Civil Resolution Tribunal

Date Issued: June 6, 2019

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Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan KAS 2503 v. Houtstra et al*, 2019 BCCRT 690

B E T W E E N :

The Owners, Strata Plan KAS 2503

APPLICANT

A N D :

Romke Houtstra

RESPONDENT

A N D :

Tina Van Steen

RESPONDENT
APPLICANT BY COUNTERCLAIM

A N D :

The Owners, Strata Plan KAS 2503

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member: Julie K. Gibson

INTRODUCTION

1. The respondents Romke Houtstra and Tina Van Steen own strata lot 89 (unit 306) in the applicant the Owners, Strata Plan KAS 2503 (strata).

2. The strata says unit 306's tenant (tenant) damaged the strata's garage door by driving under it when it was closing. The strata says this is contrary to Bylaw 3(2) which prohibits an owner, tenant or occupant from causing damage to common property or common assets.

3. The strata claims the $1,335.24 cost of repairing the garage door.

4. Mr. Houtstra and Ms. Van Steen say the damage was not caused by their tenant. Although they agree that the tenant's car was hit by the garage door, they say the collision was caused by:

   a. ineffective sensors,

   b. previous incidents of contact between the garage door and other vehicles,

   c. lack of signage explaining how to use the door safely, and

   d. failure of the outgoing vehicle to yield to the incoming vehicle, contrary to the strata's bylaws.

5. Ms. Van Steen and Mr. Houtstra say the strata failed to comply with *Strata Property Act* (SPA) sections 133 and 135. They say the strata did not provide evidence to support the chargeback of repair costs to their strata lot account. As well, they say the chargeback was billed to their strata lot account prior to the hearing.

6. Ms. Van Steen counterclaims, saying the strata destroyed "possible video evidence" and otherwise conducted itself improperly in investigating the damage to the garage door and charging the repair costs to strata lot 89. Ms. Van Steen claims $2,479.84 in legal fees.

7. The strata denies any improper process and says it was responsive to correspondence from Ms. Van Steen and Mr. Houtstra. The strata says the video

surveillance evidence was inadvertently erased as part of the closed circuit television's 30 day cycle for re-recording over previous footage.

8. The strata is represented by strata council member Heather Austen. Ms. Van Steen and Mr. Houtstra represent themselves, with Ms. Van Steen providing some materials on behalf of herself and Mr. Houtstra.

JURISDICTION AND PROCEDURE

9. 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.

10. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. In some respects, this dispute amounts to a "he said, she said" scenario with both sides calling into question the credibility of the other. In particular, Ms. Van Steen alleges something improper in the strata failing to retain the video footage, whereas the strata says it was an innocent oversight. Credibility of 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. In the circumstances of this dispute, I find that I am properly able to assess and weigh the evidence and submissions before me.

11. 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 the decision *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, in which the court recognized that oral hearings are not necessarily required where credibility is in issue. I decided to hear this dispute through written submissions.

12. 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.

13. The applicable tribunal rules are those that were in place at the time this dispute was commenced.

14. 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.

15. There is a preliminary issue that arises since the respondents sold their strata lot after this dispute was commenced, but prior to the issuance of this decision.

16. In *Kervin* v*. The Owners, Strata Plan LMS 3011*, 2017 BCCRT 146, the tribunal addressed the situation where the applicant owner sold her strata lot before tribunal decision process was complete. At paragraph 24, the tribunal set out the factors to consider in whether to continue a proceeding or hear a claim or dispute from a former owner, which I find useful in determining whether I should proceed to hear this dispute involving the respondents as former owners. Paragraph 24 lays out these factors:

    a. Whether all of the parties to the claim or dispute agree that the claim or dispute should be resolved by the tribunal;

    b. Whether an issue raised by the claim or dispute is of importance to persons other than the parties to the dispute;

    c. The stage of the tribunal proceeding at which the applicant ceases to be an owner;

    d. The relative prejudice to the parties of the tribunal's potential order; and

    e. The effect of continuing the proceeding on the tribunal's resources and mandate.

17. While I am not bound by previous decisions of the tribunal, I find consideration of these factors useful in analyzing this situation, where the strata is the applicant applying for relief against former owners.

18. First, section 189.1 of the SPA says that only a strata, owner or tenant can file a tribunal strata dispute. However, there is no legislated restriction on who can be named as a respondent to a dispute. With that said, Ms. Van Steen brings a counterclaim here, but it is really a claim relating to legal fees incurred addressing the strata's claim.

19. Here, the respondents sold the strata lot after this dispute started. They also paid the contested charge to their strata lot as part of the sale. These factors, in my view, also support a decision to resolve this dispute, in this claim mainly of importance to the parties themselves.

ISSUES

20. The issues in this dispute are:

    a. Who is responsible for the damage to the strata's garage entry gate and what is the cost of the repair?

    b. Is the strata entitled to reimbursement of tribunal fees and dispute-related expenses, and/or interest?

    c. On the counterclaim, is Ms. Van Steen entitled to reimbursement for $2,479.84 in legal fees?

    d. On the counterclaim, is Ms. Van Steen entitled to reimbursement for tribunal fees, dispute-related expenses, and/or interest?

BACKGROUND AND EVIDENCE

Bylaws

21. I find the relevant bylaws are those filed at the Land Title Office on August 24, 2016. The following bylaws apply to this dispute:

    a. Bylaw 3.2 says that an owner, tenant, occupant, renter or visit must not cause damage, other than reasonable wear and tear, to common property or common assets.

    b. Bylaw 8.9 says that any cost of remedying a contravention of the Bylaws or Rules levied against a Tenant becomes the responsibility of a Landlord/Owner if the Tenant refuses to pay the fine.

    c. Bylaw 14.9 says that incoming vehicles have the right of way at the garage door.

    d. Bylaw 18.6(e) says that security footage will be kept for up to 30 days, and that this period may be extended for bylaw enforcement purposes.

    e. Bylaw 20.4 says that an owner shall reimburse the Strata Corporation for expenses related to damage to common property arising from the use or occupation of the owner's strata lot. These expenses shall include the cost of the deductible portion of any insurance claim which may be made in relation to the said damage.

    f. Bylaw 37A says that the strata council is authorized, in its sole discretion, to pursue a dispute with the tribunal to collect money owing to the strata, without a requirement of a further vote or approval of the owners at a general meeting.

Evidence and Findings

22. The strata has 236 residential units. Short-term rentals of these units are permitted.

23. There are two indoor parking garages, on levels P1 and P2 respectively. I find that the garage door for P1, the subject of this dispute, is a common asset, based on my review of the strata plan and the definition of common asset in section 1 of the SPA.

24. The entrance to each parking level is monitored using closed-circuit television (CCTV), which is recorded on a 30-day cycle. At the end of a thirty-day cycle, the CCTV footage re-records over old footage.

25. Each owner is issued a maximum of two garage door openers which allow them to use the overhead garage door entrances to P1 and P2. A panel screen in the security office is activated and makes a record each time a garage door opener is used.

26. It is undisputed, and I find, that the garage door entry gates are the strata's responsibility to repair and maintain.

27. On November 10, 2017, the tenant's car collided with the strata's garage door on P1, causing damage. The incident was recorded by the parking garage's CCTV system.

28. The tenant says that another car was exiting the parkade. Before the door closed completely, but after the car exited, the tenant pressed her garage door opener to keep the door open, then drove into the parkade. The garage door hit her vehicle, without causing much damage to her vehicle. Then the door reversed and closed immediately behind her as she entered and parked her vehicle.

29. The garage door opener log shows that the tenant scanned in 4 seconds after the exiting motorist.

30. The strata says that the door would have been closing when the tenant proceeded to drive under it. The strata says the tenant was "negligent or careless" in proceeding while the door was closing.

31. The strata says that the tenant proceeded to drive under the gate despite a sign posted on the parkade stating “wait for the gate to close.” I disagree with the strata’s characterization of the signage.

32. A photograph of the P1 garage door entrance shows only a sign reading “Lock Out Auto Crime. Wait for the Gate to Close.” I interpret this signage to mean a driver entering the parkade should wait for the gate to close behind them, to ensure no unauthorized entries to the building. The existing sign is an anti-theft measure, not an instruction on the safe use of the garage door.

33. I find that, at the time of the incident, there was no signage saying that the gate would allow only one vehicle at a time, and that a driver must wait for the gate to close before activating their opener in order to pass safely under the door.

34. On November 15, 2017, the strata contacted Ms. Van Steen and Ms. Houtstra to tell them about the damage to the garage door.

35. On November 28, 2017, strata council met and, in addition to other business, reviewed a proposed letter to Ms. Van Steen and Mr. Houtstra to inform them about the damage to the garage door.

36. On November 28, 2017, the strata manager, on behalf of strata council, wrote to Ms. Van Steen and Mr. Houtstra telling them that a resident of unit 306 had entered the parkade at about 6:40 p.m. on November 10, 2017, just as the garage door was starting to close, and that the vehicle struck the lower part of the garage door causing damage to it.

37. The letter said that because the resident caused the damage to the door, the cost of repairs would be charged back to unit 306. The letter refers to Bylaw 3.2 and provides an opportunity for the owners to respond in writing and to request a hearing, if desired. The letter asks for a response within 14 days. I find this letter compliant with the requirements of section 135 of the SPA.

38. On December 11, 2017, Ms. Van Steen and Mr. Houtstra provided a written response. They took the position that their tenant was not responsible for the

damage to the garage door because the tenant used the garage door in a reasonable manner, and that the accident would have been preventable had proper signage been installed.

39. Ms. Van Steen and Mr. Houtstra attached sample signed for the strata to consider, one of which reads “CAUTION – GATE WILL ALLOW ONLY ONE VEHICLE AT A TIME – DO NOT TAILGATE” and another that says “Gates timed for ONE vehicle.”

40. On December 13, 2017, Ms. Austen emailed Ms. Van Steen and Mr. Houtstra offering an opportunity for them to review video surveillance of the incident.

41. On December 14, 2017, Ms. Van Steen and Mr. Houtstra declined to review the video at that time. Instead, they took the position that evidence would be needed to show that there had not been other similar incidents in recent months. I take this to be a request for garage door maintenance records and/or records of cars hitting the garage door previously. Ms. Van Steen and Mr. Houtstra wrote that the onus was on strata council to prove that the damage was caused by this single incident.

42. On December 20, 2017, the strata was invoiced $1,834.90 for repairs to the overhead garage door for P1 and to service the overhead garage door for P2, which was noted to be “squeaking.”

43. The video surveillance evidence was then erased, before Ms. Steen or Ms. Houtstra could view it.

44. On January 16, 2018, the property manager, on behalf of the strata, wrote to Ms. Steen and Mr. Houtstra saying that $1,335.24 was being charged to their strata lot account, for repairs to the garage door that were caused when their tenant entered the parkade.

45. On January 18, 2018, the strata charged back $1,335.24 for garage door repairs to strata lot 89’s account.

46. On January 22, 2018, the owners wrote to the strata requesting a hearing.

47. On January 23, 2018, Ms. Austen replied, proposing a time for hearing and informing the owners that the CCTV footage had been "lost" due to technical problems keeping it for the length of time.

48. Ms. Van Steen asserts that the strata acted improperly in allowing the CCTV footage to be recorded over. While it might have been preferable to retain the footage, I accept that the strata inadvertently deleted it. Since the owners and the strata agree that the garage door struck the tenant's car, and I have the evidence showing the log of use for the tenant's garage door opener, I find that the video footage is not necessary to resolve this dispute.

49. On January 29, 2018, Ms. Van Steen and Mr. Houtstra appeared before strata council for a hearing on the issue of the garage door damage.

50. Strata council determined that it would not charge a bylaw fine for violation of Bylaw 3.2, but that it would assess the common asset repair cost to the owners, under bylaw 8.9. Strata council also noted it would "consider improved signage &/ or bylaw amendments, balancing security and safety needs of the property."

51. In April 2018, then counsel for the strata produced maintenance records for the garage door, from August 2016 to July 20, 2017. I will summarize the pertinent maintenance records below.

    a. In August 2016, the door's cables and weather stripping were replaced due to being "worn out". The door's chain traveler was noted to be "almost completely worn out" and needing replacement. The chain itself was assessed as "extremely rusty" and something that "may need replacement. As well, the top section of the door had broken down, and carriage bolts were recommended to strengthen it.

    b. In October 2016, there is a note that damage to the bottom of the door "…may need replacement in future." The bottom retainer is noted to be "falling off again due to being hit. It can be reattached against but in future replacement will be needed." Also in October 2016, there as a

recommendation for problems with the door's drive chain to be shortened, or the "door may fall off open limit an in result leave door stuck open." (quote reproduced as written)

c. In February 2017, routine maintenance to the door is completed. As well, the door was found to be sitting crooked and was repaired under warranty.

d. In April 2017, the P1 parkade door was hit and bottom weather-stripping was torn off. The strata spent $128.63 replacing the weather-stripping.

e. In June 2017, the P1 parkade door was hit again. New sections were installed on the door. The strata paid $1,365.31 for repairs.

f. In July 2017 the P1 door was noted to be noisy when operated, and to leave a gap under one side when closed. The shaft and coupler were repaired, and safeties were notes to be working. The strata spent $508.73 on repairs.

52. On January 7, 2019, Ms. Van Steen and Mr. Houtstra sold unit 306. As part of the sale, they say the chargeback on the strata lot account was paid.

POSITIONS OF THE PARTIES

53. The strata says the tenant caused the damage to the garage door. It says that

    a. the garage door was operating normally immediately before the incident,

    b. the door trip sensors were operating as required immediately before the incident,

    c. the door trip sensors are 12 inches above the ground and operating as required,

    d. the garage door remains open for 9 seconds upon activation.

54. Mr. Houtstra and Ms. Van Steen say the tenant did not cause the damage to the garage door.

55. They say their tenant entered the garage immediately after an exiting vehicle. The Bylaws required the exiting vehicle to yield to the incoming vehicle, but it failed to do so. Mr. Houtsta and Ms. Van Steen say their tenant proceeded in a safe and cautious manner, but that the garage door then lowered onto the vehicle.

56. Mr. Houtstra says the garage door had no sensor that responds if a vehicle or person is directly under the door. As well, there was no signage at the parkade entrance warning users that the door must completely close between each vehicle passing through, in order to proceed through safely.

57. The owners also say other vehicles have also come into contact with the garage door, due to its design. They ask that the strata prove that the door was in good working order immediately prior to the incident.

58. The owners also say strata failed to comply with section 133 of the SPA, which requires a chargeback based on an alleged bylaw contravention where the tenant is determined to have improperly caused damage to common property.

59. The owners also say that the strata must strictly comply with the process set out in Section 135 of the SPA, which it did not.

ANALYSIS

Did the strata fail in its duty to repair and maintain the garage door?

(a) Repairs

60. Under section 72 of the SPA, the strata must repair and maintain common property and common assets. It is undisputed that this includes the garage door to P1.

61. A strata is required to act reasonably in repairing and maintaining common property and common assets. If the strata has not acted reasonably, it can be found negligent.

62. In *Weyerman* v. *The Owners, Strata Plan VIS 4816*, 2018 BCCRT 69 a tenant's car was partly under the garage door, exiting the parkade, when she had to stop for

pedestrians. While her car was stopped, the parkade door came down onto it, striking and shattering her car's back window. The garage door sensor was found to have been functioning as designed. The tenant failed to prove that the strata knew the garage door was not operating properly. The tenant's claim for damage to her car was dismissed.

63. *Weyerman* is different to the facts in this dispute, because in this dispute the maintenance records show a history of collisions between cars and the garage door, and because this dispute engages the question of the strata's responsibilities where it has set the garage door to let only one car pass at a time.

64. Based on the maintenance records I find that the strata acted reasonably in obtaining repairs for the garage door.

(b) Signage

65. I turn to the question of maintaining the garage door and the specific concern about signage. The respondents say that the parkade does not have signage to warn drivers that the parkade door must close completely between each vehicle passing through. That is, because of the way the door is set up, when a car passes through, the next driver must wait for the door to close completely before activating it and driving through.

66. Based on the evidence, I agree with this characterization, which was consistent with the strata's evidence.

67. Given that the maintenance records demonstrate that the garage door was hit by a car once in 2016 and again in mid-2017, and then again by the tenant in this dispute in late 2017, I find that the strata failed in its obligation to install proper signage regarding the safe use of the door. I find that the strata knew there was a problem with users hitting the door but did not improve signage to try to prevent it.

68. The strata admits that the garage door is set up to remain open for "only 9 seconds" once it is activated. I find that a reasonable response, after the strata learned of the second collision with the garage door, would have been to place signage inside and

outside the parkade, explaining that the door is timed for one car only. Reasonable signage would tell parkade users to wait until the door closes completely before activating it with their garage door opener and proceeding. I find that the strata failed to maintain the garage door by failing to properly signpost the function where the door will permit only one car to pass at a time.

69. I find that it was reasonable for the tenant to expect that she could use her garage door opener to open the garage door by pressing it after the outgoing car left the parkade, without waiting for the door to closely completely.

70. However, I also find that she should have noted whether the door was moving up or down before proceeding forward in her car. I find that she proceeded when the door was still closing, despite having pressed the garage door opener. As such, she is partly responsible for the damage to the garage door.

71. If the strata were able to impose a charge on the respondent's strata lot, which I find below they are not because they breached section 135 of the SPA, I find that it would have been reasonable to divide the repair expenses equally between the strata and the owners. I say this because, on the evidence before me, both the tenant and the strata fell below a reasonable standard with respect to use of and signage for the garage door, respectively.

72. Based on the evidence, I find that the door's sensors were operating properly, because once the door met the tenant's car, it reversed without causing much damage.

73. I also find that the fact that an outgoing vehicle failed to yield, as required by the bylaws, does not excuse a less than reasonable approach either on the part of the strata or the tenant.

Did the strata comply with Sections 133 and 135?

74. Having said that, I find that the strata breached section 135 of the SPA by applying a chargeback of the repair expenses to the respondents' strata lot before they had (a) production of requested garage door maintenance records and (b) their hearing

before strata council. Section 135 clearly contemplates that a hearing, if requested, must occur before requiring a person to pay the costs of remedying a bylaw contravention, by applying the charge against the subject strata lot.

75. The strata argued that the breach of section 135 was merely technical and ought to be excused. I disagree. The maintenance records and the hearing were both essential to provide the respondents with a meaningful opportunity to respond to the strata's position. The respondents did not have a proper hearing, because disclosure of the maintenance records had not occurred beforehand.

76. As for the owners' argument that the strata breached section 133 of the SPA, I disagree. However, this finding makes no difference given my conclusion about section 135.

77. As a result, I find the $1,335.24 charge against the respondents' strata lot invalid and set it aside.

What is an appropriate remedy?

78. Given that the parties have now had a full written hearing before the tribunal, I find that it would be consistent with the tribunal's mandate to provide economical and flexible dispute resolution for me to resolve the issue of the allocation of garage door repair costs. I find this approach preferable to requiring the strata to provide the process contemplated by section 135, which is less practical than it otherwise might be because the dispute involves former owners.

79. I find that the strata and the tenant each partly caused the damage to the garage door.

80. However, because Bylaw 8.9 says the strata can only collect the cost of remedying a bylaw contravention from the owner if the tenant refuses to pay, and no evidence was filed proving a demand for payment to the tenant and the tenant's refusal, I find that the owners are not liable for the repair costs.

81. As a result, I order the strata to repay the respondent owners $1,335.24, because that charge was levied without compliance with section 135 of the SPA or the requirements of Bylaw 8.9.

82. I find it is not necessary for me to address Ms. Van Steen's implied argument that assessing the repair costs against the respondent owners may have been significantly unfair, because I have determined that the charge should be reversed due to the strata's non-compliance with the SPA and bylaws.

Counterclaim

83. Turning to the counterclaim, I dismiss Ms. Van Steen's claim for legal fees, consistent with the tribunal's general rule that the parties are self-represented. Tribunal rule 132 permits me to award legal fees only in extraordinary circumstances, which I find do not exist here.

84. I dismiss Ms. Van Steen's counterclaim.

TRIBUNAL FEES, EXPENSES AND INTEREST

85. 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 divided success between the claim and counterclaim, I order each party to bear their own tribunal fees and dispute-related expenses.

86. The *Court Order Interest Act* (COIA) applies to the tribunal. The respondent owners are also entitled to pre-judgement interest under the COIA, which I calculate from the date of their sale of the strata lot, January 7, 2019, which I infer is the date they paid the outstanding balance on the strata lot account, to the date of this decision, for a total of $11.13.

87. 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, unless the tribunal orders otherwise.

DECISION AND ORDERS

88. I order that, within 30 days of this decision, the strata pay Ms. Van Steen and Mr. Houtstra a total of $1,346.37, broken down as:

    a. $1,335.24 as a refund for the repair charge for the garage door,

    b. $11.13 in pre-judgement interest.

89. Ms. Van Steen and Mr. Houtstra are also entitled to post judgement interest under the *COIA*.

90. I dismiss Ms. Van Steen's counterclaims.

91. I dismiss the parties' claims to tribunal fees and dispute-related expenses.

92. 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.

93. 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.

Julie K. Gibson, Tribunal Member