



# Civil Resolution Tribunal

Date Issued: December 16, 2019

File: ST-2019-002375

Type: Strata

Civil Resolution Tribunal

Indexed as: *Harvey v. The Owners, Strata Plan VR 390*, 2019 BCCRT 1417

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

WENDY HARVEY

**APPLICANT**

**A N D :**

The Owners, Strata Plan VR 390

**RESPONDENT**

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## **REASONS FOR DECISION**

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Tribunal Member:

Kate Campbell, Vice Chair

## **INTRODUCTION**

1. The applicant, Wendy Harvey (owner) owns strata lot 13 (SL13) in the respondent strata corporation, The Owners, Strata Plan LMS 1178 (strata).

2. The owner says the strata has failed in its duty to maintain and repair the common property outside SL13, including wall assemblies, chimney, garden, patio, and deck areas. The owner seeks orders that the strata comply with its bylaws by performing exterior repair and maintenance work.
3. The strata denies the owner's claims. It says it has complied with all bylaws, and that it is unaware of any repairs required to the exterior wall assemblies. The strata also says it offered to make the owner's fireplaces and chimney gas-ready and install 2 gas inserts, after the strata ownership voted to ban the use of wood-burning fireplaces.
4. The strata says the owners approved a resolution to fund repairs to the patio at the 2019 AGM, and it is unaware of any issue with the decks. The strata also says this dispute is an abuse of process and should be dismissed, for reasons I will explain below.
5. The owner is self-represented in this dispute. The strata is represented by a lawyer, Veronica Franco.

## **JURISDICTION AND PROCEDURE**

6. 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.
7. 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.

8. 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.
9. 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.

### ***Preliminary Issue – Abuse of Process***

10. The strata submits that the owner's claims in this dispute are an abuse of process because they are the same or similar to those raised in previous disputes she has filed. The strata says the tribunal should therefore refuse to resolve the dispute, under CRTA section 11(1)(b). That section says the tribunal may refuse to resolve a claim or dispute if the request for resolution does not disclose a reasonable claim or is an abuse of process.
11. The strata says the owner raised her claims about maintenance of the patio, garden, and deck areas in her submissions in a previous tribunal dispute, ST-2018-004993. That dispute was decided in an August 7, 2019 decision of the tribunal, indexed as 2019 BCCRT 944 (August 2019 decision). In the August 2019 decision, the tribunal vice chair did not make any decisions about the patio, garden, or deck, or any findings about them. However, I agree that the applicant made submissions about patio and garden repairs in that dispute.
12. The strata also says the owner's other claims are similar to those contained in previous tribunal disputes that the owner has withdrawn. I agree. For example, the Dispute Notice in withdrawn dispute ST-2017-002195 set out claims for the strata to repair common property, including the garden, chimney, patios, and decks adjacent to SL13.
13. I acknowledge the strata's frustration in dealing with the large number of disputes filed by the owner, many of which she has subsequently requested to withdraw. I

also note that the owner failed to provide evidence and submissions within the deadlines set by the tribunal, even after multiple extensions were granted.

14. Because of the need to bring finality to the owner's claims, I find it is appropriate in this case to decide the dispute, rather than to refuse to resolve it.

## **ISSUE**

15. Did the strata fail to maintain or repair common property, and if so, what remedies are appropriate?

## **EVIDENCE AND ANALYSIS**

16. I have read all of the evidence provided but refer only to evidence I find relevant to provide context for my decision. In a civil proceeding like this one, the applicant must prove their claims on a balance of probabilities.
17. The strata was created in 1976 under the *Strata Titles Act*, a predecessor to the current *Strata Property Act* (SPA). The strata consists of 12 residential strata lots in a single 11-storey building.
18. In 1984, strata lots 1 and 3 were subdivided so that most of strata lot 1 became SL13, which is the owner's strata lot. SL13 is a 2-storey dwelling unit located in the base of the tower building containing the remaining 11 apartment-type strata lots.
19. There is a significant history of litigation between the parties, including previous tribunal disputes and actions in BC Supreme Court. I will not summarize that history here but refer to it where necessary below.
20. In May 2001, the strata repealed all previous bylaws and filed new bylaws at the Land Title Office (LTO). The strata made some amendments after that, then in June 2018 it repealed most of the previous bylaws and replaced them with consolidated bylaws. Then in March 2019, the strata repealed and replaced all of its previous bylaws.

21. The March 2019 bylaws were in force at the time this dispute was filed. The owner's claims about common property maintenance and repairs relate to bylaw 8. I find that under all versions of the bylaws since 2001, the strata's duty to maintain and repair common property is essentially the same, except for 2 references to cleaning that are included in the 2018 bylaws, but removed in the 2019 bylaws. For these reasons, I rely on the 2019 bylaws in this decision, but note that the outcome would be the same under any version of the bylaws since 2001, which is before the owner purchased SL13.

### ***Bylaw 5(3)***

22. In the Dispute Notice, the owner sought an order about bylaw 5(3) that deals with alterations to a strata lot. Bylaw 5(3) is the same under all versions of the bylaws since 2001. It says the strata may not unreasonably withhold its approval for an owner's request to alter or renovate a strata lot, or certain things attached to the exterior of the building such as exterior windows, fences, and common property located within a strata lot.

23. The owner's dispute application specifically requests an order that the strata comply with the owner's repeated requests to invoke bylaw 5(3) "regarding exterior common property repairs and assets upgrades." Repairs or upgrades of exterior common property or common assets do not obviously fall within bylaw 5(3), although they could do so (such as for exterior windows). However, the Dispute Notice and submissions do not explain when the owner requested to alter her strata lot, what alterations she requested, or when the strata denied such a request.

24. The burden of proof is on the owner in this dispute. Since she provided no particulars, I find the owner has not proven that the strata unreasonably withheld an approval for alterations, contrary to bylaw 5(3). I therefore dismiss this claim.

## **Bylaw 8**

25. The owner also says the strata has violated bylaw 8 by failing to maintain and repair exterior common property and assets including exterior wall assemblies, the chimney, and patio, deck, and garden areas.
26. SPA section 72 sets out the strata's general duty to maintain and repair common property. This duty is confirmed and extended through bylaw 8. Bylaw 8 says the strata must maintain and repair the common property and common assets of the strata corporation. It says the strata is also required to maintain and repair limited common property (LCP), but the duty to maintain and repair LCP is restricted to repair and maintenance that in the ordinary course of events occurs less often than once a year, plus maintenance and repairs to the following LCP and parts of a strata lot, no matter how often it ordinarily occurs:
- a. the structure of a building;
  - b. the exterior of a building;
  - c. chimneys, stairs, balconies and other things attached to the exterior of a building;
  - d. doors, windows and skylights on the exterior of a building or that front on the common property;
  - e. fences, railings and similar structures that enclose patios, balconies and yards.
27. The owner says the strata has not met its obligations under bylaw 8, as it has failed to maintain and repair the common property on the exterior of SL13. The owner says the following areas of common property have been neglected or ignored by the strata:
- a. Upgrading of the paver and pedestal assemblies;
  - b. Upgrading of the irrigation system;

- c. Upgrading of the gate and fencing assemblies;
  - d. Upgrading of the wooden arbor/trellis assembly;
  - e. Upgrading of the wooden bench assembly;
  - f. Upgrading of the wooden garden areas containment rail ties;
  - g. Upgrading of the two south skylights;
  - h. Upgrading and repair and maintenance of the chimney (supporting 2 fireplaces), including upper dampers and exterior cladding;
  - i. Upgrading of ancillary exterior electrical and plumbing additions in keeping with the overall upgrades of these areas;
  - j. Upgrading and repair and maintenance of plants damaged or removed by the strata, particularly 8 rhododendrons and 5 Japanese maples;
  - k. Repair and maintenance of the north and west second floor decks attached to SL13, to City of Vancouver Code, as well as proper painting of related parapets (inside and out);
  - l. Repair and maintenance of wall assemblies related to SL13, including stucco cleaning, flashing cleaning, caulking, and concrete pillar and wall painting;
  - m. Repair and maintenance of all concrete pillars, walls and parapets including filling scaffold holes, and fixing and painting areas with exposed rebar; and
  - n. Any and all other upgrades that may be requested on a timely/practical basis during the remediation of these areas.
28. The owner says she wants each of these items repaired, maintained, or replaced, and for each item, she wants the strata to coordinate “desired element upgrades” with her.
29. For the purposes of this dispute, the strata admits that the disputed areas are either common property or LCP that falls within the strata’s maintenance and repair

obligations. However, the strata says it has met its duty under the SPA and bylaw 8, in the circumstances.

30. For the following reasons, I find the owner has not met the burden of proving her claims.
31. A strata is not held to a standard of perfection in its maintenance and repair obligations. The strata only has a duty to make 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.). 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. Also, an owner cannot direct the strata how to conduct its repairs: *Swan v. The Owners, Strata Plan LMS 410*, 2018 BCCRT 241. The strata is also entitled to prioritize its repairs: *Warren v. The Owners, Strata Plan VIS 6261*, 2017 BCCRT 139. While prior tribunal decisions are not binding precedents, I find their reasoning persuasive and rely on them. Also, I am required to follow the decisions of the BC Supreme Court, such as in *Wright* and *Weir*.
32. In *Weir*, the court said the starting point for assessing a claim about whether the strata corporation fulfilled its maintenance and repair obligations is deference to the strata council, as approved by the ownership (paragraph 23). The reason for deference is that the strata council must act in the best interest of all owners, which requires it to balance competing interests and work within a budget that the owners can afford. With that in mind, the Court found that it is not necessarily unreasonable for a strata corporation to decide not to choose the best repair option.
33. This means that the strata may prioritize between different maintenance projects and may choose a lower standard of maintenance for financial or practical reasons, as long as the decision is reasonable. The fact that an individual owner may be unhappy with the strata's choices does not mean that the strata breached its duty under section 72 of the SPA.



34. In this case, I find that while bylaw 8 clarifies the areas of the strata's maintenance obligations, it does not set a higher standard for that maintenance than is set out in SPA section 72. In applying the reasoning from *Weir*, I find the owner has not met the onus of establishing that the strata has failed to carry out its repair and maintenance obligations such that the tribunal should intervene.
35. In making this finding, I note that many of the specific areas where the owner seeks repair have been the subject of previous litigation between the parties. That litigation is contained in various published decisions, such as the decision of Madam Justice Gray in *The Owners, Strata Plan VR 390 v. Harvey*, 2013 BCSC 2293 (Gray decision). The Gray decision dealt with various issues that are again raised in this proceeding, such as the maintenance of garden areas outside SL13 (including bamboo plants, and who should trim them), patio paving stones, deck maintenance, exterior wall assemblies, and building envelope.
36. I find the owner has not provided sufficient evidence about the need for repairs in any of the listed areas. For example, she requests upgrading of electrical, plumbing, and skylights. However, she provided no objective evidence about problems with these systems.
37. Most of the owner's claims are for "upgrading" of various components. However, while the strata is required to maintain and repair common property, it has no obligation under the SPA or bylaws to perform and pay for upgrades of common property. Decisions about whether to upgrade common property are made by the ownership, which directs the strata council by voting on the strata's operating budget and other expenditures at annual and special general meetings. There is insufficient evidence about why such upgrading is necessary, and I therefore find no reason to order any upgrades.
38. In *Lum v. Strata Plan VR519 (Owners of)*, 2001 BCSC 493, the court said in paragraph 12 that the democratic government of the strata community should not be overridden by the Court except where absolutely necessary. I find that this

reasoning applies equally to the tribunal, and I conclude there is no reason to order repairs or upgrading in this case.

39. Also, the owner submits that the strata must coordinate “desired element upgrades” with her. I find the strata has no such obligation under the SPA or bylaws. Rather, the owner is entitled to vote at general meetings, but has no further right to direct the strata’s work or expenditures.
40. In deciding the owner’s claims, I place particular weight on the fact that there is no report from an expert, such as an engineer, building envelope consultant, or building contractor, explaining why any of the requested work is necessary. This includes the exterior wall assembly and pillars, as well as the plumbing, electrical, skylights, and decks. For this reason, I find the owner has not proven her claims.
41. The photos provided by the owner show some areas, such as the garden, that could be more attractive. However, following *Weir*, I find it is open to the strata to chose a less optimal approach to matters such as landscaping, after balancing other budgetary needs.
42. The strata argues that its capacity to pay for common property maintenance has been substantially burdened by the costs of previous and ongoing litigation with the owner and her spouse, Douglas Edgar. I accept that argument. In *The Owners, Strata Plan VR 309 v. Wendy Harvey and Douglas Edgar*, Vancouver Registry, docket S095494, March 10, 2010, Mr. Justice Preston said in paragraph 19 of his oral reasons that the other owners in the strata had been put to “monumental expense” by Mr. Edgar’s actions in dealing with the strata over disputed common property repairs. In a May 20, 2010 decision on special costs for the same action, Preston J. wrote in paragraph 24 that costs of necessary common property repairs had escalated dramatically due to Mr. Edgar’s “guerilla warfare” campaign against the strata.
43. There has been extensive litigation between the parties since Preston J.’s decisions in 2010, including numerous tribunal disputes filed by the owner. I find it is reasonable that the strata must consider these costs as part of its overall capacity to

pay for common property maintenance and repairs. Also, findings in the previous court decisions establish that some of the repairs sought by the owner are to remediate areas of common property, such as patio pavers and fencing, that the owner or her spouse altered without permission in the past. Again, this is a relevant factor in how the strata may assess the cost and relative priority of those repairs.

44. Also, at least some of the common property work the owner seeks, including patio pavers, fencing and irrigation, were the subject of a \$13,500 special levy approved by the ownership at the strata's February 2019 annual general meeting (AGM). In another dispute filed with the tribunal, ST-2019-001454, the owner sought to have that special levy "expunged", on the basis that the strata failed to give proper notice of the special levy resolution. That position appears contradictory with her position in this dispute, which is the strata ought to repair the areas that were, at least in part, to be paid for by the contested special levy. I find the fact that the strata ownership approved the special levy supports the conclusion that the strata is meeting its maintenance and repair obligations. Again, I note that the strata is entitled to prioritize its repairs.
45. The strata admits that the chimney connected to SL13 has problems. However, it also says the strata ownership voted on a bylaw amendment at a June 2018 special general meeting (SGM) to ban wood-burning fireplaces. This means the owner cannot use the 2 fireplaces in SL13 to burn wood in any event. The strata also provided a copy of June 25, 2018 email to the owner, in which the strata offered to convert the wood-burning fireplaces to gas. This offer included making the chimney gas-ready, including installing required venting, and paying for 2 standard gas inserts for the 2 fireplaces. The strata says this work would meet its repair and maintenance obligations. I agree. This would make the fireplaces operational, in a manner consistent with the strata's current bylaws. The owner is not entitled to any exemption to the bylaw about wood-burning fireplaces. While it appears that the owner did not accept the strata's offer, I find that the strata met its obligations. I also note that the owner provided no evidence, such as a report from an engineer or masonry expert, to establish that the chimney poses a threat when not in use for burning wood or that it could not be converted to accommodate gas fireplaces.

46. For all of these reasons, I conclude that the owner has not met the burden of proving her claims that the strata failed to reasonably maintain and repair common property. I therefore dismiss her claims, and this dispute.
47. The applicant was unsuccessful in this dispute. In accordance with the CRTA and the tribunal's rules I find she is not entitled to reimbursement of tribunal fees or dispute-related expenses.
48. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses to the owner.

## **ORDER**

49. I order that the applicant's claim, and this dispute, are dismissed.

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Kate Campbell, Vice Chair