Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Ruan v. The Owners, Strata Plan BCS 1964*, 2019 BCCRT 128

B E T W E E N :

Zijin Ruan

APPLICANT

A N D :

The Owners, Strata Plan BCS 1964

RESPONDENT

A N D :

Zijin Ruan

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member: J. Garth Cambrey, Vice Chair

INTRODUCTION

1. The applicant and respondent in the counterclaim, Zijin Ruan (owner), owns a strata lot in the respondent strata corporation, The Owners, Strata BCS 1694 (strata). The strata is the applicant in the counterclaim.

2. This dispute involves the responsibility for payment of the strata's $15,000 insurance deductible caused by an overflow of the owner's washing machine.

3. The owner says she is not responsible to pay the strata's insurance deductible because she was not negligent in respect of the washing machine overflow, and negligence is required under the strata bylaws to find her responsible to pay the deductible.

4. In the counterclaim, the strata says the owner is responsible to pay its insurance deductible under section 158(2) of the *Strata Property Act* (SPA) and its bylaws.

5. The owner is represented by Yiwen Ruan, who I infer is a family member. The strata is represented by a strata council member.

6. For the reasons that follow, I find the strata must pay the $15,000 insurance deductible.

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 121 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. Under section 123 of the Act and the tribunal rules, in resolving this dispute the tribunal may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the tribunal considers appropriate.

ISSUE

11. The sole issue in this dispute is who is responsible to pay the strata's $15,000 insurance deductible resulting from the owner's washing machine overflow?

BACKGROUND, EVIDENCE AND ANALYSIS

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

13. In a civil proceeding such as this, the applicant must prove its claim on a balance of probabilities. The strata must prove its counterclaim on a balance of probabilities.

14. The strata was created in July 2006 and consists of a 176-unit residential strata corporation located in Vancouver, B.C.

15. The owner's strata lot 99 is located on the 21st floor of one of the 2 high-rise towers in the strata.

16. The strata's relevant bylaws are those filed at the Land Title Office on January 21, 2008. Subsequent bylaw amendments were filed and are not relevant to this dispute, with one exception: bylaw 38 amendments passed February 27, 2017 and filed on March 9, 2017.

17. Prior to March 9, 2017, bylaw 38(2) stated that owners are "…responsible for any damage caused by a waterbed, appliance or other fixtures within their strata lot."

18. At my request, the strata provided copies of the February 27, 2017 annual general meeting (February 2017 AGM) notice package and minutes. The resolution passed at the meeting replaced bylaw 38(1) with bylaws 38(1), (2) and (3), all of which relate to smoking. The strata says the resolution replaced only subsection 1 of bylaw 38 with subsections 1, 2, and 3 and that the following subsections were renumbered accordingly. If this were the case, bylaw 38(2), on which the strata relies, would be renumbered to 38(4).

19. The alternative interpretation is that subsections 1 through 3 entirely replaced the previous subsections 1 through 3, including bylaw 38(2) dealing with owner-caused damage from their appliances, and that no renumbering of the remaining subsections occurred. The proposed ¾ vote in the February 2017 AGM notice package does not say subsections 2 through 10 were renumbered, nor do the minutes.

20. The owner did not provide a response to the bylaw renumbering issue despite being given the opportunity to do so.

21. I am left to determine whether the bylaw making owners responsible for "any damage" caused by their appliances continues to have effect or if it was replaced with the March 9, 2017 smoking bylaw.

22. Given the ¾ vote resolution passed at the February 27, 2017 AGM did not specify that the subsequent subsections of bylaw 38 were to be renumbered, I find they were not. However, the resolution also did not repeal the bylaw 38 subsections.

23. Given the different subject matter, and that the owner made no submissions that the strata intended remove the owner-caused damage bylaw and replace it with the smoking bylaw, I find the strata simply failed to recognize it need to renumber the subsections of bylaw 38.

24. Therefore, I find the strata is left with a bylaw numbering issue as bylaw 38 now contains 2 subsection 2s and 2 subsection 3s. In other words, the owner-caused damage bylaw, which I have referred to below as bylaw 38(4), applies.

25. For simplicity, I will refer to bylaws as if they were re-numbered in order to align with the parties' submissions, but I suggest the strata may wish to consider addressing its bylaw numbering issue at its next general meeting.

26. The following bylaws apply to this dispute:

    a. **Bylaw 2(1)** that states an owner must repair and maintain their strata lot except for repair and maintenance that is the strata's responsibility,

    b. **Bylaw 3(2)** that states an owner must not cause damage, other than reasonable wear and tear, to those parts of a strata lot that that the strata must repair and maintain under the bylaws or insure under section 149 of the SPA,

    c. **Bylaw 38(4)** that states owners are responsible for "any damage caused by a waterbed, appliance or other fixtures within their strata lot", and

    d. **Bylaw 38(12)** that states in part that an owner shall indemnify and save harmless the strata from the expense of any maintenance, repair or replacement rendered necessary to common property, common assets or to any strata lot by the owner's "act, omission, negligence or carelessness" but only to the extent that such reimbursement is not covered by the strata's insurance, which includes an insurance deductible.

27. The parties agree that a washing machine within the owner's strata lot overflowed and caused damage to the owner's strata lot, other strata lots, and common property, and that repairs were completed that triggered the strata's $15,000 water damage deductible.

28. The owner had insurance coverage to pay the strata's deductible if charged to her (subject to the owner's deductible), but the owner's insurer denied coverage of the

strata's deductible based on the wording of bylaw 38(12), which the owner's insurer found required the owner to be negligent.

29. It is undisputed that the tribunal has authority to decide about responsibility for payment of an insurance deductible under section 158(2) of the SPA.

30. The strata's position is that the owner's washing machine is part of her strata lot and because her strata lot was the source of the water she is responsible for the loss or damage which, in this case is the insurance deductible.

31. The strata submits that the owner need only be found responsible under bylaws 2(1), 3(2) and 38(4) to be responsible to pay the insurance deductible. In other words, the strata argues the owner is strictly liable for damage emanating from the washing machine appliance in her strata lot. I disagree.

32. I agree with the owner's interpretation of bylaw 2(1) in that the bylaw establishes the owner's duty of care with respect to repair and maintenance of her strata lot. Although the washing machine is located within the owner's strata lot, I do not agree that the washing machine forms part of the owner's strata lot as suggested by the strata. The strata lot is defined under the SPA to be a lot shown on the strata plan, which does not include items within the lot, such as a washing machine.

33. The strata says bylaw 38(12) does not detract from the application of bylaws 2(1), 3(2) and 38(4) and cannot be an impediment to the strata's statutory right under section 158(2) of the SPA to sue an owner who is responsible for the damage.

34. I do not agree that bylaws 3(2) and 38(4) somehow supersede or take precedence over bylaw 38(12). Rather, I find bylaw 38(12) applies to the specific circumstances that form the basis of this dispute where the strata's insurance policy has responded to the repairs subject to a deductible.

35. I also do not agree with the strata's interpretation that bylaw 38(12) impedes the strata's right to sue an owner for an insurance deductible who is responsible for the loss. The strata is not restricted from claiming the owner must pay its deductible and it has done so by filing its counterclaim.

36. At the heart of this dispute is whether the strata's bylaws raise the level of the owner's responsibility for the insured loss to that of negligence as suggested by bylaw 38(12), or if the strata's bylaw 38(4) governs this dispute because the loss occurred from a washing machine. I find that the strata's bylaw 38(12) applies.

37. The BC Supreme Court has recently found that the principles of statutory interpretation apply to strata corporation bylaws and that determining the meaning of an individual bylaw, the bylaws must be read as a whole. See *Semmler v. The Owners, Strata Plan NES3039*, 2018 BCSC 2064 at paragraph 18.

38. Citing paragraph 25 in *Carnahan v. Strata Plan LMS522*, 2014 BCSC 2371, the court in *Semmler* also found that an interpretation which allows the bylaws to work together harmoniously and coherently should be preferred.

39. Read separately, I agree that bylaws 38(4) and (12) are largely unambiguous. However, there is no doubt the 2 bylaws conflict and are difficult to interpret together. Ambiguity is created as the 2 bylaws set different standards of responsibility for different losses. Neither bylaw restricts the type of damage an owner will be responsible for. Bylaw 38(4) restricts the cause of the damage to only waterbeds, appliances and fixtures in a strata lot, and bylaw 38(12) limits the amount of the owner's damage to the strata's insurance deductible.

40. Bylaw 38(12) clearly sets a negligence standard that explicitly applies to any expenses that are not covered by insurance. Further, bylaw 38(12) expressly says that in the event there is an insurance claim, the strata's insurance deductible is the owner's responsibility and will be charged to the owner. I find the only reasonable interpretation of bylaw 38(12) is that it applies to the strata's insurance deductibles. In adopting bylaw 38(12) the strata has deliberately turned its collective mind to insurance deductibles and adopted a negligence standard for the specific purpose of considering when an owner can be found responsible to pay the strata's deductible.

41. Bylaw 38(4) does not set a negligence standard and is specific to damage caused by "waterbeds, appliances and other fixtures". I find the only reasonable interpretation of bylaw 38(4) is that it does not apply to insurance deductibles.

42. I turn now to the application of bylaw 38(12) to the circumstances before me.

43. The strata relies on 2 well-known BC Supreme Court decisions; *Wawanessa Mutual Insurance Co. v. Keiran*, 2007 BCSC 727 and *The Owners, Strata Plan LMS 2835 v. Mari*, 2007 BCSC 740. It argues the court's finding *Mari* that the SPA's use of the term "responsible for" in section 158(2) confirms the legislation is clear and no finding of negligence is required (See *Mari* at paragraph 12).

44. Both *Keiran* and *Mari* were 2007 appeals of Provincial Court decisions where the Supreme Court found that a strata lot owner is liable for a strata corporation's insurance deductible if the owner is "responsible" for the loss giving rise to the strata corporation's insurance claim. The court held that a strata lot owner is responsible for what occurs within their strata lot and that a strata corporation may look to such an owner to recover its insurance deductible where the owner's responsibility for the loss falls short of negligence. It is important to note that the court did not consider the strata corporation bylaws in either case.

45. The owner disagrees and takes the position that bylaw 38(12) imports a negligence standard citing the BC Provincial Court decision in *Strata Plan LMS 2446 v. Morrison*, 2011 BCPC 519 and noting that this tribunal has relied on *Morrison* in several decisions, including *Clark v. The Owners, Strata Plan LMS 3938*, 2017 BCCRT 62.

46. In *Morrison,* the Provincial Court was asked to determine if section 158(2) was affected by the strata's bylaws. In particular, if a strata corporation's bylaws required the strata corporation to show the strata lot owner was negligent, as opposed to 'responsible" for a loss under section 158(2) of the SPA before being able to recover its insurance deductible.

47. The strata says the I should not follow *Morrison* because it was wrongly decided and that I am bound to follow the decisions of *Keiran* and *Mari*. Specifically, the strata says the tribunal must apply the decisions of the higher Supreme Court in *Keiran* and *Mari* rather than the lower Provincial Court decision in *Morrison* and that *Morrison* cannot be relied upon to create a stricter standard of negligence or responsibility than the standard found in section 158(2) of the SPA.

48. While I agree with the strata that I must follow court precedent, I do not agree that in doing so, I cannot or should not rely on *Morrison*. My reasons follow.

49. I find it is not within my jurisdiction to determine if *Morrison* was wrongly decided as to date, *Morrison* has not been overturned by a higher court.

50. I note that in a recent decision of the Supreme Court granting leave to appeal an earlier tribunal decision, the precise arguments of the strata will be considered. That is:

    a. Can the bylaws of a strata corporation serve to narrow the application of section 158(2) of the SPA? and

    b. Should *Morrison* apply to circumstances that are near identical to those in this dispute? (See *The Owners, Strata Plan BCS 1589 v. Nacht*, 2018 BCSC 455 at paragraphs 22 to 26).)

51. Unless and until *Morrison* is found to be wrongly decided or the court finds that the bylaws of a strata corporation cannot narrow the application of section 158(2) of the SPA, I find I am bound to follow its precedent.

52. Therefore, I find I must look at the strata's bylaws to determine the level of responsibility they convey upon an owner with respect to recovering an insurance deductible.

53. I find that bylaw 38(12) contains the same indemnity language for an owner's "act, omission, negligence or carelessness" for an owner to found responsible for an insurance deductible as was present in the bylaws considered in *Morrison*. I find that if the strata had intended to have the standard of "responsible for" loss or

damage (as contemplated in *Mari*) be applied to determinations of whether an owner was liable to repay the deductible portion of an insurance claim, it would have adopted a bylaw that echoed the language set out in section 158(2) of the Act. It did not do so. Rather, the strata chose to adopt bylaw 38(12) that sets out a more stringent standard of responsibility.

54. As a result, in order for the owner to be responsible for the $15,000 deductible, I must find the owner to be negligent in causing damage that is covered by the strata's insurance policy.

55. The owner submits she was not negligent about her washing machine overflow as there was no indication that her washing machine was going to fail. For this reason, she says bylaw 38(12) was not breached and she should not have to pay the deductible.

56. The strata did not argue the owner was negligent as it focused its submissions on the *Morrison* decision being wrongly decided and not applying in the circumstances before me.

57. Based on my findings above and absent any argument from the strata that there was reason for the owner to have suspected an issue with her washing machine, I accept that the owner was not negligent. Accordingly, I find the strata is responsible to pay the strata's $15,000 insurance deductible.

TRIBUNAL FEES, EXPENSES AND INTEREST

58. 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 find the owner was the successful party in its dispute and order the strata to reimburse her $225 for tribunal fees. The owner made no claim for dispute-related expenses, so I make no order in that regard.

59. I dismiss the strata's counterclaim for tribunal fees.

60. The strata corporation must comply with the provisions in section 189.4 of the SPA, such as not charging dispute-related expenses against the owner. However, I find the owner is responsible for her proportionate share of the $15,000 insurance deductible that I have found the strata must pay.

ORDERS

61. I order that:

    a. The strata immediately pay the $15,000 insurance deductible that forms the basis of this dispute if it has not done so already,

    b. The owner is responsible for her proportionate share of the insurance deductible payment based on unit entitlement, and

    c. Within 30 days of the date of this order, the strata pay the owner $225 for tribunal fees.

62. The owner is entitled to post-judgement interest under the *Court Order Interest Act*, as applicable.

63. I order that the strata's counterclaim is dismissed.

64. 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.

65. 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