Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan LMS 1781 v. Arora et al*, 2019 BCCRT 995

B E T W E E N :

The Owners, Strata Plan LMS 1781

APPLICANT

A N D :

RAMESH ARORA and BINOO ARORA

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: Micah Carmody

INTRODUCTION

1. This dispute is about the strata corporation's ability to recover its insurance deductible from an owner after water escaped from the owner's strata lot.

2. Ramesh and Binoo Arora (owners) own a strata lot in the applicant strata corporation, The Owners, Strata Plan LMS 1781 (strata).

3. On February 4, 2018, water escaped from a water filtration system within the owners' strata lot, damaging common property and several strata lots in the strata building.

4. The repair costs exceeded the strata's $75,000 insurance deductible. The strata seeks an order requiring the owners to reimburse the strata for its deductible. The respondents deny liability and have so far refused the strata's demands for payment.

5. The strata is represented by a council member. The respondents are self-represented.

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* (CRTA). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. The tribunal must act fairly and follow the law. It must also recognize any relationships between the parties that will likely continue after the tribunal's process has ended.

7. The tribunal has discretion to decide the format of the hearing, including in writing, by telephone, videoconferencing, or a combination of these. I am satisfied an oral hearing is not required as I can fairly decide the dispute based on the evidence and submissions provided.

8. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in court. The tribunal may also ask the parties and witnesses questions and inform itself in any way it considers appropriate.

9. Under section 123 of the CRTA and the tribunal rules, in resolving this dispute the tribunal may order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.

ISSUES

10. The issues are:

    a. Are the owners liable for the strata's deductible even without proof of negligence?

    b. If negligence is required, were the owners negligent?

    c. Did the owners fail to obtain permission for the filtration system in contravention of the strata's bylaws, and if so can the strata recover the deductible under section 133 of the SPA?

EVIDENCE AND ANALYSIS

11. Although I have reviewed all the evidence and information provided by the parties, in these reasons I only refer to what is necessary to explain and give context to my decision.

12. The strata building is a 21-story residential condominium built in 1996. The owners purchased their strata lot in 2004 and have resided in it since.

13. On or about February 4, 2018, water escaped from the owners' strata lot as a result of a failure of the water filtration system below the kitchen sink.

14. The water damage repair and remediation costs, based on the two invoices before me, totalled $125,548.61. The strata was required to pay its insurance deductible of $75,000.

15. Although the strata's Dispute Notice indicated an additional claim for repairs for $375.64, the strata confirmed during submissions that it had abandoned that claim. I have therefore not addressed it.

Are the owners liable for the strata's deductible even without proof of negligence?

16. Section 158 of the SPA addresses insurance deductibles and reads in part:

> (1) Subject to the regulations, the payment of an insurance deductible in respect of a claim on the strata corporation's insurance is a common expense to be contributed to by means of strata fees calculated in accordance with section 99 (2) or 100 (1).
>
> (2) Subsection (1) does not limit the capacity of the strata corporation to sue an owner in order to recover the deductible portion of an insurance claim if the owner is responsible for the loss or damage that gave rise to the claim.

17. There are no regulations enacted pursuant to section 158(1), so the strata must first pay the insurance deductible as a common expense and then seek to recover the insurance deductible under section 158(2).

18. BC Supreme Court decisions have confirmed that section 158(2) does not create a right in a strata to sue an owner – rather, it does not limit the ability of a strata to sue. Whether a strata can maintain an action against an owner is determined by the SPA and the strata's applicable bylaws and rules. See *The Owners, Strata Corporation VR 2673 v. Comissiona et al*, 2000 BCSC 1240.

19. Following the principles of *Comissiona*, I must examine the strata's bylaws. At the time of the water escape, the strata's bylaws provided, in part, as follows:

> 4.4(a) An owner shall indemnify and save harmless the strata corporation from the expense of any maintenance, repair or replacement rendered necessary to the common property, limited common property, common assets or to any strata lot by the owner's act, omission, negligence or carelessness […] but only to the extent that such expense is not reimbursed from the proceeds received by operation of any insurance policy. In such circumstances, and for the purposes of bylaws 4.1, 4.2 and 4.3, any insurance deductible paid or

payable by the strata corporation shall be considered an expense not covered by the proceeds received by the strata corporation as insurance coverage and will be charged to the owner.

4.4(b) Bylaw 4.4(a) does not limit, in any way, the ability of the strata corporation to sue an owner pursuant to section 158(2) of the Act.

20. Bylaw 4.4(a) is nearly identical to the relevant bylaw in *Strata Plan LMS 2446 v. Morrison,* 2011 BCPC 519. In *Morrison*, the court found that the words "owner's act, omissions, negligence or carelessness" in the bylaw are to be read collectively and import a negligence standard. In other words, there must be some affirmative act or failure to act before an owner must indemnify a strata for losses not covered by insurance. As noted by the parties, *Comissiona* and *Morrison* have been followed by the tribunal.

21. There is no real dispute that the effect of bylaw 4.4(a) is that the strata has imposed a negligence standard of liability on the owners. The dispute lies in the effect of bylaw 4.4(b). The strata says bylaw 4.4(b) serves to reduce the standard from negligence to responsibility.

22. There was no indication in *Morrison* that the bylaws before the court contained a section similar to bylaw 4.4(b). However, the tribunal considered the combined effect of bylaws nearly identical to 4.4(a) and (b) in *Strata Plan BCS 1589 v. Nacht et al*, 2017 BCCRT 88. In *Nacht*, the tribunal considered whether bylaw 4.4(b) meant that the standard of "responsible" rather than negligence applied. The tribunal concluded that bylaw 4.4(b) did not change the meaning of bylaw 4.4(a). It found that bylaw 4.4(b) simply ensured that bylaw 4.4(a) did not remove the ability of the strata to sue an owner for repayment of a deductible.

23. The strata argues that *Nacht* should not be followed, or is distinguishable from this case. It says the court in *Morrison* already confirmed that a strata retains the right to sue without the need for language equivalent to bylaw 4.4(b), so the meaning given to bylaw 4.4(b) by the tribunal in *Nacht* meant bylaw 4.4(b) served no useful purpose. The strata also distinguishes *Nacht* on the history of the bylaws. It says in

2013 bylaw 4.4(b) was added to address the *Morrison* decision. In other words, bylaw 4.4(b) was added to ensure the strata could sue even if the owners were simply responsible and not negligent. Otherwise, adopting bylaw 4.4(b) would serve no useful purpose.

24. Although *Nacht* is not a binding precedent, I find the reasoning persuasive. With respect to the strata's argument that bylaw 4.4(b) was added to address the *Morrison* decision, there was no evidence provided to confirm why the strata added bylaw 4.4(b). Bylaw 4.4(a) is a "charge back" bylaw that creates an indemnity in favour of the strata if the owner's negligence causes the strata to suffer expenses not reimbursed by its insurer, including the deductible. It purports to allow the strata to *charge* the owner for those expenses. Bylaw 4.4(b), as observed by tribunal member Pendray in *Nacht,* simply ensures that bylaw 4.4(a) is not read to remove the ability of the strata to *sue* an owner to recover the deductible.

25. In July 2018, the strata amended bylaw 4.4 to make it, in the strata's words, "even more clear" that deductibles would be charged to owners even absent negligence. I agree with the strata that its subsequent changes to the bylaw should not be taken as an admission that the previous version of the bylaw required negligence. However, even if the subsequent changes to bylaw 4.4 were not in evidence, I would still be of the view that if the strata wanted to change the standard from negligence to responsibility in 2013, it would have used much clearer language. Bylaw 4.4 as it existed before 2013 used language the courts had interpreted as importing a negligence standard. The strata chose to retain that language in the 2013 update to the bylaws that remained in place at the time of the water escape.

26. I find that under the bylaws in effect at the time of the leak, proof of negligence by the owners was required for the strata to recover its insurance deductible from the owners.

Were the owners negligent?

27. To establish negligence, the strata must demonstrate that the owners owed the strata a duty of care, that the owners' behaviour breached the standard of care, that

the strata sustained damage, and that the damage was caused, in fact and in law, by the owners' breach. See *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27.

28. I find that as owners of a strata lot in a strata building, the owners owed the strata a general duty of care regarding maintenance and repair of their strata lot to avoid causing damage to the strata. I also find that the strata has suffered damage.

29. The real issue is whether the owners' conduct fell below the standard of care expected of owners in a strata lot. The owners argue that the water filtration system was in a state of reasonable maintenance, and the water escape was a result of a spontaneous, accidental and unforeseeable failure of the water filtration system.

30. The strata relies on *Morrison* and says that owners are expected to monitor the working condition of plumbing fixtures within their strata lot, and where they fail to do so, they are negligent. The water escape in *Morrison* resulted when water overflowed the toilet bowl. The court held that the owner owed a duty to the strata to ensure that after each flush, the tank and bowl refilled and the water shut off appropriately. The court found the owner breached that duty. Here, the evidence was that the water filtration system failed overnight while the owners were sleeping. They were not actively using the system and there is no evidence of the last time they used it. Moreover, with the filtration system under the sink, its failure may not have been immediately observable, unlike the toilet in *Morrison.*

31. The strata also relies on *Westsea Construction v. Billedeau*, 2010 BCPC 109 for the principle that when water escapes from one strata lot to another an inference of negligence can be drawn. It says the fact that the filtration system failed suggests the owners did not regularly inspect it. I find that ***Billedeau's*** relevance is limited to cases where the owner or defendant fails to provide evidence. In *Billedeau* the source of the leak was undetermined, so the court inferred that the tenant left a water tap open. The inference of negligence is rebuttable with an explanation from the owner that the event happened without any fault or neglect on the owner's part. I find that the owners have provided such an explanation here.

32. They say that up until the water escape, the filtration system functioned unremarkably and the respondents did not see any signs of water escape. The water escape occurred spontaneously overnight, and the owners discovered it the morning of February 4, 2018. They immediately called the strata's emergency number and notified their insurer. The strata has not provided any evidence to suggest the filtration system was in a state of disrepair or neglect.

33. Once the owners provide an alternative explanation, the onus shifts back to the strata to provide evidence that owners failed to take reasonable steps to prevent water escape. I find the strata has not done so.

34. There was no evidence of previous leaks from the filtration system, and no warnings from the strata about other strata lots suffering water filtration system leaks. The owners also say that Mr. Arora changed the filter cartridge every 6 months and monitored the functioning of the filtration system. I accept that the owners had no reason to believe the filtration system was in danger of failing. There is no dispute that when the owners discovered the leak, they immediately called the strata's emergency number.

35. Accordingly, I find that the strata has not established that the owners failed to meet the standard of care expected of owners in a strata building with respect to their water filtration unit.

36. I find that the strata has not proved that the loss on February 4, 2018, and the resulting payment of the insurance deductible, was caused by the owners' negligence.

Did the owners fail to obtain permission for the filtration system in contravention of the strata's bylaws, and if so can the strata recover its insurance deductible under section 133 of the SPA?

37. The strata argues that the respondents are liable under section 133 of the SPA, which says that a strata corporation may do what is reasonably necessary to remedy a contravention of its bylaws or rules, including doing work on or to a strata

lot, common property and common assets. Under section 133, the strata may also require a person who may be fined for the contravention to pay the reasonable costs of remedying the contravention.

38. The strata says that by installing a water filtration system without written permission the owners breached bylaw 7.1, which requires owners to obtain written approval before altering a strata lot in a way that involves common property located within the boundaries of a strata lot, or "wiring, plumbing, heating, air conditioning and other services." Alternatively, the strata says the owners breached bylaw 8.1 which requires owners to obtain written approval before altering common property.

39. The owners say they did not install the water filtration system and have not made any alterations to any plumbing or piping within their strata lot. They say the filtration system was installed prior to their purchase of the strata lot and was present in 2004 when they moved in. The strata provided no evidence to suggest that the owners installed the water filtration system. As the applicant in this dispute, the strata bears the burden of proving its claims on a balance of probabilities. I find that it has not established that the owners installed the water filtration system.

40. The strata's further alternative argument is that even if the owners did not install the water filtration system they are still responsible for it under bylaw 8.3, which says the strata may require that the owner, among other things, be responsible for any damage suffered or cost incurred by the strata as a result of alterations to common property. Leaving aside that the water filtration system is entirely contained in the cabinet under the owners' kitchen sink and does not appear to be an alteration of common property, there is no evidence that the strata required the owners, or the previous owners, to agree in writing to those conditions. Written agreement at the time of approval is mandatory for those obligations to take hold.

41. I conclude that there is insufficient evidence that the owners contravened any bylaw. Therefore, there is no basis for the strata to recover costs.

42. In summary, I find that in order to recover its insurance deductible, the strata had to establish that the owners were negligent. It did not do so. It also did not establish

that the owners breached any applicable bylaws. It follows that I dismiss the strata's claims.

TRIBUNAL FEES AND EXPENSES

43. As the strata was unsuccessful, in accordance with the Act and the tribunal's rules I find it is not entitled to reimbursement of its tribunal fees or expenses. The applicants did not claim any dispute-related expenses.

44. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against the owner.

ORDER

45. I dismiss the strata's claims and this dispute.

Micah Carmody, Tribunal Member