



Civil Resolution Tribunal

Date Issued: September 13, 2019

File: ST-2018-005997

Type: Strata

Civil Resolution Tribunal

Indexed as: *Caldwell v. The Owners, Strata Plan 166*, 2019 BCCRT 1081

BETWEEN:

Alan Lawrence Caldwell

APPLICANT

AND:

The Owners, Strata Plan 166

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Trisha Apland

INTRODUCTION

1. The applicant, Alan Lawrence Caldwell (owner), owns a strata lot in the respondent strata corporation, The Owners, Strata Plan 166 (strata).
2. This dispute is about water damage to the owner's strata lot from several incidents of water ingress in 2017 and 2018. The owner alleges that the strata failed to

properly maintain the roof, resulting in water intrusion into his strata lot causing damage to the ceiling, walls and floors. The owner says his tenant moved out because of the damage. The owner claims \$11,900 in lost rental income from June 15, 2017, the date the tenant moved out, to August 15, 2018. He claims a further \$850 for each month thereafter, until the matter is resolved. As for the repairs, the owner claims \$3,500 to repair the bamboo floors and \$8,000 to replace the drywall, inspect the ceiling for further leaks, and repaint. The owner says the roof still leaks and asks for an order that the strata repair the roof.

3. The strata admits the roof leaked and caused damage to the owner's strata lot. However, the strata denies that it was negligent. It also denies that the roof still leaks. I infer the strata is asking me to dismiss the owner's claims.
4. The owner is represented by a lawyer, Donald R. McLeod. The strata is represented by a strata council member.
5. For the reasons set out below, I allow the owner's 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* (CRTA). 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. Though I found that some aspects of the parties' submissions called each other's credibility into question, I find I am properly able to assess and weigh the documentary evidence and submissions before me without an oral hearing. In *Yas v. Pope*, 2018 BCSC 282, the court recognized that oral hearings are not always necessary when

credibility is in issue. Further, bearing in mind the tribunal's mandate of proportional and speedy dispute resolution, I decided to hear this dispute through written submissions.

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. Further, it may make any order or give direction in relation to a tribunal proceeding it thinks necessary to achieve the objects of the tribunal in accordance with its mandate.
9. As a preliminary issue, the strata provided an undated report by its roofing company Parker Johnston Industries Ltd. The report was authored by its repair and service technician. The report provides an opinion on the roof as assessed on visual inspection. The strata says it received the report in June 2019. However, the report does not say when the inspection was done, and again, it is undated. I find the report does not meet the requirements of expert evidence under tribunal rules 114 as it also does not state the technician's education, training or experience. For these reasons, I have put no weight on the report in rendering my decision.
10. The applicable tribunal rules are those that were in place at the time this dispute was commenced. Under section 123 of the CRTA as amended, 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.
11. Tribunal documents incorrectly show the name of the respondent as The Owners, Strata Plan VIS166. Based on section 2 of the SPA, the correct legal name of the strata is The Owners, Strata Plan 166. Given the parties operated on the basis that the correct name of the strata was used in their documents and submissions, I have exercised my discretion under section 61 of the current CRTA to direct the use of the strata's correct legal name in these proceedings. Accordingly, I have amended the strata's name above.

ISSUES

12. The issues in this dispute are:
- a. What is the strata's obligation to maintain and repair the owner's strata lot?
 - b. Was the strata negligent in maintaining and repairing common property?
 - c. To what extent if any, is the strata liable for the owner's alleged losses?
 - d. Should I order the strata to repair the roof?

BACKGROUND AND EVIDENCE

13. In a civil claim such as this, the owner must prove his case on a balance of probabilities. While I have read all of the parties' evidence and submissions, I only refer to what is necessary to explain and give context to my decision
14. The strata consists of 15 strata lots in a four storey building with a flat roof. The owner's strata lot is a two-bedroom unit on the top floor of the building. The roof is directly above the owner's strata lot.
15. I find the relevant bylaws are those filed by the strata in the Land Title Office on January 28, 2013.
16. The owner says that sometime in late 2016 or early 2017, one or more leaks developed in the roof of the strata building causing damage to his strata lot. The owner says he noticed a leak in January 2017 when his tenant found water intrusion into the master bedroom.
17. The parties' emails show that the owner notified a strata council member of the leak on January 26, 2017. The owner was out of the country at the time. The owner received no response to his email. The owner emailed again on January 30, 2017. A council member replied and confirmed that it had received his email notifying it of the leak. A council member agreed to look at the roof and "try to seal around the

flashing”. However, the council member then did nothing, and the roof was not inspected or repaired. This is undisputed.

18. When the owner returned to Canada on about March 20, 2017, he contacted the strata about the status of the roof repairs. The council member said he assumed the owner or his tenant had “done something about it” themselves. It is undisputed that the owner had never fixed or agreed to fix the roof. It is also undisputed that despite the owner’s follow-up email, the strata did not inspect the roof or repair it.
19. On April 22, 2017, the owner discovered water ingress from the ceiling of his strata lot. The owner notified the strata that water had damaged 5 rows of boards. I infer from his emails he meant the bamboo flooring in the tenant’s bedroom.
20. There is no evidence of water ingress between the reported January 2017 leak and the reported April 22, 2017 leak. There is also no evidence that the strata inspected or repaired the roof between these dates. I find the strata did not take any steps until April 24, 2017 when it contacted its roofing company, Parker Johnston, about the leak. The Parker Johnston invoice shows that it attended the property on May 1 and 4, 2017, swept standing water, sealed the plumbing stacks (pipe) and vent, cleaned out a plugged downspout, and dried and sealed an attic vent. After Parker Johnston’s repairs, the owner reported no further leaks for about 1.5 years.
21. The Parker Johnston invoice does not specify the cause of the leak and I have no expert evidence about it. The parties seem to agree that the water likely came from a faulty seal around the pipe on the roof.
22. According to the strata’s chronology, the strata started organizing repairs to the owner’s strata lot in about May 2017. However, the repairs did not start until November 2017 and were not completed until the end of March 2018. Apart from the owner’s bamboo flooring, the strata repaired the owner’s strata lot, including the ceiling and wall, at its cost.
23. On December 29, 2018, the owner discovered another leak. The owner informed the strata that his roommate found water leaking down the same wall and ceiling

that was repaired after the 2017 incidents. The strata council president says he immediately inspected the leak and caulked “the old leak area” on December 29, 2018. He says he cleared the central drain and swept a “large amount” of standing water down the drain that same day. Though pooling water remained, he says there were no further reported leaks. The strata council president said he contacted Parker Johnston to repair the leak but due to the long weekend, they did not immediately attend. The Parker Johnston invoice shows that it attended the property on January 2, 2019 and re-sealed the plumbing stacks. Since there is no evidence of any subsequent leak or repair work, apart from the sealant, I infer the sealant stopped the leak.

24. As for the damage, the owner’s photographs show some water damage to his strata lot wall. The strata says it did not assess this new damage or repair the owner’s strata lot because it is waiting until the tribunal process is complete.

ANALYSIS

What is the strata’s obligation to maintain and repair the owner’s strata lot?

25. Sections 3 and 72 of the Strata Property Act (SPA) require the strata to repair and maintain common property, subject to any bylaws placing the obligation on an owner. The relevant strata bylaws are sections 2 and 29. Bylaw 2 says that an owner must repair and maintain the owner’s strata lot, except for repair and maintenance that is the responsibility of the strata corporation under the bylaws. Bylaw 29 obligates the strata to repair and maintain common property and certain limited parts of a strata lot, including the building structure, the building exterior and other parts not relevant here.
26. The law says the strata is not an insurer. Unless the strata was negligent in repairing and maintaining common property, the strata is not liable to pay an owner’s expenses for repairing an owner’s strata lot that are the owner’s responsibility under the bylaws (see *Kayne v. LMS 2374*, 2013 BCSC 51).

27. There is no particular dispute that the leak's origin was likely a faulty seal in the roof. It is agreed that the roof is common property. I find the strata was required under the SPA and its bylaws to maintain and repair the roof, including any leaks.
28. The strata plan filed at the LTO does not identify the interior ceilings or interior walls of a strata lot as common or limited property. Thus, under SPA section 68, they are part of the strata lot. Unless they are part of the building structure, I find the bylaws do not require the strata to maintain or repair them. The owner does not show where the damaged wall was located on the strata plan or say that the damage was to any structural parts of the building. Therefore, I find the damage to the wall and ceiling were the owner's responsibility to repair and maintain under bylaw 2. The owner acknowledges that the bamboo floors were his responsibility to maintain and repair.

Was the strata negligent in maintaining and repairing common property?

29. The owner claims that he should not be responsible to repair damage to his strata lot because it was caused by the strata's negligence (failing to properly maintain and repair the roof). As mentioned above, the owner asks for an order that the strata pay to repair the bamboo flooring, pay his lost rental income and inspect and repair the damage caused by the 2018 leak.
30. Absent any express limitation in the strata's bylaws, the strata is liable for damage to an owner's strata lot caused by its negligence. I find the bylaws provide no such limitation. Therefore, the relevant question is whether the strata breached its standard of care in its maintenance and repair of the roof and if so, whether its breach caused the owner's damage and loss. The standard of care is one of reasonableness rather than perfection (*see Wright v. Strata Plan No. 205*, 1996 CanLII 2460, *aff'd* 1998 CanLII 5823 (BCCA)).
31. The strata produced a building condition assessment and capital plan (capital plan) dated February 21, 2015 that prioritized common property repairs based on condition, life cycle, costs, and budget. The capital plan states that the roof was 17 years old, with a life expectancy of 25 years. The inspection states that there was

“only one roof drain servicing the roof and evidence of ponding water during wet months”. It rates the roof in “good” condition with a #3 priority on a 4-point priority scale for repairs and replacements, with #1 being “immediate”. It shows the cost of a roof replacement was estimated at \$96,000 and scheduled its replacement for 2023.

32. The owner submitted photographs of the roof. He argues that the photographs show a “clear lack of maintenance in that uneven areas of the roof were allowed to develop, corrosion occurred in and around the vents with no indication repairs had been attempted.” I have reviewed the photographs and agree the roof appears uneven and worn. However, roofs wear even with regular maintenance and I have no evidence that the unevenness was caused by a lack of maintenance. As for the ponding water, it is uncontested that water pools on the flat roof. I find the evidence does not support a finding that the ponding water caused the leak. Once the pipes were caulked, there were no further leaks despite evidence of continued ponding. The evidence does not show whether the caulking was applied below the ponding water line. I am also not persuaded, without more evidence, that the presence of corrosion means the strata had not “attempted” repairs. I find the photographs are insufficient on their own to establish a lack of maintenance or that the strata was negligent.
33. The owner argues that I also should infer the strata’s negligence because of “a lack of any evidence of inspection or repair or maintenance” despite his requests for such information. The owner relies on the court decisions in *Barker v. McQuahe*, B.C.C.A. 1964, 49 WWR 685, *Murray v. Saskatoon*, [1952] 2 A.L.R. 499 (Sask. C.A.), *Barnes v. Union Steamships Ltd.*, [1954] 4 A.L.R. 267, *McTavish v. MacGillivray and others*, SCBC Vancouver Registry B951646, July 18, 1997 (unpublished). These cases are mostly examples where the court drew an adverse inference against a party for failure to produce a witness with relevant information, or with the only relevant information. I find the owner has not established here that the requested information exists. The strata says it produced all the requested records. Apart from Parker Johnston’s invoices above, I find it equally likely that

there were no additional records because the roof did not need to be repaired and the strata kept no maintenance records.

34. Despite a lack of records, the strata says its council members would clean and “check” the roof at least “a couple time per year and after heavy wind storms”. It says they had checked the roof a few months before the January 2017 leak. Further, the strata submits that the owner himself was a prior council member, knew the roof was regularly checked, and had participated in checking the roof. Though I find he had the opportunity in reply, the owner did not specifically refute the strata’s submission on this point. Since there is no contrary evidence, I accept that the strata checked and maintained the roof as it described but kept no records. Apart from the repair delay in 2017, which I turn to next, I find the owner has not established that the strata should have done more routine roof maintenance and repairs.
35. I find the strata delayed inspecting and repairing the roof for over three months after receiving notice of the leak on January 28, 2017. I find the strata provided no reasonable explanation for its delay. In the circumstances, I find the strata’s delay was unreasonable. I find it was foreseeable that an unrepaired leaky roof would damage the strata lot directly underneath it. I find it more likely than not that the leaky roof caused the alleged damage. I find the bamboo flooring was damaged around April 22, 2017, after the strata had known the potential for leaking for about 4 months. I find the strata should have acted promptly to inspect the common property for the leak and take necessary steps to stop it. I find the strata’s lack of response fell below a reasonable standard of care. Accordingly, I find the strata liable for the damage caused by the 2017 leak.
36. As for the 2018 leak, I find the strata acted quickly to repair the roof after being notified of it. As mentioned, a strata member immediately sealed the pipe and contacted Parker Johnston, who performed additional repairs within 5 days. In those intervening 5 days, there is no evidence of further leaks.

37. In making my decision, I am mindful of the approach taken by the court in *Weir v. Owners, Strata Plan NW 17*, 2010 BCSC 784. The court said there can be “good, better or best” solutions available to repair and maintain common property. The strata must act in the best interest of all owners and balance competing priorities and needs. I find the strata’s solution to repair the roof fell within the strata’s capital planning, which did not schedule a roof replacement for several more years. A full roof replacement might have been a “best” solution in terms of reducing the risk of a further incident. However, a roof replacement is costly, and I find the law does not require the “best” solution. I find it was reasonable for the strata to hire a professional roofing company in 2017 to fix the leak. Even though the roof again leaked, I find the strata was permitted to rely on the professional’s work. There is also no expert evidence before me on the exact cause of the 2018 leak. Thus, I do not know if it was caused by a faulty repair, caulking deterioration, lack of maintenance, normal wear, or some other cause.

38. The owner has the burden of proof. I find he has not established that the strata acted negligently and caused the December 2018 leak. Accordingly, I find the strata is not liable in negligence for any damage to the owner’s strata lot caused by the 2018 leak. As stated above, the bylaws provide that the owner is responsible to repair his own strata lot. Therefore, I also find the strata is also not strictly liable under the bylaws for these repairs.

To what extent if any, is the strata liable for the owner’s alleged losses?

The Bamboo Floors

39. Due to the strata’s negligence in delaying the repair of common property in 2017, I find the strata is liable for the owner’s bamboo flooring that was damaged from the leak.

40. The owner says the strata’s contractor scratched the floor in the hallway when performing the other work. The owner provided photographs of the scratched floor establishing it exists. The emails show the strata asked the contractor about the scratch and it denied causing the scratch. I find there is insufficient supporting

evidence to conclude that the contractor caused the scratch. I find the strata is only liable for the water damaged floor.

41. There is suggestion in the evidence that the owner had an insurance policy that might have insured the floors. However, the owner submitted no insurance documents and does not say whether his insurer covered the flooring loss. Though the owner would not be entitled to double recovery, the strata does not argue that the owner's loss was covered under his insurance policy. Since neither party says it was covered, I infer it was not.
42. In his affidavit, the owner explained that he wants the strata to pay to install the "undamaged floor and pay for any extra flooring that is required, the cost of which I do not know yet." The owner estimated the cost in his Dispute Notice as between \$2,500 to \$3,500. However, he provided no quote or other evidence to establish the value. Therefore, I find I have insufficient evidence to quantify the owner's loss.
43. As I am not able to quantify the loss, I find the appropriate order is for specific performance under section 123(1)(a) of the CRTA (as amended). I find the strata must at its cost, take immediate steps to replace the bamboo floors with equivalent floors in the owner's strata lot that were damaged by water in 2017 and to complete the work within 30 days, or at a later date on written agreement by both parties. I expect in carrying out the work that the strata will adhere to the notice requirements under the SPA and the owner will cooperate with the strata to allow it access to replace and install the floors.

The Lost Rent

44. As mentioned, the owner is claiming \$850 per month in lost rental income from the date his tenant moved out on June 15, 2017 until this matter is resolved. The owner provided evidence establishing that he had been earning rental income of \$850 per month. The undisputed evidence is that the owner was not renting the damaged bedroom after June 2017. Based on the photographs and description of the repairs, I find the work was extensive enough that the room was not rentable until the work was done.

45. The strata says the owner failed to mitigate his loss by not repairing the floors himself and seeking a new tenant. In reply, the owner says that he is not qualified to repair the floors himself. He offers no explanation, such as a lack of ability to pay, as to why he did not have someone else repair the floor.
46. I find it was not reasonably foreseeable that the owner would leave the floors unfinished after the other work was complete. I find the owner had a duty to mitigate his loss by finishing the floors to make the suite rentable. I find the owner is entitled to damages for his loss of rental income but limited to the date at which he should have reasonably mitigated his loss.
47. The strata argues that it should not be responsible for loss caused by the owner delaying the repairs after the 2017 leak. The strata says it was “told verbally” by its contractor on “at least a few occasions” that the owner denied access and delayed the job. The owner disputes that this occurred. The strata provided no corroborating evidence, such as a witness statement from the contractor. Therefore, I do not accept the strata’s submission on this point.
48. However, I find there is evidence that the owner delayed the job for about 2.5 weeks. The emails show that on December 11, 2017, the strata told the owner that the contractor was ready to install drywall by December 22, 2017. The owner asked it to hold off for personal reasons. I find the owner was only ready to resume the job by about January 10, 2019. The emails suggest the work was potentially delayed because of the owner’s indecision about flooring, but they are inconclusive.
49. As mentioned above, the job was complete by the end of March 2018. I find that neither party provided any reason that the repairs could not have been finished and the room available for possession by April 1, 2018. Accounting for the owner’s 2.5 week, delay, I allow the owner’s claim of \$850 per month from the date of vacancy, June 15, 2017 to March 15, 2018. I find the strata is required to pay the owner a total of \$7,650.00 (9 months x \$850) for loss of rental income.

2018 Water Damage

50. The owner claims \$8,000 to replace the drywall, inspect the ceiling for further leaks, and to repaint. The owner provided no estimate or other evidence to establish the value of this work and there is no evidence of a further leak. In any event, the bylaws say that it is the owner who must maintain and repair his strata lot. Since, I did not find the strata negligent regarding the 2018 leak, I find the strata is not liable for the claimed loss. I find the fact that the strata previously repaired the strata lot does not mean that it must do so again in similar circumstances.
51. Notwithstanding its bylaws, the strata says it is willing to repair the water damage once the owner permits access. Apart from the strata's willingness, there is insufficient evidence that the parties entered into an agreement that the strata would make these repairs. Since I found the strata neither negligent nor strictly liable for the 2018 loss, I find it would not be appropriate to order the strata to inspect and repair the damage within the owner's strata lot. Though I note the parties are at liberty to make their own voluntary arrangements. I dismiss this aspect of the owner's claims.

Should I order the strata to repair the roof?

52. The owner asks for an order that the strata repair the roof as necessary so that further leaks do not occur. I found the strata repaired the leak in January 2019 by applying caulking. There was no evidence of any further leak since that repair, and the owner provided no evidence, such as an expert report, to establish that roof repairs are necessary. Therefore, I dismiss this aspect of the owner's claim.

TRIBUNAL FEES, EXPENSES AND INTEREST

53. 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. Since the owner was partially successful in this dispute, I will allow ½ his fees and expenses. The owner requests \$346.92 for copies of the strata contractor's repair estimates and documents, about \$58.25 for

photocopying and an undisclosed amount for registered mail. The owner provided no receipts for these expenses. However, it is the tribunal's practice to allow reasonable expenses under \$50 even without receipts. On a judgment basis, I therefore, order the strata to reimburse the owner \$112.50 in tribunal fees and \$25 in dispute-related expenses for a total of \$137.50.

54. 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.
55. The *Court Order Interest Act* (COIA) R.S.B.C. 1996, c. 79, as amended, applies to the tribunal. The owner is entitled to pre-judgement interest on the \$7,650.00 loss of rental income under s.1(2) of the COIA. I calculate the pre-judgement interest to be \$193.90.

DECISION AND ORDERS

56. I order that the strata:
 - a. take immediate steps at the strata's expense, to replace the water damaged floors in the owner's strata lot with equivalent floors, and complete the work within 30 days, or at a later date on written agreement by both parties,
 - b. pay the owner a total of 7981.40, calculated as,
 - i. \$7,650.00 for loss of rental income,
 - ii. \$193.90 in prejudgment interest under the COIA,
 - iii. \$137.50 in tribunal fees and dispute related expenses.
57. The owner is also entitled to post-judgement interest under the COIA as applicable.
58. The owner's remaining claims are dismissed.
59. Under section 57 of the CRTA, as amended, 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 CRTA, as amended, 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.

60. 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 CRTA, as amended, the owner as 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 CRTA, as amended, 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.

Trisha Apland, Tribunal Member