



# Civil Resolution Tribunal

Date Issued: May 14, 2019

File: ST-2018-007725

Type: Strata

Civil Resolution Tribunal

Indexed as: *Matear v. The Owners, Strata Plan VIS 4909*, 2019 BCCRT 580

BETWEEN:

Julie Matear

**APPLICANT**

AND:

The Owners, Strata Plan VIS 4909

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Andrea Ritchie, Vice Chair

## INTRODUCTION

1. The applicant, Julie Matear (owner), owns a strata lot in the respondent strata corporation, The Owners, Strata Plan VIS 4909 (strata). The owner is self-represented. The strata is represented by a member of its strata council.

2. The owner says the strata allowed a pest control company access into her unit and that her floor was damaged as a result. The owner seeks reimbursement for the cost of replacing her tile flooring and in-floor heating system.

## **JURISDICTION AND PROCEDURE**

3. 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*. 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.
4. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Some of the evidence in this dispute amounts to a "he said, she said" scenario. The credibility of interested witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or tribunal proceeding appears to be the most truthful. The assessment of what is the most likely account depends on its harmony with the rest of the evidence. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the tribunal's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary. I also note that in *Yas v. Pope*, 2018 BCSC 282, at paragraphs 32 to 38, the British Columbia Supreme Court recognized the tribunal's process and found that oral hearings are not necessarily required where credibility is an issue.
5. 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.

6. Under section 123 of the *Act*, in resolving this dispute the tribunal may make one or more of the following orders:
  - a. Order a party to do or stop doing something;
  - b. Order a party to pay money;
  - c. Order any other terms or conditions the tribunal considers appropriate.

## **ISSUE**

7. The issue in this dispute is who is responsible for the cost of repairing the owner's tile flooring and in-floor heating system.

## **BACKGROUND AND EVIDENCE**

8. In a civil dispute such as this, the applicant owner bears the burden of proof. This means the owner has to provide evidence to prove each of her claims on a balance of probabilities.
9. While I have read all of the parties' evidence and submissions, I have only addressed the evidence and arguments to the extent necessary to explain my decision.
10. The strata was created in December 1999 and consists of 27 residential strata lots located in Victoria, British Columbia.
11. The strata's relevant bylaws are those filed at the Land Title Office on April 7, 2014, when the strata completely amended its bylaws. I discuss the relevant bylaws in greater detail below.
12. In March 2018, subterranean termites were detected in the owner's strata lot. The strata scheduled two pest companies to inspect the issue and prepare quotes. On March 15, 2018, one company, OIPC, advised it would be necessary to drill

boreholes through the floor in the owner's strata lot, but that it could be done in areas where there was no in-floor heating.

13. On March 27, 2018, OIPC attended the owner's unit to perform the treatment, but when there advised the treatment could not be done effectively without drilling through specific areas of the owner's floor, including through the tile, in-floor heating, and concrete slab. The strata council member present declined to authorize the procedure that day.
14. By letter dated April 19, 2018, the strata wrote to the owner advising of the strata's responsibilities about pest control and advising the owner she was responsible for the repair and maintenance of improvements within her strata lot, including her flooring and in-floor heating system. The strata asked the owner to work with her contractor to take any necessary steps to minimize damage to the flooring given the necessary pest control treatment.
15. In response, the owner requested an in-person meeting with the strata council, which occurred on May 9, 2018. Though the minutes are dated May 9, 2017, I find this is a typographical error given the chronology of events, I find the meeting took place on May 9, 2018. The minutes from that meeting indicated that the owner expressed concern about potential damage to her flooring improvements, but that she was agreeable to treatment for the subterranean termite issue. At the meeting the owner provided council with an estimate from a third company, Garden City Pest Control (GCPC), who could provide the treatment using 1/4 inch boreholes, instead of OIPC's 5/8 inch boreholes.
16. On May 11, 2018, a strata council member suggested to the owner through email that she look into having one or more tiles removed prior to the pest control work.
17. The strata submits it approved the use of the company suggested by the owner, GCPC. On May 16, 2018 a home inspector attended the owner's strata lot and, using an infrared device, marked the location of the heating wires on the floor. In an email dated May 16, 2018, the owner requested reimbursement for the marking and

stated “you can go ahead and book the termite treatment.” The strata reimbursed the owner for the cost of the marking.

18. On May 22, 2018, a strata council member emailed the owner advising GCPC was asked to proceed with the pest control treatment and that they would be contacting the owner directly to schedule the work.
19. The next day, the owner responded to the strata council member indicating she would not agree to participate in the scheduling of the work and would not supervise the work, as it was up to the strata to do so. She further indicated if the floor was damaged she intended to make an insurance claim and did “not want in any way to be seen to give consent.”
20. The strata responded stating a council member agreed to provide access to the owner’s strata lot on the owner’s behalf and would show them the markings for the in-floor heating system wires. GCPC was then given the strata council member’s contact information for the scheduling of the work.
21. GCPC performed the pest control treatment in the owner’s strata lot on May 30, 2018.
22. The owner stated on July 15, 2018 she tried to turn on her in-floor heating system and it did not work. She subsequently reported the issue to the strata.
23. On September 11, 2018, the owner requested a hearing with council to discuss the damage to her in-floor heating system. In preparation for the meeting, the owner provided a further email dated September 13, 2018 setting out the concerns she wanted addressed at the hearing, including:
  - a. The strata’s failure to provide 48 hours’ written notice of the need to enter her strata lot;
  - b. That her in-floor heating system had not worked since the pest control treatment was done; and

- c. Reimbursement for the replacement of her in-floor heating system and installation of new tile flooring.
24. A hearing was held on September 25, 2018. The minutes from the hearing indicated the owner felt the strata did not do their proper due diligence to find a pest control treatment method that would not require drilling through her floor. The owner also provided the strata with an invoice for removal and replacement of her in-floor heating system and new tile floor, totaling \$7,900 plus GST, and advised removal and re-installation started on September 24, 2018.
25. On October 2, 2018, the strata wrote to the owner and advised that although 48 hours' written notice was not documented prior to entry into the owner's strata lot, the owner was well-informed of the work schedule. The strata further stated it was confident due diligence was done regarding the pest control treatment options and advised the owner her request for reimbursement for the replacement of her in-floor heating system and installation of new tile was rejected.
26. The condition of the tile flooring and in-floor heating system was not inspected by, or on behalf of, the strata after the pest control treatment was completed. Although the owner provided various photographs of her strata lot in evidence, all of the photos were taken after the subject tiling and in-floor heating system had been removed.
27. The tribunal issued the Dispute Notice on October 18, 2018.

## **POSITION OF THE PARTIES**

28. The owner's position is that the strata allowed a contractor to enter her strata lot without giving her 48 hours' written notice and subsequently caused damage to her tile floor and in-floor heating system. She also takes the position that the strata did not take enough action to find a solution to the pest problem that would not cause damage to her strata lot.

29. The owner seeks \$8,295, the cost to replace the flooring and in-floor heating system, \$250 in interest paid on her line of credit, \$225 in tribunal fees, and interest pursuant to the *Court Order Interest Act*.
30. The strata admits it did not give the owner strict 48 hours' written notice, but submits it performed all due diligence to deal with the pest control issue and to find an effective solution for all parties.
31. The strata's position is that it is responsible for the pest control measures for the building structure, and that the owner is responsible for the repair and maintenance of any alterations and improvements to her strata lot, including her tile floor and in-floor heating system.

## **ANALYSIS**

32. The evidence before me shows that subterranean termites were present in the owner's strata lot. The extent of the infestation is unclear, but the evidence suggests that at least 3 pest control companies provided an opinion to the strata that boreholes through the owner's floor and into the concrete slab were necessary to treat the infestation located on interior load bearing walls (with footings). I am satisfied the strata tried to utilize a method that would avoid drilling through the owner's floor, but when the work was to be done, it was determined by that pest control company that boreholes would need to be drilled in areas with in-floor heating. The strata declined to authorize the work on that day in order to inform the owner, and further investigation into alternative options was done.
33. Given all of the evidence before me, I find the strata acted responsibly and with due care in gathering all available information and seeking advice prior to making its decision on how to proceed with the pest control treatment.
34. Council gave the owner a full opportunity to suggest alternatives, including other companies, to complete the work. The strata did ultimately select the contractor put forward by the owner, which advised they could perform the work using a smaller

borehole. Council reviewed the quotes of several companies, reviewed their obligations for repair and maintenance with the property management company and with the Vancouver Island Strata Owners Association, and kept the owner informed along the way.

35. Further, the work was completed by a carefully selected contractor of the owner's choosing and the strata reimbursed the owner for the infrared testing done to mark the location of the in-floor heating wires before the work commenced. Based on the overall evidence, I do not find the strata was negligent in its treatment of the pest control issue.
36. In relation to the owner's assertion that she was not given 48 hours' written notice prior to GCPC entering her unit to perform the work, I find the owner essentially agreed to permit access to her strata lot without 48 hours' prior notice. I say that because the owner stated through email that the strata was authorized to go ahead and schedule the work, but that she refused to participate in the scheduling of the work or to be present while it happened. She insisted that was strata's responsibility. However, in any event, I am satisfied that the strata kept her apprised of what was happening and that the date of the work was verbally communicated to her. A statement from a council member indicated he spoke to the owner who advised she would be out of town starting May 30, 2018 and it was therefore mutually determined to be an ideal time to perform the work as she would be away.
37. Section 72 of the *Strata Property Act* (SPA) states that a strata corporation must repair and maintain common property and common assets, which would include pest control that impacts the structure of the building.
38. Under bylaw 2(3), an owner is responsible for and must repair and maintain any alterations or betterments to their strata lot. It is not disputed that the tile flooring and in-floor heating system were improvements to the strata lot undertaken by the owner in 2015.



39. If an owner is trying to hold the strata responsible to pay for repairs to a strata lot, the owner must prove that it is more likely than not that the source of the damage was due to the strata's negligence.
40. The courts have held that a strata corporation is required to act reasonably in its maintenance and repair obligations. If a strata corporation's contractors and consultants fail to carry out work effectively, the strata corporation should not be found negligent if it acted reasonably in the circumstances. (See: *Kayne v. LMS 2374*, 2013 BCSC 51, *John Campbell Law Corp v. Strata Plan 1350*, 2001 BCSC 1342, and *Wright v. Strata Plan #205*, 1996 CanLII 2460 (BCSC) aff'd 1998 BCCA 5823).
41. In other words, the strata is not an insurer and is not responsible to reimburse the owner for the claimed damages, unless the strata acted negligently, which the strata denies.
42. In order for the strata to be responsible for the cost of repairing the floor damage in this case, the owner must prove:
  - a. The damage to the tile flooring and in-floor heating system was, more likely than not, caused by the pest control treatment; and
  - b. That the strata acted unreasonably in selecting and overseeing the pest control treatment.
43. Given my conclusion above, that the strata acted responsibly and with due diligence in having the pest control treatment completed, I find the owner has not proven that the strata is responsible for the cost of repairing her floor. I would add that the owner had the floor removed and replaced before any inspection was done, so the cause of the malfunctioning in-floor heating system is unclear. I appreciate the owner provided a 1-page letter from her replacement contractor indicating their opinion that drilling through the heated floor caused the malfunction, however I find the report was sparse, contained no photographs, and I give it no weight.

44. Based on the evidence before me and the bylaws and SPA, I find that the strata is not responsible for the repair of the owner's floor tiling and in-floor heating system. For these reasons, I dismiss the owner's claims.

### **TRIBUNAL FEES, EXPENSES AND INTEREST**

45. 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. Here, the strata was the successful party but paid no tribunal fees and claimed no dispute-related expenses. Accordingly, I make no order in this regard. I dismiss the owner's claim for tribunal fees.

46. The owner initially claimed \$1,000 in legal fees, but subsequently advised she no longer wished to pursue that claim. As such, I have not addressed the owner's claim for legal fees in this decision.

47. The strata corporation must comply with the provisions in section 189.4 of the SPA, such as not charging dispute-related expenses against the respondent.

### **DECISION AND ORDERS**

48. I order the applicant's claims, and this dispute, dismissed.

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Andrea Ritchie, Vice Chair