



# Civil Resolution Tribunal

Date Issued: November 29, 2019

File: ST-2019-003380

Type: Strata

Civil Resolution Tribunal

Indexed as: *Millen v. Keller*, 2019 BCCRT 1343

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

STEPHEN MILLEN AND MARGOT MILLEN

**APPLICANTS**

**A N D :**

JEFFREY KELLER

**RESPONDENT**

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**REASONS FOR DECISION**

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Tribunal Member:

Kathleen Mell

## **INTRODUCTION**

1. This dispute is about damage arising from 2 water leaks. The applicants, Stephen Millen and Margot Millen, own a strata lot located below the strata lot owned by the respondent, Jeffrey Keller. Both strata lots are located within the strata corporation, The Owners, Strata Plan LMS 429 (strata).
2. The applicants say that water leaked into their strata lot from the respondent's strata lot. The applicants seek an order that the respondent reimburse them the \$2,500.00 deductible they paid their insurance company because of the repair costs.
3. The respondent says more investigation into the cause of the leaks is necessary. He also submits that the applicants' insurance company should attempt to retrieve the deductible from his insurance company.
4. The applicants are represented by Stephen Millen. The respondent is self-represented.

## **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 whether the respondent is responsible for the leaks, and, if so, whether he should reimburse the applicants their \$2,500.00 insurance deductible.

## **EVIDENCE, FINDINGS AND ANALYSIS**

10. In a civil dispute such as this, the applicants must prove their claim. They bear 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.
12. There is no dispute that water entered the applicants' strata lot from the respondent's strata lot. There were 2 separate leaks. The first leak occurred on January 11, 2019 when the respondent's water heater failed and caused damage to the applicants' strata lot and the parkade. The applicants made a claim with their insurance company and repair work began. The applicants say that during the installation of a new water heater in the respondent's strata lot on January 22, 2019, another leak occurred.
13. There is no dispute that the applicants paid a \$2,500.00 insurance deductible to their personal insurers. This is supported by receipts provided in evidence, which the respondent had the opportunity to review.
14. The respondent agrees with the applicants' description of events and adds that during the installation of the new water heater they found a leak in the pipe over the

water heater that had to be repaired. The respondent does not deny that the leaks came from his water heater, but he argues that the drain should have been able to accommodate the water entering the pan below, but both times it did not. The respondent requests further investigation be done to determine why the drain could not accommodate the water.

### ***The Bylaws***

15. The strata was created under the *Condominium Act* (CA), the predecessor to the *Strata Property Act* (SPA). Under regulation 17.11(3) of the SPA, all Part 5 bylaws under the CA ceased to have effect and, except for bylaws that conflicted with Standard Bylaws under the SPA, Standard Bylaws were deemed to be the strata's bylaws effective January 1, 2002. Further, any bylaw that conflicted with the SPA ceased to have effect on January 1, 2002. Based on my review of the strata's bylaws, I find the strata's bylaws in effect at the time of this dispute to be the Standard Bylaws plus the strata's rental restriction bylaw that was registered in 1998.
16. The SPA and the strata's bylaws do not contain provisions that specifically address water damage and associated repairs as between strata lot owners.
17. The bylaws set out responsibilities for repair and maintenance for both the strata and strata lot owners. Bylaw 2(1) states that an owner must repair and maintain their strata lot, except for repair and maintenance that is the responsibility of the strata corporation. Bylaw 8(c) limits the strata's duty to repair and maintain strata lots to: the structure and exterior of the building, chimneys, stairs, balconies, and other things attached to the exterior of a building, doors and windows on the exterior of a building or that front on the common property, fences, railings, and similar structures that enclose patios, balconies, and yards.
18. I acknowledge the respondent's submission that the leaks came from his water heater but that the drain should have been able to accommodate the amount of overflowing water. The respondent submits that further investigation needs to be conducted into why the drain did not perform correctly. This implies that the

respondent believes the drain was responsible for the water leaking into the applicants' strata lot and that the drain was not his responsibility to repair or maintain.

19. The respondent has provided no specific information as to where this drain is located but it is likely attached to the water heater pan. The water heater is not common property and it is the respondent's responsibility to repair.
20. The respondent has not provided any evidence to show that the drain should have been able to accommodate the amount of water that leaked and was somehow faulty. Based on the evidence, I find that the respondent has not shown that the drain was what caused the water to leak into the applicants' strata lot or that the drain was not the respondent's obligation to repair and maintain.
21. The respondent also makes mention of a pipe leaking during the installation of the new water heater that resulted in the second leak. Again, the respondent has not provided information as to where the pipe is located but the evidence suggests, and I find, that it was a pipe connected to the water heater and not one located in the wall or ceiling of the respondent's strata lot. Based on this, I also find that this pipe was not common property and therefore the duty to repair and maintain this pipe rests with the respondent as well.
22. Therefore, the 2 things that did leak were the respondent's hot water tank and a pipe above the hot water tank. I have found that both of these things are the owner's responsibility to repair.
23. The respondent also suggests that a contributing factor in the leak was the hot water tank had a faulty sensor and that he disconnected the sensor alarm in 2018. The hot water tank was the respondent's responsibility to repair and maintain. I find the respondent's statement does not assist the respondent in his argument that he should not be responsible for reimbursing the applicants the deductible they paid because of the water leaks.

### ***Negligence***

24. In addition to the respondent's duty to repair and maintain the water heater, the bylaws also address nuisance. Bylaw 3(1)(a) states that an owner, tenant, occupant or visitor must not use a strata lot in a way that causes a nuisance or hazard to another person. I find that bylaw 3(1)(a) establishes that the respondent has a duty of care to the applicants.
25. Liability for negligence occurs when someone owes, but fails to meet, a duty of care and damages result. In addition to his general duty of care, the respondent also had a duty under the bylaws to ensure that water egress from his strata lot did not cause damage to the applicant's strata lot.
26. Case law suggests that an owner is liable in negligence for water that escapes from his or her property, unless he or she can provide an explanation to show otherwise (*Westsea Construction v. Billedeau*, 2010 BCPC 109 at paragraph 39, and *Fontaine v. ICBC* [1998] 1 SCR 424). Decisions of this tribunal have described this scenario as a reverse onus of proof (see, for example, *Crockart v. Turcotte*, 2018 BCCRT 276) that has application to strata properties (see, for example, *Mingxi Yu v. Maiwand Ahmadzai*, 2018 BCCRT 791 and *Averin et al v. Ball*, 2019 BCCRT 608).
27. As discussed above, the respondent had the responsibility to repair and maintain the water heater. The respondent has not provided a sufficient or reasonable explanation to show that he is not liable for the water egress from his strata lot or the damages to the applicants' strata lot.
28. Finally, the respondent submits that the applicants should have waited for their insurance company to contact his insurance company to retrieve the deductible. The applicants say that their insurance company indicated from the outset that it would not pursue the respondent's insurance company for the deductible. The respondent has provided no evidence to support his claim that his insurance company would reimburse the applicants' insurance company for the deductible. Based on the evidence, I find that the applicants are not responsible for attempting to convince their insurer to seek the deductible from the respondent's insurer.

29. For these reasons, I find that the respondent must reimburse the applicants the \$2,500.00 insurance deductible they paid toward the repair costs and I so order. I note that, subject to the *Limitation Act* provisions, nothing in this decision restricts the owner from seeking reimbursement of the \$2,500.00 from the strata should he determine that the drain is common property and a cause of the water ingress into the applicants' strata lot.

## **TRIBUNAL FEES, EXPENSES, AND INTEREST**

30. The applicants were substantially successful in this dispute. 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. I see no reason in this case not to follow that general rule. Given my finding that the respondent was responsible for the damage to the applicants' strata lot, I find the respondent must reimburse the applicant the \$225.00 they paid in tribunal fees. The applicants did not claim any dispute-related expenses, so I order none.

31. The applicants are entitled to pre-judgement interest under the *Court Order Interest Act* (COIA) from the February 7, 2019 date of the invoice which set out the \$2,500.00 deductible to the date of this decision, which I calculate to be \$39.53.

## **DECISION AND ORDERS**

32. I order that within 30 days of the date of this decision, the respondent must pay to the applicants a total of \$2,764.53 broken down as follows:

- a. \$2,500.00 the insurance deductible paid,
- b. \$225.00 for tribunal fees paid, and
- c. \$39.53 for pre-judgement interest under the COIA.

33. 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 a BCSC order.

34. 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, 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 a BCPC order.

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Kathleen Mell, Tribunal Member