



# Civil Resolution Tribunal

Date Issued: May 17, 2019

File: ST-2018-003003

Type: Strata

Civil Resolution Tribunal

Indexed as: *Section 1 of The Owners, Strata Plan VIS 5030 v. Section 2 of The Owners, Strata Plan VIS 5030 et al*, 2019 BCCRT 598

**B E T W E E N :**

Section 1 of The Owners, Strata Plan VIS 5030

**APPLICANT**

**A N D :**

Section 2 of The Owners, Strata Plan VIS 5030 and The Owners, Strata Plan VIS 5030

**RESPONDENTS**

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## **REASONS FOR DECISION**

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Tribunal Member:

Sarah Orr

## **INTRODUCTION**

1. The applicant, Section 1 of The Owners, Strata Plan VIS 5030 (“RS”) is comprised of the residential strata lots in the respondent strata corporation The Owners, Strata Plan VIS 5030 (strata). The respondent, Section 2 of The Owners, Strata Plan VIS 5030 (“CS”) is comprised of the non-residential strata lots in the strata.

2. Each of the decks on the strata building is designated as limited common property (LCP) for the exclusive use of the strata lot owner whose strata lot is next to it, all of whom are in the RS. No owners in the CS have access to the LCP decks. The strata has determined the LCP deck membranes must be repaired and replaced, and the parties dispute who should pay for the repairs.
3. The RS says the LCP deck membrane repairs are a common expense payable by all owners of the strata in accordance with section 99 of the *Strata Property Act* (SPA). The RS wants a declaration that the deck repairs are a common expense.
4. The CS says the LCP deck membrane repairs solely benefit members of the RS, and therefore they should be paid for only by the RS.
5. The strata has members of both the RS and CS on its council and takes no position on the issue in this dispute but notes that it has historically been responsible for repairing the LCP decks.
6. The RS is represented by Mary Brunton, their legal representative. The CS is represented by an executive member and the strata is represented by a council member.

## **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. The applicable tribunal rules are those that were in place at the time this dispute was commenced.
11. Under section 123 of the Act and the tribunal rules, in resolving this dispute the tribunal may make order a party to do or stop doing something, order a party to pay money, order any other terms or conditions the tribunal considers appropriate.
12. Tribunal documents incorrectly show the name of the RS as Strata Corporation Section 2 of Strata Plan VIS5030 and the CS as Strata Corporation Section 1 of the Strata Plan VIS5030. Based on section 193 (4) of the SPA and the strata's bylaws, the correct legal name of the RS is Section 1 of The Owners, Strata Plan VIS 5030 and the correct legal name of the CS is Section 2 of The Owners, Strata Plan VIS 5030. Given the parties operated on the basis that the correct names of the RS and CS were used in their documents and submissions, I have exercised my discretion under section 61 of the Act to direct the use of the sections' correct legal names in these proceedings. Accordingly, I have amended the style of cause above.

## **ISSUES**

13. The issue in this dispute is whether the LCP deck repairs are a "common expense" of the strata as defined in the SPA such that all owners must contribute to the cost.

## **BACKGROUND AND EVIDENCE**

14. The strata is a phased building, with the first phase filed at the Land Title Office (LTO) in September 2000, the second phase filed in June 2002, and the third phase

filed in July 2003. The strata is comprised of 280 strata lots, 163 of which are residential and 117 of which are non-residential or commercial. The strata plan shows the CS strata lots on the lower floors and the RS strata lots on the upper floors. With respect to unit entitlement across the entire strata, the residential strata lots comprise 86.2% and the commercial strata lots comprise 13.8%. With respect to votes across the entire strata, the residential strata lots comprise 75.7% of the votes and the commercial strata lots comprise 24.3% of the votes.

15. Both the RS and the CS were created on August 27, 2010, after all phases were complete.
16. In 2015 the strata deposited consolidated bylaws with the LTO that repealed all previous bylaws, including the Schedule of Standard Bylaws under the SPA. In 2016 the strata filed amendments to its bylaws, and in 2018 the RS filed amendments to the RS bylaws. Neither are these amendments are relevant to this dispute.
17. There are 246 decks on the strata property, each one of which is attached to a residential strata lot and designated as limited common property (LCP) for the exclusive use of each of the owners of the adjacent residential strata lots. None of the strata lots in the CS have decks or have access to decks.
18. The RS says that before 2015 all deck membrane repairs were repaired from the strata's funds. It says between 2013 and 2015 approximately 27 such repairs were completed. The CS does not dispute this.
19. In 2014 the strata received a depreciation report from an engineering firm (RJC), which states that the strata's balconies and decks are protected with a liquid-applied waterproofing membrane. The report determined that the liquid membrane was generally in poor condition and had failed in many locations, which may have allowed water ingress into the brick veneer cavity causing efflorescence on the brick surface. The report recommended renewal of the membrane in 3 stages, completing 1/3 of the balconies in the first stage, completing the next 1/3 of the

balconies 3 years later, and completing the final 1/3 of the balconies 3 years after that. It estimated each stage would cost \$215,000 for a total of \$645,000.

20. The RS says that in 2015, on the recommendations set out in the depreciation report, the strata began working on a renewal plan with the support of the building committee, as opposed to dealing with maintenance issues on an ad-hoc basis. The building committee is comprised of volunteers to support the management of the strata's building operations, maintenance and capital projects. Membership on the building committee is open to both RS and CS members.
21. On March 18, 2015, in accordance with section 74 of the SPA, the strata filed a  $\frac{3}{4}$  resolution designating certain areas of the strata plan which were originally designated as common property as LCP for the exclusive use of all strata lots in the RS (RSLCP) or LCP for the exclusive use of all strata lots in the CS (CSLCP). None of the LCP decks attached to residential strata lots were designated as RSLCP or CSLCP. I note that the strata's LTO general index in evidence does not show evidence of this filing. However, based on the evidence the RS submitted showing proof of filing and the fact that the parties appear to have operated under the assumption that the resolution was properly filed, I am satisfied the strata filed this resolution with the LTO and that the strata met the requirements of section 74 of the SPA with respect to this resolution.
22. The strata's building committee conducted inspections of the deck membranes in 2015 and 2016. At the strata's February 18, 2016 AGM, the ownership in attendance unanimously authorized the strata to spend \$50,000 plus a 10 percent contingency from its contingency reserve fund (CRF) for balcony/roof deck and parapet/cornice repair and resurfacing. In 2016 and 2017 the strata replaced the deck and roof gable membranes next to residential strata lots on levels 10 and 11 of the strata's building. The evidence before me shows the strata spent approximately \$234,100 in 2016 and \$69,300 in 2017, and that this work covered 4,300 square feet with minimal gutter and downspout restoration.

23. On January 31, 2017 the strata sent the owners notice of its upcoming AGM on February 20, 2017. The notice package included a proposed resolution for capital projects funded by a special levy of \$953,375 assessable to all owners (resolution #1). Included in this resolution was the deck membrane renewal and replacement project which was estimated to cost \$441,875. The description of this project in the notice package states, "...ongoing balcony deck and parapet/cornice membrane renewal and replacement is proposed based on condition and risk of further leakage into living/working space...This work assists in optimizing the life of the concrete the membranes are designed to protect and will mitigate water damage to both the brickwork and occupied areas such as suites and commercial areas."
24. At its February 20, 2017 AGM, the ownership passed resolution #1 requiring 50 percent of the special levy payable in March 2017 and the remaining 50 percent due in October 2017.
25. The strata collected the first 50 percent of the special levy in March 2017. However, all the bids the strata received for the deck membrane renewal project exceeded the approved funding in resolution 1, and the strata cancelled collection of the second special levy payment for October 2017.
26. On November 9, 2017 RJC submitted a Depreciation Report Update to the strata. This report indicates that the deck membranes protect the building's structural integrity. The report does not specify that this is true only for certain types of decks such as those decks forming "roofs" over habitable space.
27. In November 2017 the strata sent owners the notice package for a special general meeting (SGM) scheduled for December 4, 2017. The notice package included information about a proposed resolution for a special levy of \$7 million for the "balcony/deck and gutter/downspout renewal project (resolution #2).
28. The description of the project in the notice package states, "The balcony / deck membrane renewal and replacement work would assist in optimizing the life of the concrete and rebar in the balcony / deck slabs. These membranes are designed to protect these structural components as well as mitigate damage to the supporting

columns, upstands that support the railings, brickwork and occupied areas including residential and commercial strata lots due to water ingress. In many instances these membranes provide the waterproof “roof” over common property, limited common property, and residential/commercial strata lots.”

29. The notice package contained a November 15, 2017 summary report from RJC about the deck/balcony membrane replacement project which said,

...The purpose of this type of waterproofing system is to protect the underlying deck slabs from moisture and chloride ingress which results in corrosion related deterioration (i.e. concrete spalling, wherein the embedded reinforcing steel bars ‘shed’ the concrete in which they are embedded). When such corrosion related deterioration occurs, repairs must be undertaken to maintain the structural integrity of the suspended concrete deck slabs. These repairs require costly and disruptive repairs, which involve jackhammering. Maintenance of the waterproofing is a preventative approach to reduce the amount of concrete repairs required over the service life of the building structure.

Further, the waterproofing system prevents moisture ingress into occupied space. For example, in a location where the waterproofing has a vertical upturn onto the exterior wall of the building, the waterproofing system acts as a moisture barrier... In locations where a balcony deck slab is located above occupied space the polyurethane waterproofing acts similarly to a roofing membrane...

30. The report goes on to state that for 35 percent of the decks in the first phase of the project and all decks in the second and third phases of the project, the existing waterproofing is showing excessive cracking or debonding and has reached the end of its service life.
31. The strata held an open house for all owners on November 4, 2017 to discuss resolution #2. RJC presented to the ownership on the balcony/deck membranes & gutter downspout replacement project. They said the 2-ply polyurethane waterproofing material protects the underlying concrete from corrosion which causes efflorescence and rust staining, and as well as spalling of concrete as

reinforcing bars corrode. They said it also prevents brick veneer spalling and efflorescence, grout failure and cracking, and prevents moisture ingress into occupied space.

32. The CS says the presentation did not explain or allocate costs based on “sections” or “types” of lots, nor did it differentiate between the pool area or areas to which the CS members have no access. The CS says the strata failed to differentiate between “roof” repair costs and those related to the LCP decks that do not act as “roofs.”
33. At the December 4, 2017 SGM resolution #2 was defeated.
34. At the strata’s February 15, 2018 AGM, the ownership passed a resolution authorizing the strata to spend \$776,120 of its CRF to replace the deck membranes in phase 3 of the project (levels 10 and 11). However, this resolution passed with the caveat that there was a pending dispute between the RS and the CS that would be going to the tribunal as to allocation of these costs. The explanation for this resolution in the notice package says that on a square footage basis, 60% of the LCP decks act as a roof over occupied space.
35. On October 29, 2018 the strata held an SGM. Its notice package sets out proposed resolutions related to the LCP deck membrane repairs, all of which were subject to the outcome of this dispute in relation to cost allocation. The minutes of that meeting are not in evidence, so I am unable to determine whether the resolutions were passed, however given the caveat on the proposed resolutions, I find the outcome of those resolutions has no bearing on this decision.

## **ANALYSIS**

36. In a civil claim like this one, the RS must prove its claim on a balance of probabilities. This means the tribunal must find it is more likely than not that the RS’ position is correct.
37. I have only addressed the parties’ evidence and submissions to the extent necessary to explain and give context to my decision.



***Are the LCP deck membrane repairs a “common expense” as defined in the SPA such that all owners must contribute to the cost?***

38. The RS says the strata is responsible for the costs of the LCP deck membrane repairs, whereas the CS says the RS should cover the cost since only members of the RS have access to the LCP decks. The strata takes no position but says it has historically been responsible for renewing and replacing the deck membranes.
39. The SPA defines “common expenses” as expenses relating to the common property and common assets of the strata, or expenses required to meet any other purpose or obligation of the strata.
40. The SPA defines “common property” as the part of the land and buildings on a strata plan that is not part of a strata lot. The SPA defines “limited common property” (LCP) as common property designated for the exclusive use of the owners of one or more strata lots. The CS says RJC proceeded under an incorrect assumption in its depreciation report that the LCP decks were common property. However, on a plain reading of the definitions of both “common property” and “limited common property” I find LCP clearly falls within the definition of common property, and therefore I find RJC did not make an incorrect assumption in the depreciation report.
41. Section 72 (1) of the SPA says the strata must repair and maintain common property, however section 72 (2) allows the strata to, through its bylaws, make an owner responsible for the repair and maintenance of LCP which that owner has a right to use. In this case the strata has delegated the daily maintenance of the LCP decks to the owners who have exclusive use of those decks. Bylaw 15 says owners with access to LCP decks are responsible for daily maintenance which includes day-to-day cleaning, tidying, and removing debris to ensure drainage is not obstructed. The bylaw also says an owner is responsible to ensure items placed on LCP decks do not perforate or otherwise damage the deck area surface and membrane or obstruct the drainage system or the building envelope or associated

structure. There is no suggestion in this dispute that the LCP deck membrane repairs fall under an owner's obligation in bylaw 15.

42. The RS says the strata is responsible for the LCP deck membrane repairs under bylaw 12 (1) (b) (v), however, that bylaw says the strata must repair and maintain common property that has not been designated as LCP, including any membrane beneath or associated with the roof top areas, paved and landscaped areas, decks, patios, balconies and parking garage. It is undisputed that the decks in question are LCP, therefore I find this bylaw does not apply to the LCP deck membrane repairs in question.
43. However, bylaw 12 (1) (c) (i) says the strata must repair and maintain LCP, excluding RSLCP or CSLCP, to the extent such repair and maintenance occurs less than once per year in the ordinary course of events. I find this bylaw applies to the LCP deck membrane that forms the subject of this dispute. Bylaw 12 (1) (c) (ii) says the strata must repair and maintain LCP, excluding RSLCP or CSLCP, to the extent the repair and maintenance affects the structure or exterior of a building, or the chimneys, stairs, eaves troughs, gutters and other things attached to the exterior of a building, including decks, balconies, patios and roof top areas, regardless of how often the repair or maintenance ordinarily occurs. On the plain reading of this bylaw, I find the strata is responsible for repairing and maintaining the LCP decks. This is consistent with the strata's historic practice.
44. Bylaw 13 (1) (c) says the RS is responsible for any repair and maintenance that relates solely to and benefits only the RS. The RS says the LCP deck membrane repairs would not solely benefit members of the RS, but that the repairs are vital to the integrity of the building envelope and would thus benefit all owners. On the contrary, the CS says that since only residential owners have access to the LCP decks, the repairs would benefit only those owners. In the alternative, the CS says the deck membranes that form "roofs" over habitable areas may benefit the entire ownership, but the remainder of the LCP deck repair work would benefit only those residential owners with access to those decks. Much of my interpretation of the bylaws, SPA, and Strata Property Regulation (regulation) turns on this point.

45. I find RJC's 2014 depreciation report and 2017 update depreciation report, November 2017 summary report and presentation to the ownership at the open house all show that repairing the LCP deck membranes is vital to the structural integrity of the building and the building envelope, and thus benefits all owners, not just the owners with access to the decks.
46. The CS says that if the tribunal finds the LCP deck membrane repairs benefit all owners, then only 60% of the cost can be allocated to the strata, as that is the proportion of the decks that form "roofs" over habitable areas. For the remaining 40% of the LCP decks, the CS says the repairs are unnecessary except for the fact the members of the RS wish to exercise exclusive use and enjoyment of the decks. However, I find that is not borne out by the evidence. RJC's November 15, 2017 summary report notes that for decks with a vertical upturn of the liquid applied membrane, that membrane acts as a moisture barrier. Its summary report also indicates that the LCP deck membrane repairs will prevent efflorescence into the building's brick, prevent corrosion, and protect the integrity of the underlying concrete slabs.
47. The CS says RJC cannot be considered an independent expert because they included a \$750,000 support and site supervision fee in the \$7 million estimated funding for resolution #2. However, the CS has not denied the reliability of RJC's reports, and it has not submitted any evidence from engineers, contractors, or other professionals to refute the information contained in RJC's various reports.
48. On the evidence before me, I find the RS has established that the LCP deck membrane repairs are not solely for the benefit of residential owners, but that they benefit all owners by protecting the structural integrity of the building and the building envelope. Therefore, I find the RS is not responsible for the LCP deck membrane repairs under bylaw 13 (1) (c), and that the strata is responsible for them under bylaw 12 (1) (c).
49. The CS notes there is a distinction between an obligation to repair and maintain certain property and the obligation to pay for that repair and maintenance. Bylaw 2

(1) (a) states that with respect to a matter that relates solely to a section, the section has the same powers and duties as the strata to establish its own operating fund and CRF for common expenses of the section, including expenses relating to LCP designated for the exclusive use of all the strata lots in the section. I find use of the word “all” means this bylaw relates only to RSLCP and CSLCP, and not to the LCP decks, as those are not for the exclusive use of all the strata lots in the RS.

50. Bylaw 3 (1) states that an owner’s contributions to the strata’s common expenses and the applicable section are to be levied in accordance with the bylaws. Bylaw 3 (2) (a) states that common expenses that relate solely to a section, or to areas designated as LCP “for the exclusive use of a section,” or that relate to matters that are within the responsibility of a section to repair and maintain, shall be allocated to that section and shall be borne by the owners of the strata lots within that section. Bylaw 3 (2) (b) says common expenses that do not relate solely to a section are for the account of the strata and are to be borne by all owners in proportion to the unit entitlement of their strata lot.
51. As explained above, I find the LCP deck membrane repairs do not relate solely to the RS, and do not fall within the RS’ responsibility to repair and maintain. I also find that “for the exclusive use of a section” relates to RSLCP, not to the LCP decks, since only individual owners whose strata lots are attached to a deck have access to that deck, and the LCP decks cannot be said to be for the exclusive use of the RS as a whole. Therefore, I find the strata is required to fund the LCP deck membrane repairs under bylaw 3 (2).
52. Bylaw 3 (3) (d) states that a section is responsible for repair and maintenance expenses for LCP “designated for the exclusive use of strata lots in a Section, excluding common property, as set out in these bylaws under Division 3 – Repair & Maintenance...” Bylaw 3 (4) states that repair and maintenance of common property is the obligation of the strata, payable by all owners based on the schedule of UE.
53. The RS says bylaws 3 (3) (d) and 3 (4) make it clear that the RS is only responsible for repair and maintenance expenses related to RSLCP, and that since the LCP

decks are not included in RSLCP, the LCP deck repair expenses are the responsibility of the strata.

54. The CS contrasts the wording in bylaw 3 (3) with the wording in bylaw 2 (7) (b) which states that the section executive of each section may make rules governing the use, safety, and condition of LCP “designated for the exclusive use of all of the strata lots” in the section. The CS says use of the words “all of the” before “strata lots” in bylaw 2 (7) (b) means it pertains to RSLCP and CSLCP, but the wording of bylaw 3 (3) (d) does not use the words “all of the” before “strata lots”, and so that bylaw does not refer only to RSLCP or CSLCP, and therefore it includes the LCP decks.
55. However, the wording of bylaw 3 (3) contains an exclusion for common property. The CS says the LCP decks are not common property, so they are not excluded from the RS’ obligations set out in bylaw 3 (3) (d). However, as explained above, I find LCP falls within the definition of common property. The wording of the bylaw specifically refers to common property as described in the division of the bylaws relating to repair and maintenance. Given my finding above that the strata is responsible for LCP deck membrane repairs under bylaw 12 (1) (c), I find the LCP decks fall within the exclusion for common property in bylaw 3 (3) (d). I therefore agree with the RS’ interpretation of this bylaw, and I find that the expenses referred to in 3 (3) (d) refer only to RSLCP and not to the LCP decks. I find the responsibility for funding the LCP deck membrane repairs falls within the strata’s obligation under bylaw 3 (4). In other words, I find the LCP deck repairs are a common expense.
56. Section 99 of the SPA says that owners must contribute their strata lots’ shares of the total contributions budgeted for in the operating fund and CRF through strata fees calculated in accordance with this section and the regulations based on unit entitlement.
57. The CS refers to section 6.4 (1) of the regulation which states, for the purposes of section 99 of the SPA, if a contribution to the operating fund relates to and benefits only the LCP, the contribution is shared only by owners of the strata lots entitled to

use the LCP. However, I have already found that the LCP deck membrane repairs are not for the sole benefit of and do not relate solely to the owners with access to the decks. Therefore, I find these sections of the regulation do not apply to this dispute.

58. The CS refers to section 195 of the SPA which is entitled “expenses of section” and says strata expenses related solely to the strata lots in a section are shared by the owners of the strata lots in the section. Section 11.2 (1) of the regulation states that, for the purposes of section 195 of the SPA, if a contribution to the operating fund relates to and benefits only LCP for the exclusive use of strata lots in a section, the contribution is shared only by owners of the strata lots entitled to use the LCP. Again, as I have already found that the LCP deck membrane repairs are not for the sole benefit of and do not relate solely to the owners with access to the decks, I find these sections of the SPA and the regulation do not apply to this dispute.

## **TRIBUNAL FEES AND EXPENSES**

59. 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. However, the RS has not claimed reimbursement of its tribunal fees or dispute-related expenses, and therefore I decline to make such an order.

## **DECISION AND ORDERS**

60. I order that:

- a. The LCP deck membrane repairs are a common expense of the strata to which all strata lots must contribute.

61. 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 123.1 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.

62. 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 123.1 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.

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Sarah Orr, Tribunal Member