



# Civil Resolution Tribunal

Date Issued: November 22, 2019

File: ST-2019-002868

Type: Strata

Civil Resolution Tribunal

Indexed as: *Fischer v. The Owners, Strata Plan NW 2269*, 2019 BCCRT 1319

**B E T W E E N :**

BERTHOLD FISCHER and MARGARET FISCHER

**APPLICANTS**

**A N D :**

The Owners, Strata Plan NW 2269

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Sarah Orr

## INTRODUCTION

1. The applicants, Berthold Fischer and Margaret Fischer (owners), own strata lot 20 as joint tenants in the respondent strata corporation, The Owners, Strata Plan NW 2269 (strata). The owners say there are cracks in the concrete footing of their garage requiring immediate repairs. They say they notified the strata of this issue,

but the strata has refused to repair the cracks even though it is the strata's responsibility to do so.

2. The owners want the tribunal to order the strata to immediately repair the cracks in the concrete footing of their garage. They also want the strata to reimburse them \$535 for the cost of a structural engineering report (Group4 report), and \$80 for registered letters they sent to the strata's property manager, for a total of \$615.
3. The strata says 2 of its contractors did not support the urgency of the repairs stated in the Group4 report, and that when it followed up with the engineer who wrote the Group4 report he could not substantiate many of its claims. The strata also says the owners failed to notify it that they were planning to hire an engineer, and it should not be responsible for reimbursing expenses they incurred in relation to a maintenance issue that is the strata's sole responsibility.
4. The owners are represented by their daughter and the strata is represented by A.S., who I presume is a strata council member.

## **JURISDICTION AND PROCEDURE**

5. 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.
6. 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.

7. 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.
8. 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.

## **ISSUES**

9. The issues in this dispute are:
  - a. Is the strata required to immediately repair the cracks in the concrete footing of the owners' garage?
  - b. Is the strata required to reimburse the owners \$615 for the Group4 report and registered mail?

## **EVIDENCE AND ANALYSIS**

10. In a civil claim like this one, the owners must prove their claim on a balance of probabilities. This means the tribunal must find it is more likely than not that the owners' position is correct.
11. I have only addressed the parties' evidence and submissions to the extent necessary to explain and give context to my decision.
12. The strata is a phased residential complex created in 1985. In February 2012 the strata filed a complete set of bylaws with the Land Title Office (LTO) repealing and replacing all previous bylaws. On January 23, 2019, the strata filed bylaw amendments with the LTO which are not relevant to this dispute.

13. It is undisputed that the strata repaired cracks in the owners' concrete garage floor in February 2019, and that the only cracks at issue in this dispute are those in the concrete footing of the corner pillars of the owners' garage.

***Is the strata required to immediately repair the cracks in the concrete footing of the owners' garage?***

14. Under section 72 of the *Strata Property Act* (SPA) and the strata's bylaws, the strata is required to repair and maintain common property. The parties agree that the cracks in the concrete footing of the owners' garage are on common property and that they are the strata's responsibility to repair and maintain. Based on the strata plan and the photos of the cracks in evidence, I agree. Therefore, the question I must determine is whether the cracks require immediate repair.

15. The owners bought their strata lot in 2014 and say they noticed cracks in the corner pillars of their garage that year. They say they notified 2 strata council members in 2014, who took no action. They say that in 2015 a strata council member told them to be patient, as there were other more urgent repairs the strata was required to complete. They say that over the next few years several strata council members assessed the cracks in their garage and took photos, but the strata took no action to repair the cracks. While there is no supporting documentary evidence of the owners' communications with the strata in relation to this issue, the strata does not dispute that these communications took place, and therefore I accept the owners' evidence on this point.

16. In early June 2018 the owners notified the strata by email of significant concrete cracking inside their garage. It is not clear from this email whether the owners were referring to the cracks in the concrete footing, or cracks on the garage floor, which are not at issue in this dispute. Later that month, the strata hired Safesidewalks who inspected the owners' garage and determined that the garage floor needed to be excavated and repaired subject to the strata's approval. It is unclear whether Safesidewalks inspected the cracks in the concrete footing at that time, but there is no evidence they made any recommendations about those cracks.

17. The minutes from the strata's June 20, 2018 council meeting state that Safesidewalks had completed its assessment of "raised concrete and sidewalk cracks" throughout the complex. The minutes state that the strata would prioritize Safesidewalks' recommendations for planning and budgeting for a project in 2019. The minutes from the strata's November 20, 2018 council meeting state that, as indicated in previous minutes, the strata had completed a complex-wide assessment of concrete sidewalk and walkway repairs for consideration in the 2019 budget.
18. The owners say that after reading the November 20, 2018 minutes they were concerned that the cracks in the concrete footing of their garage were not included in the strata's repair plans for 2019, so they decided it was necessary for them to hire a structural engineer to assess the cracks. The owners hired Z.Y.Y., from Group4 Engineering to assess the extent of the damage to the concrete footing and determine whether repairs were required. The parties agree that the owners did not notify the strata of their plans to hire an engineer.
19. On November 23, 2018 Z.Y.Y. inspected the owners' driveway and garage and issued the Group4 report the same day. The Group4 report noted a crack on the garage corner between the concrete footing and the brick cladding, which Z.Y.Y. said is a "partial differential settlement of the concrete footing." The report said this was unacceptable and required immediate repairs to prevent damage to the exterior wall. The report did not specify the nature or extent of the necessary repairs.
20. On December 3, 2018, the owners notified the strata by letter of the Group4 report. On January 31, 2019 the strata's property manager emailed Z.Y.Y. from Group4 to clarify what time frame he meant in his report by "immediate" repairs, and whether the potential "further significant or substantial damage" the repairs were meant to avoid could be expected to happen within the year if the repairs were not completed. Z.Y.Y. responded that concrete cracks on walls and foundation are very common and can be ignored if the cracks are less than 1/8 inch wide. He said the owners' exterior garage wall had an "obvious crack damage issue" but that it was difficult to predict whether there would be further crack-related damage. He said it

would depend on environmental factors such as temperature, as well as the existing footing reinforcement, so he could not determine the severity of the situation.

21. The owners say that in his email Z.Y.Y. referenced the need for “pinning and shoring engineering design” to repair the failing foundation. I disagree. In his email Z.Y.Y. said he did not have any contractors who dealt with pinning and shoring issues, but that he could provide pinning and shoring design if the strata required him to do so.
22. The strata says that neither the Group4 report nor Z.Y.Y.’s email comments provide specifics about required repairs, and therefore they are too vague for the strata to rely on for planning repairs. I agree that the Group4 report does not specify the nature of the required repairs, and I find Z.Y.Y.’s January 2019 email to the strata somewhat tempered his initial recommendation for immediate repairs. However, I find the Group4 report and email do indicate that the cracks could potentially cause significant damage to the owners’ garage.
23. At some point in early 2019 the strata hired Pavecon Road Maintenance Ltd. (Pavecon) to inspect the concrete cracks in the owners’ garage. The strata submitted a February 2, 2019 inspection report from Pavecon (Pavecon report) which noted recent repairs on the concrete footing and brick cladding. The report notes there was a picture attached, but that picture is not in evidence. The remainder of the Pavecon report refers only to the cracks in the garage floor, which have since been repaired and are not at issue in this dispute. The Pavecon report also indicates that it could not provide an engineering determinant of the structural integrity of the cracks. For these reasons, I find the Pavecon report is unhelpful in determining whether the cracks in the concrete footing of the owners’ garage require immediate repair.
24. The owners say that in the spring of 2019 the strata hired a contractor who applied a “thin coat of concrete onto several of the exterior wall foundation cracks” of their garage. The strata does not address these repairs in its submissions, and there is no other evidence before me about these repairs. The owners say this superficial

work hid the damage, rather than repairing the underlying problem, and that in having these repairs completed the strata “deliberately” ignored the recommendations in the Group4 report. However, as noted above, I find the Group4 report contained no details about what specific repairs were required. The owners submitted 3 photos of the exterior of their garage that they took after these repairs were completed which show some remaining cracks.

25. In July 2019 the strata hired an engineer from Calysta Consulting (Calysta) who inspected the cracks in the concrete footings of the owners’ garage. The strata submitted Calysta’s July 23, 2019 engineering report (Calysta report) stating that the random cracking on the concrete slab on the garage floor was caused or contributed to by concrete shrinkage, subgrade settlement under the slab over a long period of time, lack of crack control joints in the original slab construction, and inadequate subgrade compaction. It said the crack in the brick veneer was probably caused by moisture behind the brick that froze over the past few winters. It said freezing and thawing will cause minor cracks which are not a problem. The Calysta report also described some hairline cracks on the garage’s exterior foundation concrete which it said were caused by shrinkage because there is no steel reinforcing buried in the concrete. It said that if the front of the garage foundation was settling the cracks would be “wide open.”
26. The Calysta report concluded that the existing cracks in the concrete were not structural and would not affect the building’s performance. It said the recent repair was adequate for the “near future.” The report said the cracks in the concrete and brick veneer may re-open in the future, but they could be easily repaired by filling them with epoxy. It said if the veneer moved out of the plane in the future it could be reattached to the wall using helical wall tiles.
27. The owners say the Calysta engineer completed his assessment in 12 minutes and that he took no measurements or photographs, so they cannot know exactly what cracks he referred to in his report. They also say the most significant cracks in the concrete footing were no longer visible at the time of the Calysta inspection because of the cosmetic patch repairs the strata completed in the spring of 2019. I

agree that without photographs or measurements I am unable to determine precisely what cracks the engineer inspected. The owners also say they tried to show the Calysta engineer the Group4 report, but that the council member who accompanied the engineer on the inspection did not allow the owners to communicate with him or view the Group4 report. The strata does not specifically dispute this, and there is no evidence the Calysta engineer reviewed the Group4 report before writing the Calysta report.

28. The owners also say there is no evidence of moisture on the wall behind the brick façade, and that the area is dry with no indication of mold, staining or water permeating through the façade. However, they did not explain how they determined this, and so I find these concerns are not substantiated by the evidence.
29. The strata relies on *Rezaizanjani v. The Owners, Strata Plan VR 2517*, 2019 BCCRT 932, in which the tribunal found the strata's decision not to immediately undertake repairs to the applicant's balcony that were recommended in an inspection report was reasonable in the circumstances. Although that decision is not binding on me, it refers to the BC Supreme Court's decision in *Weir v. The Owners, Strata Plan NW 17*, 2010 BCSC 784, which is binding on me. In that case the Court said that in carrying out its duty to repair and maintain common property under section 72 of the SPA, the strata is required to choose a reasonable repair and maintenance option, but not necessarily the best or perfect option. The Court said the strata may prioritize between different maintenance projects, as long as the decision is not unreasonable.
30. The strata says it reasonably responded to the owners' complaints about the cracks in their garage and determined they were not a priority for repairs. On the evidence before me, and following *Weir*, I find the strata acted reasonably in responding to the owners' concerns. However, the issue remains that there are 2 conflicting engineering reports in evidence. Essentially, each party says I should prefer the report they obtained over the other. On the evidence before me, and for the reasons explained above, I find I cannot reconcile the differences between the 2 reports.



31. While I find the Group4 report is vague in its recommendations, it expresses the potential for significant damage to the garage if the cracks are not repaired, and I find this should not be ignored. Without more information about the nature or extent of the strata's spring 2019 repairs to the owners' exterior garage wall, I am unable to determine if those repairs were sufficient to address the concerns expressed in the Group4 report.
32. I have also found that several of the owners' concerns with the Calysta report are valid, particularly since the Calysta report contains no photos or measurements of what exactly the engineer inspected. If the owners' allegations about the superficial nature of the strata's spring 2019 repairs are true, it is possible the Calysta engineer was unable to inspect some of the cracks the owners are concerned about. I also find the fact that the Calysta engineer did not review the Group4 report detracts from the weight I place on the Calysta report, since the Calysta engineer was not given an opportunity to explain his findings in direct comparison to those in the Group4 report.
33. In the circumstances, I find there is insufficient information before me to determine whether immediate repairs are required to the owners' garage, and what the nature or extent of those repairs should be. Therefore, within 90 days of the date of this decision, I order the strata to hire an engineer to inspect the cracks in the concrete footing of the owners' garage and provide a report setting out the details of their inspection and the nature, extent, and timeline of any required repairs. The strata must share the report with the owners within 7 days of receiving it. Once the strata obtains the report it must decide on a course of action in accordance with its obligations under section 72 of the SPA and the bylaws.

***Is the strata required to reimburse the owners \$615 for the Group4 report and registered mail?***

34. Under section 49 of the CRTA, and the tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for reasonable dispute-related expenses. I find the cost of the Group4 report and the registered mail

expenses are both dispute-related expenses. Since the owners were partially successful, I find they are entitled to half the amount of their reasonable dispute-related expenses. However, for the following reasons I find that neither the cost of the Group4 report nor the registered mail expenses were reasonable in the circumstances.

35. I have found that the owners notified the strata council about the concrete cracks in their garage on several occasions between 2014 and 2018 before they hired Group4. However, I find their evidence indicates that the strata was responsive and that various council members investigated the issue and determined the cracks were not a priority. Safesidewalks inspected the owners' garage in June 2018 and made recommendations to the strata about repairs. The owners say that after reading the November 20, 2018 council meeting minutes, they were concerned that the cracks in the concrete footing of their garage were not included in the strata's repair plans for 2019, so they decided it was necessary for them to hire a structural engineer to assess the cracks. However, I find that based on the strata's responsiveness up to that point, if the owners were unsure what repairs were included in the November 20, 2018 minutes, they should have asked the strata before hiring Group4 and incurring that expense. In the circumstances, I find it was unreasonable for the owners to hire Group4 without first consulting the strata and clarifying their concerns. Therefore, I find the owners are not entitled to reimbursement for the cost of the Group4 report and I dismiss this claim.
36. The owners also claim reimbursement of \$80 in registered mail expenses, though they only submitted receipts totalling \$65.74. Regardless, these receipts appear to be for correspondence with the strata between December 3, 2018 and April 3, 2018, and I find there is no indication that it was necessary for them to send correspondence to the strata by registered mail as opposed to by email or regular mail. I dismiss this claim.
37. Since the owners were partially successful in this dispute, I find they are entitled to reimbursement of half their tribunal fees in the amount of \$112.50.

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

## **ORDERS**

39. I order that:

- a. Within 14 days of the date of this order the strata must pay the owners \$112.50 in tribunal fees.
- b. Within 90 days of the date of this decision, the strata must hire an engineer to inspect the cracks in the concrete footing of the owners' garage and provide a report setting out the details of their inspection and the nature, extent, and timeline of any required repairs. The strata must share the report with the owners within 7 days of receiving it. Once the strata obtains the report it must decide on a course of action in accordance with its obligations under section 72 of the SPA and the bylaws.

40. The owners are entitled to post-judgment interest under the *Court Order Interest Act*, as applicable.

41. The remainder of the owners' claims are dismissed.

42. 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 a BCSC order.

43. 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 BCPC's monetary limit for claims under the Small Claims Act (currently \$35,000). Under section 58 of the CRTA, the owners 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 a BCPC order.

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Sarah Orr, Tribunal Member