Civil Resolution Tribunal

Date Issued: April 30, 2020

File: ST-2019-004686

Type: Strata

Civil Resolution Tribunal

Indexed as: *Cuthbertson v. The Owners, Strata Plan LMS 1023*, 2020 BCCRT 472

B E T W E E N :

BRUCE CUTHBERTSON

APPLICANT

A N D :

The Owners, Strata Plan LMS 1023

RESPONDENT

REASONS FOR DECISION

Tribunal Member: David Jiang

INTRODUCTION

1. This dispute is about who should pay for water damage. The applicant Bruce Cuthbertson (owner) owns a strata lot in the respondent strata corporation, The Owners, Strata Plan LMS 1023 (strata). The owner says the strata improperly charged his strata lot account approximately $3,000 for mould abatement of his garage. He seeks an order for the strata to reverse this charge and complete

outstanding repairs to the garage's drywall and ceiling at the strata's expense. The owner estimates his total claims have a monetary value of $8,000.

2. The strata disagrees with the respondent's claims. It says it was entitled to charge back the mould abatement to the owner's strata lot account to preserve the building. It also says the owner is responsible for remaining repairs because they affect his strata lot. The strata says that under the bylaws and *Strata Property Act* (SPA) the owner must take responsibility for such repairs.

3. The applicant is self-represented. A strata council member represents the strata.

JURISDICTION AND PROCEDURE

4. 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.

5. 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.

6. 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.

7. 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

8. The issues in this dispute are as follows:

    a. Did the strata appropriately charge back the owner's strata lot account for mould abatement of the owner's garage?

    b. Must the strata complete repairs on the owner's garage?

EVIDENCE AND ANALYSIS

9. In a civil claim such as this, the applicant bears the burden of proof, on a balance of probabilities. I have only addressed the evidence and arguments to the extent necessary to explain my decision.

10. Much of this dispute is about whether the strata or the owner was negligent. The owner's position is that the strata failed to address overflowing gutters, which led to the water damage in the owner's garage. The strata's position is that it was not negligent, and that the owner delayed repairs by taking too long to move his car (a collector's vehicle) from the garage. The strata says this caused mould to grow and the owner should therefore pay for mould abatement.

11. For the following reasons, I find the owner was negligent and the strata was not. As a result, the owner's claims must fail.

12. Some background is necessary. The registered strata plan shows that the owner owns strata lot 7 in the strata. The strata lot is a townhouse-style accommodation that includes a garage on the main floor. Based on the plan, I find the garage is not common property and is part of the owner's strata lot.

13. It is undisputed that on November 1, 2018, the owner reported to the strata's property manager that water was leaking into his garage. On November 2, 2018, a strata council member inspected the owner's garage and the strata hired a restoration company for emergency repairs and initial remediation work.

14. The owner provided the restoration company access to his garage. The restoration company advised the strata that the owner's car had to be moved for it to complete its assessment and start repairs. The owner's car was uninsured for driving. A temporary operation permit and certificate of insurance shows the owner moved his car from the garage on December 17, 2018. I will discuss the timing of these events in further detail below.

15. I infer from the above that the owner consented to the garage repairs but there is no indication the parties discussed who would pay for the repairs.

16. After the owner moved his car, the restoration company completed an assessment and started work on December 20, 2018. In its assessment report, it advised that mould was growing on the ceiling and walls.

17. The owner requested a hearing about the status of repairs, which the strata council held on January 15, 2019. As documented in a January 17, 2019 letter to the owner, the strata accepted that overflowing gutters above the owner's garage caused water ingress into the garage walls and ceiling. The restoration company worked on both emergency repairs to the garage exterior (including a gutter catch basin and wood trim) and mitigation work. However, the restoration company also completed additional mould abatement work.

18. The strata wrote that the cost of the work was initially $1,000 for the emergency repairs and mitigation, but the owner delayed providing access to his garage. The strata said this increased the cost of work to approximately $3,000 to $4,000 to account for the additional mould abatement.

19. The strata added it would not make an insurance claim as the damage was below its $5,000 deductible and, in any event, mould abatement was not covered under its insurance policy. The owner does not dispute these policy limits.

20. The strata based its findings on the restoration company's December 2018 assessment report and January 7, 2019 email. In the email, the company estimated that regular mitigation costs would have been $1,000 if the owner had provided

access within a reasonable time period. It estimated the cost had increased to approximately $3,000 to $4,000 because mould now impacted the building fabrics and it had to carry out mould abatement beyond regular exterior repairs and mitigation.

21. The evidence shows the restoration company completed its work on January 24, 2019. It did not completely restore the garage to its previous state, leaving the ceiling and drywall unfinished.

22. At a May 28, 2019 strata council meeting, the strata discussed the final figures from the restoration company. The minutes show that the restoration company's costs increased from $1,342.53 to $4,369.56. The strata decided to charge back the difference of $3,027.03 to the owner's strata lot.

Issue #1. Did the strata appropriately charge back the owner's strata lot account for mould abatement of the owner's garage?

23. A strata corporation is not entitled to charge back costs it has incurred to an owner without an enforceable bylaw or rule that creates the debt. See *Shen v. The Owners, Strata Plan LMS 1005,* 2020 BCCRT 63, at paragraph 28, citing *Ward v. Strata Plan VIS #6115,* 2011 BCCA 512 and *Rintoul et al v. The Owners, Strata Plan KAS 2428,* 2019 BCCRT 1007.

24. In its correspondence to the owner and the arguments in this dispute, the strata did not say which bylaw it used to charge back costs to the owner. The strata's bylaws are registered in the Land Title Office. Having reviewed the strata's bylaws, I find that the strata proceeded under bylaw 4.4. Bylaw 4.4 says that an owner shall indemnify the strata for the cost of repairs rendered necessary to common property or any strata lot by an owner's act, omission, negligence or carelessness.

25. Several tribunal decisions have found that the phrase "owner's act, omission, negligence or carelessness" must be read collectively and import a standard of negligence. See, for example, *The Owners, Strata Plan BCS 2174 v. Liu,* 2020 BCCRT 366 and *Hu v. The Owners, Strata Plan BCS 3507,* 2020 BCCRT 74.

26. Although tribunal decision are not binding, I find the reasoning in these decisions applicable to this dispute. I note that in *Hu* at paragraph 28 the tribunal Vice Chair considered a bylaw with quoted portions that are identical to the wording in bylaw 4.4. By adopting the indemnity language referring to an "owner's act, omission, negligence or carelessness" the strata adopted a standard of negligence. I find that bylaw 4.4 requires the owner to be negligent before any repair costs may be charged back to him.

27. To prove negligence, the strata must show that the owner owed it a duty of care, the owner breached the standard of care, the strata sustained damage, and the damage was caused by the owner's breach: *Mustapha v. Culligan of Canada Ltd.,* 2008 SCC 27 at paragraph 33.

28. In short, the question is whether the additional mould abatement work (the charge back at issue) was rendered necessary by the owner's negligence.

29. A preliminary consideration is whether the strata should have been arranging and paying for the mould abatement work at all. Under bylaw 11, the strata must repair and maintain a strata lot, but this duty is restricted to the structure and exterior of the building. The restoration company's December 2018 report indicates the abatement included removing impacted drywall and associated building fabrics. The report also showed mouldy wall studs. I conclude that, as the work included removing building fabrics and dealing with the affected studs, this work was necessary to repair and maintain the strata lot's structure.

30. As I have found the mould abatement work necessary, the next question is whether it was rendered necessary by the owner's negligence.

31. I find that the owner owed a duty of care to the strata regarding maintenance and repairs of his strata lot to avoid causing damage to the strata.

32. I also find the strata suffered damage. The restoration company wrote in its January 7, 2019 email the mould worsened because the company was not able to start work within a reasonable time period. The company also provided a rough estimate of the

damages, and it says the delay increased the price of repairs by about $3,000. The charge back amount was ultimately $3,027.03.

33. The owner says the mould was pre-existing and “growing for years”. He provided photos as evidence. I find the photos lend limited support to the owner’s position. The photos included exterior images of the underside of the gutter and sheathing beside the gutter that the owner says shows wood rot. While I find the depicted areas show damage, they do not show that the garage walls, ceilings, and wall studs (the actual areas at issue) were damaged by water over time. There is no other evidence, such as an opinion from a professional, that establishes such a link. The restoration company did not say any of the mould was pre-existing or that it was not caused by the November 1, 2018 leak. The owner’s photos were also dated June 14, 2019. They do not show the conditions of the gutters in the years leading up to the water damage in November 2018.

34. The real question is whether the owner breached the standard of care. I find the applicable standard is reasonableness: *Burris v. Stone et al,* 2019 BCCRT 886 at paragraph 28. The strata essentially argues the owner breached the standard of care by failing to move his car until December 17, 2018. This was more than a month after the water damage occurred on November 1, 2018.

35. I agree with the strata and find that the owner acted unreasonably by not moving his car sooner. I find the owner reasonably knew or ought to have known that any delays in repairs would worsen any water damage (including mould) in the garage. It is undisputed that the restoration company had difficulty arranging an inspection of the garage with the owner. It first inspected the garage on November 9, 2018. At the time, the company reported that the ceiling and drywall had to be repaired, but it could not proceed because the owner’s car was in the way. On November 20, 2018, the company advised the strata that they had left voicemail to the owner to remove the vehicle, but the voicemails were not answered. The property manager spoke to the owner and advised the strata that the owner was trying to find storage for his car.

36. The owner does not deny that the restoration company and strata contacted him or that he was advised to move his car on November 20, 2018. He provided little explanation for why he did not move his car earlier. I acknowledge the owner's evidence that his car was uninsured for driving and he had to obtain a temporary operation permit and certificate of insurance to move his vehicle. He also had to find a place to put his car. However, the owner did not say that that these factors delayed moving the car in any significant way.

37. In arguments, the owner also says the delay was only 2 to 3 weeks. In these circumstances, where the owner knew water had leaked into his garage and a company was waiting for his car to be moved, I find that even this time period would be unreasonable. In any event, as the owner was advised to move his vehicle on November 20, 2018, I find the delay was 27 days. As this is nearly 4 weeks, I find this to be an unreasonable time period.

38. The owner also says if it was an emergency, the strata or the restoration company should have moved the car. I disagree and find the strata acted reasonably by exhausting all attempts to have the owner move his car. There is no indication the owner provided the strata car keys or otherwise gave permission to move the car.

39. In summary, I find the strata was entitled to charge back repairs under bylaw 4.4 as the owner was negligent. I dismiss this claim.

Issue #2. Must the strata complete repairs on the owner's garage?

40. The owner says the strata should complete repairs on his garage, which include further drywall, insulation, and painting work. The owner did not provide an estimate or other evidence regarding the cost of these repairs, though I infer he believes the cost would be $5,000.

41. The strata says it was entitled to hire the restoration company to preserve the structure of the building. It says the remaining, incomplete repairs affect drywall and ceiling areas that are entirely within the interior of the owner's strata lot. The strata says these areas are the owner's responsibility.

42. The strata's bylaws outline responsibilities for repairs. Bylaw 3.1 says 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 11, cited above and repeated here for reference, says the strata must repair and maintain a strata lot, but this duty is restricted to the structure and exterior of the building.

43. A strata corporation is not required to reimburse an owner for repairing their strata lot when the repairs are the owner's responsibilities under the bylaws. An exception to this is if the strata has been negligent in repairing and maintaining the common property. See *Basic v. Strata Plan LMS 0304,* 2011 BCCA 231 and *Kayne v. LMS 2374,* 2013 BCSC 51.

44. There is no indication that the remaining, incomplete repairs are to the structure or exterior of the strata's building. I therefore conclude the owner is responsible for the cost of completing repairs to the garage. However, the owner may be reimbursed if he can show the strata has been negligent in maintaining the common property.

45. To prove negligence, the owner must show the strata owed him a duty of care, the strata breached the standard of care, and the owner sustained damage as a result of the breach: *Mustapha,* cited above. The standard of care that applies to the strata is reasonableness: *Weir v. Owners, Strata Plan NW 17,* 2010 BCSC 784)

46. For the reasons that follow, I find the owner has not proven on a balance of probabilities that the strata was negligent.

47. The strata denies it was negligent and says the leak was caused by unusually heavy rainfall. I accept there was heavy rainfall on November 1, 2018 as the owner does not dispute the strata's submission.

48. The owner submits the strata used valley gutters which were a "a leak waiting to happen". The owner provided photos of the gutters. However, the owner did not provide any evidence (such as an opinion from a professional) to show that valley gutters are prone to overflowing. I do not find it apparent from the photos that the strata did anything wrong.

49. The owner said the strata allowed the gutters to overflow 2 or 3 times over the past several years. The owner also says he emailed the strata twice in May 2014, advising that the gutters were overflowing from rainfall. I infer the overflows occurred at a rate of less than once a year, which I do not find noteworthy. There is no evidence that whatever caused the gutters to overflow in May 2014 (such as an obstruction or heavy rainfall at the time) caused the overflow in November 2018, many years later.

50. Some of the owner's submissions also supported the strata's position. For example, he noted that in 2017 the strata commissioned a study of exterior building issues. The owner did not provide the study or say the study identified any problems with the gutters. The owner also did not decisively say the strata was negligent. In arguments he wrote that negligence "may be too strong a word" to describe the strata's actions.

51. In summary, I find the strata was not negligent and therefore does not need to pay to complete repairs on the owner's garage. I dismiss this claim.

TRIBUNAL FEES AND EXPENSES

52. 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.

53. The strata is the successful party. It did not pay any tribunal fees or claim dispute-related expenses. I therefore do not order any.

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

ORDER

55. I dismiss the owner's claims and this dispute.

David Jiang, Tribunal Member