expenses and find the applicants must reimburse the strata this amount.
59. The strata corporation must comply with the provisions in section 189.4 of the SPA, such as not charging dispute-related expenses against an owner, unless the tribunal orders otherwise. Therefore, apart from my order above for \$233.10, the strata cannot charge other dispute-related expenses to the applicants.

DECISION AND ORDER

60. I order that the applicants':
- a. claims and dispute is dismissed, and
 - b. must, within 30 days of the date of this decision, reimburse the strata \$233.10 for dispute-related expenses.
61. The strata is entitled to post-judgement interest under the *Court Order Interest Act*, as applicable.
62. 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.
63. 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