



# Civil Resolution Tribunal

Date Issued: August 10, 2020

File: ST-2019-010898

Type: Strata

Civil Resolution Tribunal

Indexed as: *Leclair v. The Owners, Strata Plan LMS 3452*, 2020 BCCRT 889

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

LESLIE LECLAIR and RHEA DEL VECCHIO

**APPLICANTS**

**A N D :**

The Owners, Strata Plan LMS 3452

**RESPONDENT**

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## **REASONS FOR DECISION**

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Tribunal Member:

Chad McCarthy

## **INTRODUCTION**

1. This dispute is about water damage caused by clogged common property (CP) roof drains and drainpipes. The applicants, Leslie Leclair and Rhea Del Vecchio (owners), own strata lot 31 in the respondent strata corporation, The Owners, Strata Plan LMS 3452 (strata). The owners say water from the clogged drains and drainpipes entered their strata lot and damaged drywall and carpet in their master

bedroom, and laminate flooring in their living room. There is no dispute about the drywall damage, but the owners say the strata admitted responsibility for the carpet and laminate damage, and was negligent in inspecting and maintaining the roof drains and drainpipes that caused the water damage. The owners claim a total of \$15,245.05, broken down as follows:

- a. \$10,295.05 to replace all of the carpet and laminate in their strata lot,
  - b. \$750 to move their belongings out of their strata lot during the carpet and laminate replacement, and return the belongings to the unit, and
  - c. \$4,200 for 14 nights of rental accommodation while the carpet and laminate are being replaced.
2. The strata says it was not negligent and is not responsible for repairs to the owners' strata lot, so it owes nothing. The strata says its insurance covers the damaged portions of the carpet, but the owners did not allow those repairs to proceed because they also wanted the laminate replaced. The strata says it does not carry insurance for the laminate, which is not original to the strata lot, and is an owner-installed "betterment."
  3. Leslie Leclair, a lawyer, represents both himself and Rhea Del Vecchio in this dispute. A strata council member represents the strata.

## **JURISDICTION AND PROCEDURE**

4. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over strata property claims under section 121 of the *Civil Resolution Tribunal Act* (CRTA). The CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. The CRT must act fairly and follow the law. It must also recognize any relationships between dispute parties that will likely continue after the CRT's process has ended.
5. The CRT 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 CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in court. The CRT 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 CRT rules, in resolving this dispute the CRT may order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the CRT considers appropriate.
8. In its submissions, the strata pre-emptively objected to any owner reply submissions that addressed matters that could and should have been raised in the owners' initial submissions. I find that the owners' replies do not raise any persuasive new arguments. Further, given the outcome of my decision, I find placing less or no weight on the owners' replies would not have affected the results in any event.
9. Under CRTA section 38, the CRT has discretion in determining all aspects of the hearing process. In their replies, the owners suggested the strata avoided CRT-imposed submission character limits by writing arguments for one claim in the argument field of another claim. I find the parties' submissions were lengthy but not excessive, and neither party argued that they had insufficient space for their submissions, including responses. So, I considered all of the submissions in formulating my decision. I also reject each party's suggestion that aspects of the other party's submissions were inappropriate or objectionable in the circumstances, as I find that was not the case.

## **ISSUES**

10. The issues in this dispute are:

- a. Is the strata responsible for the water damage to the owners' carpet and laminate flooring, and if so, does the strata owe \$10,295.05 for carpet and laminate replacement, or another amount?
- b. Does the strata owe the owners \$750 or another amount for moving expenses, and \$4,200 or another amount for alternative accommodations?

## **EVIDENCE AND ANALYSIS**

11. In a civil proceeding like this one, the owners, as applicants, must prove their claims on a balance of probabilities. I have read all the submitted evidence, but I refer only to the evidence I find relevant to provide context for my decision. I have also considered the caselaw references submitted by both parties. But to keep things brief and understandable, I will not refer to all of these references in my decision, particularly where I find they are of limited or no applicability to the circumstances of this dispute. I note that other CRT decisions are not binding on me, but I must follow the decisions of the courts of British Columbia and the Supreme Court of Canada.

### ***Background***

12. The strata was formed in 1998, and includes townhouse-style homes. The strata filed consolidated new bylaws under the *Strata Property Act* (SPA) with the Land Title Office in 2016, which I find are the bylaws applicable to this dispute. The owners own strata lot 31.
13. The undisputed evidence is that on the evening of September 17, 2019, the owners discovered that water had entered their strata lot where it bordered adjacent strata lot 30. The owners contacted the strata's property management company, Profile Properties Ltd. (PP) by email that evening, and followed up by telephone the following morning. Contractors investigated the source of the leak within about 24 hours of it first being discovered, and soon after the owners called PP. There was water damage to the attic space, drywall, master bedroom carpet, and living room

laminated flooring in strata lot 31, as well as water damage in neighbouring strata lot 30.

14. A roofing contractor, Marine Roofing Repair & Maintenance (Marine), investigated the source of the water leak on September 18 and 19, 2019. Marine found two clogged drain boxes on the roof above strata lots 30 and 31, and that nearby roof drainpipes were also clogged with debris. Marine cleared those clogs. The strata does not dispute that the clogged roof drains and pipes are CP, and that they were the source of the water leak that damaged strata lots 30 and 31.
15. The attic and drywall damage to the owners' strata lot are not at issue here, but the carpet and laminate damage are. Based on the evidence provided by restoration professionals and the parties' correspondence, I find that the carpet was originally installed by the developer of the owners' strata lot when it was first constructed. I also find that the living room was originally carpeted, but that laminate flooring was later installed in the living room by a strata lot 31 owner. So, I find the laminate flooring is a "betterment" for the purposes of strata property insurance.
16. This strata dispute's claims are not about insurance coverage, and the parties' respective insurers are not named parties in the dispute. However, the insurance situation is relevant background information.
17. Both the strata and the owners carried home insurance. The owners do not deny that the strata's insurance coverage was activated in this case, because the water damage exceeded the strata's \$5,000 deductible for that type of loss. Based on correspondence with their insurer, it appears that the owners' insurance did not cover the type of water damage caused by the clogged roof drains and pipes.
18. The owners are named insureds under the strata's insurance policy, as set out in SPA section 155(b). I find the strata's insurers engaged a ClaimsPro Inc. insurance adjuster, MM, to represent the insurers and to handle the strata's insurance claim, as described in MM's letters to Mr. Leclair dated November 19, 2019 and January 15, 2020. MM determined that the strata's insurance covered replacement of all the master bedroom carpet, including in a closet, but did not cover replacing all the

undamaged carpet in the strata lot's other rooms to match the replacement carpet, which is what the owners seek. MM also found that the strata's insurance policy did not cover damage to the laminate flooring, because it did not cover betterments.

***Is the strata responsible for the water damage to the owners' carpet and laminate flooring?***

19. The owners say the strata is responsible for the water damage to their master bedroom carpet and laminate floors. The owners say the strata should pay to replace all the carpet and laminate flooring, and then seek to recover those amounts from the strata's insurer. In contrast, the strata says that its liability for water damage is a different question than the extent of coverage provided under its insurance policy. The strata says that it was initially unsure about the extent of its responsibility, but it obtained legal advice clarifying that, under the SPA and applicable caselaw, the strata is not responsible for the water leak or resulting damage to the owners' strata lot.

***Alleged "Concession"***

20. At the outset, I note that many of the owners' arguments are focussed on an alleged "concession" by the strata, where the strata indicated it was responsible for the water damage to the owners' carpet and laminate floors. The owners allege that the strata "chose to align its interests with the [strata's] insurance company", that MM acted as the strata's agent, and that the strata admitted liability for replacing all the carpet and laminate floors through MM's correspondence with the owners.

21. With respect, I disagree. Having reviewed the correspondence in evidence, I find it is clear that MM was acting in his capacity as an insurance adjuster in his discussions with the owners, and that MM represented the strata's insurers, not the strata. I find MM never suggested he was acting as the strata's agent or that he was negotiating an admission of legal liability on the strata's behalf. While MM sometimes referred to the "strata's responsibility" and similar phrases, I find these statements referred to either the strata's responsibility to maintain insurance coverage under SPA section 149, or whether the strata's insurance policy was

“responsible” for covering certain types of damage to the owners’ strata lot. I find that the strata did not admit liability for the carpet and laminate damage through MM.

22. Further, even if the strata had admitted liability, I find the owners did not provide sufficient evidence that they are entitled to a remedy for such an admission. I find the parties did not agree to a settlement agreement or a similar contract about liability and damages for the water leak. The owners do not say that they relied on the alleged liability admission to their detriment, except for saying that they were “prejudiced” because contractor personnel they permitted into their strata lot for water inspection and remediation tore a section of carpet and broke off a section of laminate during their work. However, I find the owners have failed to show that they would have prevented contractors from entering their strata lot and performing such necessary water inspection and remediation, if they had known their insurance, the strata’s insurance, and the strata, would fail to cover the cost of replacing the laminate flooring and undamaged carpet. The owners did not argue that they will not repair or replace their admittedly damaged, and in some cases mouldy, carpet and laminate if they do not receive their desired compensation for it. On balance, I find the torn and removed sections of carpet and laminate were already water damaged and worthless before being torn and removed, and would have needed to be replaced anyway. Overall, I find that the owners have not shown they were prejudiced by any alleged strata liability admission.

#### *Strata Insurance and Strata Liability*

23. Regarding insurance, I note that SPA section 149(1)(d) requires strata corporations to maintain property insurance on original fixtures in a strata lot, such as strata lot 31’s carpet. Under SPA section 152(b), a strata corporation may, but is not required to, maintain insurance on betterments in a strata lot, such as the laminate flooring. Similarly, SPA section 161(1)(a) says an owner may, at its option, maintain insurance on betterments in the owner’s strata lot. On the evidence before me, I find that the strata carried the insurance required by section 149(1)(d) at the time of the water leak.

24. Having said that, I also find that the strata's liability to the owners for damage to their strata lot is not determined by the strata's responsibility to maintain insurance under the SPA, or the extent of such insurance coverage. SPA section 3 says the strata is responsible for managing and maintaining the CP and common assets of the strata, and SPA section 72(1) says the strata must repair and maintain CP and common assets. I find that the clogged roof drains and drainpipes are CP, and the strata must repair and maintain them.
25. Strata bylaw 2(1) says the owners must repair and maintain their strata lot, except for repair and maintenance that is the strata's responsibility. Bylaw 9(1) says that the strata must repair and maintain common property that has not been designated as limited common property, which is consistent with SPA section 72(1). Bylaw 9(1)(c)(6) identifies certain parts of a strata lot that the strata must repair and maintain, but I find these parts do not include interior floor coverings such as carpet and laminate.
26. On the evidence before me, I find the strata is not responsible for repairing or maintaining the owners' carpet and laminate floors, but it is responsible for maintaining and repairing the clogged CP roof drains and drainpipes.
27. The owners say the strata was negligent, and did not adequately maintain and repair the CP roof drains and drainpipes, and as a result they clogged and caused the water leak and water damage to strata lot 31. While the strata does not dispute that the clogs caused the water damage, it says it had an adequate maintenance program in place, and that it could not have reasonably anticipated that the clogs would form so quickly in this case.
28. Under the SPA and caselaw, it is well established that a strata corporation is not liable to an owner for damage resulting from inadequate CP repair or maintenance, unless the strata was responsible for that CP and was negligent in repairing or maintaining it (see *Basic v. Strata Plan LMS 0304*, 2011 BCCA 231 and *Kayne v. LMS 2374*, 2013 BCSC 51). Notably, the courts have also confirmed that a strata corporation is not an insurer.



29. According to *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at paragraph 3, to successfully demonstrate strata negligence, the owners must prove that:

- a. The strata owed the owners a duty of care,
  - b. The strata breached the applicable standard of care,
  - c. The owners sustained damage, and
  - d. That damage was caused, in fact and in law, by the strata's breach.
30. I find that the strata owed the owners a duty of care, under the SPA and its bylaws, to repair and maintain the roof drains and drainpipes. The standard of care owed by the strata was reasonableness. This means that in repairing and maintaining the drains and drainpipes, the strata needed to act reasonably, not perfectly, in the circumstances (see *Basic*, referring to *John Campbell Law Corp. v. Strata Plan 1350*, 2001 BCSC 1342, *Weir v. Strata Plan NW 17*, 2010 BCSC 784, and *Wright v. Strata Plan No. 205* (1996), 1996 CanLII 2460 (BCSC), aff'd (1998) 1998 CanLII 5823 (BCCA)). Further, if the strata's hired contractors fail to carry out repair and maintenance work effectively, the strata is not negligent if it acted reasonably in the circumstances (see *Wright* at paragraph 30, also cited by *Kayne* and *John Campbell*).
31. The question is, did the strata act reasonably in the circumstances, in repairing and maintaining the roof drains and drainpipes? I find the strata acted reasonably, and was not negligent, for the following reasons.
32. The owners say that the strata had moss removed from the roof shortly before the water leak occurred, and that the clogged drains and drainpipes were caused by detached moss that was not cleared away. The evidence of Marine, the strata's roof contractor who investigated the leak, including Marine's report and photos, does not say that the clogs formed recently due to moss cleaning. There is no expert opinion in evidence confirming where the clog debris came from. So, I find the evidence fails to show the clogs were significantly caused by the moss abatement. However, even if the clogs were caused by moss-removal debris, I find the clogs were not

visible from anywhere except the rooftop, if at all, and the evidence does not support that the strata was, or should have been, aware of the clogs. Also, I find that the strata reasonably relied on its moss removal contractor to adequately remove the moss debris, because I find the photos in evidence show the roof is not safely accessible to those without proper safety equipment and training.

33. Photos of the clogged roof drains show very small plants growing from some of the clog debris. I find this is evidence that some of the clogs may have accumulated over time, which the owners also allege in their submissions. The owners say that the strata did not have a roof drainage repair and maintenance program in place, and that not having a program in place was negligent. However, the owners do not say what an adequate frequency of drain and gutter cleaning would have been, and pointed to no evidence confirming that the drain and drainpipe clogs accumulated over an unreasonably long period of time. The owners also say I should draw an adverse inference against the strata for failing to provide photographic evidence of its oversight of the roof drain and gutter maintenance. I find it is not appropriate to draw the suggested adverse inference, as the strata did provide evidence supporting its roof drainage maintenance, as discussed below.
34. The strata says it had the roof drains and gutters cleaned annually in the fall season. The strata provided invoices from a contractor showing that roof drain cleaning was performed in October 2016, November 2017, and November 2018. The parties do not deny that the annual roof drain cleaning occurred again in November 2019. There is no evidence before me showing that, before the September 2019 incident, water leaks or other issues had arisen at the strata property due to insufficient roof drain maintenance. Further, the strata says its roofs were inspected only a few days before the September 17, 2019 water leak and no drainage issues were noted. The strata submitted no inspection report, and did not indicate whether drainage was included in the inspection, so I place limited weight on this argument. However, I note that the evidence shows the strata has undertaken other roof repairs based on this inspection report.

35. Finally, the owners say that MM's agreement to replace the carpet in the master bedroom is an admission by the strata that its drain and gutter maintenance program had failed. I find this argument unpersuasive, because I find MM's offer to replace the master bedroom carpet related only to the extent of insurance coverage available to the owners, and not to the strata's legal liability for its roof drainage repair and maintenance program.
36. Having weighed the evidence, I find that the strata had in place a maintenance program that included annual roof drainage maintenance, in addition to other roof maintenance such as moss removal and other repairs. The evidence does not show that this annual maintenance had been inadequate to prevent leaks and damage in the past, and it does not indicate that the strata should have known the maintenance would have been inadequate to prevent the September 2019 leaks.
37. As a result, I find the strata's roof drain and drainpipe repair and maintenance activities were reasonable in the circumstances, and that the strata met the required standard of care. Therefore, the strata was not negligent, and is not liable to the owners for the water damage to their carpet and laminate floors. I dismiss the owners' claim for \$10,295.05 for the cost of replacing the strata lot's carpet and laminate floors.

***Does the strata owe the owners for moving expenses and alternative accommodations?***

38. The owners say they need to move personal belongings out of the strata lot and then return them to the strata lot once repairs are complete, which will cost \$750. They also say they will have to stay somewhere else for 14 days while their strata lot repairs are being performed, which will cost \$4,200.
39. Above, I found that the strata is not responsible for the water damage to the strata lot's carpet or laminate floor. Therefore, I find the strata is also not responsible for any related moving expenses or alternative accommodation charges the owners incur while having those items replaced. As a result, I find it unnecessary to consider whether the owners have proven the amounts claimed, and whether the

owners need to move their belongings and themselves elsewhere during the repairs. I dismiss the owners' claims for \$750 in moving expenses and \$4,200 in accommodation expenses.

40. For the same reasons, I make no finding about whether the costs of carpet and laminate replacement, or related moving and accommodation expenses, are recoverable under an insurance policy.

## **CRT FEES AND EXPENSES**

41. Under section 49 of the CRTA and tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses.
42. The strata was successful, but did not pay any CRT fees, so I order no fee reimbursement.
43. The strata also claims \$5,694.29 for an unspecified letter from a lawyer and "other expenses" without further particulars. The strata says it is entitled to an order analogous to "special costs" in a court, which can include legal fees, because it says this dispute was an abuse of process. The strata says this is really an insurance coverage dispute, and that the strata's insurance policy required the owners to participate in an appraisal process rather than filing a CRT dispute.
44. I find the owners' initiation of this dispute was not an abuse of process. The core issue of the strata's alleged negligence in repairing and maintaining roof drains and drainpipes was a triable issue that related to the owners' claimed remedies. Further, unlike the case relied upon by the strata (*Parfitt et al v. The Owners, Strata Plan VR 416 et al*, 2019 BCCRT 330), which is not binding on me, the owners' behaviour here did not rise to the level of making threats against a party, or any similar conduct deserving of rebuke. Further, the strata provided no evidence supporting the claimed \$5,694.29 in expenses, or any description of the expenses beyond an unidentified letter from a lawyer. I find the strata's expenses are unproven and there

was no abuse of process, so I order no reimbursement of CRT dispute-related expenses.

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

## **ORDER**

46. I dismiss the owners' claims, and this dispute.

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Chad McCarthy, Tribunal Member