Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Medjuck v. The Owners, Strata Plan LMS 2854*, 2019 BCCRT 1269

B E T W E E N :

CODY MEDJUCK

APPLICANT

A N D :

The Owners, Strata Plan LMS 2854

RESPONDENT

AMENDED REASONS FOR DECISION

Tribunal Member: J. Garth Cambrey, Vice Chair

INTRODUCTION

1. The applicant, Cody Medjuck (owner), owns strata lot 31 (SL31) in the respondent strata corporation, The Owners, Strata Plan LMS 2854 (strata).

2. The owner says that water entered SL31 from the building exterior causing significant damage to the flooring and kitchen cabinets of SL31. The owner says the strata is negligent in not stopping water from entering SL31. The owner also says that the strata agreed to repair the water damage that occurred in SL31 but subsequently denied the owner's request for reimbursement of water damage repairs.

3. The owner seeks reimbursement of $10,000.59 from the strata stating this is the cost to repair the water damaged flooring and cabinets in SL31. In their submissions, the owner seeks to increase their claim amount to $16,642.50 based on subsequent quotations received, which I find I need not address based on my conclusion set out below.

4. The strata denies the applicants' claims and asks that they be dismissed.

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

6. For the reasons that follow, I dismiss the owner's claims and this dispute.

JURISDICTION AND PROCEDURE

7. 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.

8. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email or other electronic means, 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.

9. 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.

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, pay money or make an order that includes any terms or conditions the tribunal considers appropriate.

11. As described in detail below, it came to my attention after I made my original decision, that all the parties' submissions were not before me.

12. By way of background and explanation, the parties to a tribunal dispute provide their evidence and submissions by uploading them directly to an online portal. Once the dispute has been assigned to a tribunal member, the online portal is closed, and the parties are unable to directly upload further evidence or submissions.

13. When this dispute was originally assigned to me, some of the documents that the respondent strata had uploaded were not able to be opened. On November 1, 2019, tribunal staff asked the respondent to resubmit the documents in a readable format so the applicant owner could review them and provide submissions by November 7, 2019. The replacement documents were uploaded to the portal on November 5, 2019, which I reviewed.

14. I made my decision on November 6, 2019, without reviewing the owner's supplementary submissions, which were received on November 7, 2019. After tribunal staff provided my decision to the parties, staff advised me of this oversight.

15. At common law, an administrative tribunal may reopen a proceeding to cure a jurisdictional defect, which is also reflected in section 51(3) of the CRTA.

16. The British Columbia Court of Appeal discussed the scope of the power to reopen a hearing to cure a jurisdictional defect in *Fraser Health Authority v. Workers' Compensation Appeal Tribunal*, 2014 BCCA 499. Among other things, the court

found it is a jurisdictional defect for an administrative tribunal to fail to provide the parties with procedural fairness.

17. In the context of the tribunal's online system of gathering evidence and submissions, I find in the circumstances here it would be a breach of procedural fairness for me to make a decision without having seen all the parties' evidence and submissions. While I had seen the parties' evidence, I had not seen the owner's supplementary submissions, which I find was a breach of procedural fairness.

18. Therefore, I decided under section 51(3) of the CRTA to reopen this dispute to address the parties' further submissions on the resubmitted evidence.

19. At my request, the parties were given an opportunity to provide supplementary submissions on the resubmitted documents, which were fully received on November 19, 2019.

20. I have reviewed those submissions and find that they essentially repeat earlier submissions about an exploratory "hole" made in the building exterior in August 2017 next to the owner's patio door, and whether that "hole" was the cause of the water leaks into SL31. I find the supplementary submissions do not change the substance of my reasons or the outcome of this dispute.[1]

ISSUES

21. The issues in this dispute are as follows:

    a. Did the strata agree to pay for the water damage repairs to SL31?

    b. Who is responsible under the SPA and strata bylaws to repair the water damage to SL13?

    c. Was the strata negligent?

BACKGROUND, EVIDENCE AND ANALYSIS

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

23. In a civil proceeding such as this, the owner must prove each of their claims on a balance of probabilities.

24. The strata was created in 1997 under the *Condominium Act* and exists under the *Strata Property Act* (SPA). It is a mixed-use strata corporation located in Vancouver, B.C. consisting of 82 strata lots in 2 separate buildings above a parking garage. Four of the residential strata lots, including SL31, are townhouse-type strata lots comprising 1 separate building that is the focus of this dispute. All remaining strata lots are located in the second building.

25. The strata filed a complete new set of bylaws at the Land Title Office (LTO) on June 7, 2001 that apply to this dispute. Subsequent bylaw amendments were filed at the LTO that are not relevant to this dispute. The Schedule of Standard Bylaws under the SPA does not apply. I address relevant bylaws as necessary in my analysis below and note the strata does not contain separate sections.

26. LTO records show the owner purchased SL31 on July 14, 2016.

27. There is some history to the owner's claim, and I find it is necessary to recount some of that history for context. I also note at the outset that neither party raised the *Limitation Act*, which generally restricts a party from filing a strata property dispute with the tribunal more than 2 years after discovering they had a claim. Given my conclusion below, I did not find it necessary to seek submissions from the parties on the *Limitation Act*, even though the owner's claim might have been discovered outside the 2-year limitation period.

28. In September 2016, the owner reported water ingress into SL31 at or near the patio door next to the kitchen area, which they say they discovered when they were replacing floor tiles in SL13 with laminate flooring. The strata arranged for a

contractor (DCI) to investigate the leak and by October 19, 2016, the strata's contractor had suggested the patio door of SL31 needed to be replaced.

29. The leak into SL31 continued and for reasons unknown, the strata arranged for a second contractor (StrataMaster) to investigate the water ingress. StrataMaster completed 3 site visits in early November 2016 and determined water was entering SL31 "at multiple areas around the [patio] door threshold and additionally at areas around and below the window…". StrataMaster removed some interior drywall and made temporary repairs to try and stop water entering SL31. StrataMaster recommended the strata retain a building engineer to investigate the issue further because of "signs of improper envelope construction".

30. The strata submits, and I agree, that its contractor (DCI) retained JRG Building Engineering (JBE) to complete a site inspection. The owner confirmed in a January 4, 2017 email to the property manager that an engineer attended SL31 on November 25, 2016 and I infer it was a representative of JBE.

31. In a February 27, 2017 email from DCI to the property manager, DCI includes an undated letter from JBE entitled "Building Envelope Water Leak Remediation: 1 East Cordova, Vancouver". The JBE letter states it was asked to complete a preliminary site inspection relating to water ingress on the southwest wall of a residential suite. Given the address matches that of the strata, the owner's January 4, 2017 email, and the strata's submission that its contractor retained JBE "on or about November 25, 2016", I find it more likely than not that the undated JBE letter refers to an inspection of SL31 and the remaining south west exterior wall area of the building comprising SL31. My conclusion is further confirmed by the May 2017 DCI invoice that describes the cost of the building envelope assessment report.

32. The JBE letter, in essence, recommends a full rehabilitation of the entire exterior wall that includes the patio door of SL31.

33. The strata says that it proceeded with some targeted repairs and that during the repair work, it became evident that the targeted repairs would not suffice. I find the evidence supports the strata's position. Namely, invoices the strata received from

DCI dated June, August (2), and October 2017 for a deposit for "wall repair", roof work and extra roof work, dismantling of scaffolding and erecting new scaffolding, respectively. Photographs provided by the strata also show scaffolding was erected on the balconies of SL13 and a neighbouring strata lot, indicating work was being performed at this exterior wall area by at least September 2017.

34. In an August 28, 2017 email to the owner, the property manager advised the strata was awaiting a final report, that the it would require building permits, and would be "boarding off the building". The owner acknowledged the email and thanked the property manager for the update. Also, in a September 27, 2017 email from the property manager to the owner and others, the property manager apologized for poor communication about the exterior repairs and explained that the strata "had opened up a few areas and found water penetration" and that "a permit would have to be pulled and bring the existing building cladding up to today's rainscreen codes". The email went on to say that the strata had received a quote from "JR Engineering" to provide a report and scope of repairs, which was expected in the next few weeks. Based on the overall evidence and submissions, I find the property manager meant JRS Engineering, which is the engineering firm hired by the strata and a different firm from JBE mentioned earlier. The property manager also stated that, depending on the scope of repairs, an SGM would be required to raise a special levy to complete the repairs.

35. The owner says between February 27 and August 28, 2017, they did not have any communication from the strata despite having emailed and left phone calls for the property manager. While this may have been so, the owner did not provide dates of telephone messages, copies of their emails, nor any evidence that they reported further leaks into SL31 until about August 18, 2017 when the owner emailed the property manager. The tone of the owner's August 18, 2017 email is not hostile and requests the property manager have the contractors return to cover exposed wall areas, ending with "hoping you are able to get hold of [the contractors] to follow up".

36. I do not agree that the actions of the strata establish any breach of fiduciary duties as alleged by the owner. In a strata setting, the courts have found that fiduciary duties

are owed by individual council members to the strata corporation and not by the strata corporation itself. As a result, the BC Supreme Court has suggested a strata corporation should not be held vicariously liable for the actions of its strata council members. (See *Dockside Brewing Co. Ltd. v. Strata Plan LMS 3837*, 2007 BCCA 183 at paragraphs 51 to 57 and *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc*., 2016 BCSC 32 at paragraph 267.)

37. The owner submits the strata completed repairs to significantly reduce the water ingress into SL13 that had occurred in August 2017. In the Dispute Notice, the owner says the repairs to temporarily stop or reduce water ingress were completed in November 2017. The strata does not dispute this.

38. The evidence shows the strata retained JRS Engineering in September or October 2017 to complete a review of the wall system and leaks and make recommendation on an appropriate scope of repair.

39. A further report of water ingress into SL31 was made by the owner on December 17, 2017. However, it is apparent that water entered SL13 because the scaffolding contractor mistakenly removed the temporary plastic window and door covering from the exterior of SL13. It is also apparent that the plastic covering was reinstalled within a day or so of the owner bring this to the strata's attention.

40. The strata's remaining submissions about the repairs affecting SL13, which are not disputed by the owner, are that JRS Engineering completed its report in March 2018, the strata accepted JRS Engineering's proposal to repair the building in April 2018, and a special levy was passed in June 2018 for the purpose of funding the repairs. The undisputed submissions also state the work commenced in November 2018 following the strata's receipt of a building permit and was substantially complete in July 2019.

41. Aside from a reported leak into SL13 in September 2018, which was promptly attended to by the strata, no other leaks into SL13 were reported by the owner.

42. In order to find the strata responsible for repairing SL13, the owner must prove any of the following:

    a. The strata agreed to pay for the water damage repairs, or

    b. The strata's bylaws require the strata to pay for the water damage repairs to SL13, or

    c. The strata acted in a negligent manner.

43. I address each possibility in turn.

Did the strata agree to pay for the water damage repairs to SL31?

44. The owner says that the strata repeatedly told them that repairs to the interior of SL31 could not be repaired until the outside rainscreen work was completed and the leaks abated. It is unclear if the owner is implying the strata agreed to complete the repairs, which the strata specifically denies.

45. The earliest evidence I could locate that addresses responsibility for the SL13 expenses at issue is an email forming part of an email exchange between the owner and property manager dated October 19, 2016. The owner's email notes the strata's contractor advised the owner that SL13's patio door needed replacing, and the owner enquired of the replacement door status and questioned who would order the door. The property manager replied stating the expense "should be a strata expense as the strata is responsible for the building cladding". I do not find the strata committed to any interior repairs to SL13 in this email exchange.

46. The first formal request to address the interior repairs was made by the owner 2 years later on October 18, 2018 in an email sent to a strata council member. The owner stated his lawyer had contacted the property manager about reimbursement for SL13 damage and that the manager did not commit the strata to pay the interior repair expenses. The owner suggested it was clear the strata was responsible for the estimated $10,000 repairs and asked if they could come to an agreement to avoid legal action. The strata council member replied that they would take up the request

with the strata council but that it might take while for the property manager to respond.

47. Having not received a response, on April 1, 2019, the owner again requested the opportunity to discuss interior repairs with the strata council noting the windows and door had been installed in SL13. The strata council member responded on April 8, 2019 stating the strata council had recently discussed SL13. They advised the strata council felt the matter was more of an insurance issue and requested a breakdown of the estimated repair expenses. They also suggested the owner request a hearing with the strata council "to present your case to us".

48. A hearing was held on May 1, 2019. On the same date, the strata council member emailed the owner advising their request for reimbursement was denied because it could not be properly considered without proof of the owner's insurer denying coverage. The owner was invited to submit proof their insurer would not pay for the damage together with any other information, and the strata would reconsider.

49. The owner submitted the requested letter from their insurer to the strata council member on May 29, 2019. On June 7, 2019, the strata council member replied that the issue had been discussed by the strata council and it had decided not to alter its denial of the owner's request for payment of interior damage expenses.

50. Based on the evidence provided, I find the owner has failed to prove the strata agreed to reimburse them for water damage to the interior of SL13. Specifically, I find that none of the evidence establishes such an agreement.

Who is responsible under the SPA and strata bylaws to repair the water damage to SL13?

51. Section 72 of the SPA requires a strata corporation to repair and maintain common property and common assets and permits a strata corporation, by bylaw, to take responsibility for repair and maintenance of specified portions of a strata lot.

52. Bylaw 12.1(b) restates the requirements of section 72 and makes the strata responsible for repair and maintenance of common property.

53. It is undisputed, and I find based sections 1(1) and 68 of the SPA, the exterior cladding of the building is common property of the strata. Therefore, the strata is responsible for repair of the cladding, which it has done.

54. Bylaw 4.1 makes an owner responsible for repair and maintenance to their strata lot unless it is the responsibility of the strata.

55. Under bylaw 12.1(d), the strata takes responsibility for portions of a strata lot but none of the listed items apply in this case.

56. Under section 68(1) of the SPA, the boundary between a strata lot and another strata lot or common property is midway between the structural portions of the dividing wall, floor or ceiling, unless a different boundary is set out on the strata plan. Here, there is not a different boundary identified on the strata plan.

57. I find the interior flooring and kitchen cabinets of SL13 are located with the boundaries of SL13 and therefore, the owner's responsibility to repair.

Was the strata negligent?

58. As noted by the strata, the courts have held that a strata corporation is required to act reasonably in its maintenance and repair obligations. If a strata corporation's contractors and consultants fail to carry out work effectively, the strata corporation should not be found negligent if it acted reasonably in the circumstances. (See *Kayne v. LMS 2374*, 2013 BCSC 51, *John Campbell Law Corp v. Strata Plan 1350*, 2001 BCSC 1342, and *Wright v. Strata Plan #205*, 1996 CanLii 2460 (BC SC), affirmed 1998 BCCA 5823).

59. In other words, the strata is not an insurer and is not responsible to reimburse the owner for the claimed damages, unless the strata acted negligently, which the strata denies.

60. Also, 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.

61. To succeed in a claim for negligence, the applicant must prove each of the following on a balance of probabilities:

    a. The strata owed the owner a duty of care;

    b. The strata breached the standard of care;

    c. The owner sustained reasonably foreseeable damage; and

    d. The damage was caused, in fact and in law, by the strata's breach of the standard of care.

    (See *Mustapha v. Culligan of Canada Ltd*., 2008 SCC 27.)

62. The owner says the strata was negligent because of the lengthy time it took to stop water from entering SL13. In essence, they say the water damage in SL13 was minimal in September 2016 when first reported but the length of time the strata took to address the building envelope (cladding) repairs was unreasonable and that the delay caused further damage to SL13.

63. The strata says it is not an insurer and as long as it acts reasonably in carrying out its duty to repair, it is not negligent. The strata also says it cannot be held to be vicariously liable for the actions of its contractors. The strata provided several BC Supreme Court decisions to support its position.

64. For the reasons that follow, I agree with the strata.

65. It is clear the strata owed the owner a duty of care to repair and maintain common property as set out in section 72 of the SPA and bylaw 12.1. The issue is whether the strata breached its standard of care, which is one of reasonableness as I have stated, when it repaired the exterior wall of SL13.

66. As noted, the building cladding was not completely repaired until July 2019. However, I note the last reported leak into SL31 was December 2018 and before that September 2017. These leaks were both isolated incidents and promptly attended to by the strata. Based on the evidence and submissions, I find the period of most active or frequent leaks was in about August 2017. The owner submits this is when the most damage occurred due to "major flooding" but they did not submit photographs or other evidence to show the "major flooding" that occurred.

67. The owner also submits that an exploratory "hole" in the building exterior next to SL13's patio door was the cause of the leak. However, the March 20, 2018 JRS Engineering report concludes otherwise. The report states the transition points at the walls, such as architectural columns to wall or columns to windows, and the failed deck membranes, are the likely cause of the water ingress (page 9). The report also notes the windows and doors had generally reached the end of their serviceable life range (page 9) and the vertical transitions from the deck to the wall were "reverse lapped" which is an improper detail that could result in additional water ingress (page 7).

68. Based on the JRS Engineering report, I find the exploratory hole was not the cause of the water ingress and water would likely have entered SL13 even if it had not been made. Further, the owner admits repairs to significantly reduce the water ingress into SL31 were completed in November 2017 and, as noted, has failed to establish additional damage occurred to SL13 between August and November 2017. I find the owner has failed to prove any actions or inactions of the strata caused additional damage to SL13.

69. I find the active leaks occurred about the same time the strata had retained DCI to complete targeted repairs, which was when the strata determined that more complete repairs were necessary.

70. I find the steps taken by the strata to investigate the water ingress into SL13 and attempts to complete targeted repairs in 2017 were reasonable. I find it was also

reasonable for the strata to rely on its contractors' opinions that targeted repairs would be sufficient to stop the leak in to SL13.

71. Unfortunately, the targeted repairs were not successful, and the strata then retained a building envelope engineer to provide an opinion on a more complete repair, which was ultimately successful. I also find the steps taken by the strata to retain an engineer and complete a full recladding of the exterior wall of SL13 were reasonable. While it may be that the strata could have better communicated its actions to the owner but that does not mean the steps it took to repair the common property building exterior were unreasonable.

72. For these reasons, I find the strata was not negligent. I dismiss the owner's claim that the strata must pay for repairs to SL13.

TRIBUNAL FEES AND EXPENSES

73. 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. Here, the respondent strata was the successful party but did not pay tribunal fees or claim dispute-related expenses, so I order none.

74. The strata must comply with the provisions in section 189.4 of the SPA, such as not charging dispute-related expenses against the applicant owner.

DECISION AND ORDER

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

J. Garth Cambrey, Vice Chair

[1] Paragraphs 11 through 20 were added to explain a jurisdictional defect cure about procedural fairness that does not change my reasons or the outcome of this dispute.