



Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Simmons et al v. The Owners, Strata Plan LMS 49, 2019 BCCRT 753*

B E T W E E N :

Bryan Simmons and Barbara Simmons

APPLICANTS

A N D :

The Owners, Strata Plan LMS 49

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Kate Campbell

INTRODUCTION

1. The applicants, Bryan Simmons and Barbara Simmons (owners) own strata lot 27 (SL27) in the respondent strata corporation, The Owners, Strata Plan LMS 49 (strata).

2. SL27 is located directly underneath a common property mechanical room (MR). The owners say the strata failed to properly maintain and repair the MR equipment, leading to a series of leaks that damaged SL27 and interfered with their tenant's use and enjoyment of the strata lot. They seek the following remedies:
 - a. Orders to replace or add various MR equipment, including hot water tanks, condensing boilers, a floor drain, and drainage hoses.
 - b. Reimbursement for repair expenses.
 - c. An order that the strata pay for all future repairs due to leaks from the MR into their master bedroom closet.
 - d. Reimbursement of dispute-related expenses.
3. The strata denies the owners' claims. It says it reasonably maintained and repaired the common property, based on the recommendations of its experts. It says it was not negligent and did not breach its duties under the *Strata Property Act* (SPA), so is not liable for repairs to the owners' strata lot. The strata also says the equipment replacements and additions requested by the owners are unreasonable because they are unnecessary, would cost millions of dollars, and are not supported by the opinion of an engineer or certified plumber.
4. The owners are self-represented. The strata is represented by a strata council member.
5. For the reasons set out in this decision, I allow the owners' claims in part.

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 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.

Preliminary Matter

10. The owners request an order that the strata pay for all future repairs caused by leaks from the MR into the SL27 master bedroom.
11. The tribunal does not typically make prospective orders relating to matters that have not yet occurred: *Bourque et al v. McKnight et al*, 2017 BCCRT 26; *James v. B.A. Blacktop Ltd. et al*, 2018 BCCRT 528. Although those decisions are not binding on me, I find no reason to depart from that general rule in this case. Damages are a legal remedy ordered as compensation for loss or injury that has occurred, rather than injury that might occur in the future. There is no way to establish the cost of repairs for damage that has not yet occurred, and I find it would be inappropriate to order a potentially unlimited amount of monetary compensation. Also, the occurrence of future leaks is speculative, and the cause of and liability for any such leaks must be determined based on the circumstances at that time. For example, relevant strata bylaws may change. For these reasons, I decline to make any order about future leaks.

ISSUES

12. The issue in this dispute are:
- a. Are the owners entitled to reimbursement of \$5,000 in expenses due to the leaks?
 - b. Should I order the strata to replace or add the MR equipment requested by the owners?

BACKGROUND AND EVIDENCE

13. I have read all of the evidence provided but refer only to evidence I find relevant to provide context for my decision. In a civil proceeding such as this, the applicant owners must prove their claims on a balance of probabilities.
14. The strata was created in 1991, under the former *Condominium Act*, a predecessor to the SPA. It consists of a 14-storey concrete building, with 27 strata lots. The owners purchased SL27 in October 2002.
15. The strata bylaws in effect at the time of this dispute were those registered at the Land Title Office (LTO) on August 2, 2007. LTO documents show the strata repealed all previous bylaw amendments and replaced them with the August 2, 2007 amendments. Subsequent bylaw amendments were filed, but these are not relevant to this dispute.
16. The parties agree that SL27 is located under the MR, which is designated as common property on the strata plan. The parties agree there have been some leaks from the MR and common property pipes into SL27. The strata does not contest that there has been water damage due to some of these leaks, although the parties disagree about the number of leaking incidents.
17. The owners say that since 2002, water has leaked on various occasions from the MR into the SL27 master bedroom closet. They say the first leak caused over \$20,000 in damages, which were paid by the strata.

18. The owners say the majority of the leaks have occurred since August 2017. They say there were 7 separate leaks in a 13-month period in 2017-2018. The owners say these leaks caused significant damage, including repair costs (drywall, carpets, cleaning, painting), lost rental income, and damage to clothing. They also say the ongoing leaks have caused inconvenience for them and for their tenant.
19. The earliest leak at issue in this dispute occurred around July 7, 2017. The strata hired Allied Plumbing, whose invoice says there had been water leaking through the walk-in closet ceiling in SL27. Allied traced the leak, and reported that the drain discharge lines on the 4 relief valves for the hot water storage tanks were not long enough to reach the drain port, which was on the floor. As a result, in the event of a discharge from a relief valve, the water leaked through the concrete seal membrane around the drain port and into SL27, instead of down the drain. Allied recommended extending the drain lines to reach the floor drain. This work was performed at a cost of \$1,034.25 to the strata on July 19, 2017.
20. A document provided by the strata titled, “description of causes of leaks into PH2 – July, 2017 to September, 2018” states that there was another leak into SL27 from common property on November 15-16, 2017. The strata’s document says the leak was due to condensation and overflow water following a power outage. The document says the newly extended drain line installed by Allied was not connected to the drain. The deficiency was corrected.
21. The strata hired Artisan Plumbing (Artisan) to repair the subsequent leaks. Artisan’s invoices report the following information:
 - a. January 15, 2018 – After the owners’ tenant reported water on the SL27 ceiling, Artisan cut into the ceiling and found a leak on the hot water recirculation line. It was not possible to repair the line, so Artisan removed and replaced the piping from above SL27 to the MR. Artisan also found and repaired additional pipe leaks in the same area on the that visit.
 - b. June 21, 2018 – Another leak coming through the SL27 ceiling from the MR. Artisan found a leak in a copper elbow just before the recirculation pump.

- Artisan clamped the leak temporarily, and a week later replaced the defective piping and a ball valve that leaked when the water was turned back on.
- c. July 16, 2018 – Artisan replaced approximately 45 feet of recirculation piping in the ceiling above SL27, some of which had been found defective during an inspection at the time of the last repair.
 - d. August 1, 2018 – Another leak in SL27. Artisan found the source was a defective gauge that was leaking in the MR, and replaced the gauge.
22. Due to the owners' frustration over the ongoing leaks, their lawyer hired Charles Perkins, a certified professional home inspector from Cornerstone Building Inspections, to assess the MR equipment. Mr. Perkins conducted his inspection on July 3 and 4, 2018. He met with the strata's representative, the strata property manager, and a representative from Allied Plumbing. Mr. Perkins reported as follows:
- a. There was no active leaking in the MR.
 - b. Wolverine K-type and L-type copper water lines were used. K-type installations have been known to fail prematurely due to the thinness of the pipes and the region's acidic water.
 - c. Due to its location below the MR, SL27 is susceptible to leakage without preventative measures. The MR currently has no provision to contain leakage.
 - d. The MR floor drain is too small to accommodate the overflow discharge from the numerous pressure release valves on the mechanical equipment. A replacement drain is recommended.
 - e. Some of the mechanical components, such as circulation pumps and expansion tanks, are aging. The service personnel can advise owners of its age and replace if requested.

23. After the owners filed this dispute, the strata hired engineer A. Bouchard to investigate the source of the water leaks and make recommendations on remediation. He conducted a site visit in October 2018 and reviewed relevant documents, including building plans, the strata's maintenance notes, and Mr. Perkins' inspection report.

24. In his January 11, 2019 report, Mr. Bouchard noted that the area above the SL27 walk-in closet ceiling is a common pathway for various mechanical systems in the building, including hot water, cold water, sanitary drainage including the floor drain from the MR, the sprinkler system, and the heat pump supply and return lines. Mr. Bouchard said that condensation discharge along tempered pipes and pin hole leaks in pipes were the most likely sources of water damage in SL27. He also reported that the following overall circumstances contributed to the water damage in SL27:

- a. SL27's location directly under the MR and its variety of water-containing systems (water distribution, heat pump loop, MR drainage, sprinkler system).
- b. The potential interactions of the water-containing systems were not thoroughly considered at the time of design or installation (such as condensation due to having uninsulated cold and hot pipes in the same space).
- c. Potential material defects. The copper piping had pinhole leaks, even though it was only 27 years old, which was relatively early in its typical service life of 40 to 50 years. Other local buildings had similar problems, typically associated with the soft water chemistry.

25. Mr. Bouchard also reported the following findings:

- a. The MR was in fair to good condition, with equipment either renewed or in serviceable condition, and evidence of ongoing maintenance. The need for upcoming equipment renewal was anticipated with age, as is typical.

- b. There was cracking and an “abandoned penetration” in the suspended concrete slab in the MR. These were commonly observed deficiencies, but were a possible moisture ingress pathway (and had been in the past based on staining).
 - c. Condensation on the pipes appeared to be contributing to corrosion, especially on the heat pump loop piping. If unaddressed, this was anticipated to compromise the pipe over time.
26. Mr. Bouchard said that in 3 to 5 years, or possibly sooner depending on deterioration, the strata would need to renew the domestic water plumbing. He also said the strata could consider water chemistry management systems, to delay the need to replace the domestic water piping.
27. Mr. Bouchard recommended that the following remedial actions be undertaken in or above SL27 as soon as feasibly possible, to mitigate against further water damage in SL27 and the risk of pipe failure:
- a. Replace all pipes with visible corrosion, including the heat pump loop piping and the drain primer line.
 - b. Insulate all exposed pipes containing tempered fluids.
 - c. Remove abandoned penetration and seal the crack in the concrete slab.
 - d. Reinstate interior finishes.
28. Mr. Bouchard also recommended removing the water-stained insulation in the MR, to confirm the condition of concealed piping.
29. Mr. Bouchard also said that as a “best practice improvement”, the strata could consider applying a liquid membrane to the MR floor, possibly on a phased basis as sections of the floor were exposed during other work. He said this was not considered mandatory.

30. On January 22, 2019, after receiving Mr. Bouchard's report, the strata council met and agreed to implement Mr. Bouchard's key recommendations as soon as possible. The strata property manager was directed to consult with contractors to determine the cost.

FINDINGS AND ANALYSIS

Are the owners entitled to compensation for damages resulting from the leaks?

31. The parties agree that there has been water damage in SL27, and that the leaking pipes and equipment are common property or common assets, which the strata has a statutory duty to repair and maintain. The strata's duty to repair and maintain common property is set out in sections 3 and 72 of the SPA. Section 3 says the strata corporation is responsible for managing and maintaining the common property and common assets of the strata corporation for the benefit of the owners. Section 72 says the strata corporation must repair and maintain all common property.

32. Strata bylaw 23 says the strata must repair and maintain all common assets and common property of the strata corporation that have not been designated as limited common property (LCP). The LCP exemption is not relevant to this dispute. The strata admits it is responsible to maintain the MR equipment and the pipes in the ceiling above SL27, and says it has met that duty.

33. The strata's bylaws do not require it to maintain or repair any portion of an owner's strata lot. Strata bylaw 21 says an owner must maintain and repair his or her strata lot, except for property that is the responsibility of the strata to maintain, repair, and insure under section 149 of the SPA. The section 149 exemption relates to fixtures installed by the owner-developer and does not apply in this dispute. Thus, under the SPA and bylaws, the owners are responsible for all repairs to their strata lot.

34. Numerous decisions from the BC Supreme Court, and previous tribunal decisions involving similar facts, have found that a strata corporation is only liable to pay for

repairs to a strata lot where it has been negligent: see *Kayne v. LMS 2374*, 2013 BCSC 51; *Dominelli v. The Owners, Strata Plan LMS 3215*, 2019 BCCRT 203; *John Campbell Law Corporation v. Owners, Strata Plan 1350*, 2001 BCSC 1342.

35. In *John Campbell*, the BC Supreme Court considered a case where a common property sewer pipe became blocked by a tree root and caused sewage to flood the plaintiff's strata lot. The court dismissed the plaintiff's claim for damages, finding that although the strata corporation had not routinely inspected the sewer pipes for blockage, it acted reasonably in the circumstances because the blockage could not have been anticipated. The court reasoned as follows in paragraph 18:

I conclude that if a strata corporation such as the defendant has taken all reasonable steps to inspect and maintain its common facilities, consistent with the practice of other such associations generally, they should not be held liable for damages arising as a result of any strict statutory liability nor should they be put in the position of acting as an insurer by default.

36. In *John Campbell*, the court relied on the earlier decision in *Wright v. The Owners, Strata Plan #205*, 1996 CanLII 2460 BCSC. In *Wright*, the BC Supreme Court said that a strata corporation's duty to repair is limited, and the strata corporation only has a duty to make repairs that are reasonable in the circumstances.

37. In summary, the strata is not an insurer and is not responsible to reimburse the owner for the claimed damages, unless the strata acted negligently. Thus, the question before me is whether the strata acted negligently by failing to undertake maintenance and repairs that were reasonable in the circumstances. Based on the evidence before me, I find the strata was negligent.

Negligence

38. The evidence before me establishes that SL27 was affected by water leaks from common property pipes or equipment above SL27 numerous times, including at least 5 separate incidents from July 2017 to August 2018.

39. Based on the history of leaks, it was clear by January 2018 that any leaking in the MR or pipes would likely damage SL27. I find that this pattern of leaks means that the damage to SL27 was foreseeable, and therefore comprehensive investigation was reasonable in the circumstances.
40. The owners provided photos showing some of the leak damage, and correspondence from their tenant expressing her frustration with the ongoing inconvenience, and damage to her personal belongings. The photos and repair invoices confirm that the strata's plumbers had to cut large holes in the drywall ceiling of SL27 on numerous occasions. While this evidence is not determinative of liability, I find that it shows that the ongoing leaks were a serious situation which had a significant impact on the owners and their tenant. In short, I find that the series of leaks was not a minor issue.
41. The owners say the strata was negligent in its efforts to prevent the repeated leaks. They say the strata ignored their ongoing requests for an engineer's evaluation until after they filed this dispute with the tribunal, and failed to look for the overriding cause of the repeated leaks.
42. The strata says it met its maintenance and repair obligations, acted reasonably in the circumstances, and was not negligent. Based on Mr. Bouchard's report, I accept that the strata reasonably met its routine maintenance obligations. However, I agree with the owners that the strata did not take sufficient action to assess the overriding cause of the repeated leaks, and consider a permanent solution, until after the owners filed this dispute in August 2018.
43. I accept the strata's argument that the plumbing invoices show that each leak was a separate incident, and arose from a different source. However, the evidence also shows that SL27 was extremely susceptible to damage from any leakage coming from the common property above.
44. On the recommendation of its plumbers, the strata extended the MR drain lines and replaced 45 feet of piping as proactive measures. However, Mr. Bouchard's report establishes that a number of other remedial actions were appropriate and

necessary to mitigate the risk of further water damage in SL27. Mr. Bouchard indicated that this work should be performed as soon as possible.

45. There is no evidence before me indicating that the problems identified by Mr. Bouchard in October 2018 could not have been identified sooner if anyone had performed a similar inspection. Given the seriousness of the leaking problem, I find it was unreasonable for the strata to delay obtaining an engineer's assessment until October 2018. I find that this is not a case like *John Campbell*, where the strata lot damage was a single event that could not have been anticipated. The owners say there were previous leaking incidents from common property into SL27 in 2002, 2014, and 2015. The strata did not provide contrary evidence, so I accept this as fact. Since SL27 was obviously vulnerable to leaks from the common property above, I find it was unreasonable not to inspect the condition of the pipes after the leaking recurred in July 2017.
46. The strata says it would have acted if any of its contractors had recommended it, but they did not. In *Wright*, the court said that if professionals hired by a strata to carry out work fail to do so effectively, the strata is not responsible as long as it acted reasonably in the circumstances. However, there is no evidence before me that the strata ever asked anyone, before the dispute was filed, to comprehensively assess the leak situation affecting SL27, or even inspect all of the piping above SL27. I acknowledge that when assessing the extent of a strata corporation's duty to repair under the SPA, the standard is not perfection, and that determining what is reasonable may involve assessing whether a solution is good, better, or best: *Weir v. The Owners, Strata Plan NW 17, 2010 BCSC 784*. However, I find that given the number of leaks since 2014, and their impact on SL27, the strata acted unreasonably by failing to hire an expert to assess the leak situation and propose a comprehensive mitigation strategy until October 2018.
47. For all these reasons, I find the strata failed to reasonably meet its repair and maintenance obligations during the period after the June 2017 leak, until it retained Mr. Bouchard in October 2018. The strata was therefore negligent during that period.

48. In making this finding, I note that the strata said the November 2017 leak was caused by the fact that the MR drain line was not connected to the drain. However, I do not accept that explanation, since the strata provided no invoice or other record confirming this explanation, and such that documentation was reasonably available to it. Also, other correspondence in evidence indicates that Allied fixed this problem in July 2017. I therefore place no weight on the strata's unconfirmed assertion about the cause of the November 2017 leak.

49. Since I have found the strata was negligent, I now consider what remedies are appropriate

Repair Costs

50. On the Dispute Notice, the owners requested \$5,000 in compensation for expenses resulting from the leaks. In their evidence and submissions, they request reimbursement of \$4,643.67 for the costs of repairing leak damage.

51. The owners provided a list of these expenses, and provided copies of receipts, invoices, or cheque stubs to support each expense. I find these expenses were reasonable, as they are for paint, drywall, and carpet repairs. I therefore order the strata to reimburse the owners \$4,643.67 for repair costs.

52. I find that the owners are also entitled to pre-judgment interest on this amount, under the *Court Order Interest Act* (COIA), from February 1, 2018, which I calculate to be \$98.68.

Repair Orders

53. The minutes of the January 22, 2019 strata council meeting indicate that the council agreed to perform a number of "essential repairs", based on the recommendations from Mr. Bouchard. The strata authorized the following work in SL27 (or in the ceiling above it):

- a. Replace all pipes with evidence of corrosion, including but not necessarily limited to the heat pump loop piping and the drain primer line.

- b. Insulate all exposed pipes containing warm water – that is the domestic water lines and the heat pump loop.
- c. Remove the empty conduit tube coming from the ceiling and seal the crack in the suspended concrete slab.
- d. Restore the interior finishes.

54. The strata also authorized the following work in the MR:

- a. Remove the water-stained insulation on the pipes, to find out what state the pipes are in.
- b. Check that the piping is sound, and replace if it isn't.
- c. Put new insulation on the plumbing lines.
- d. Clean the floor, to determine whether new staining occurs.
- e. Apply liquid membrane if possible, especially at the intersection of the floor surface and the concrete boiler service pad.

55. From the evidence before me, it is unclear whether this work has occurred. For that reason, I order the strata to complete the work listed in the January 22, 2019 minutes by no later than September 30, 2019.

56. In addition to the list above, the owners request that I order the strata to perform the following repairs or replacements. I address these requests in turn:

- a. *Replace the hot water tanks and condensing boilers in the MR with new ones which have self-contained galvanized pans with water sensor shut-offs.* I decline to make this order, as it was not recommended in either Mr. Perkins' or Mr. Bouchard's reports. Mr. Perkins said that such equipment could have been installed when the boilers and hot water tanks were changed. However, he did not recommend replacing the hot water tanks or boilers at the present time, and he did not suggest that these should be removed to add pans underneath.

- b. *The strata replace the MR floor drain with a larger drain.* This was recommended in Mr. Perkins' report. Since Mr. Bouchard reviewed Mr. Perkins' report, as well as technical drawings for the building, and did not recommend replacement of the floor drain, I decline to order this repair. In particular, Mr. Perkins' recommendation appeared to be based on mitigating risk in the event that all of the relief valves released at once, and it is unclear from the evidence how likely that is to occur. The strata may want to further investigate the cost and utility of replacing the floor drain.
- c. *Replace all drainage hoses for each component in the MR which require access to the floor drain with new, up-to-code hoses.* I decline to make this order because none of the expert reports recommended it, and there is no evidence that the hoses do not meet Building Code requirements.

FEES AND EXPENSES

57. 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. As the owners were largely successful in this dispute, I see no reason to depart from this general rule. I therefore order the strata to reimburse the owners \$225.00 for tribunal fees.
58. The owners request reimbursement of \$735.00 for Mr. Perkins' report, and provided an invoice to support this amount. In the context of this dispute, I find it was reasonable to obtain Mr. Perkins' opinion. I therefore order the strata to reimburse the owners for the \$735.00 fee.
59. The owners request reimbursement of \$80.00 for process server fees incurred to provide the Dispute Notice on the strata. While the strata says the owners could have given notice in a less expensive manner, I find that using a process server is an option consistent with the tribunal's rules, and was reasonable in the circumstances since the owners live outside Canada. I therefore order reimbursement of \$80.00 for the process server.

60. The owners request reimbursement for their portion of the legal fees the strata paid for its defence in this dispute. Section 167(2) of the SPA says an owner who sues a strata corporation is not required to contribute to the expense of defending the suit. Section 189.4 provides that section 167(2) applies to tribunal disputes.
61. Therefore, pursuant to sections 167(2) and 189.4 of the SPA, the strata must ensure that no portion of the strata's expenses in this proceeding were paid with the owners' strata fees. The strata says that this has already occurred, and the owners provided no contrary evidence, so I make no specific order about this expense.
62. Finally, the owners request \$4,668.60 for travel costs incurred to attend a hearing before the strata council. While I agree the hearing was required under the SPA before this dispute could proceed, I find these claimed travel expenses are not reasonable dispute-related expenses. First, it is unclear why a hearing of less than 3 hours required a five night stay. Second, the April 28, 2018 email from the owners' lawyer specifically says he or their rental manager could attend the hearing in their place. He said it was mandatory to request a hearing, but wrote, "I assume that you do not wish to make the trip yourselves." Based on this email, I do not accept the owners' submission that they were required to travel to attend the strata council hearing. I therefore order no reimbursement for travel expenses, and dismiss this claim.

DECISION AND ORDERS

63. If not done already, I order the strata to complete the work listed in the January 22, 2019 strata council meeting minutes by no later than September 30, 2019.
64. I order that within 30 days of this decision, the strata pay the owners a total of \$5,782.35, broken down as follows:
- a. \$4,643.67 as reimbursement for repair costs,
 - b. \$98.68 as prejudgment interest under the COIA,
 - c. \$225.00 for tribunal fees, and

d. \$815.00 for dispute-related expenses.

65. The owners are also entitled to post-judgment interest under the COIA.

66. The owners' remaining claims are dismissed.

67. 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.

68. 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.

Kate Campbell, Tribunal Member