



Civil Resolution Tribunal

Date Issued: October 21, 2019

File: ST-2019-000587

Type: Strata

Civil Resolution Tribunal

Indexed as: *Lum v. Section 1 of the Owners, Strata Plan LMS 921,*

2019 BCCRT 1207

B E T W E E N :

SIMON LUM

APPLICANT

A N D :

Section 1 of The Owners, Strata Plan LMS 921

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Kathleen Mell

INTRODUCTION

1. The applicant, Simon Lum (owner), owns a strata lot in the respondent strata corporation Section 1 of The Owners, Strata Plan LMS 921 (strata).
2. This dispute is about a bird's nest damaging the owner's balcony. The owner says that the strata is responsible for the damage as under the bylaws it must maintain and repair the balcony because it is limited common property. He argues that the strata should not have charged back to him the \$498.75 cost of fixing the damage. He also submits that the strata did not follow the correct procedure under the *Strata Property Act* (SPA) when it charged the amount back to him. The owner is self-represented.
3. The strata argues that the bylaws say that the owner is responsible for keeping his balcony clean and he violated this bylaw. The strata submits it was authorized to charge the owner back the repair cost. The strata is represented by LD, a strata council member.

JURISDICTION AND PROCEDURE

4. 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.
5. The tribunal has discretion to decide the format of the hearing, including in writing, by telephone, videoconferencing, 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.

6. 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.
7. 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.
8. Tribunal documents incorrectly show the name of the respondent as Strata Corporation 1 of Strata Plan LMS 921 whereas, based on sections 193(4) of the SPA and the strata's bylaws, the correct legal name is Section 1 of The Owners, Strata Plan LMS 921. Given the parties operated on the basis that the correct name was used in their documents and submissions, I have exercised my discretion under section 61 to direct the use of the section's correct legal name in these proceedings. Accordingly, I have amended the style of cause above.

ISSUES

9. The issues in this dispute are:
 - a. Did the owner contravene a strata bylaw?
 - b. Did the strata properly charge back the balcony's repair cost to the owner?

EVIDENCE, FINDINGS AND ANALYSIS

10. In a civil dispute such as this, the applicant must prove his claim. He bears the burden of proof on a balance of probabilities.
11. While I have reviewed all of the material provided, I have only commented below on the evidence and submissions necessary for this decision.

The Damage

12. The owner discovered a bird's nest made up of twigs and leaves on his balcony. It is undisputed that the balcony is limited common property. The owner emailed the strata on July 20, 2018 and said that when he removed the nest he noticed a hole. He stated that the balcony's vinyl membrane was damaged exposing the wood underneath. The owner told the strata that because the balcony was limited common property the strata was responsible for "preventative work" and the repair.
13. The strata sent a contractor and building manager to investigate the balcony. On August 31, 2018, the property manager sent the strata an email saying that the birds pecked at the balcony underneath the nest causing a hole. He said that he had "seen a lot of dirty decks" but the owner's balcony and siding were the "dirtiest" he had ever seen. He recommended patching the balcony and charging the cost back to the owner because he had not been caring for the balcony.
14. The owner argues that the strata is responsible for maintaining the limited common property and this includes cleaning it.
15. The strata hired a company to fix the balcony and wrote to the owner on November 14, 2018 enclosing the \$498.75 invoice. It told the owner he was responsible and asked for payment within 30 days.
16. As mentioned, the owner argues he should not be responsible for this amount because the bylaws say the strata is responsible for repairing and maintaining limited common property.

Did the owner contravene a bylaw?

17. On September 22, 2003 the strata filed new bylaws at the Land Title Office. Bylaw 5.2 states that an owner who has the use of limited common property must repair and maintain it except for repair and maintenance that is the responsibility a separate section or the strata. Bylaw 14.1 (b) sets out the specific areas of limited common property that a separate section must maintain.

18. On November 17, 2018, the owner told the strata that under bylaw 14.1 (b) the strata was responsible for repairing and maintaining limited common property that was designated for the exclusive use of a strata lot. The owner says that this specifically includes balconies, no matter how often the repair or maintenance occurs.
19. On December 19, 2019, the property management company sent the owner a letter stating under bylaw 47.1 a resident must not allow a strata lot or any limited common property attached to a strata lot to become unsanitary or untidy. The bylaw specifically mentions that rubbish, dust, garbage, boxes, packing cases and other similar refuse must not be thrown, piled or stored on the limited common property. It states that any expenses incurred by the strata to remove such refuse would be charged to the strata owner.
20. The December 19, 2019 letter said that the chargeback to the owner's strata lot would not be reversed but invited the owner to contact the strata if he had any further questions or concerns.
21. The owner requested a hearing on December 24, 2018, which occurred on January 10, 2019. The owner submits that he paid the amount due before the hearing to stop interest from accruing and not because he was accepting responsibility. Following the hearing, on January 17, 2019, the strata sent the owner a letter finding him in contravention of bylaw 47.1 and stated that the chargeback would not be reversed.
22. The strata submits that the bylaws should not be read in isolation. Although it did not reference these bylaws in its letters to the owner, it submits that bylaw 6.4 says that an owner will indemnify a strata from the expense of any maintenance, repair or replacement to the limited common property caused by the owner's act, omissions, negligence or carelessness or any circumstance that is deemed the responsibility of the owner, to the extent that the expense is not reimbursed by an insurance policy.
23. The strata also refers to bylaw 50.14 that says a resident must not permit the accumulation on a balcony of ice, snow, leaves or debris or permit anything to

happen that would develop any drainage problems or cause damage to limited common property.

24. The owner responded that he did his best to keep his balcony clean and that it is difficult to predict when a wild bird will nest. He says that the damage was caused by nature and not due to his negligence. He submits that the strata did not perform regular maintenance and inspection and therefore it was the strata's negligence that caused the damage.
25. The owner provided pictures of other balconies showing wear and tear with gaps between the main part of the balcony and the top vinyl layer. These pictures do not represent damage resulting from the other owners keeping their balconies untidy. The owner himself characterizes the damages shown in the pictures as "deterioration". I find that these pictures do not represent what happened to the owner's balcony and therefore place no weight on this evidence.
26. Based on the bylaws, I find that the owner did have an obligation to keep his balcony sanitary and tidy. The owner submits that it was while cleaning his deck that he discovered the bird's nest and this indicates that he was doing his best. The property manager indicated how dirty the owner's balcony was. The owner did not provide evidence about how often he cleaned his balcony or any evidence as to its upkeep. I find that allowing the balcony to fall into such a state of neglect that a bird was able to build a nest of twigs and leaves over time and then peck through the nest and the vinyl covering is proof that the balcony was not sanitary and tidy.

Did the strata properly charge back the balcony's repair cost to the owner?

27. The owner submits that the proper procedure was not followed in charging him back the cost of repair.
28. Although I have found a contravention of the bylaw, this does not necessarily mean that the strata was authorized to charge back the balcony's repair cost to the owner. I note that bylaw 47.1 refers to charging back the cost of removing refuse but not the cost of repairing damage caused by the balcony's unsanitariness.

29. However, sections 129 and 133 of the SPA permit a strata to make repairs to remedy a bylaw contravention and to charge reasonable repair costs to the owner. A strata may deal with bylaw contraventions as it sees fit as long as it complies with the principles of procedural fairness and does not act in a way that is significantly unfair. (*Chorney v. The Owners, Strata Plan VIS770*, 2016 BCSC 148, at para. 52).
30. SPA section 135 says that a strata must not make an owner pay for contravening a bylaw unless the strata gives the owner notice and an opportunity to respond, including at a hearing, if the owner wants one.
31. In my view, the strata's letter stating the repair cost had already been charged back to the owner did not comply with section 135 of the SPA as required. The strata should have first given the owner an opportunity to be heard. However, in *Cheung v. The Owners, Strata Plan VR1902*, 2004 BCSC 1750, the court held that section 135 of the SPA is a procedural section. In that case, the strata imposed fines before an opportunity to be heard was given. The strata in the *Cheung* case then reversed the fines, held a hearing, and then imposed the fines again. The court held that while section 135 was not initially complied with, the irregularity was rectified prior to the imposition of the fines ultimately imposed.
32. *Cheung* is considered in *S.M. v. The Owners, Strata Plan ABC*, 2017 BCCRT 23. Although *S.M. v. The Owners* is not binding on me, I find the reasoning applies here. In *S.M. v. The Owners, Strata Plan ABC*, the strata fines for bylaw contraventions did not comply with SPA section 135, but the Vice Chair held this was an irregularity that the strata cured. The strata did not reverse the fines, but held off demanding payment, giving the owner an opportunity to respond and to attend a hearing. After the hearing the strata demanded payment, and the tribunal found that the requirements of SPA section 135 had then been met.
33. I find that the scenario in *Cheung* and *S.M. v. The Owners, Strata Plan ABC*, is essentially what has occurred in this case. Here, the strata sent the November 14, 2018 letter detailing the contravention and stated it had charged back the cost of the repair. The owner disputed the chargeback and the council

considered his argument and then sent another letter dated December 19, 2019. While the chargeback was not expressly reversed, the strata did not demand payment at that point and instead invited the owner to make contact if he had any concerns. The owner expressed his concerns and asked for a hearing. The owner decided to make the payment because he did not want interest to accrue but not because the strata was demanding it at that time or suggesting it was going to take legal action to obtain it.

34. After the hearing, the strata then stated it would not reverse the chargeback. As in *Cheung and S.M. v. The Owners*, I find here the irregularity in the section 135 process was corrected by the time the strata sent its January 17, 2019 letter.
35. The owner also alleges that the decision to charge back his unit was unfair as the strata council members do not reside in his low-rise portion of section 1 but rather live in the tower portion. He states that owners of the tower units were not charged back the cost of repairs to their balconies. As noted, I have decided that the chargeback was justified against the owner because the damage was caused by his failure to keep his balcony clean. I do not have sufficient evidence to make a determination about the reasons for the repairs of the other strata lots. Therefore, there is insufficient proof to find that the strata was acting in a biased manner when it charged the cost of the repair back to the owner as compared to other owners.
36. Accordingly, I find that the strata properly charged back the cost of the repair to the owner. I dismiss the owner's claims.

TRIBUNAL FEES, EXPENSES, AND INTEREST

37. Under section 49 of the Act, and the tribunal's rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. Because the owner was unsuccessful he is not entitled to have his tribunal fees and expenses reimbursed.

DECISION AND ORDER

38. I dismiss the owner's claims and this dispute.

Kathleen Mell, Tribunal Member