Civil Resolution Tribunal

Date Issued: December 24, 2019

File: ST-2016-00571

Type: Strata

Civil Resolution Tribunal

Indexed as: *Chu v. The Owners, Strata Plan NWS 3412*, 2019 BCCRT 1439

B E T W E E N :

Wai Kam Chu

APPLICANT

A N D :

The Owners, Strata Plan NWS 3412

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Trisha Apland

INTRODUCTION

1. The applicant, Wai Kam Chu (owner), owns strata lot 14 (SL14) in the respondent strata corporation, The Owners, Strata Plan NWS 3412 (strata). The owner claims the strata's conduct towards her was significantly unfair. The owner seeks

compensation for loss of use of her strata lot resulting from water ingress and damage.

2. The owner initiated this dispute in 2016 asking that the strata repair its common property and her strata lot and compensate her alleged loss. After commencing this dispute, the strata completed the common property repairs and the parties reached an agreement as to further interior repairs. The parties agree the only outstanding issue is compensation for the owner's alleged loss of use of SL14. The owner claims damages of $101,200, for 44 months of potential lost rental income at $2,300 per month.

3. The owner is represented by legal counsel, Stephen Hamilton and the strata is represented by legal counsel, Hong Guo.

4. For the reasons that follow, I find the strata must pay the owner $46,200 in damages.

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. The applicable tribunal rules are those that were in place at the time this dispute was commenced.

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.

POSITIONS OF THE PARTIES

10. The owner's position is that the strata's conduct was significantly unfair under section 164(1)(a) of the *Strata Property Act* (SPA), for failing to repair and maintain the building exterior in a timely way, which in turn negatively affected SL14. The owner submits that she was unable to use or rent out SL14 lot due to water damage, mold and continuing water ingress into her strata lot. The owner argues that the best measure of her damages is the market rate for her loss of potential rental income from January 1, 2016 to August 27, 2019, which she says is $101,200.00.

11. The strata does not directly address the owner's significant unfairness argument. The strata reframes the owner's claim as a claim in negligence. The strata says that it acted reasonably by adopting the strategies recommended by its experts, within the confines of its limited budget, to solve the water ingress problem. The strata's position is that damages have to flow as a "direct" consequence of its actions, and it argues loss of rental income is not a direct consequence. Further, the strata says the owner failed to mitigate by not remediating the mold herself.

ISSUES

12. As noted above, the parties reached an agreement on the repair issues before this adjudication, so I have not addressed those issues in this decision.

13. The remaining issues in this dispute are:

    a. Was the strata's conduct significantly unfair?

    b. Was the strata negligent in failing to repair or maintain common property?

    c. What damages, if any, flow from the strata's conduct?

EVIDENCE AND ANALYSIS

Background

14. In this tribunal proceeding, the owner must prove her claims on a balance of probabilities. I have read all of the submissions and evidence provided, but refer only to information I find relevant to provide context for my decision.

15. Under section 3 of the SPA, the strata is responsible for managing and maintaining the common property and common assets of the strata corporation for the benefit of the owners. Under Section 72 of the SPA, the strata must repair and maintain common property.

16. I find the strata's relevant bylaws are those bylaw amendments filed in the Land Title Office (LTO) on March 21, 2001 as BR66135. Under bylaw 3(1) an owner must repair and maintain the owner's strata lot, except for repair and maintenance that is the responsibility of the strata corporation under the bylaws. Bylaw 9 requires the strata corporation to repair and maintain common property and parts of a strata lot limited to the structure of a building, exterior of a building, balconies and other things attached to the exterior of a building, doors, windows, and skylights on the exterior of a building, and other parts of the building that are unrelated to this dispute.

17. The strata plan was filed in the LTO on December 13, 1990. The four-floor strata building is wood frame construction on top of a two-level concrete parking garage. There is no dispute that the building suffered from years of chronic water ingress causing damage to the common property and several strata lots.

18. The owner says that her strata lot was uninhabitable due to water and mold. It is undisputed that the owner moved out of SL14 by about June 2013.

19. Based on the strata's professional assessments in evidence, I find SL14 was uninhabitable and the owner needed to move out. Specifically, on June 10, 2013, a contractor, Abundance Design & Construction Ltd., inspected SL14 and determined it was not "livable" or "healthy" and needed immediate repair due to water ingress and mold. On August 20, 2013, an engineer, Rainshield Engineers (Rainshield), performed an on-site investigation into reported areas of water ingress. It investigated several areas of concern in the building, which it reported to the strata on September 12, 2013. Specific to SL14, its report states that it found water staining, structural damage and decay, active water ingress, and conditions for fungi growth. It recommended immediate corrective action to address the "safety and health concerns" of SL14 including repairs to exterior walls, windows, doors, balconies, and the building envelope. Rainshield's report recommended that the strata retain a qualified building envelope engineer to consult and prepare detailed work specifications and drawings for the recommended "immediate corrective actions".

20. Based on the list of failures, I find Rainshield's recommended repairs related to common property and those portions of the strata lots that are the strata's responsibility to maintain and repair under bylaw 9. However, the strata took no immediate action to address the Rainshield recommendations or to correct the stated issues.

21. On January 17, 2014, the strata held an emergency council meeting with an update on 7 "leaky units", including SL14. Of the "leaky units", council agreed to hire a "decoration and painting" company to do "trial" repairs to one of the strata lots, which was not SL14. The decision and repairs are not explained. The evidence does not establish that these repairs addressed the Rainshield recommendations.

22. In 2014, LDR Engineering Group conducted a building enclosure condition assessment. According to its May 8, 2014 report, it found active water ingress,

structural damage, and health and safety hazards. It said the building enclosure failed for numerous reasons, including inadequate face-sealed stucco construction and aged and poorly waterproofed windows, doors, decks, and balconies. LDR recommended a $12,650,000.00 comprehensive building envelope repair.

23. At the November 4, 2014 strata council meeting, council said "temporary patches have already been done for all leaking units with reported leaks". The 2014 council meeting minutes show the strata approved repairs to other strata lots related to water ingress issues. However, apart from minor work such as patching drywall, there is no evidence of repairs to either the exterior or interior of SL14 by this time. The owner says the strata had told her that there were insufficient funds to complete the repairs for SL14.

24. At a December 22, 2014 council meeting, the strata council had another engineering company, JRS Engineering (JRS), propose solutions. JRS advised council that the major source of water ingress was from the flat roof and poor membrane. The minutes mention SL14's "molding & water ingress" and that council decided to replace the roof first. There is no 2014 written report in evidence from JRS, though I note there is one for 2016.

25. On April 27, 2015, the strata approved a contractor, Helios Roofing and Waterproofing Ltd. (Helios), to make some targeted repairs to the building. According to the December 5, 2015 strata council minutes, Helios reported that the "rotting situation has expanded greatly" at SL14 and it needed to consult with its engineer to "come up with a plan". Since there is no engineering plan in evidence for Helios's work, I infer the strata proceeded with repairs in 2015 without an engineered solution as recommended by Rainshield. The extent of Helios's repairs up to December 2015 are not in evidence. However, photographs before and after that date show SL14 partially demolished with a section of its exterior wall removed and open to the outside except for some plastic sheathing coverage. I find Helios partially demolished SL14 and did not repair it.

26. At its May 13, 2016 annual general meeting, the strata proposed a special levy "for Major Water Ingress Repair of SL14 and involved strata lots". The resolution was defeated by the majority of owners. In June 2016, the strata property manager urged council to address the SL14 "rotting situation". Six months later, on December 8, 2016, the strata held a special general meeting to raise $500,000 by special levy to complete the repairs to the building and exterior repairs to SL14. This time the resolution passed.

27. On April 12, 2018, the strata hired the engineering firm, Apex Building Sciences Inc. (Apex), to consult, assess, administer and oversee the repairs. Apex hired a contractor, EPS Westcoast Construction (EPS), on October 19, 2017 to perform the remediation work. EPS's construction schedule shows it started work in January 2018.

28. In July 2018 the strata wrote the owner to inform her the repairs would be complete by July 23, 2018 and she could move in after that date. However, the October 18, 2018 strata meeting minutes list mold as a continuing interior "concern" for SL14. I have no completion report from EPS or Apex on the condition of SL14 by this date, which I infer the strata should have in its possession. I have insufficient evidence that SL14 was liveable by July 23, 2018 because it was stated in the strata's letter.

29. The parties seem to agree otherwise that the exterior work to SL14 was complete by the end of August 2019. Based on the above, I find the repair work started in January 2018 and finished by the end of August 2019.

Was the strata's conduct significantly unfair?

30. As set out in *Hill v. Strata Plan KAS 510,* 2016 BCSC 1753 (*Hill*) at paragraph 64, the strata has a "fundamental duty to repair and maintain its common property". The failure to meet this duty in circumstances that are oppressive can result in financial sanctions.

31. Section 164 of the SPA provides the court with authority to make an order to prevent or remedy a significantly unfair action of the strata corporation, including the

council, in relation to an owner. Under section 123 of the CRTA, the tribunal has authority to make an order to remedy a significantly unfair act.

32. The BC Court of Appeal considered the language of section 164 of the SPA in *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44. The test established in *Dollan* was restated by the BC Supreme Court in *The Owners, Strata Plan LMS 1721 v. Watson,* 2018 BCSC 164 at paragraph 28:

    a. What is or was the expectation of the affected owner or tenant?

    b. Was that expectation on the part of the owner or tenant objectively reasonable?

    c. If so, was that expectation violated by an action that was significantly unfair?

33. The courts have defined "significant unfairness" in section 164 to include "oppressive" conduct, also defined as conduct that is “burdensome, harsh, wrongful, lacking in probity or fair dealing, or has been done in bad faith”. It includes conduct that is "unfairly prejudicial", or unjust and inequitable, (see *Dollan* at paragraph 49, and *Hill* at paragraph 67).

34. I find the strata had a statutory obligation and one under its own bylaws to repair the building envelope, windows, and structural decay of SL14 (“building defects”). I find it failed to meet that obligation. I do not find the strata met its obligation by hiring Helios, since it did not fix the building defects.

35. The strata argues that the standard is not one of perfection, but one of reasonableness. I agree that this is the standard. However, as stated in *Oldaker v. Strata Plan VR 1008,* 2007 BCSC 669*,* “every strata corporation faced with problems of water ingress must rely upon and be guided by advice received from professional” (at paragraph 56). I find the strata’s failure to follow the uncontroverted advice of its own engineers (Rainshield and LDR) and for failing to obtain an engineered plan once it started repair in 2015 unreasonable in the circumstances. I find this was not a choice between the best solution and a solution that would work.

Helios's work stopped because it needed an engineered plan, which the strata had already been told it needed by September 12, 2013.

36. While I accept the strata had a limited budget, I find this is not a sufficient excuse to delay its statutory obligations or take short cuts when faced with risks to health and safety and uncontroverted engineering recommendations for urgent repairs. A solution to a limited budget in emergent situations is to raise money. I find the strata's delay of almost 2 years to attempt to raise funds through a special levy (May 2014 - April 2016), plus another 7 months to raise it again after the first vote failed, unacceptable in the circumstances.

37. Going back to the first branch of the *Dollan* test, I find the owner, forced out of her home in 2013, had a reasonable expectation that the strata would comply with its legal obligations by repairing the building defects in a timely and reasonable manner, according to engineer recommendations. Additionally, the evidence is that the strata performed water ingress related repairs to other strata lots in 2014. I find it was reasonable for the owner to expect the strata to also repair those portions of her strata lot that fell under the strata's responsibility. I find the strata took no positive steps and opted instead to avoid its statutory duties for years.

38. With respect to the second branch of the test, I find that the owner's reasonable expectation was violated by a series of actions that were significantly unfair.

39. First, I find the strata's lack of positive action for years both burdensome and harsh, considering it knew the owner's strata lot was uninhabitable. Second, I find it was inequitable that the strata repaired other strata lots but not the owner's until after 2017. Third, I find the results of the failed special levy were significantly unfair. The court in *Dollan* said that while "considerable deference will generally be granted to democratic decisions reached by strata corporations, even a democratic and fair process may yield results that are significantly unfair to the interests of minority owners". I find that is what happened here.

40. The strata produced witness statements of other owners who said that their strata lots were livable for the years in question. One of these owners described the repair

issues as “inconveniences”. Although I appreciate the water ingress problems impacted other owners’ strata lots by varying degrees, the evidence is that SL14 was uninhabitable due to the issues discussed above. The special levy was needed to raise funds to repair the building defects and comply with the strata’s statutory duty. I find the vote results were unfairly prejudicial to the owner.

41. On balance, I find the owner has proven that the strata’s conduct was significantly unfair towards her.

Was the strata negligent in failing to repair or maintain common property?

42. Based on my finding of significant unfairness, I find no need to discuss the strata’s argument that it is not liable in negligence.

What damages, if any, flow from the strata’s conduct?

43. As mentioned, the owner claims damages for 44 months of lost rental income. I discuss the claimed 44-month period below. I turn first to whether lost rental income is an appropriate measure of damages to remedy significantly unfair conduct.

44. In *Radcliffe v. The Owners, Strata Plan KAS1436,* 2014 BCSC 221, Mr. Justice Weatherill described section 164 of the SPA as “an equitable oppression remedy” and held that “if a claim under s. 164 is properly made out, any appropriate remedy will follow” to “right the wrong”.

45. The strata argues that the owner cannot receive damages that are “indirect, uncertain, and … in the future.” The strata relies on the Supreme Court of Canada’s decision in *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59. The strata says damages must be the “direct consequence of the injurious act” and since loss of rental income is an indirect consequence, I should not grant it.

46. However, the issue in *Infineon* was whether the court should authorize a class action under the Civil Code of Quebec (CCQ) to recover damages from international manufacturers. The causation test applied in *Infineon* was specific to article 1457 of

the CCQ. I find it is not the applicable test here. In BC, the courts have allowed indirect damages for significantly unfair conduct, such as in the *Hill* decision.

47. In *Hill* at paragraph 93, Mr. Justice Weatherill awarded damages for what he viewed as reasonable considering the "unfair treatment the petitioner was subjected to". Mr. Justice Weatherill found the strata's treatment significantly unfair in failing to repair structural defects for years that it had a statutory obligation to fix. The test he applied was to attempt to place the petitioner owner "in the same position she would have been in had the strata corporation repaired the Structural Defects in a timely manner". I apply the same test here.

48. However, I stop to point out that although I apply the same test, the facts are different. In *Hill,* Mr. Justice Weatherill awarded damages based on the petitioner selling the strata lot had the strata's oppressive conduct not occurred. The evidence was overwhelming that the petitioner intended to sell the strata lot rather than rent it. So, he declined to award damages for lost rental income. In the present dispute, the owner had specifically mentioned in 2014 that she was unable to rent her strata lot because of the unrepaired building defects. I find the owner intended to rent out the unit, but for these issues.

49. There is no rental prohibition in the strata bylaws. There is evidence that other strata lots in the same building are rented out. Although the owner was not renting her strata lot prior to moving out in 2013, I find that she had lost the real opportunity to do so because of the building defects and the strata's delay in repairs.

50. I find that the owner lost the benefit of her ownership of SL14 by her inability to use it as a rental. I am satisfied that the strata must reimburse the owner for potential lost rental income for the time period needed to "right the wrong".

51. The owner argues that the appropriate period is 44 months. She submits that had the strata accepted and proceeded by at least May 8, 2014 it is probable that the building defect repairs would have been completed before the end of 2015. She argues that the strata should compensate her loss of rental income from January 1, 2016 until August 27, 2019, when she says the exterior work was complete.

52. I accept that the strata should have proceeded with repairs by at least May 8, 2014, but I do not accept the building repairs would have ended by 2015. I find this does not account for the actual time it took to finish repairs, which was considerably longer than originally scheduled. The evidence does not establish that the strata caused the longer construction period.

53. The evidence does not allow me to quantify the owner's loss using a precise mathematical equation. However, if the strata commenced the process when recommended by engineers, I find the project's estimated completion date would have been around April 2017. But for the strata delaying repairs, I find the owner would have been able to rent SL14 by May 1, 2017. I find her period of loss was the inability to rent from May 1, 2017 until September 1, 2019. On a judgment basis, I allow 28 months for lost rental income.

54. As for the value of the lost rental income, the owner relies on a May 7, 2019 report by Campbell & Pound Real Estates Appraisers (Campbell & Pound) for the market rental value of comparable strata lots. The strata did not submit its own report or object to the owner's report. I accept that the Campbell & Pound report meets the requirements for expert evidence under tribunal rule 8.3 and I have admitted it as such.

55. The Campbell & Pound report estimates that as of May 7, 2019 the monthly economic rent for SL14, a 3-bedroom townhome, was $2,300 per month. The report lists comparable townhouse monthly rentals from $1,750 per month to about $2,500 for 2019. The "CMHC-SCHL" graph embedded in the report shows rents increased by about $100 on average per year. Therefore, I find they are likely a few hundred dollars higher than a rental starting in May 2016.

56. The 3-bedroom townhouse mentioned in the report for $1,750 was in the same strata complex as SL14. The appraiser explained that the owner's townhome is "superior" but provided little detail about the differences between the units to justify the price difference. The higher priced townhouse is described as "modern". I find the evidence is that the owner's townhouse is more in line with the lower end

'comparables'. On a judgment basis, I find $1,650 is an appropriate monthly rent for SL14 at the relevant time.

57. The Campbell & Pound report also includes a graph showing that the vacancy rate in 2018 was 1% in the greater Vancouver area where the strata is located. It is widely publicized in British Columbia that the vacancy rate has been low for many years in this area. I accept that the owner would have been able to rent the unit if she put it on the market in 2016.

58. I assess the owner's loss of potential rental income is $46,200 based on 28 months at $1,650 per month.

59. The strata argues that the owner failed to mitigate her damages. The strata speculates that had the owner "conducted a mold removal immediately for herself to live in the unit, the cost of mold removal would have been under a thousand dollars for her to at least living (sic) in the building which would not resolve in a moving-out situation immediately".

60. The burden of proof is on the party alleging failure to mitigate (see for example, *Red Deer College v. Michaels*, 1976 CanLII 15 (SCC)). I find the strata has not met this burden. The problem with the owner's strata lot was not limited to some mold that could be removed to make the unit liveable. Again, the evidence is that water was actively entering into the strata lot, there was unsafe structural decay, and black mold inside the walls. I find the owner had no reasonable way to make the strata lot liveable by just removing the mold herself. I reject the strata's failure to mitigate argument.

61. As stated by Mr. Justice Weatherill in *Hill* at paragraph 91, awarding damages for significant unfairness requires, in the end, "a balancing act" between what expenses should be imposed on the strata and "the need to fairly compensate" the owner. The filed strata plan shows 148 strata lots including the owner's SL14. An award of $46,200 would on average equal $312 per strata lot. I find in the circumstances that $46,200 is an appropriate amount to fairly compensate the owner for the strata's significantly unfair conduct.

62. I award the owner damages in the sum of $46,200.

TRIBUNAL FEES, EXPENSES AND INTEREST

63. 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. I see no reason in this case not to follow that general rule. I therefore order the strata to reimburse the owner the $225.00 she paid in tribunal fees.

64. The owner claims a total of $909.35 for dispute related expenses. This includes $9.11 in courier fees, $35.04 in LTO fees, $235.20 for copies of strata records, and $630.00 for the Campbell & Pound report. Based on the receipts and invoices in evidence, I accept that the owner incurred these expenses in relation to this dispute. Although I did not accept its opinion on the exact rental value of SL14, I found I needed to rely on Campbell & Pound's report to determine the appropriate monthly rent. I find the claimed dispute related expenses were reasonably incurred and I allow them.

65. The *Court Order Interest Act* (COIA) applies to the tribunal. The award was based on loss of rental income as of May 1, 2017 and is a global award meant to fairly compensate the owner for the strata's significantly unfair conduct. On a judgment basis, I have decided that the appropriate date to calculate pre-judgment interest on the $46,200 award is from the midpoint of the loss of rental income, July 1, 2018, to the date of this decision. This equals $1,221.33.

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

ORDERS

67. Within 30 days of this order, I order the strata pay the owner a total of $48,555.68, broken down as follows:

a. $46,200.00 in damages,

b. $909.35 in dispute related expenses,

c. $225.00 in tribunal fees, and

d. $1,221.33 in pre-judgment interest under the COIA.

68. The owner is also entitled to post-judgment interest under the COIA, as applicable.

69. 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). The order can only be filed if, among other things, the time for an appeal under section 123.1 of the CRTA has expired and leave to appeal has not been sought or consented to. Once filed, a tribunal order has the same force and effect as a BCSC order.

Trisha Apland, Tribunal Member