Civil Resolution Tribunal

Date Issued: May 15, 2020

File: ST-2019-009647

Type: Strata

Civil Resolution Tribunal

Indexed as: *Trkla v. The Owners, Strata Plan KAS3099*, 2020 BCCRT 533

B E T W E E N :

WALTER TRKLA

APPLICANT

A N D :

The Owners, Strata Plan KAS3099

RESPONDENT

REASONS FOR DECISION

Tribunal Member: David Jiang

INTRODUCTION

1. This dispute is about who should pay for repairing a heat pump and water damage to the interior of a strata lot. The applicant, Walter Trkla (owner), owns a strata lot in the respondent strata corporation, The Owners, Strata Plan KAS3099 (strata). The owner seeks $3,280 for reimbursement of heat pump repairs, $1,320 for reimbursement of water damage repairs, and $400 for travel costs and the loss of

use of his property as dispute-related expenses. The owner also seeks an order for the strata to comply with its bylaws and the *Strata Property Act* (SPA), respond to letters, manage itself professionally, and avoid bullying or intimidating conduct.

2. The strata disagrees with the owner's claims. It says the owner is responsible for repairing the heat pump and water damage to his strata lot. The strata also says it has acted professionally and denies bullying the owner or breaching any bylaws or provisions of the SPA. The strata also says the owner should have reported the water damage earlier and claims $5,105.09 as reimbursement for repairs. The strata claimed this amount as a dispute-related expense and did not file a counterclaim.

3. The owner 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. Is the strata responsible for repairing and maintaining the heat pump and if so, what is the appropriate remedy?

    b. Is the strata responsible for repairing water damage to the owner's strata lot interior and if so, what is the appropriate remedy?

    c. Is the strata entitled to $5,105.09 as reimbursement for repairs?

    d. Should I order the strata to comply with its bylaws and the SPA, respond to letters, manage itself professionally, and avoid bullying or intimidating conduct?

EVIDENCE AND ANALYSIS

9. In a civil claim such as this, the applicant owner bears the burden of proof, on a balance of probabilities. I have reviewed all the evidence and submission and only address them to the extent necessary to explain my decision.

10. The strata plan shows the strata consists of 40 residential strata lots located in 5 buildings. Since June 2012, the owner has owned strata lot 23 in the strata. Strata lot 23 is in building C.

11. Building C consists of strata lots that either occupy the basement and ground floor or, like strata lot 23, occupy the second and third floors only. The third floor resembles a penthouse as it is set back from the edges of the second-floor roof. The strata plan shows the second floor has both a roof area marked as a common property and a separate roof deck for the owner's exclusive use. The second-floor

roof and roof deck are flat whereas the third floor has a sloped roof. It is undisputed that the heat pump at issue is located outside the owner's strata lot, on the second-floor roof area marked as common property.

12. The evidence shows the 5 buildings are next to a lake and an RV site. As noted in the developer's October 2006 disclosure statement, the strata lots were intended for use as seasonal vacation residences or rental properties.

Issue #1. Is the strata responsible for repairing and maintaining the heat pump and if so, what is the appropriate remedy?

13. The following facts are undisputed. In July 2018, the owner's heat pump malfunctioned. It is part of an HVAC system that services the owner's strata lot.

14. The other strata lots also have heat pumps. These were installed by the owner developer as part of the original construction. Like the owner's, each heat pump services a specific strata lot without any shared piping. Any electricity used by each heat pump is charged to that owner's strata lot.

15. The owner asked the strata's property manager, CM, for the strata to repair the heat pump. The property manager advised that the strata council would need to first decide whether it had to pay for such repairs. The owner decided to obtain 3 bids to repair the heat pump. He says he did so because he had company arriving that same month and the strata lot was too hot without air conditioning. He says he accepted the lowest bid and the owner's contractor completed its work in mid-July 2018.

16. From the above, I find that the owner began repairs before waiting for the strata to accept or reject his request for repairs.

17. The evidence shows the owner subsequently asked the strata for $3,280 as reimbursement for repairs but the strata did not provide a firm response. The owner eventually filed his application for dispute resolution in November 2019.

18. The strata's registered bylaws outline who is responsible for different repairs. They do not specifically mention the heat pumps. However, under SPA sections 3 and 72 and bylaw 10, the strata must repair and maintain common property and assets.

19. The parties take the following positions. The owner says the heat pump is common property and as such, the strata must maintain and repair it. The strata says the heat pump is not common property because it is for the owner's exclusive use, and hence the owner's responsibility to maintain and repair. The strata also says the owner proceeded with repairs before the strata had the opportunity to consider his request. The strata says this should disqualify him for asking for reimbursement.

20. For the reasons that follow, I find that the heat pump is common property that the strata must repair and maintain. However, I find the strata is not required to reimburse the owner for the heat pump repairs because he acted before the strata had the opportunity to consider his request for repairs.

The Heat Pump as Common Property

21. As noted earlier, strata lot 23 has an outdoor deck on the second floor designated as limited common property for the owner's exclusive use. There is also a separate second floor rooftop area shown as common property on the strata plan. The owner marked a portion of the strata plan to show the heat pump is located outside on the common property area. The owner says the heat pumps servicing the other strata lots are similarly located outside on common property. The strata does not dispute the location of the owner's heat pump or the other heat pumps.

22. An owner developer's personal property, or chattel, installed on the common property of the strata may become the strata's common property if the meets the legal test of a fixture. The test is outlined in *Scott v. Filipovic,* 2015 BCCA 409 at paragraph 18. I summarize it as follows:

    a. An item unattached to land is not a fixture unless the facts suggest a different intent.

b. An item attached (affixed) to land, even slightly, is a fixture unless the facts suggest a different intent.

c. For the facts to suggest otherwise, they must be "patent to all to see".

d. The intention of the person affixing the item is determined objectively by examining factors such as the degree of attachment and the purpose of the item.

e. A tenant's fixtures are still fixtures, though a tenant and landlord may agree otherwise.

23. Based on the test in *Scott*, I am satisfied the heat pump is a fixture. There is no indication it is attached to the roof and a photo in evidence leads me to conclude it rests there under its own weight. However, the owner's submissions and the photo show it is connected to the strata's building through pipes and wires. Although I find the degree of attachment to be modest, it nonetheless exists. The heat pump's purpose is for the owner to better enjoy the land (cool down his strata lot). This also supports the conclusion that it is a fixture.

24. The strata says that the heat pump is not a fixture because it can be removed without damaging the building. I am not satisfied this is the case as the strata provided no supporting details or evidence. Further, assuming the strata's submissions are accurate, I do not find it determinative under the test in *Scott.*

25. As to what the heat pump is attached to, I find it is located on the common property roof but attached to a common property wall. Section 1(1) of the SPA says common property includes that part of the lands and buildings shown on a strata plan that is not part of a strata lot. Section 1(1) defines a strata lot to be a lot shown on a strata plan. SPA section 68(1) says that if a strata lot is separated from another strata lot, the common property or another parcel of land by a wall, floor or ceiling, the boundary of the strata lot is midway between the surface of the structural portion of the wall, floor or ceiling that faces the strata lot and the surface of the structural portion of the wall, floor or ceiling that faces the other strata lot, the common

property or the other parcel of land. SPA section 68(1) says it applies unless otherwise shown on the strata plan, but that is not the case here.

26. Based on the strata plan and the above, I find the exterior wall next to the heat pump is common property. From the evidence, I conclude the heat pump is both located on the common property roof attached to the common property exterior wall and as such, the heat pump is common property.

Responsibility for Maintenance and Repairs of the Heat Pump

27. This still leaves the question of who is responsible for the heat pump's maintenance and repairs. The parties provided 2 different approaches demonstrated in the case law.

28. In *Newman v. The Owners, Strata Plan EPS 680,* 2017 BCCRT 122 (*Newman*), the tribunal decided an external heat pump that serviced a specific strata lot was common property. The tribunal found that, based on the strata plan, the definition of a strata lot and the boundaries of a strata lot as defined under SPA section 68(1), anything outside the legal defined boundaries of the strata lots shown on the strata plan are not part of a strata lot shown on the strata plan. The tribunal found that the heat pumps in that dispute were not within the boundaries of any of the strata lots, and concluded the heat pumps, even though each one serviced a specific strata lot, were not part of a strata lot. The tribunal found they were part of the common property, and the strata had to repair and maintain them under SPA section 72 and the strata's bylaws.

29. The reasoning in *Newman* has also been followed in *Warren v. The Owners, Strata Plan VIS 6261,* 2017 BCCRT 139 and *Schuler v. The Owners, Strata Plan BCS 4064,* 2018 BCCRT 794. *Schuler* is another dispute about an air conditioner that serviced a specific strata lot. One of its components was located on a rooftop designated as common property. The tribunal concluded that air conditioning units were common property that the strata had to repair and maintain under SPA section 72.

30. The second approach comes from *Okrainetz v. Condominium Plan No. 82R42988 (1992),* 1992 CanLII 7881 (SKQB). In *Okrainetz* the court concluded that the furnace and air conditioner at issue, while located on common property, were never intended to be part of the common property. The furnaces and air conditioners serviced particular strata lots and there was no indication the strata intended to maintain them.

31. While I have considered *Okrainetz* I find it to be distinguishable on the facts. In *Okrainetz* the furnace and air conditioner were on a balcony that could only be accessed through the attached apartment. The strata plan showed the balcony was for the exclusive use of its owner. In this dispute, the owner's heat pump rests on a roof marked as common property. That area is not marked for the owner's exclusive use. There is no indication the owner can easily or safely access the area from his strata lot. The owner says he would have to use a ladder. The contractor's invoice shows a lift truck was necessary to complete repairs. The strata did not provide evidence to refute this.

32. *Okrainetz* is also a Saskatchewan case with different applicable statutes. I note it was cited favourably in *Legault v. Torcan,* 1993 BCPC 5 and *Elahi v. Strata Plan VR1023*, 2011 BCSC 1665, but I also find these cases distinguishable. *Legault* predates the SPA, which is the statute under consideration. *Elahi* considered a solarium that was located on limited common property. The court found the petitioner owners were responsible for its repair. I find a key component of that case was the interpretation of a unanimous resolution that provided the owners permission to build the solarium. The resolution said the owners had to "construct and <u>maintain</u> a solarium" (emphasis added in *Elahi* at paragraph 33). There is no similar document regarding responsibility for maintenance of the heat pump in this dispute.

33. Although tribunal decisions are not binding, I find the reasoning in *Newman* persuasive and applicable as it considers the provisions of the SPA, which apply to this dispute. I have found the heat pump to be a fixture and attached to common property. Under the analysis in *Newman,* it is also not part of a strata lot. I find the

heat pump is common property that the strata must repair and maintain under SPA sections 3 and 72, and bylaw 10.

34. In any event, I also conclude that the evidence falls short of showing the heat pumps were never intended to be part of the common property. The strata's correspondence and council meeting minutes suggest the council found the matter unsettled. The strata says that other owners previously paid to repair their own heat pumps but did not provide any supporting evidence.

What is the appropriate remedy, if any?

35. Although I am satisfied the heat pump is common property and the strata must repair and maintain it, I am not satisfied it is appropriate to order the strata to reimburse the owner for repairs.

36. In *The Owners, Strata Plan NW 1017 v. Ahern et al,* 2019 BCCRT 617 (*Ahern*) the tribunal dismissed the owner's claim for reimbursement of the cost of replacing a fence that the strata corporation had to maintain and repair under its bylaws. The tribunal wrote at paragraph 44 that in some circumstances it might be necessary for an owner to conduct repairs that are the strata corporation's responsibility and seek reimbursement, such as an emergency. However, the tribunal noted that if, in general, owners could unilaterally decide to repair common property, they would usurp the strata corporation's ability to prioritize repair and maintenance for the benefit of all the owners and within a budget. See also *Ciesek v. The Owners, Strata Plan VIS 4542,* 2019 BCCRT 312 at paragraphs 38 to 42 and *Zhang v. The Owners, Strata Plan 375,* 2019 BCCRT 1146 at paragraphs 24 to 31.

37. Although not binding I find *Ahern* applicable and persuasive. I find the owner acted unilaterally in repairing the heat pump, before the strata had an opportunity to consider his request. There is no indication that the strata agreed to permit the owner to complete heat pump repairs or that it agreed to pay for repairs. As noted above, the owner reported the issue to the strata's property manager in July 2018 and arranged for repairs that same month before the strata made any decision.

38. Although I accept that the owner expected company at his strata lot the same month his heat pump broke, I do not find this was an emergency that entitles him to payment for the claimed repair expenses. There is no indication that delaying repairs would have damaged any common property or the owner's strata lot. I also reject any argument that the owner could have reasonably assumed the strata would refuse his request. The evidence and submissions do not support such a conclusion.

39. In summary, I find the strata is responsible for repairing and maintaining the owner's heat pump but does not need to reimburse the owner for repairs. I dismiss this claim.

Issue #2. Is the strata responsible for repairing water damage to the owner's strata lot interior and if so, what is the appropriate remedy?

40. The owner's submissions and evidence show he is claiming for repairs to the interior of his strata lot. He provided pictures of mould and water damage to his interior carpet, baseboard, wall, windowsill, and window frame. The owner says this damage is attributable to the strata's negligence and claims reimbursement for repairs of $1,320.

41. The strata denies it was negligent. It says it completed necessary exterior repairs and the remaining damage is entirely within the interior of the owner's strata lot. The strata says these areas are the owner's responsibility.

42. For the following reasons, I find the strata was not negligent and the owner must bear the cost of repairing the water damage to the interior of his strata lot.

43. Bylaw 2(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 10 says the strata must repair and maintain a strata lot, but this duty is restricted to the structure and exterior of the building, including certain exterior items.

44. Generally, 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. However, the owner may claim reimbursement 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.

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 v. Culligan of Canada Ltd.,* 2008 SCC 27. The standard of care that applies to the strata is reasonableness: *Weir v. Owners, Strata Plan NW 17,* 2010 BCSC 784.

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

47. The owner effectively says the strata breached the standard of care by failing to repair the leak in a timely manner. For the following reasons, I disagree and find the strata acted reasonably.

48. I find the strata first became aware of the need for repairs in a June 21, 2017 email. In that email, the owner wrote to the property manager that in 2016 he noticed some water damage on the upstairs window sill and floor area. He felt he could deal with it on his own but "neglected to do so".

49. The owner says he reported the leak to the strata in 2014, and that he reported the issue again on July 23, 2016 and December 3, 2016, through email. However, he did not provide the full emails from those dates and only provided excerpts in his submissions. The strata says it has no record of being advised of the leak in 2014 or 2016. As a result, I place greater weight on the June 21, 2017 email. I accept the strata's submission that it was first notified of the water leak in June 2017.

50. I find the strata acted reasonably from June 2017 onwards. The strata council meeting minutes shows the strata approved repairs in August 2017. This was approximately 2 months after it became aware of the water damage. It took 2 more

months to select a contractor in October 2017. I find that essential repairs were done by February 2018, 4 months later. In that regard, the property manager CM wrote in a February 20, 2018 email that the work was mostly done, and that the contractor was waiting for warmer weather to do the finishing work and complete the other units that were scheduled for repair. I find nothing unreasonable about the strata's conduct under this timeline.

51. A May 17, 2018 invoice for $1,806 shows the contractor installed new flashing and repaired the owner's window. The contractor completed further exterior repairs in October 2018 for both the owner and other owners as shown in invoices for that month. While repairs took some months to complete, I am satisfied by CM's February 2018 email that this was because the contractor required warmer weather.

52. There is also no indication that the strata's alleged delay caused the water leak or worsened any resulting damage. The parties agree that the water leak was caused by poor installation of flashing on a sloping roof. There is no indication the strata was involved in its installation.

53. In summary, I find the strata was not negligent and does not need to pay for water damage repairs to the owner's strata lot interior. I dismiss this claim.

Issue #3. Is the strata entitled to $5,105.09 as reimbursement for repairs?

54. The strata says the owner was aware of the water leak in 2016 and should have reported it at that time. It says the other 8 units had flashing problems that were only $1,722.56 to repair, whereas the owner's repairs cost $6,828.15. It says the owner should pay it the difference of $5,105.09. The strata says this amount is a dispute-related expense, which as I explain below, I find it is not. It did not choose to make a counterclaim or frame its claim in negligence, though negligence was argued extensively in the owner's claim for interior strata lot repairs.

55. I decline to award this amount for 2 reasons. First, under CRTA section 49(1)(b), the tribunal may order a party to pay reasonable expenses and charges that relate to the conduct of the proceeding. I do not find the claimed amount to relate to the

conduct of this proceeding. According to the evidence, the strata is claiming repair costs incurred in May and October 2018. These charges predate the owner's application for dispute resolution which was submitted on November 21, 2019.

56. Second, I infer the strata is asking for a set-off from any amounts awarded to the owner. However, the burden is on the strata to show a set-off. The strata did not provide any evidence that the damage to the exterior of the owner's strata lot would have been reduced had the owner reported the issue in 2016, or by how much.

57. In summary, I dismiss the strata's claim for $5,105.09 in dispute-related expenses.

Issue #4. Should I order the strata to comply with its bylaws and the SPA, respond to letters, manage itself professionally, and avoid bullying or intimidating conduct?

58. The owner asked for several orders that relate to his allegations that the strata has targeted him for harassment. He also makes other allegations of wrongdoing by the strata. In PowerPoint slides, the owner explains that the main reason why the owner and the strata have a fraught relationship is that they disagree on how the strata dealt with a license to use or occupy a boat slip at the neighboring lake.

59. The owner did not request any order specific to the license or boat slip or the other allegations. Instead, he requests that I order the strata to generally comply with its bylaws, the SPA, respond to correspondence and hearing requests and manage itself professionally. For the reasons that follow, I decline to do so.

60. The strata is already obligated to comply with its bylaws and the SPA. As part of that obligation, the strata must also hold council hearings in compliance with SPA section 34.1 and produce records under SPA section 35 and 36. Under SPA section 31, the strata council members must also act honestly and in good faith in view of the best interests of the strata, at the standard of a reasonably prudent person.

61. The owner has not asked the tribunal for specific orders, such as an order for the strata to hold a hearing or produce any records. In submissions the owner acknowledges the strata held hearings and produced records regarding the issues

of the heat pump and water leak, though he was dissatisfied with the process. In these circumstances, I find that ordering the strata to generally follow its bylaws and the SPA, to respond to letters, and to act professionally would serve no useful purpose. The owner remains free to ask the tribunal for specific orders about hearing requests, document disclosure, the enforcement of bylaws, or other such matters.

62. The owner also requests an order for the strata to avoid bullying or intimidating conduct. I decline to issue this order. As noted in *Louhimo v. The Owners, Strata Plan PG 33,* 2019 BCCRT 491, the tribunal's jurisdiction in strata property matters is stated in CRTA section 121. Allegations of harassment are outside of the tribunal's jurisdiction for strata property claims as they do not involve the matters set out in CRTA section 121(1). Although not binding, I find *Louhimo* applicable in these circumstances and I am persuaded by it. Under section 10 of CRTA, I refuse to resolve the owner's claim about harassment.

TRIBUNAL FEES AND EXPENSES

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.

64. The strata is the successful party. I do not award any tribunal fees as it did not claim any. I have already dismissed the strata's claim for repair reimbursement as a dispute-related expenses. As the strata did not claim for any other dispute-related expenses, I do not award any.

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

ORDERS

66. I dismiss the owner's claims.

67. I also dismiss the strata's claim for dispute-related expenses and therefore I dismiss this dispute.

David Jiang, Tribunal Member