Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Peters et al. v. Whiting et al*, 2019 BCCRT 1282

B E T W E E N :

DANA PETERS and MALCOLM ROLFSEN

APPLICANTS

A N D :

SHARON WHITING and The Owners, Strata Plan K803

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Julie K. Gibson

INTRODUCTION

1. This dispute is about governance and repairs to common property (CP) and limited common property (LCP) in a strata corporation containing only 2 strata lots.

2. The applicants Dana Peters and Malcolm Rolfsen jointly own strata lot 1 (SL1) in the respondent strata corporation, The Owners, Strata Plan K803 (strata). The other

strata lot (SL2) is owned by the respondent Sharon Whiting. There is equal unit entitlement between SL1 and SL2.

3. The parties agree that the strata did not comply with of the *Strata Property Act* (SPA) until holding an Annual General Meeting (AGM) in September 2018. Up until then, the strata had no contingency reserve fund (CRF). Common property repairs and maintenance were generally not shared between the parties, except for agreements about a pump station and insurance. Rather, each strata lot maintained the common property located closest to it.

4. Since the strata was not following the SPA, the applicants say they paid for repairs to common property that should have been the subject of a special levy. They say they spent $18,149.25 on repairs to exterior doors, windows, deck, railings and stairs.

5. The applicants say the same repairs are needed to the rest of the common property, located on Ms. Whiting's side of the duplex. The applicants say Ms. Whiting must now pay the equivalent of ½ of the total necessary repair expenses.

6. The applicants say they spent $18,149.25. Based on this figure, they estimate that $36,298.50 is the total that should have been levied for repairs or replacement of the remaining exterior doors, windows, deck, railings and stairs. The applicants ask the tribunal to order a special levy of $36,298.50, with a requirement that Ms. Whiting pay $18,149.25 to the strata, while the $18,149.25 already paid by the applicants be considered to satisfy their half of the total expenses.

7. Ms. Whiting denies these claims. She says the repairs were unnecessary or are not her responsibility to pay for because the SPA process was not followed.

8. The parties are each self-represented.

JURISDICTION AND PROCEDURE

9. 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.

10. 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.

11. 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.

12. 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.

13. In submissions, the owners referred to the strata under the name The Owners, Strata Plan KAS803. On the strata plan, it is referred to as The Owners, Strata Plan K803. Given section 2 of the SPA, I have referred to the strata according to the registration number shown on the strata plan.

Strata as a Party

14. With the consent of the parties, I added the strata as a party to this dispute at my own initiative, pursuant to section 61 of the CRTA. In doing so, I have followed the approach used by the tribunal in *Chipkin* v*. Lin et al*, 2019 BCCRT 419, which I find helpful though it does not bind me.

15. Under section 61, the tribunal may make any order or give any direction in relation to a tribunal proceeding it thinks necessary to achieve the objects of the tribunal in

accordance with its mandate. In this dispute, I find it is necessary and consistent with the tribunal's mandate, as set out above, to add the strata as a party. A central issue in this dispute is the applicants' request for orders to carry out common property repairs. As explained in *Anthony v. Schnapp,* 2016 BCSC 1839 and *Bourque et al v. McKnight et al*, 2017 BCCRT 26, common property repairs are the responsibility of the strata, not of any individual owner. Thus, it is generally inappropriate to order individual owners to complete such repairs. In order to provide a final decision in answer to the applicants' claims, I find it was necessary and fair to add the strata as a party, and I have done so.

16. I have not requested separate submissions from the strata on the issues in this dispute. The applicants and respondent are the only members of the strata council. The parties have each provided detailed submissions on the issues in this dispute, so I find it would serve no purpose in the circumstances to request further submissions from the same individuals in their role as strata council members. Rather, I accept the parties' submissions as submissions from separate strata council members, as there is no consensus among them.

ISSUES

17. The issues in this dispute are:

    a. Should the tribunal order the strata to impose a special levy of $36,298.50 for repair costs sought by the applicants?

    b. If not, should the tribunal order the strata to impose a special levy for the remaining $18,149.26 that the applicants say is required for further common property repairs?

BACKGROUND FACTS

18. The strata consists of 2 strata lots in 1 duplex residential building. The strata plan shows that the roof and front and back yards are common property (CP). The deck is limited common property (LCP).

19. The strata building was constructed in 1989.

20. In March 2002, Ms. Whiting bought SL2.

21. In June 2010, the applicants became joint owners of SL1.

22. The strata has not adopted bylaws that replace or amend the Schedule of Standard Bylaws under the SPA. Thus, the Schedule of Standard Bylaws (bylaws) in the SPA applies.

23. The relevant bylaws are summarized as follows:

    a. **Bylaw 5**: An owner must obtain the strata's written approval before making an alteration to a strata lot that involves the building's structure of exterior, doors, windows or skylights on the building exterior or that front common property, or common property located within strata lot boundaries.

    b. **Bylaw 6**: An owner must obtain written approval from the strata before making an alteration to common property, and the strata may require as a condition of approval that the owner agree in writing to take responsibility for any related expenses.

    c. **Bylaw 8**: The strata must also repair and maintain LCP where the repair and maintenance ordinarily occurs less than once per year, and stairs, balconies and other things attached to a building, doors, windows on the exterior of the building and fences, railings and similar structures that enclose patios, balconies and yards, no matter how often the repair or maintenance occurs.

24. Up until September 17, 2018, the strata did not conform with requirements of the SPA or bylaws.

25. The parties agree that, from 1989 to September 17, 2018, the original owners and then current owners of SL1 and SL2 maintained and paid for what they described as "their own" repair and maintenance expenses.

POSITIONS OF THE PARTIES

26. The applicants say that at a strata meeting, the parties agreed to "…prove all the common property expenses they had to be added up and a payment schedule was to be determined who owed what to KAS803 and the individual owners."

27. The applicants say that Ms. Whiting then refused to resolve the past repair expenses.

28. The applicants seek an order that the respondent pay $18,149.25 to the strata. The applicants describe this payment as ½ of a "levy" for $36,298.50, for expenses they already incurred repairing exterior doors, windows, decks, railing and stairs, plus another equal amount for completing those same repairs on Ms. Whiting's "side" of the duplex.

29. Ms. Whiting says that she has repaired the building exterior and CP or LCP on the SL2 side since 2002, at her own cost. Ms. Whiting did not counterclaim seeking reimbursement for these repair expenses.

30. Ms. Whiting says she is not responsible for the claimed amount because:

    a. she was not consulted about the type or cost of repair/replacements before the first part of the work was done,

    b. there was no SPA authorized levy for these repairs, and

    c. some of the repairs were only necessary because the applicants failed to properly maintain the building exterior on their "side" of the duplex.

EVIDENCE AND ANALYSIS

31. In this civil claim, the applicants bear the burden of proof on a balance of probabilities. I have reviewed all of the evidence but only refer to the evidence and submissions as I find necessary to provide context for my decision.

September 2018 AGM

32. An AGM was held for the first time on September 17, 2018.

33. At the AGM, a budget was approved. As part of the budget, the owners agreed to start paying strata fees as required by the SPA.

34. Ms. Whiting says the parties agreed that "going forward, every repair" required to strata property would require 3 quotes. This agreement is not reflected in the AGM Minutes.

35. There is no documentary evidence supporting the applicants' submission that the parties agreed to share the expenses for repairs made by each strata lot owner during the two years prior to the AGM. Because of this, I find there was no such agreement.

Common Property and Other Repairs

36. The applicants seek an order, in effect,

    a. to be credited for $18,149.25 they have already spent on repairs to the exterior doors, windows deck, railings and stairs, and

    b. requiring the strata complete another $18,149.25 in repairs to exterior doors, windows, deck, railings and stairs, with Ms. Whiting alone paying that amount to the strata.

37. Ms. Whiting submits that strata lot owners should remain responsible to maintain their own portions of the building, such as their halves of the deck. While this may have been how the strata conducted itself historically, doing so is not compliant with the SPA.

38. Under SPA section 72, the strata corporation must repair and maintain all common property and common assets, except for LCP which may be restricted by bylaw. The strata may also take responsibility to repair and maintain identified portions of a strata lot, by bylaw.

39. Under bylaw 8, the exterior doors, windows, deck, railing and stairs are all the strata's responsibility to repair and maintain. I find the deck is a thing attached to the building exterior and analogous to a balcony. Therefore, it falls under bylaw 8(c)(ii)(c). Under the bylaw, these repairs are not the responsibility of the individual strata lot owners.

40. . The strata's duty to maintain and repair these parts of LCP is not optional and cannot be blocked by an individual owner or group of owners without a bylaw amendment: see *Tadeson v. Strata Plan NW 2644*, 1999 CanLII 6999 (BCSC) and *Clarke v. Strata Plan VIS770*, 2010 BCSC 705.

41. A strata corporation has a duty to carry out those repairs that are reasonable in the circumstances: *Wright v. The Owners, Strata Plan #205*, 996 CanLII 2460 (S.C.), aff'd (1998), 43 B.C.L.R. (3d) 1, 1998 CanLII 5823 (C.A.). The standard is not perfection. Rather, determining what is reasonable may involve assessing whether a solution is good, better, or best: *Weir v. The Owners, Strata Plan NW 17*, 2010 BCSC 784.

42. In this dispute, the owners disagree about

    a. whether the repairs already completed can now be the subject of a retroactive levy, and

    b. whether the additional repairs are reasonable in the circumstances such that a levy should be ordered.

Repairs Already Completed

43. Mr. Rolfsen and Ms. Peters provided invoices for CP and LCP repair and maintenance expenses they incurred as follows:

    a. October 14, 2017 - $6,226.50 for supply and installation of a new window and patio and kitchen doors, and

b. May 24, 2018 - $11,922.75 for supply and installation of new decking, stairs and railings.

44. The invoices do not describe why the work was done, nor comment on whether the repairs were urgent. The applicants did not file photographs showing the doors, window, patio, decking, stairs and railings as they appeared immediately prior to these repairs.

45. In submissions, Ms. Whiting submitted that that the applicants should not seek an order for a special levy of $36,298.50, when they have only submitted receipts showing $18,149.25 in expenditures. Ms. Whiting suggested this claim may be fraudulent. I disagree with that description of the claim.

46. As I understand the evidence, the applicants have paid for $18,149.25 in repairs to the deck, doors, and windows. They estimate that the same amount will need to be spent again to bring the rest of the CP and LCP up to the standard of those repairs. For this reason, they are requesting a levy of $36,298.50, with ½ payable to the strata by Ms. Whiting, and none payable to the strata by them because they personally incurred the $18,149.25 already.

47. The applicants say they replaced the CP and LCP railings and outside deck, which were 31 years old. In submissions, they explain becoming frustrated with what they describe as Ms. Whiting's belief that CP and LCP would last forever if meticulously maintained.

48. The applicants submit there was no significant change in use or appearance of the CP or LCP. A glass railing was replaced with an iron railing. Dura deck material was replaced with composite decking. The deck cannot be seen by the public. Because Ms. Whiting is not asking that these repairs be reversed, I make no findings about whether the work required a ¾ vote under SPA section 71.

49. The time that the applicants decided to do these repairs, they say the strata had not complied with SPA and the bylaws for 31 years. Instead, they submit that Ms. Whiting dictated what CP was to be repaired, how and when.

50. While I have considered the applicants' frustration about feeling unable to move forward on certain repairs, I find that they made changes to the railings, deck, stairs, doors and windows in contravention of bylaws 5 and 6, which required them to first obtain strata approval.

51. Ms. Whiting submits that expenses incurred without prior strata approval should not be reimbursed. She says only budgeted or agreed levy amounts should be paid by the strata bank account.

52. The applicants say they repaired CP and those portions of their strata lot that were the strata's responsibility to repair. They say they should now be reimbursed.

53. Funds for the repair and maintenance of CP and common assets form part of the common expenses of the strata. Repairs may be funded through the operating fund, CRF, or through a special levy.

54. The SPA requires a special levy to raise funds for repairs or a ¾ vote for an expenditure from the CRF if repair funds are to be paid out of it (see SPA section 96). Here, there was no CRF at the time the repairs were completed, and the approval process for CRF expenditures in SPA section 96 was not met in any event. A special levy requires a ¾ resolution be passed by the owners. Because this is a duplex, such a levy requires a unanimous vote. Here, no such resolution was passed.

55. While there may be circumstances in which duplex owners cannot obtain unanimous agreement for a repair expense to be funded, Ms. Peters and Ms. Rolfsen did not prove a vote was even attempted. I find the expenditure of the first $18,149.25 was an unapproved expenditure by owners, not the strata.

56. In *Anthony v. Schnapp*, 2016 BCSC 1839, a dispute arose between 2 owners in a duplex. In *Anthony*, the yards of the duplex were common property, not LCP, and one owner made a number of changes to what they considered "their half" of the yard, such as constructing a patio, shed and fence. The owner argued that the strata had expressly or by implication approved the changes to the common

property. The Court found that the strata had not approved the alterations and found that some of the alterations were significant . The Court ordered the strata to remove the offending alterations. By analogy, I find that the applicants cannot be reimbursed for incurring repair expenses where they knew they did not have strata approval.

57. A strata is not permitted to spend funds from the operating fund on repair and maintenance unless that expenditure is consistent with the purpose of the fund and the expenditure has been approved, or the expense falls under section 98(3) of the SPA.

58. Section 98(3) discusses the limited circumstances in which a strata may make an expenditure that has not been put forward for approval in the budget at an AGM or SGM. An expenditure may be made from the operating fund if there are reasonable grounds to believe that an immediate expenditure is necessary to ensure safety or prevent significant loss or damage.

59. Here, even if the strata had made these repairs rather than the individual owners, the evidence does not establish the repairs were necessary immediately to ensure safety or prevent significant loss or damage. The applicants did not provide photographs of the repaired items as they appeared pre-repair, nor any evidence from a contractor offering an opinion as to urgency.

60. Given that the unauthorized expenditure does not fall under the exceptions in section 98 and was made by the owners of SL1 and not the strata, I find that it should not have been made and may not be retroactively approved.

Proposed Repairs

61. I now turn to the claim for a levy of another $18,149.25, to be made payable by Ms. Whiting alone.

62. The applicants say that the common property deck, railing and windows located near SL2 need replacement in the next 2-4 years.

63. As discussed above, the deck, railing and windows for the strata are all the strata's responsibility to repair, and not that of the individual owners. Under the SPA and bylaws, this is so whether or not the railing, for example, is located closer to either SL1 or SL2.

64. Ms. Whiting provided an email chain that refers to a contractor who had concerns about the roof not being supported to the Building Code standard and referring to a possibility that an engineer may be required to inspect the deck and its roof to assess snow pack strength requirements and load requirements. Neither party filed evidence from a contractor or engineer to prove or explain these issues. In any case, the roof is not mentioned in the Dispute Notice, so I make no determination about it.

65. In support of their submission, the applicants provided some photographs of windows that they say show "possible mould", frames and seals that are broken, and discolouration. Looking at the photographs, I cannot tell whether the windows need replacement, or whether a repair would suffice. I also cannot determine whether mould is present or not. Neither party provided a contractor's quotation or opinion explaining what a reasonable repair or replacement would be, or how urgently it is needed.

66. The applicants also filed photographs of what they describe as a "rotting railing". I find that these photographs show significant rust and areas where the railing is not properly attached to the deck. Given the extent of the rust, I find that the photographs prove that the railings likely cannot be used safely in their current state.

67. Similarly, the photographs of the deck appear to show areas of significant wear. However, there is no evidence providing an estimate or opinion from a contractor or engineer as to the proposed repair or replacement of the deck, its urgency, or cost. I cannot make those determinations based on a series of close-up photographs alone.

68. I do not have sufficient evidence to find that a levy of $18,149.25 would be reasonable for the required repairs. I have no evidence to show what door repairs are required, if any.

69. Based on the photographs filed in evidence and the deck's undisputed age, I find that the windows, deck and railings may need significant repair or replacement. I order the strata to obtain, at its expense, a written report on the current state of the windows, deck and railings, from a licensed contractor or building engineer.

70. According to the AGM Minutes, the strata now has a property manager. That person may be able to assist in selecting the contractor or engineer. The owners may then decide which repairs to complete, with costs being shared among the owners, based on their unit entitlement as required by SPA section 99.

71. The parties can then obtain quotes and determine which repairs should be completed, and on what schedule. If the owners become deadlocked, they can file a new dispute before the tribunal. I reach this conclusion because the courts have said that a court should not interfere with the democratic governance of a strata unless absolutely necessary: *Foley* v*. The Owners, Strata Plan VR 387*, 2017 BCSC 1333. I find this reasoning applies equally to discourage tribunal intervention in a strata's democratic governance process.

72. In submissions, the parties commented on a roof over the deck of SL2, prior water pipe replacement, a juniper hedge, the pump station costs, whether a cheque to the strata would be properly issued to cover annual insurance premiums, ivy removal and other matters. Because these issues were not the subject of the orders sought by the applicants, I will not comment on them further here.

Concluding Comments

73. In summary, the strata must follow the SPA and bylaws. The SPA and bylaws are designed to provide structured governance and to facilitate communication between owners on key issues. No one owner can direct that CP and LCP repair and maintenance obligations fall to a particular strata lot owner.

74. The bylaws require that the strata repair and maintain the windows, railings, exterior doors, deck and stairs. These duplex strata lot owners are each be responsible to contribute to the operating fund and CRF, based on unit entitlement.

TRIBUNAL FEES and EXPENSES

75. 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. All parties succeeded in some aspects of this dispute. I decline to order any party to reimburse another for tribunal fees. Neither party claimed dispute-related expenses.

76. The strata corporation must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against an owner.

ORDERS

77. Within 120 days, I order that the strata obtain a report from a contractor or building engineer commenting on necessary repairs to the windows, deck, railings and stairs.

78. The report is then to be shared among the owners, who may make a decision about how to proceed

79. The applicants' remaining claims are dismissed.

80. 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). Once filed, a tribunal order has the same force and effect as an order of the BCSC.

Julie K. Gibson, Tribunal Member