Civil Resolution Tribunal

Date of Original Decision: May 2, 2019

Date of Amendment: May 30, 2019

File: ST-2018-002768

Type: Strata

Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan NW 64 v. Jamani et al*, 2019 BCCRT 524

B E T W E E N :

The Owners, Strata Plan NW 64

APPLICANT

A N D :

Bhadur Jamani and Alma Jamani

RESPONDENTS

A N D :

The Owners, Strata Plan NW 64

RESPONDENT BY COUNTERCLAIM

AMENDED REASONS FOR DECISION

Tribunal Member: J. Garth Cambrey, Vice Chair

INTRODUCTION

1. The applicant and respondent by counterclaim, The Owners, Strata Plan NW 64 (strata), is a strata corporation existing under the *Strata Property Act* (SPA). The respondents, Bhadur Jamani and Alma Jamani (owners), own strata lot 16 (SL16) in the strata. The owners are the applicants in the counterclaim.

2. In this dispute the strata alleges the owners owe it for bylaw fines, invoice chargebacks and vehicle towing. The strata seeks recovery of a total of $4,533.83 as described below.

3. In the counterclaim, the owners seek to recover $4,460.00 in repair costs and $7,000.00 in lost rental income relating to a roof leak. The owners also ask for an order that the strata restore their strata lot and its common property "backyard", to the condition they were in prior to a roof leak and drainage repairs.

4. The strata is represented by a strata council member. The owners are represented by Bhadur Jamani.

5. For the reasons that follow, I refuse to resolve or dismiss the strata's claims. I refuse to resolve the owners' claim for reimbursement for repairs and lost rental income and order the strata to complete limited repairs to the common property adjacent to SL16.

JURISDICTION AND PROCEDURE

6. 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.

7. 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.

8. 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.

9. Under section 10 of the Act, the tribunal must refuse to resolve a claim that it considers is not within the tribunal's jurisdiction. A dispute that involves one or more issues that are within the tribunal's jurisdiction and one or more that are outside its jurisdiction may be amended to remove those issues that are outside its jurisdiction.

10. Under section 61 of the Act, the tribunal may make any order or give any direction in relation to a tribunal proceeding it thinks necessary to achieve the objects of the tribunal in accordance with its mandate. In particular, the tribunal may make such an order on its own initiative, on request by a party, or on recommendation by a case manager (also known as a tribunal facilitator).

11. Tribunal documents incorrectly show the name of the respondent as The Owners, Strata Plan NW 64 Sperling, whereas, based on section 2 of the SPA, the correct legal name of the strata is The Owners, Strata Plan NW 64. Given the parties operated on the basis that the correct name of the strata was used in their documents and submissions, I have exercised my discretion under section 61 to direct the use of the strata's correct legal name in these proceedings. Accordingly, I have amended the style of cause above.

12. 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.

POSITION OF THE PARTIES

The strata's claims

13. The strata's overall claim for bylaw fines, repair charges and towing charges is $4,533.83 as set out in the Dispute Notice. The strata did not provide a breakdown of the charges, however, based on an April 3, 2017 "Collections Report" provided by the owners, on which the strata expressly relies, I have determined the amount claimed by the strata to be $4,512.80 broken down as follows (I cannot explain the $21.03 difference):

a.	Bylaw fines prior to May 31, 2015		$ 600.00
b.	"Fine – motorcycle Parked w/o ins"		$ 200.00
c.	Strata fee late payment fines		$ 275.00
d.	Fines for bylaw infractions		$1,450.00
	i. Noise – June 18, 2016	$200.00	
	ii. Noise – July 9, 2016	$200.00	
	iii. Vehicles without insurance	$400.00	
	iv. Form K (11 months at $50)	$550.00	
	v. Jumping the fence	$100.00	
e.	Chargeback of Towing Costs		$ 200.00
f.	Chargeback of collection costs		$ 262.50
g.	Strata lot repair invoice chargeback		$1,525.30
			$4,512.80

14. I was not provided with a copy of the management contract between the strata and property manager, but I find the reference to "collection costs" is a fee charged by the strata property manager to the strata for issuing collection notices or notices of outstanding fees and charges. I infer the charge is similar to an "NSF" charge. I also find the charge to the owners is from the strata and not directly from the property manager, given the contractual arrangement between the strata and property manager.

15. The strata says the owners failed to pay increased strata fees resulting from a newly passed budget, that the strata's property manager demanded payment of the outstanding strata fees, and then imposed bylaw fines for non-payment of strata fees. The strata says the owners were also fined for other violations of the strata's bylaws, which I have listed above.

16. The strata also says the owners owe the strata for work it completed to SL16 following the strata's investigation of water damage resulting from a roof leak. The strata says the owners knew of a water leak from a bathroom in SL16, that they failed to notify the strata of the bathroom leak, and attempted to have the strata repair the water damage from the bathroom leak as part of the roof leak repairs.

17. The strata also says the owners' tenants parked their vehicles on common property in violation of the strata's bylaws that require all vehicles to be insured.

18. The strata asks for orders that the owners pay the strata $1,525.30 for work the strata completed to SL16 that it says was the owners' responsibility. The strata also asks for an order that the owners pay $200.00 in towing charges relating to their tenants' vehicles, being $100.00 per vehicle.

19. The owners deny they owe bylaw fines and say the strata did not follow the procedures of the SPA in giving notice to the owners and adopted an unfair approach in attempting to collect alleged outstanding fines and charges. The owners also say the strata's bylaws at the time were "unfair, ambiguous and conflicting" and were therefore not enforceable. They say the strata's claims for reimbursement of invoices are statute-barred under the *Limitation Act* (LA).

20. The owners ask that the strata's claims be dismissed.

The owners' counterclaim

21. The owners say the strata is responsible for the repairs to SL16 resulting from the roof leak and for lost rental income for the period their strata lot was being repaired as a result of the roof leak.

22. The owners ask for orders that the strata pay them $4,460 for repairs to their strata lot and $7,000 for lost rental income. They say the strata's bylaws required it to repair SL16 and that they were forced to repair SL16 because the strata would not. The owners also say they lost 3.5 months of rent between August 1 and November 15 while they were repairing SL16.

23. The strata says that much of the cost of the work in the owners' strata lot related to a plumbing issue and not to the roof leak. In its Dispute Response, the strata admits "the only work to be done [by the strata's contractor after the roof leak was to] repair the inspection holes and paint them over." The strata does not ask that the owners' claim for reimbursement be dismissed and based on its Dispute Response, appears to suggest it might be responsible for drywall repairs resulting from inspection. It says the drywall repairs were not completed because the owners failed to authorize the strata's contractor to complete asbestos abatement in their strata lot.

24. As for the owners' lost rental income, the strata says the owners advised the strata they would evict their tenants in May or June 2016 in order to move into SL16. For this reason, the strata says the tribunal should dismiss the owners' claim for lost rental income.

25. In essence, the owners' drainage repair claim is that the strata failed to repair and maintain its common property by not removing old fencing and construction debris left from the repair work. They say the affected common areas adjacent to the other 2 neighbouring strata lots have been restored to a better condition than prior to the repair work, whereas the common property adjacent to SL16 has not been restored to the same standard.

26. They ask for orders that the strata restore their "backyard" to its original condition prior to major drainage repairs completed in 2016, including the replacement of a set of stairs the strata removed during the drainage repairs.

27. The strata did not fully address the owners' claim about the condition of the 'backyard" of SL16. It says the fence was replaced by the plumbing contractor and looks different because it is also a gate for future access. The strata also says the

sump had to be raised and meets code requirements. Further, the strata says the stairs were approved in 2005 and that the owners signed an agreement that they would be responsible for the stair repair and maintenance, which they did not do.

28. I infer the strata seeks the owners' claim be dismissed.

ISSUES

29. The issues in this dispute are:

    a. Are the strata's claims out of time under the LA?

    b. Are the owners' claims out of time under the LA?

    c. Subject to my findings relating to the LA:

        i. Is the strata entitled to payment of $275.00 in bylaw fines for late payment of strata fees?

        ii. Is the strata entitled to payment of $2,250.00 in bylaw fines for violations other than late payment of strata fees?

        iii. Is the strata entitled to reimbursement of $262.50 for "collection costs" charged by its property manager?

        iv. Is the strata entitled to reimbursement of $200 towing costs related to the owners' tenant's vehicles?

        v. Is the strata entitled to reimbursement of $1,525.30 related to water damage investigation of SL16?

        vi. Are the owners entitled to reimbursement of $4,460.00 for repairs to SL16?

        vii. Are the owners entitled to reimbursement of $7,000.00 for lost rental income?

viii. Are the owners entitled to an order that the strata restore the "backyard" of SL16 to the condition it was in before the strata completed drainage repairs, including the stair replacement?

BACKGROUND AND EVIDENCE

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

31. In a civil proceeding such as this, the strata must prove its claims, on a balance of probabilities. The owners must prove their counterclaims on a balance of probabilities.

32. The strata is a 31-unit townhouse strata corporation located in Burnaby, B.C. that was created in 1971 under the *Strata Tiles Act*. The strata continues to exist under the SPA.

33. The owners purchased SL16 in March 1988. SL16 is a 3-storey strata lot with a basement, main floor and upper floor.

34. The strata's relevant bylaws are those filed at the Land Title Office on April 11, 2011. Subsequent bylaw amendments were passed but they are not relevant to these disputes. The April 11, 2011 filed bylaws included 7 sections, numbered 1.1 to 7.7, about parking, water leaks, pets and rentals, among other things, entitled "Rules & Regulations of NW 64 'SPERLING TOWNHOUSES". I find the heading of "Rules and Regulations" is simply incorrect. I find these additional sections are bylaws, and not rules, for the following reasons.

35. First, the content of these sections refer to them as bylaws rather than rules and there is no requirement for a strata corporation to register its rules at the Land Tile Office.

36. Second, in 2017, amendments were filed with respect to section 6.1 that contemplated the section was a bylaw.

37. Third, if these sections were rules, parts of the sections on pet and rental restrictions would be unenforceable as restrictions on pets and rentals must be contained in a registered bylaw under sections 123 and 141 of the SPA respectively, not in a rule.

38. Fourth, the section on water leaks would also not be enforceable as a rule as a strata corporation can only take over repair and maintenance of parts of a strata lot if it has passed a bylaw under section 72 of the SPA.

39. For these reasons, I find it is more likely than not that the strata approved these sections as bylaws and not as rules.

40. Based on my analysis, I do not find the strata's bylaws were "unfair, ambiguous and conflicting" as alleged by the owners and find the bylaws are enforceable. I will not discuss further the owners' argument on this issue.

The roof leak

41. On December 11, 2014, the strata arranged for its restoration and plumbing contractors to attend the owners' strata lot because of a suspected roof leak. The plumbing contractor's invoices confirm the leak was caused by a blockage in the roof drain pipe and that the drain pipe had to be exposed for repair by cutting into the walls of SL16 in the upper floor and basement. One of the plumber's invoices notes that it "removed some roots from [the] line and eventually broke through blockage." The invoice also noted that a nail from the siding had penetrated the drain line on the third floor and that the pipe was repaired at that location.

42. The restoration contractor noted in its December 18, 2014 letter that water damage had occurred to SL16 as a result of the leak that it found by removing "saturated" drywall in the master bedroom and adjacent closet on the upper floor of SL16. The restoration contractor reported that the main floor living room and basement levels were affected by water ingress from the backed-up roof drain pipe. The contractor tested drywall for asbestos and found asbestos was present in the upper floor

drywall sample but not the basement drywall sample. No explanation was provided as to why the main floor drywall was not tested.

43. The strata's restoration contractor also noted in its December 18, 2014 report, that their technician was "informed about an unrelated leak in [the] upstairs bathroom" (bathroom leak) that it believed at the time to be related to the bathroom window.

44. Also on December 18, 2014, the strata's property manager provided the December 18, 2014 restoration contractor's report to the owners advising of the bathroom leak and requesting if the owners wanted the contractor to continue with the bathroom leak related repairs. The owners replied on the same day that the bathroom leak "has already been addressed with my plumber" and requested the strata proceed with the work that was the strata's responsibility.

45. The total cost of the emergency restoration work in SL16 completed by the strata's restoration contractor was $3,161.36 as evidenced in a single invoice dated January 7, 2015. It appears the strata requested its contractor separate investigation work that might have related to the bathroom leak and then re-issue separate invoices so the strata could charge the owners for a portion of the emergency work.

46. In an August 5, 2015 strata email to the owners, the strata requested the owners pay the revised partial invoice totaling $1,525.33 but provided no correspondence or other evidence supporting how the amount was arrived at or on what authority the strata was charging the amount to the owners. The owners also provided a copy of an envelope containing a registered letter postmarked September 9, 2015 that they say included a request to pay. The registered letter was not included in evidence. The collection report provided shows SL16 was charged the amount of the invoice on August 19, 2016.

47. On April 26, 2017, the owners wrote to the strata advising that they objected to the restoration invoice being charged to SL16 because they did not authorize the strata to complete any work in SL16 and that other work they asked the strata to complete in December 2016 was not completed. The owners also stated that because of the strata's failure to complete the remaining interior work after 18 months, the owners

completed it at their expense. The owners requested the strata pay them $4,804.05 which is what they claimed was their cost to repair SL16 as a result of the roof leak in December 2014.

The drainage repairs

48. In about September 2016, the strata completed drainage repairs to the property south of SL16 (drainage repairs). It is undisputed that the property is the strata's common property despite the owners' reference to the property as their "backyard". In an undated notice to its members, the strata reports on the "2016" drainage issues reportedly caused by the improper installation of drain pipes in 2007 by a different drainage contractor used by the strata. The owners say the notice was issued in February 2017 which the strata does not dispute.

49. It is also undisputed that the strata removed a set of wooden stairs it alleges was a safety concern.

50. The owners describe the extent of the repairs as "a major drainage maintenance project" behind SL16 and the 2 adjacent strata lots. They say that during the repair work, "concrete patios were destroyed as piping needed to be replaced" and that a fence adjacent to SL16 was "destroyed" to allow workers access to the area. The owners also say the new access resulting from the fence removal was used on a daily basis to bring supplies and equipment onto the common property.

51. Both parties submitted photographs on the condition of the subject common property at various times.

ANALYSIS

The Limitation Act

52. Section 13 of the Act states that the LA applies to the tribunal as if it were a court. It also says reference to a claim in the LA is deemed to include a claim under the Act. The LA defines a "claim" as "a claim to remedy an injury, loss or damage that

occurred as a result of an act or omission". The limitation period only applies to claims, as defined.

53. Section 6 of the LA says of the basic limitation period is 2 years, and that a claim may not be commenced more than 2 years after it is discovered.

54. Section 8 of the LA says that, except for special situations referred to in sections 9 to 11 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 proceeding would be an appropriate means to seek remedy for the injury, loss or damage.

55. Section 21 of the LA sets the ultimate limitation period applicable to a strata property claim at 15 years.

56. Section 22 of the LA states that if a claim is started in time, a counterclaim or "related claim" is also started in time.

Are the strata's claims out of time under the LA?

57. The Supreme Court of British Columbia has determined that a claim to enforce a bylaw fine under the SPA is not caught by the LA because a claim under the LA does not include a penalty, which is what a bylaw fine is. (See *The Owners, Strata Plan KAS 3549 v. 0738039 B.C. Ltd*., 2015 BCSC 2273, affirmed in 2016 BCCA 370). Therefore, I find the strata's claims for fines are not out of time, given the LA does not apply.

58. Except for the strata's claims for bylaw fines, I find the LA applies to the strata's remaining claims in this dispute, because the strata's remaining claims are for financial losses or damage as described below.

59. The strata's Dispute Notice was issued on April 25, 2018 so if the date of discovery under the LA arose before April 25, 2016, the strata's claim is out of time.

60. In addition to bylaw fines, I have found the strata's claims relate to:

    a. Chargeback of towing costs in June 2016 for 2 vehicles belonging to the owners' tenants at $100.00 per vehicle or a total of $200.00,

    b. Chargeback of 5 separate "collection costs" of $52.50 charged by the strata's property manager totalling $283.50 for the period October 31, 2016 through March 28, 2017, and

    c. Chargeback of a repair invoice for restoration investigation the strata alleges relates to the bathroom leak totalling $1,525.30 dated January 7, 2015, but not provided to the owner until August 5, 2015 by email, and not charged to the account of SL16 until August 19, 2016.

61. I find the chargebacks against SL16 for towing costs and "collection costs" are not out of time because the dates of the charges were after April 25, 2016.

62. I do not reach the same conclusion for the repair invoice. I find the date the strata reasonably knew or ought to have known it had a claim against the owners for the cost of repairs to SL16 was August 5, 2015, the date the strata emailed the invoice to the owner. I do not accept the strata's explanation that it did not discover the claim a full year later in August 2016 because it had to wait until after the next "rainy season" before charging SL16 with the cost of the invoice. There is no evidence before me that supports the strata's assertion.

63. Therefore, I find the strata's claim of $1,525.30 for repairs to SL16 is out of time under the LA. Accordingly, I refuse to resolve that $1,525.30 claim under section 10

of the Act. I will discuss the strata's claims for towing costs and "collection costs" below, along with its claims for payment of bylaw fines.

Are the owners' claims out of time under the LA?

64. The owners' claims relating to the December 2014 roof leak are for $4,460.00 in costs relating to repair of SL16 and $7,000 in lost rental income for the period SL16 was being repaired.

65. I have noted that section 22 of the LA permits a "related claim" to be brought if the first claim, here the strata's claim for repair costs resulting from the roof leak, are within the limitation periods of the LA. I find the owners' claims for repair costs and lost rental income are related claims within the meaning of section 22 of the LA because the claims result from the same issue and the same facts, being the December 2014 roof leak. However, just because I have found the strata's claim to be out of time does not mean the owners' related claims are out time. The owners' Dispute Notice was issued September 13, 2018, so if the owners' date of discovery for each claim under the LA arose before September 13, 2016, the owners' claim is out of time.

66. Not all correspondence between the parties was provided in evidence. However, in an April 26, 2017 letter to the strata, the owners say they had no support from the strata to attend to the SL16 repairs "18 months after the initial roof leak" which I calculate to be about July 2016. The owners go on to say it was at that time they determined they had no alternative but to complete the repairs. The evidence suggests the owners started repairs to SL16 about August 2016 which I find accords with their April 26, 2017 correspondence. Given the owners would not have known the amount of their claim until the work on SL16 was complete, I find the owners did not discover their claim within the meaning of the LA until November 1, 2016, the date of the invoice for drywall and painting repairs to SL16 as it appears carpet replacement was completed in October 2016.

67. Accordingly, I do not find the owners' claim for $4,460 for the cost repairing SL16 is out of time.

68. I turn now to the owners' claims for lost rental income and find that the owners would have know about the August 2016 rent by August 31, 2016. The same can be said for September 2016 rent for about half the month until September 13, 2106, which is the date that is exactly 2 years before the date of the Dispute Notice. Therefore, I find the owners' claim for lost rent for the month of August 2016 and half the month September 2016 is out of time. For the same reason, I find the owners' claim for lost rent from September 14 through November 15, 2106 is within the 2-year limitation period and is not out of time.

69. I am not persuaded the owners' remaining claims relating to the 2016 drainage repairs to common property adjacent to SL16 are out of time.

70. First, the February 2017 notice issued by the strata shows the last invoice received for the drainage work was dated September 2, 2016. The actual completion date of the drainage work was not provided. I find the evidence shows the owners likely discovered the claim after September 13, 2016, given the September 28, 2016 email and the fact that the drainage work invoice was only issued on September 2, 2016.

71. Second, the council meeting minutes of April 5, 2017 state the strata was awaiting a final quote for fence replacement "from last year's water damage at the south side of the property" and that strata "will have to reduce the height of the sump before the landscaping can be done." I find it reasonable that the owners believed the strata would complete repairs to the common property adjacent to SL16 at least until April 5, 2017, which is within the 2-year period prior to the Dispute Notice being issued.

72. For these reasons, I find the owners' claims for common property repairs and a replacement set of stairs are not out of time. I discuss all of these claims further below.

Is the strata entitled to payment of $275.00 in bylaw fines for late payment of strata fees?

73. The strata's bylaw 1(a) requires owners to pay strata fees "on or before the first day of the month to which the strata fees relate."

74. Section 135(1) of the SPA states that a strata corporation may not impose a fine against a person for a bylaw contravention unless it has received a complaint, given the owner or tenant written particulars of the complaint and a reasonable opportunity to answer the complaint, including a hearing if requested. The requirements of section 135 must be strictly followed before a fine can be imposed as set out in *Terry v. The Owners, Strata Plan NW 309*, 2016 BCCA 449.

75. The strata claims the owners were paying reduced strata fees for 2016 in that they paid $250.00 per month when the strata fees were actually $268.82 per month. This is a difference of $18.82 per month. The owners do not disagree but say that they issued post-dated cheques for strata fees and that the fees increased after a new budget was passed. They say the increased fees were paid when they issued new postdated cheques and the strata did not follow section 135 of the SPA by providing details of the complaint and allowing the owners to respond. I agree with owners.

76. In its submissions, the strata states its property manager provides a monthly financial statement to each owner that includes a collection report. It says if the owner was confused or had any questions as to the charges noted on the report, they could have contacted the strata. I find this to be an admission that the strata did not advise the owners of the bylaw contravention, that a fine would be imposed, or provide the owners with an opportunity to respond. This is also supported by letters sent to the owners stating fines have been levied on dates that correspond with the dates of the fines noted on the collection report.

77. Given my conclusion, I find the strata is not entitled to collect $275.00 in late payment fines for the owners' payment of strata fees because it did not follow the procedural requirements of section 135 of the SPA. I dismiss this $275.00 claim of the strata.

Is the strata entitled to payment of $2,250.00 in bylaw fines for violations other than late payment of strata fees?

78. As I have noted, the strata's remaining claims for bylaw fines total $2,250.00 and can be broken down as follows, based on the April 3, 2017 collection report for SL16.

a.	Bylaw fines prior to May 31, 2015		$ 600.00
b.	"Fine – motorcycle Parked w/o ins" on June 19, 2015		$ 200.00
c.	Fines for bylaw infractions		$1,450.00
	i. Noise – June 18, 2016	$200.00	
	ii. Noise – July 9, 2016	$200.00	
	iii. Vehicles without insurance	$400.00	
	iv. Form K (11 months at $50)	$550.00	
	v. Jumping the fence	$100.00	
			$2,250.00

Bylaw fines before May 31, 2015 and motorcycle fine

79. I dismiss the strata's claims for reimbursement of the bylaw fines relating to before May 31, 2015 and the June 19, 2015 motorcycle totaling $800. The owners disputed the fines and the strata provided no evidence or submissions to support them. I find the strata failed to meet its burden of proof with respect to these $800 fines claimed.

80. The remaining bylaw fines are addressed in correspondence from the strata dated July 26, 2016. Identical letters were sent to the owners and one of their tenants notifying of noise complaints, vehicle storage without insurance, and a tenant climbing a wooden fence. I will address each in turn and note it was not until December 6, 2016 that the strata notified the owners that the aforementioned fines had been imposed at a November 7, 2016 council meeting.

Noise fines

81. In its submissions, the strata states it received several complaints from owners about excessive noise on the stated dates and I note the SPA does not require the complaint to be in writing. The strata did provide an email from a person whose mother lives in a strata lot near SL16 dated May 2, 2016 complaining of continuing loud music after 10 pm but did the email not give a date and the letter predates the alleged noise bylaw violations.

82. The strata's July 26, 2016 letter states the strata received complaints about excessive noise occurring on June 18, 2016 between 3 am and 5am and on July 9, 2016 between 10 pm and 1:30 am, cited bylaw 3 in full, and offered the owner (and tenant) the opportunity to respond within 14 days, failing which the strata may proceed with fines or other remedies. I note bylaw 3(1)(b) prohibits owners and tenants from causing unreasonable noise. There is no evidence that either the owner or the tenant responded to the July 26, 2016 letter and based on other submissions, I find the tenants moved out SL16 about the same time.

83. I find in the context of the alleged noise bylaw violations, the July 26, 2016 letter met the requirements of section 135(1) of the Act provided the tenants still lived in SL16.

84. However, the real issue here is whether the strata has the authority to issue fines against the owner, for bylaw violations of the owners' tenants. I find it does not. Section 130(1) of the SPA allows the strata to fine an owner for bylaw contraventions committed by the owner, a visitor, or an occupant if the strata lot is not rented by the owner to a tenant. If a strata lot is rented by the owner to tenant, as is the case here, section 130(2) requires the strata to fine the tenant and not the owner. Under section 131 of the SPA, it is only after the strata follows section 135 and imposes a fine against the owners' tenant that the strata may collect the fine from the owners.

85. Therefore, even if the tenants occupied SL16 on July 26, 2016, it is clear from the evidence that the tenants did not occupy SL16 on November 7, 2016, when the

strata imposed the fine. Further, the fines for the tenants' bylaw violations were incorrectly imposed directly against the owners, contrary to section 130 of the SPA, as evidenced by the strata's December 6, 2016 letter.

86. For these reasons, I find the strata is not entitled to reimbursement of $400.00 in noise bylaw fines. I dismiss this aspect of the strata's claim.

Vehicle insurance fines

87. The same analysis about the noise fines applies to the strata's claim for $400.00 relating to the owners' tenants not having vehicle storage insurance contrary to bylaw 1.2.

88. I therefore dismiss the strata's claim for payment of these fines.

Fence jumping fines

89. The strata's July 26, 2016 letter identifies that bylaw 3(1)(e) prohibits a person from climbing or jumping a common property fence. I disagree.

90. Bylaw 3(1)(e) states an owner or tenant must not use common property in a way that is contrary to the purpose for which the common property is intended as shown expressly or by necessary implication on or by the strata plan. A review of the strata plan does not show the fence in question.

91. Further, there are no bylaws that expressly prohibit owners or tenants from sitting on or climbing over fences unless they cause damage to the common property.

92. Even further, the only evidence provided by the strata is a photograph of a person on the fence. There is no accompanying evidence, such as a written statement attesting that the individual is one of the owners' tenants.

93. For these reasons, I dismiss this $100.00 claim for the fine related to the owners' tenant climbing a fence.

Form K fines

94. Section 146 of the SPA and the strata's bylaw 6.3 require the owner to provide a Form K – Notice of Tenant's Responsibilities within 2 weeks of renting all or a portion of their strata lot. Bylaw 24 allows for fines to be assessed every 7 days for continuing bylaw contraventions.

95. The owners submit that they provided an original Form K dated May 8, 2015, with signatures of 1 tenant on the front and 4 additional tenants on the back, to the strata's property manager at the time. They say when the strata changed property managers in about May 2016, they emailed a copy of the May 8, 2015 Form K to the new property manager as requested.

96. The strata's new property manager wrote a letter dated July 26, 2016 to the owners stating that the owners had not complied with a "December 31, 2016 [sic]" request to provide a Form K for the 3 tenants living in SL16. A copy of the earlier request, which I infer is dated December 31, 2105, was not provided so I am unable to determine if it complied with section 135(1) of the SPA. Given the onus is on the strata to prove its position, and it did not provide a copy of the December 31, 2015 letter, I find, for the purposes of this decision, that the December 31, 2015 letter did not meet the requirements of section 135(1). If I am wrong about the December 31, 2015 letter and it did comply with section 135(1), I find the 12-month period that elapsed between the date of the letter and December 6, 2016 when the strata notified the owners of its decision to fine, is contrary to section 135(2) of the SPA. I do not agree that giving notice of a decision to fine 1 year after providing the owners with the opportunity to respond to a complaint meets the test of "as soon as feasible."

97. The strata's July 26, 2016 letter cites bylaw 6.1 through 6.3 and goes on to say the owners may respond to the allegation or request a hearing within 14 days failing which the strata may take further enforcement action, including imposing fines. The owners did not reply to the strata's letter and it appears there was no further correspondence on the subject until the strata's December 6, 2016 letter.

98. In the same December 6, 2016 letter to the owners referenced earlier, the strata advised the owners that it had imposed fines of $50.00 per month for the 11-month period from “June 2015 through June 2016 less 1” or $550.00, against the owners for failure to provide the requested Form K.

99. In *Terry,* the court found at paragraph 28:

> An owner or tenant who may be subject to a fine must be given notice that the strata corporation is contemplating the imposition of a fine for the alleged contravention of an identified bylaw or rule, and particulars sufficient to call to the attention of the owner the contravention at issue. [My emphasis]

100. In other parts of the *Terry* decision, such as paragraphs 29, 31, 34, the court is clear that section 135(1) must be followed *before* fines can be imposed. Further, at paragraph 33, the court found that the strata corporation did not give Ms. Terry “fair notice” that it was contemplating future fines for ongoing bylaw contraventions. The courts findings in *Terry* are instructional and helpful to me here when considering the strata’s December 6, 2016 decision to impose fines retroactively.

101. Based on the overall evidence, I find the July 26, 2016 letter to the owners did not meet the procedural requirements of section 135(1) of the SPA as set out in *Terry* for fines imposed relating to the Form K. While the letter stated fines may be imposed, it did not state the fines would be imposed retroactively to June 2015. I find the strata did not provide sufficient particulars in its July 26, 2016 letter to give the owners’ fair notice that it was contemplating charging them retroactive fines.

102. For these reasons, I find the strata is not entitled to payment of $550.00 in bylaw fines for the owners’ failure to submit a current Form K. I dismiss this aspect of the strata’s claim.

Is the strata entitled to reimbursement of $262.50 for "collection costs" charged by its property manager?

103. To support its claim for reimbursement of "collection costs", the strata relies on its assertion that a monthly collection report is provided to the owners and that the owners should have contacted the strata if they had any questions.

104. I note the collection report specially identifies "Collection Costs – AR2 - Letter + Fines" on 5 occasions, each with a charge of $52.50. There are submissions that suggest "AR2" is a particular stage of arrears, but the correspondence provided does not explain what "AR2" means nor is there any strata bylaws that reference different stages or charges that relate to "AR2" as noted by the owners. As earlier noted, I infer the "collection costs" to be a charge from the property manager to the strata.

105. Section 116 of the SPA sets out specific charges for which a strata corporation can file a lien against the tile of a strata lot, such as strata fees and special levies. Charges not listed in section 116 are commonly referred to as non-lienable charges and would include "collection costs". In order to collect a non-lienable amount the strata must have the authority to do so under a valid and enforceable bylaw or rule that creates the debt. (see *Ward v. Strata Plan VIS #6115*, 2011 BCCA 512.) It is possible that section 118 may permit the strata to include "collection costs" as a reasonable disbursement in the amount of a lien, but that is not the case here.

106. The strata does not have such a bylaw permitting it to charge owners "collection costs". For that reason, I find the strata was not entitled to charge the owners $262.50 and I dismiss this aspect of the strata's claim.

Is the strata entitled to reimbursement of $200 towing costs related to the owners' tenant's vehicles?

107. Bylaw 1.1 prohibits an owner, tenant or occupant from storing unlicensed or uninsured vehicles on the strata's common property.

108. In addition to the fines assessed against the owners that I have already discussed, the strata claims $200.00 for towing fees. The strata submitted receipts from a towing company showing it incurred 2 $100.00 charges for removal of 2 separate vehicles from the strata. I accept that the strata incurred $200.00 in towing fees for the removal of the 2 vehicles. The strata admits that on June 24, 2016, the date the vehicles were towed, the owners' tenants, who it says were the registered owners of the vehicles, did not live in SL16.

109. Under section 133 of the SPA, the strata may require the person who may be fined for a bylaw contravention under section 130 of the SPA to pay the reasonable costs of remedying a bylaw contravention. As I have noted, section 130 of the SPA allows the strata to fine an owner for bylaw contraventions committed by the owner, a visitor, or an occupant if the strata lot is not rented by the owner to a tenant. If a strata lot is rented by the owner to tenant, as is the case here, the strata must fine the tenant and not the owner.

110. I find the strata was not entitled to charge SL16 for the towing fees for 2 reasons.

111. First, if in fact, the vehicle owners were the owners' tenants at the time, I find the strata was not entitled to directly charge the owners to remedy a bylaw contravention of their tenants, given the language in sections 130 and 133 of the SPA.

112. Second, if the vehicle owners were considered to be visitors or occupants of SL16, based on a plain reading of section 135(1), I find the reasoning in *Terry* applies equally to the procedures a strata corporation must follow before requiring an owner to pay the costs of remedying a bylaw contravention by their visitor or occupant. The evidence is that the strata did not give the owners written particulars of the complaint about towing costs nor a reasonable opportunity to answer the complaint, contrary to section 135(1) of the SPA. The July 26, 2016 letter only gave notice that owner may be subject to bylaw fines and made no mention of towing fees. In order to comply with the SPA, I find the strata must have given notice to the

owners that it intended to charge them the towing fees prior to doing so, which the strata did not.

113. For these reasons, I find strata is not entitled to payment of the $200.00 towing fees charged to SL16 and I dismiss this aspect of the strata's claim.

Are the owners entitled to reimbursement of $4,460.00 for repairs to SL16?

114. The owners' claim for repairs can be broken down to $1,800.00 for carpet, $2,585.00[1] for interior drywall repairs and paint, and $75.00 paid to their tenant for increased electricity expense for drying equipment[2]. To support their claim, the owners provided copies of 2 cancelled cheques totaling $1,800.00 to a carpet company, an invoice for drywall and paint for SL16 totaling $2,585.00[1]. They also provided a copy of a letter and cancelled cheque to their tenant for $75.00 with statistics on hydro expenses for what they say is electrical consumption for SL16 for the period October 2012 through December 2014 broken down by month.[2]

115. The owners say bylaws 3.3 and 3.4 apply and require the strata to repair the resultant damage caused by roof leaks to the "value of the original interior". They say the strata's restoration contractor stated the carpets needed to be replaced and that the drywall and painting costs relate to repairs completed to drywall inspection holes made by the strata's restoration contractor or plumbing contractor.

116. As earlier noted, the strata did not argue they were not responsible for the interior drywall repairs but stated the owners would not allow for asbestos abatement and therefore, the strata was unable to complete the repairs. The strata also disagrees that the carpet needed replacement and, if it did, the damage was from the bathroom leak and not the roof leak.

117. For the following reasons, I find the strata is responsible to reimburse the owners for the owners' claimed amount for drywall and painting of SL16, but not for carpet replacement and increased electricity expense.[2]

118. I agree with the owners that bylaws 3.3 and 3.4 make the strata responsible for repairs to SL16 resulting from the roof leak to the same standard and value as the original interior. I find the strata's contractors were required to cut drywall to determine the cause of the roof leak and possibly to make repairs to the roof drain pipe within the walls of SL16. Based on the evidence, I find the invoice submitted by the owners for the cost of this repair is reasonable. I order the strata to reimburse the owners $2,460.00 for the cost of the drywall and paint.

119. The owners are entitled to pre-judgement interest on the cost of the drywall and paint repairs under the *Court Order Interest Act* (COIA) from November 1, 2016 to the date of this decision.

120. As for the carpet replacement, I find the strata's restoration contractor did not state the carpet need to be replaced. Rather, the contractor's report indicated the carpet should "be inspected for removal", which I find means the carpet may require replacement and not that it did require replacement.

121. Additionally, there is no evidence that the replacement carpet was of the same quality as the "original" carpet nor was the strata offered the opportunity to make any determination on the quality of the replacement carpet.

122. Finally, I agree with the strata that it is more than likely, the bathroom leak may have contributed to the carpet damage and because there was no invoice copy provided, it is unknow which carpet was replaced.

123. For these reasons, I dismiss the owners' claim for $1,800.00 for carpet. Although it is clear the owners reimbursed their tenant $75.00 for electricity expenses, I find this was a matter between the owners and their tenant. I cannot conclude the increase in electricity in SL16 was solely the result of drying equipment and for that reason, I dismiss the owners' claim for $75.00 paid to their tenant.[2]

Are the owners entitled to reimbursement of $7,000.00 for lost rental income?

124. I have found that 1½ months, or approximately $3,000.00 of the owners' claim for lost rental income is out of time under the LA. For the following reasons, I dismiss the owners remaining claims for lost rental income that are not out of time under the LA.

125. The roof leak occurred in December 2014. SL16 continued to be occupied until about July 2016. Although the owners were in discussion with the strata on the responsibility for the repairs, there is no reason why SL16 had to be vacated to allow for drywall repairs, painting and carpet replacement. There is no evidence before me why this work could not have been completed while SL16 was occupied. While the owners argue they had difficulty locating trades to do the work, they did not provide any proof of their difficulties such as emails or correspondence that they were denied service from contractors that were too busy to do the work.

Are the owners entitled to an order that the strata restore the backyard of SL16 to the condition it was in before the strata completed drainage repairs, including the stair replacement?

126. The facts about the drainage repairs described above are not in issue. The real issue is whether the strata has failed to restore the common property adjacent to SL16 to the same standard as the common property adjacent to neigbouring strata lots that was also subject to the drainage work. For the reasons that follow, I agree with the owners that further work is required by the strata as I have set out below.

127. The strata is responsible for reasonable repair and maintenance of common property under section 72 of the SPA and bylaw 8. Although not expressly argued by the parties, I find it would be significantly unfair to the owners if the strata did not bring the level of common property repair next to SL16 to the same standard as the neigbouring strata lots.

128. The tribunal has jurisdiction to determine claims of significant unfairness effectively because the language in section 164 of the SPA is similar to the language of section 123(2) of the Act, which gives the tribunal authority to issue orders with respect to significant unfairness. (See *The Owners, Strata Plan LMS 1721 v. Watson*, 2018 BCSC 164 at paragraph 119.)

129. The courts and the tribunal have considered the meaning of "significantly unfair" in a number of contexts, equating it to oppressive or unfairly prejudicial conduct. In *Reid v. Strata Plan LMS 2503*, 2003 BCCA 128, the British Columbia Court of Appeal interpreted a significantly unfair action as one that is burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith and/or unjust or inequitable.

130. The British Columbia Court of Appeal has considered the language of section 164 of the SPA in *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44. The test established in *Dollan* was restated in *Watson* at paragraph 28:

131. The test under s. 164 of the Strata Property Act also involves objective assessment. [*Dollan*] requires several questions to be answered in that regard:

a. What is or was the expectation of the affected owner or tenant?

b. Was that expectation on the part of the owner or tenant objectively reasonable?

c. If so, was that expectation violated by an action that was significantly unfair?

132. Applying the test to the facts before me, I find the expectation of the owners for the strata to maintain common property to the same standard as common property next to neigbouring strata lots is objectively reasonable.

133. I find the strata's action to leave the common property next to SL16 to a lower standard than the common property of neighbouring strata lots is inequitable. The strata has not provided any reasonable explanation for why the common property next to SL16 should be left in a less favourable condition than common property

next to the neighbouring strata lots. Therefore, I find the strata's action is significantly unfair to the owners. Discussion on the owners' requested relief follows.

134. Several photographs were provided by both parties with the strata providing limited submissions. Based on the photographs, I find the condition of the common property behind SL16 is not the same as the neigbouring strata lots on either side of SL16. The common property behind SL16 and the 2 adjacent strata lots is the only common property that was affected by the drainage repairs. I agree with the owners' position that debris from the drainage repairs remains on the common property. Specifically, I find there are rocks against the exterior of SL16, and wooden fencing debris up against the perimeter fence. I order the strata to remove these items from the common property within 30 days of the date of this decision.

135. Contrary to the strata's statement that bark mulch was only provided in front common property areas, the owners say bark mulch was installed to the common property to the rear of 1 strata lot next to SL16. The photographs confirm the installation of bark mulch to one the adjacent strata lots to SL16, but there is no evidence to suggest the strata arranged and paid for the work.

136. The photographs also show the common property to the rear of the other neigbouring strata lot has grass and not gravel as is depicted in the photographs of the common property behind SL16. I order the strata, in consultation with the owners, to install bark mulch and/or grass on the common property to the rear of SL16 that is level with the patio of SL16 and below the rock retaining wall. There is no evidence the common property adjacent to SL16 that is above the rock retaining wall was affected by the drainage work and I make no order about repair and maintenance to that area of the common property.

137. As for the raised sump located on the lower level, I acknowledge that the strata originally intended to reduce the height of the sump as shown in the council meeting minutes of April 5, 2017. However, that does not mean it must be done or the that the strata may have changed its mind. For example, an alternative to lowering the sump could be to raise or modify the area around the sump. I find modifications are required to remove any tripping hazard associated with the sump and bring the landscaping surrounding the sump to level equal with surrounding strata lots other than SL16. I order the strata make appropriate modifications in consultation with the owners.

138. The owners say 1 panel of fencing next to the patio of SL16 was not replaced which I infer is correct given the strata did not object and there is one additional panel on the other side of the patio. The strata did not address this part of the owners' claim and I accept the owners' statement that 1 fence panel was not replaced. I order the strata to replace it.

139. The owners also provided photographs showing the perimeter fencing that was replaced has 2 fence posts that are higher than the rest of the posts and another section of perimeter fencing that includes orange plastic 'construction' fencing. The strata did not address the construction fencing but says the reinstalled perimeter fencing requires the higher fence posts because the replaced panel was installed as a gate in order to allow easier access to the area if required in future. I find the strata's position regarding the gate and fence post height to be reasonable. I also find the new fence to be of similar design and construction to the previous fence and disagree with the owners that it creates privacy concerns. I therefore decline the owners' request the new fence be improved. However, I order the strata to remove and dispose of the orange construction fence and repair or replace the existing fence at that location.

140. I decline to order the strata to replace vegetation that was removed on the exterior of the fence panel that was removed for access given there is no evidence to suggest the property line location. I find it is more likely than not that the property

on the exterior of the fence at that location is municipal property and therefore alterations are not within the strata's authority. However, nothing in this decision restricts the owners from asking the municipality to plant material at this location that might improve the level of the owners' privacy.

141. It is undisputed that the stairs' location was the strata's common property. The owners say the strata should replace the stairs because the strata approved their installation in September 2005. It is unclear who installed the stairs in 2005, or who paid for the installation, but the strata relies on an agreement it says the owners signed in which the owners took responsibility for repairing and maintaining the stairs. The parties agree the stairs needed to be removed to allow for the drainage repairs and the owners do not dispute the existence of the agreement or the strata's position that the stairs were in a state of disrepair. That the strata admitted to approving the stairs in 2005 and to removing the stairs for the drainage work does not mean it is responsible to replace them.

142. I find that the owners have failed to prove their claim that the strata is responsible to replace the removed stairs. For that reason, I dismiss the owners' claim in this regard.

143. Nothing in this decision restricts the owners from requesting permission from the strata to replace the stairs at their cost, subject to the strata's bylaws.

TRIBUNAL FEES, EXPENSES AND INTEREST

144. 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 owners were the most successful party, I decline to order the owners reimburse the strata for tribunal fees that the strata paid for its dispute. I order the strata to reimburse the owners $125.00 for tribunal fees paid relating to the owners' counterclaim. Neither party claimed dispute-related expenses.

145. I calculate the amount of pre-judgment interest for the cost of drywall and painting to SL16 under the COIA from November 1, 2016 to the date of this decision to be $71.92[1].

146. 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, the owners are not exempted from paying their proportionate share of the costs to repair the common property adjacent to SL16, based on unit entitlement.

ORDERS

147. I refuse to resolve the strata's claim for reimbursement of repair costs charged back to SL16 because the claim is out of time under the LA.

148. I refuse to resolve the owners' claim for lost rental income for the period August 1 to September 13, 2016 because the claim is out of time under the LA.

149. I order that the strata's remaining claims are dismissed.

150. I order that the strata, within 30 days of the date of this order:

a. Pay $2,781.92[1] to the owners broken down as follows:

i. $2,585.00[1] for the cost of the drywall and painting repairs to SL16,

ii. $71.92[1] in pre-judgement interest under the COIA, and

iii. $125.00 for reimbursement of tribunal fees.

b. Arrange for the following work (repairs) to be done to the common property adjacent to SL16 on the level of SL16's rear patio (lower level):

i. to remove rocks against the exterior of SL16, and wooden fencing debris up against the perimeter fence,

ii. in consultation with the owners,

- arrange for the installation of bark mulch and/or grass on the (lower level), and
- make appropriate modifications to or around the lower level sump so as to avoid any tripping hazard.

c. Install 1 panel of fencing next to the patio of SL16 such that fencing on each side of the patio to the rear of SL16 is the same length, height, type and design, and

d. remove and dispose of the orange construction fence to the rear of SL16 and repair or replace the existing fence at that location.

151. I order the strata ensure the repairs are completed by September 30, 2019.

152. I order the owners' remaining claims are dismissed.

153. The owners are also entitled to post judgement interest under the COIA, as applicable.

154. 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.

155. 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

[1] Paragraphs 114, 145 and 150 amended to correct an inadvertent mathematical error.

[2] Paragraphs 114, 117 and 123 amended to cure the jurisdictional defect in failing to address the respondents' counterclaim at first instance, under the common law.