



Civil Resolution Tribunal

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Civil Resolution Tribunal

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B E T W E E N :

The Owners, Strata Plan VR 588

APPLICANT

A N D :

LORRAINE MARR and LEIGH MARGETTS

RESPONDENTS

A N D :

The Owners, Strata Plan VR 588

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

J. Garth Cambrey, Vice Chair

INTRODUCTION

1. The applicant (and respondent by counterclaim), The Owners, Strata Plan VR 588 (strata), is an airspace leasehold strata corporation existing under the *Strata Property CRTA* (SPA). The respondents (and applicants by counterclaim), Lorraine Marr and Leigh Margetts (collectively owners), are leasehold tenants of a strata lot (304) in the strata.
2. The strata is represented by a member of its strata council. The owners are represented by Lorraine Marr.
3. The strata sought payment of an alleged agreed payment from the owners. The strata's claim was settled during facilitation and is not before me.
4. In their counterclaim, the owners say the strata is responsible to repair "glass, seals and flashing" relating to a skylight above the roof access stairs in 304 (skylight). They seek orders for the skylight repair and that an "advanced good faith payment", which I infer relates to the strata's claim, "be forgiven". The details of the "good faith payment" and the meaning of "be forgiven" are unclear, however, I find that claim of the owners was related to the strata's claim and settled during facilitation. Therefore, I find the owners' claim that their "advanced good faith deposit be forgiven" is also not before me.
5. For the reasons that follow, I order the strata to replace the cracked skylight glass and related seals, and repair or replace the exterior flashing located at the top of the skylight.

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 CRTA* (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. I decided to hear this dispute through written submissions. I am satisfied an oral hearing is not required as I can fairly decide the dispute based on 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 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 CRTA and the tribunal rules, in resolving this dispute the tribunal may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the tribunal considers appropriate.

ISSUES

10. The issues in this dispute are:
 - a. Is the skylight common property (CP)?
 - b. If yes, can the strata, by bylaw, limit its responsibility for repair and maintenance of the CP skylight?
 - c. Is the strata responsible to repair the glass, seals and flashing of the skylight?

BACKGROUND, EVIDENCE AND ANALYSIS

11. I have read all the submissions and evidence provided but refer only to information I find relevant to provide context for my decision.

12. In a civil proceeding such as this, the applicant owners must prove their counterclaim on a balance of probabilities. As I have noted, the strata's claim has been resolved and is not before me.
13. The strata was created in January 1979. It is located in Vancouver, B.C. and consists of 30 strata lots. As noted on the strata plan, some strata lots have stair access to the roof level where a limited common property deck designated for their exclusive use is located. The stair access is identified as part of the strata lot on the strata plan. The owners' strata lot is one that has roof access. A sloped roof above the stairs, stands above the roof level to allow roof access. The sloped roof contains the skylight that forms the subject of this dispute.
14. The skylight itself consist of 2 separate glass units within a metal frame.
15. On July 5, 2006, the strata filed a complete new set of bylaws at the Land Title Office (LTO). Three subsequent bylaw amendments have been filed at the LTO, but those amendments are not relevant to this dispute. I find the Standard Bylaws under the SPA do not apply. The bylaws relevant to this dispute are summarized as follows:
 - a. Bylaw 2(1) states an owner is responsible for repair and maintenance of their strata lot, except for repair and maintenance that is the responsibility of the strata.
 - b. Bylaw 11(2) states the strata is responsible for repair and maintenance of common property.
 - c. Bylaw 11(4) states the strata is responsible for repair and maintenance of strata lots but the duty to repair and maintain is restricted to the exterior of a building and doors and windows on the exterior of a building or that front on common property, among other items that do not apply here.
 - d. Bylaw 11(5) states that notwithstanding other subsections of bylaw 11, the strata will generally repair or replace skylight glass on the exterior of the building only if there is water ingress into a strata lot or the glass is included in

a replacement program involving the strata. Broken seals in double-paned glass, water between double panes of glass, and discolouration of glass is not reason enough for the strata to repair or replace the glass.

e. Bylaw 11(6) states an owner may “opt to replace or repair glazing” that does not meet the strata’s criteria and sets out when the strata will consider paying for replacement glass or repairs.

16. The owners provided submissions about a crack in the skylight glass that allegedly occurred in 2012 and was replaced by the strata in December 2016. The owners provided portions of an estimate dated April 2016 to replace the skylight glass from a contractor (Unity) that noted the skylight system no longer met the building code. I place no weight on the Unity evidence as the glass was replaced after the letter was obtained and there was no supporting evidence provided to confirm whether the existing skylight system meets current building codes.

17. The owners say the replacement glass was installed by the strata’s contractor (Vancouver Glass) and that it also cracked. The strata says the glass that cracked was installed by the owners at their cost. Given my findings below, it is not necessary that I determine who replaced the glass unit that is now cracked.

18. In about March 2018, the owners advised the strata there was a leak in the skylight and requested it be repaired. The strata arranged for a service person from Vancouver Glass to attend 304. A different representative from Vancouver Glass provided his opinion on the cracked glass in March 2018 suggesting it was the poor design of the skylight system and that the entire skylight system should be replaced. He also suggested the representative that viewed the glass was not concerned with safety and that water could not enter 304 as a result of the cracked glass. Water tests were performed on the skylight in June 2019, by members of the strata council, and in August 2019, by the strata’s contractor, Columbus Construction and Restoration Ltd. (Columbus).

Is the skylight common property (CP)?

19. It is unclear if the parties agree that the skylight in question is CP as some evidence provided by the owners refers to limited common property. For the following reasons, I find the skylight is CP.
20. Section 1(1) of the SPA states that CP includes parts of a building shown on a strata plan that is not part of a strata lot. Here the strata plan identifies the roof areas as CP. The strata plan also identifies the sloped part of the roof, where the skylights are located, as CP. For example, this is shown on section view of strata lot 15 on page 37 of the plan.
21. Based on the strata plan, the skylight is clearly not part of the strata lot, but even if it was, bylaw 11(4) would make the skylight (a window) part of the strata's responsibility because it fronts on CP.

Can the strata, by bylaw, limit its responsibility for repair and maintenance of the CP skylight?

22. Although neither party argued the validity of bylaws 11(5) and (6), both parties interpreted the bylaws to support their respective positions.
23. Section 72 of the SPA says the strata must repair and maintain CP, unless it is limited common property or identified in the *Strata Property Regulation* (regulation). There is no regulation that permits the strata to make an owner responsible for repair and maintenance of CP. Therefore, I find the strata's bylaws 11(5) and 11(6) noted above, that purport to limit responsibility of the strata for CP skylight repairs, contravene section 72 of the SPA. Under section 121(1)(a) of the SPA, bylaws are unenforceable if they contravene the SPA. Therefore, I find bylaws 11(5) and 11(6) are unenforceable.
24. I find the strata cannot limit its responsibility to repair the CP skylight as discussed further below.

Is the strata responsible to repair the glass, seals and flashing of the skylight?

25. Given my findings above that the skylight is CP and the strata has a duty to repair it under section 72 of the SPA, the remaining question is: Is it reasonable for the strata to defer its statutory obligation to repair the skylight? I find the answer is no.
26. The owners say the skylight leaks and provided undated video clips that show water dripping from the top of the skylight into the owners' strata lot. The strata agreed there were water stains on the interior wall of the owners' strata lot but agreed with Columbus that the water stains were inconsistent with a leaking skylight.
27. The strata has refused to undertake skylight repairs suggesting that the June 2019 water testing completed by the strata council and the Columbus letter report dated August 7, 2019 support its position that repairs are not required. I disagree.
28. The strata's water test did not show that water leaked into the owners' strata lot until water was directed underneath the exterior flashing. The Columbus letter was provided after a water test was performed on the skylight with the same result; namely that water entered 304 when water was directed underneath skylight flashing. In particular, the Columbus report, states with "the right conditions of wind and driving rain, water could get up under the flashing and open edge of the top piece of glass." This indicates that water ingress into 304 could occur. The statement that spraying water under the flashing "does not replicate normal rainfall conditions" does not mean water ingress into 304 will not occur. Nor does the fact that no water leaks were observed on the day the skylight was tested mean water leaks did not occur or will not occur in the future. The photograph contained in the Columbus report shows clear weather and blue sky in the background and does not indicate whether it was raining during the water test, although I infer it was not. I also find the statement that no active water leaks were observed to be meaningless given the earlier statements of the contractor that it was able to make the skylight leak.

29. The courts have found that a strata corporation is not held to a standard of perfection. Rather, it is required to act reasonably in its maintenance and repair obligations.
30. As noted in *Weir v. Strata Plan NW 17*, 2010 BCSC 784, the strata corporation may have several reasonable options available to undertake necessary repairs. The fact that one of the options may be a more cautious approach or even turn out in hindsight to be the less wise or preferable course of action will not give the court a basis for overturning a strata council's decision regarding the repair option selected, as long as the option selected is a reasonable one.
31. I agree with Columbus and I find it is more likely than not that the skylight could leak. Therefore, I find repairs to the skylight are necessary. I do not find that the strata's selected option not to repair the skylight is reasonable given its own contractor determined it was possible for the skylight to leak.
32. It is not known what part of the skylight, (glass, seals or flashing) would be the cause of the leak in the right circumstances. The parties agree the skylight glass is cracked near the bottom but disagree on whether it is visible from the interior of 304. From the photographs, I find the crack would be difficult to see unless one was standing at the top of the stairs. However, I find the location of the crack is not determinative of whether the glass should be replaced.
33. Columbus made no recommendation for replacement of the glass. However, given the glass is a sealed unit, I find a cracked piece of glass more than likely affects the performance of the skylight window and I order the strata to replace the cracked skylight glass. I also order the strata to replace the skylight flashing as recommended by Columbus. Given my order that the glass be replaced, the seal between the cracked glass unit and metal frame will also need replacement after the existing cracked glass is removed. For these reasons, I order the strata to replace the cracked skylight glass unit and related seals, and repair or replace the exterior flashing at the top of the skylight. If further leaks occur, I order the strata to take additional steps to repair or replace the skylight as necessary.

34. I note that Unity, Vancouver Glass and Columbus all reported that the skylight design, which exists at other locations in the strata, is outdated and no longer used. It is also possible the skylight no longer meets building code requirements, but that is not substantiated in the evidence before me. Nothing in this decision restricts the strata from taking steps to replace the entire skylight system, if it finds that is the best option.

TRIBUNAL FEES, EXPENSES AND INTEREST

35. 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. The owners were the successful party but did not claim dispute-related expenses other than interest, to which they are not entitled. I therefore order the strata to pay the owners \$225 in tribunal fees.

36. The strata must also comply with the provisions in section 189.4 of the SPA, such as not charging dispute-related expenses against the owners.

DECISION AND ORDER

37. I order that the strata, within 30 days of the date of this decision:

- a. pay the owners \$225 for tribunal fees,
- b. commence repairs of the CP skylight of 304 by replacing the cracked glass and seals and repairing or replacing the exterior flashing at the top of the skylight.

38. If the ordered skylight repairs are not successful in stopping water ingress into the owners' strata lot, I order the strata to take additional reasonable steps to do so.

39. Under section 57 of the CRTA, a party can enforce this final tribunal decision by filing, in the Supreme Court of British Columbia (BCSC), a validated copy of the order which is attached to this decision. Once filed, a tribunal order has the same force and effect as an order of the BCSC.

40. 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 Provincial Court of British Columbia's monetary limit for claims under the *Small Claims Act* (currently \$35,000). Under section 58 of the CRTA, a party can enforce this final decision by filing a validated copy of the attached order in the BCPC. Once filed, a tribunal order has the same force and effect as an order of the BCPC.

J. Garth Cambrey, Vice Chair