



Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Boothroyd et al v. The Owners, Strata Plan VR 2402*, 2019 BCCRT 1009

B E T W E E N :

Carol Boothroyd and Robert Andrew

APPLICANTS

A N D :

The Owners, Strata Plan VR 2402

RESPONDENT

A N D :

Murray McLeod and Luci Ethier

RESPONDENTS BY THIRD PARTY NOTICE

REASONS FOR DECISION

Tribunal Member:

Micah Carmody

INTRODUCTION

1. The applicants, Carol Boothroyd and Robert Andrew, own a ground level strata lot (SL73) in the respondent strata corporation The Owners, Strata Plan VR 2402 (strata).
2. This dispute is about water damage to SL73 resulting from a clogged drain on the terrace of strata lot 106 (SL106) on the third floor. The strata's contractor attended to emergency repairs and restoration of SL73 and the other damaged strata lot. The total cost of repair was less than the strata's \$10,000 insurance deductible. The strata requested that the applicants pay their portion of the repair costs, which the strata calculated as \$3,491.25.
3. The applicants seek an order that the strata pay the \$3,491.25 invoice it sent the applicants for repairs to SL73. They also seek an order that the strata clean all deck drains in an appropriate maintenance schedule and inform all owners and residents about their respective responsibilities for deck drain cleaning.
4. The strata says that the applicants are responsible for the costs to repair their own strata lot. If the applicants are not responsible, the strata seeks to recover the costs from the respondents by third party notice, Murray McLeod and Lucy Ethier (respondent owners). The respondent owners own SL106, which is located two stories above SL73. They have exclusive access to the terrace from which the water escaped. The strata says the respondent owners negligently caused the clogged deck drain.
5. The applicants and the respondent owners are self-represented. The strata is represented by a strata council member.
6. For the reasons that follow, I find that the strata must pay for the repairs to SL73.

JURISDICTION AND PROCEDURE

7. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over strata property claims 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 dispute parties that will likely continue after the tribunal's process has ended.

8. 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.
9. 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.
10. 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

11. The issues in this dispute are:
 - a. Can the strata charge the applicants for the repairs to their strata lot?
 - b. Was the water damage caused by the respondent owners' negligence?

POSITIONS OF THE PARTIES

12. The applicant owners say that given they did nothing wrong, it would be unfair for them to pay for the damage to their own strata lot. They say the strata did not tell them that they were responsible for the repairs until the repairs were complete. They say that their insurer denied their claim and they cannot find a policy that would have covered a 'rain water event'. They have no access to SL106's terrace

and could not clean the drains. They say the water damage was caused by the negligence of either the respondent owners or the strata for failing to maintain and clean the drains.

13. The strata says that under its bylaws, owners are responsible for repair of their own strata lots. Given that the water damage was to the interior of SL73, the owners must pay for the repairs. In the third party claim, the strata says that under bylaw 2(2) the respondent owners were responsible for the repair and maintenance of their terrace and deck drains. It says the respondent owners have indemnified the strata from the expense of any repair caused by their negligence, and therefore they must reimburse the strata for the repair costs.
14. The respondent owners say that maintenance of the deck drains was the strata's responsibility under the bylaws, and they were not negligent in maintaining their limited common property terrace.

EVIDENCE AND ANALYSIS

15. On or about October 17, 2017, water escaped from the terrace of SL106, which is limited common property. The strata says the cause was a clogged drain on SL106's terrace. The respondent owners did not actively dispute the cause or provide another explanation, so I accept that the clogged drain was the cause of the water escape.
16. The strata hired a contractor to attend to emergency repairs and restoration of SL73 and the other affected strata lot. Apparently, there was no damage to common property. The total cost of repairs was below the strata's \$10,000 insurance policy deductible.
17. On April 12, 2018, the strata invoiced the applicants for \$3,491.25. I infer that the applicants have not paid this invoice. The invoice is not in evidence, although the letter to the applicants that refers to the invoice is.

18. The strata submitted two invoices from the contractor, both dated November 28, 2017. One is for emergency work in the two affected strata lots, totalling \$3,895.50. The other is to 'rebuild' those strata lots, totalling \$6,016.50. The contractor's invoices do not allocate costs between the two strata lots. The strata says it divided the total cost of repair between the two affected strata lots, but it has not explained how it determined that the applicants owed \$3,491.25.

Can the strata charge the applicants for the repairs to their strata lot?

19. Under the strata's bylaws, an owner must repair and maintain the owner's strata lot, except for repair and maintenance that is the responsibility of the strata under the bylaws.

20. The strata says that there are no bylaws that impose an obligation on the strata to repair a strata lot. I agree, which is why it is curious that the strata instructed its contractor to repair and restore the applicants' strata lot.

21. The strata does not dispute the applicants' account that the strata instructed its contractor to address the immediate remediation as well as the final restoration of SL73 to its former condition. The applicants say the contractor advised them that the strata's insurance would cover it. While a contractor cannot bind the strata to do something contrary to the bylaws, I find that the owners reasonably relied on the contractor's statement, together with the strata's failure to inform the owners that they were responsible for the repairs until after the repairs were completed.

22. In an email to the strata's property manager, the applicants argued that they were denied the opportunity to limit the cost of repairs to their strata lot by doing some or all of the work themselves. This argument has merit, in my view, because a strata that proceeds to repair a strata lot while representing that it is paying for the repairs deprives the owner of several choices. These choices include the choice of whether to complete the repairs, the choice of contractors, the choice to complete the repairs in stages, and the choice to complete some or all of the repairs on their own. While in many cases it may be convenient and cost-effective to have the strata's

contractors that attended to the emergency complete all the repairs, this does not excuse the strata's failure to seek the owners' consent.

23. In order for a strata to charge an owner, it must find its authority in either the SPA or the bylaws. In my view, there is only one provision in the SPA that allows the strata to charge an owner for repairs completed to the owners' suite without the owner's approval. That is section 85 of the SPA, which provides that if a public or local authority issues a notice or order requiring work to be done to the strata lot and the owner refuses to complete the work, the strata may have the work completed and the owner must reimburse the strata for the cost of the work. There was no evidence of such a notice or order here.
24. The invoice that the strata is asking the applicants to pay is a non-liable amount, as it cannot be included in the amount of a Certificate of Lien filed under section 116 of the SPA. In order to collect a non-liable amount, the strata must have the authority to do so under a valid and enforceable bylaw or rule that creates the debt. (See *Ward v. Strata Plan VIS #6115*, 2011 BCCA 512).
25. The strata relies on bylaw 35(3), which in part provides that an owner will pay for any damage, to the extent that the strata's insurance proceeds do not, to common property or a strata lot resulting from the owner's or others' acts, omissions, negligence or carelessness. It is not disputed that the applicants were not negligent, and did nothing to cause or contribute to the damage to their strata lot. Accordingly, bylaw 35(3) does not permit the strata to charge the applicants for the repair costs. Whether it permits the strata to charge the respondent owners is discussed below.
26. In *Tam v. The Owners, Strata Plan BCS 282*, 2017 BCCRT 93, the tribunal ordered the strata to reimburse the owner for a contractor's emergency repair invoice that was charged back to the owner. The damage was entirely within the owner's strata lot and neither the owner nor the strata were at fault. The vice chair found there was no evidence to suggest that the strata and owner had discussed the emergency repair costs or that the owner had agreed to pay the costs. The strata had no authority to charge these costs to the owner. The owner also sought an order that

the strata pay for all the repairs (not just the emergency repair costs) and submitted an estimate because the work had not been done. The vice chair confirmed that the owner was responsible for the cost of the remaining repairs to the owner's strata lot because the strata had not been negligent.

27. Although *Tam* is not a binding precedent, I find it persuasive. A bylaw that makes owners responsible for repair of the owner's strata lot does not give the strata a right, after having repaired an owner's strata lot without addressing responsibility for costs, to recover those costs from the owner. The strata must find its authority to impose charges on owners in the Act or the bylaws, and there was no such authority here.
28. Much of the applicants' argument and evidence related to its assertion that the strata was negligent in maintaining the deck drains. Given my conclusion that the strata had no authority to charge the owners for the repairs its contractors completed, it is not necessary to decide whether the strata was negligent.

Was the water damage caused by the respondent owners' negligence?

29. The strata relies on bylaw 35(3) which, as describe above, says owners must pay for any damage to common property or a strata lot if the damage was caused by their acts, omissions, negligence or carelessness. I find that the language used in this bylaw imports a negligence standard, which means that if the strata wants to recover its costs, it must establish that the respondent owners were negligent. See *The Owners, Strata Plan BCS3084 v. Goldin*, 2019 BCCRT 793, and cases cited therein.
30. The respondent owners' terrace is shown on the strata plan as a terrace, as opposed to a balcony or a patio. The respondent owners argue that some bylaws only apply to decks and balconies as opposed to terraces. I have not addressed this argument because it would not affect the outcome. In these reasons I use the term 'deck' and 'terrace' interchangeably given that much of the evidence does so as well.

31. The respondent owners' terrace is approximately 950 square feet. Until 2010, the deck surface was brick. The owners say, and the strata has not disputed, that there were 2 locations where 4-inch perforated stainless steel drain grates were positioned to drain surface water. It was the owners' responsibility to ensure any debris around the drain grate was removed to prevent water buildup. In 2010, the strata had a new roof membrane installed and replaced all deck bricks with 18-inch square concrete pavers, installed into pedestals, with a 1/8-inch gap on all sides to facilitate rain water runoff.
32. The strata has not disputed, and I find, that there were no visible drain grates on the owners' deck since the concrete pavers were installed. The drains are entirely beneath the concrete pavers.
33. Who was responsible for repair and maintenance of the deck drains? Section 72 of the SPA says a strata must maintain and repair common property but allows the strata to, by bylaw, make an owner responsible for the repair and maintenance of limited common property that the owner has a right to use.
34. Bylaw 2(2) says that an owner who has the use of limited common property must repair and maintain it to the satisfaction of council, except for repair and maintenance that is the responsibility of the strata corporation under the bylaws.
35. The bylaws place responsibility with the strata for repair and maintenance of limited common property that occurs less often than once a year. The strata is also responsible if the property in question is the structure of a building, the exterior of a building, or "chimneys, stairs, balconies and other things attached to the exterior" of a building.
36. The Strata submits that deck drain cleaning is a maintenance task that occurs on an ongoing basis. Bylaw 2(3)(b) sets out how owners may clean their decks and balconies. While it is clear that deck cleaning is the owners' responsibility, I do not agree with the strata that the bylaws make deck *drain* cleaning the owners' responsibility. I agree with the applicants that cleaning the surface of the deck

pavers and cleaning the deck drains underneath are different tasks. There is nothing in the bylaws about how owners should clean or maintain their deck drains.

37. The strata did not dispute that after the pavers were installed in 2010, the drains were hidden and could only be discovered by lifting the large concrete pavers and searching for the drains. When the Strata cleaned the drains in response to the 2017 leak, small marker holes were drilled in the patio pavers to indicate the position of the drains underneath. I find it would be unreasonable to expect owners to remove the large, heavy pavers and clean the deck drains beneath them, particularly before the locations of the drains were marked. I also find it would be unreasonable to expect owners to do this task more than annually. This finding is supported by the strata's council's choice, at its January 25, 2018 strata council meeting, to advise owners not to remove deck pavers to ensure no damage occurs to the membrane.
38. I find that the deck drains are limited common property that required repair or maintenance less often than once per year. In part, I base this finding on the evidence that that no party, between 2010 and 2017, conducted any repair or maintenance on the drains. I also find that the drains are integral parts of the exterior of the building as they run through the deck structure, which forms the roof over the strata lots below. I therefore find that maintenance of the drains was the strata's responsibility.
39. The owners' responsibility was limited to cleaning the terrace and the visible surfaces of the pavers. The strata argued that the respondent owners negligently failed to clean their terrace, and that the drains were clogged due to excess debris from the respondent owners' planters.
40. There is no indication that the planters were in contravention of the bylaws. There is also no indication that the respondent owners were ever made aware of any potential issue with debris clogging the drains prior to the water escape incident.
41. The strata relied on a January 14, 2018 memo from R (the strata did not explain who R is) to the strata council president. In the memo, R noted that most of the

material buildup on the drains was leaf litter and soils. He also mentions other plant material, and installer waste material that “may have contributed to blocking the drains.” The memo was inconclusive about the source of the plugged drain. I find that the reference to installer waste material confirms what the applicant and respondent owners allege, which is that the strata had not cleaned the drains since the pavers were installed in 2010.

42. While that the respondent owners were required under the bylaws to clean and maintain their terrace, they provided comprehensive evidence showing that they did so. Their evidence included a detailed statement from Ms. Ethier, which I accept, explaining how she meticulously cleaned the terrace and the surface of their deck. They also included photos of the various tools they used, such as scrub brushes, brooms and an industrial vacuum. The respondent owners’ conduct did not fall below the standard expected of a reasonable owner. Not only did they comply with the relevant cleaning bylaws, the evidence shows that they asked the strata council to provide all residents with guidance on cleaning the pavers.
43. I find that the respondent owners were not negligent in maintaining their terrace. As a result, they are not required to reimburse the strata for the repair costs. Because the strata paid for the repairs, I do not need to determine whether the strata was negligent in failing to inspect and maintain the deck drain.

Other orders requested

44. The applicants seek an order that the strata clean all deck drains in an appropriate maintenance schedule and inform owners and residents about their responsibilities for deck drain cleaning. I find that this issue is moot. The minutes from the January 25, 2018 strata council meeting state that owners are to sweep up debris and not to use power washers. They are also not to remove deck pavers, as the strata will arrange for regular inspection of the drains by qualified personnel to ensure no damage occurs to the membrane. This clarifies for owners and residents the responsibilities for deck drain cleaning. There would be no point in ordering the strata to do what it is already doing, so I make no order.

TRIBUNAL FEES AND EXPENSES

45. Under section 49 of the CRTA, 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 not to follow that general rule. I therefore order the strata to reimburse the applicants for tribunal fees of \$225.00. The applicants did not claim any dispute-related expenses. The strata was unsuccessful in the third-party claim, so I make no order for reimbursement of fees for that claim.
46. The strata corporation must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against the applicants and respondent owners.

ORDERS

47. I order that the strata must not charge the applicants for any costs associated with the repairs conducted to SL73.
48. I order the strata, within 30 days of this dispute, to pay the applicants \$225.00 for their tribunal fees.
49. The applicants are entitled to post-judgement interest under the *Court Order Interest Act*, as applicable.
50. I dismiss the rest of the applicants' claims.
51. I dismiss the strata's claim against the respondent owners.
52. Under section 57 of the CRTA, a party can enforce this final tribunal decision by filing a validated copy of the attached order in the Supreme Court of British Columbia (BCSC). The order can only be filed if, among other things, the time for an appeal under section 123.1 of the CRTA 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 a BCSC order.

53. Orders for financial compensation or the return of personal property can also be enforced through the Provincial Court of British Columbia (BCPC). However, the principal amount or the value of the personal property must be within the BCPC's monetary limit for claims under the *Small Claims Act* (currently \$35,000). Under section 58 of the CRTA, the applicants can enforce this final decision by filing a validated copy of the attached order in the BCPC. The order can only be filed if, among other things, the time for an appeal under section 123.1 of the CRTA 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 a BCPC order.

Micah Carmody, Tribunal Member