



# Civil Resolution Tribunal

Date Issued: September 4, 2020

File: ST-2020-002650

Type: Strata

Civil Resolution Tribunal

Indexed as: *McGill v. The Owners, Strata Plan NW 3121*, 2020 BCCRT 992

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

DONNA MCGILL

**APPLICANT**

**A N D :**

The Owners, Strata Plan NW 3121

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Rama Sood

## INTRODUCTION

1. The applicant, Donna McGill, owns a strata lot in the respondent strata corporation, The Owners, Strata Plan NW 3121.
2. Ms. McGill says the strata is responsible to repair the deck and balcony roof that form part of her strata lot. She seeks an order that the strata perform these repairs.

3. The strata says the deck and balcony roof were added without strata approval by a previous owner. It says Ms. McGill is solely responsible for repairing and maintaining the deck and balcony roof under the strata bylaws.
4. Ms. McGill is self-represented. The strata is represented by a strata council member, PC.
5. I find that the deck and balcony are part of the strata lot and Ms. McGill is responsible for their repair and maintenance. My reasons follow below.

## **JURISDICTION AND PROCEDURE**

6. 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.
7. 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.
8. 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.
9. 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.
10. CRT documents incorrectly show the name of the respondent as The Owners, Strata Plan NWS 3121. Based on section 2 of the *Strata Property Act* (SPA), the

correct legal name of the strata is The Owners, Strata Plan NW 3121. Given the parties operated on the basis that the correct name of the strata was used in their documents and submissions, I have exercised my discretion under section 61 to direct the use of the strata's correct legal name in these proceedings. Accordingly, I have amended the strata's name above.

## **ISSUE**

11. The issue in this dispute is whether the strata must pay for repairs to the deck and balcony roof on Ms. McGill's strata lot.
12. Although the strata mentioned in its submissions that Ms. McGill should remove the deck and balcony roof, it did not file a counterclaim. For this reason I will not address this issue in my decision.

## **BACKGROUND**

13. I have read all the submissions and evidence provided but refer only to information I find relevant to provide context for my decision. In a civil proceeding such as this, Ms. McGill, as the applicant, must prove each of her claims on a balance of probabilities.
14. The strata is a phased development that was created in 1989. The strata lots are a mix of single-dwelling houses, duplexes, and townhouses.
15. Ms. McGill purchased strata lot 55 (SL 55) in 2016. It is a 2-storey house that was originally built in 1973. It was added to phase IV of the strata in August 1990. The strata plan shows SL 55 has 2 upper level balconies designated as limited common property.
16. At some point, a deck connecting the 2 balconies, exterior stairs to the deck, and a balcony roof were added to SL 55. The deck, balcony roof, and exterior stairs do not appear on the strata plan. According to the strata, there are no records of building permits or strata approval for their construction.

17. On May 24, 2019, Ms. McGill asked the strata to repair the deck and balcony roof because they were structurally unsound and possibly unsafe. The strata obtained a June 2019 engineering report that stated the balcony roof, deck, and exterior stairs were additions to the original house and did not meet 2018 Building code requirements.
18. At a special general meeting on November 25, 2019, a  $\frac{3}{4}$  vote resolution to expend \$50,000 from the contingency reserve fund to repair SL 55's deck, balcony roof, and stairs was rejected by the strata owners.
19. Ms. McGill continued to pursue the issue with the strata. In a March 3, 2020 letter, the strata informed Ms. McGill that it would not be presenting another resolution for repairs at the upcoming annual general meeting. It also stated Ms. McGill was responsible for the repairs. Since the engineer's report stated that the alterations did not comply with the current code and the alterations were unusable and unsafe, the strata asked Ms. McGill to cordon off the areas to ensure no access until the deck was repaired.
20. The strata had a structural review done of SL 55. In a May 5, 2020 report, the engineer stated that records showed there was no building permit for the deck or balcony roof and that it would have required strata permission and a municipal permit. The report did not discuss the exterior stairs. The report also stated that the additions likely violated municipal bylaws and strata bylaws. In addition, the report stated the structures' design was inadequate and violated current building standards.

## **POSITION OF THE PARTIES**

21. Ms. McGill says the deck and balcony roof are limited common property and the strata is responsible for their repair and maintenance under the strata's bylaws. She says they were added either by the original owner before 1990, or by the strata after SL 55 was added to the strata.

22. The strata says the deck and balcony roof were added by an owner and without strata approval after SL 55 became part of the strata. It says Ms. McGill is responsible for repairing and maintaining them under the strata bylaws.
23. I will not address repair and maintenance of the exterior stairs in this decision since it was not raised by either party.

## **ANALYSIS**

24. Under section 72 of the *Strata Property Act* (SPA) the strata is required to maintain and repair common assets and common property of the strata corporation. The strata may, by bylaw, make an owner responsible for the repair and maintenance of limited common property that an owner has the right to use (section 72(2)(a) of the SPA).
25. The strata filed bylaws at the Land Title Office (LTO) in June 1991. Since then, the strata filed 7 bylaw amendments. The relevant bylaws with amendments are summarized as follows.
26. Under bylaw 2(1) and bylaw 2(2), an owner must repair and maintain their strata lot and limited common property they have use of, except for repair and maintenance that is the responsibility of the strata under the bylaws.
27. In addition, under bylaw 2(3)(a) an owner must repair and maintain skylights and any other structures on the exterior of the building that have been added on by an owner and not registered on the strata plan. An owner must also repair and maintain alterations to common property or limited common property where the owner accepted, as a condition for authorization, responsibility for related maintenance and repair (bylaw 2(3)(b)).
28. Bylaw 9 addresses the strata's responsibilities and states it must repair and maintain a strata lot's:
  - structure and exterior of a building (bylaw 9(1)(d)(i) and (ii)),

- chimneys, stairs, balconies and other things attached to the exterior of a building (bylaw 9(1)(d)(iii)),
- the doors and windows on the exterior of a building (bylaw 9(1)(d)(iv)), and
- fences, railings and similar structures that enclose patios, balconies and yards, excluding add-ons, alterations or extensions differing from the original plan, which will remain the owner's responsibility (bylaw 9(1)(d)(v)).

***Who is responsible for repairing and maintaining the deck and balcony roof on SL 55?***

29. I must first determine whether the deck and the balcony roof are common property, limited common property, or part of the strata lot. Section 1(1) of the SPA defines common property as “that part of the land and buildings shown on strata plan that is not part of a strata lot”, among other things that are not relevant to this dispute. It also defines limited common property as common property designated for the exclusive use of the owners of one or more strata lots., I find the deck and balcony roof are not common property since they are not on the strata plan. Likewise, I find they are also not limited common property which is a form of common property (see *Bourque v. The Owners, Strata Plan VIS 6730*, 2020 BCCRT 701 at paragraph 25, although it is not binding on me).
30. I find the applicable bylaws in this dispute are bylaws 2(3)(a) and bylaw 9(1)(d)(iii). Read separately, they are largely unambiguous. However, the 2 bylaws conflict and are difficult to interpret together.
31. As mentioned above, bylaw 2(3)(a) states that the owner must repair and maintain skylights and any other structure on the exterior of the building added by an owner and not registered on the strata plan. By contrast, bylaw 9(1)(d)(iii) states that the strata must repair and maintain a strata lot's balconies and other things attached to the exterior of a building. I asked the parties for further submissions on this issue but their responses did not address this matter.

32. For bylaw 2(3)(a) to apply, I must first determine if the deck and balcony roof were added by an owner after SL 55 became part of the strata. Ms. McGill says the deck and balcony roof were either added by the previous owner before SL 55 was added to the strata or were added by the strata before SL 55 was sold to its first owner. Ms. McGill presented several arguments in support of her position. However, I find they are not convincing and that the deck and balcony roof were added by an owner after SL 55 became part of the strata. My reasons are as follows.
33. Ms. McGill says the first owner, WV, owned SL 55 from 1991 to 1997. Although WV died, Ms. McGill says his son, EV, confirmed that his father did not do any exterior renovations while he owned it. Ms. McGill provided 2 brief emails from EV that he recalled sitting at a table underneath the upstairs “patio” and that he did not recall his father building a “patio”.
34. The strata says the son’s comments to Ms. McGill are hearsay and not reliable. While the CRT is permitted to accept hearsay evidence, in this case I find the 2 emails are too vague and are unsubstantiated. I find EV’s reference to a patio does not necessarily mean the deck and it could have referred to one of the balconies that were in the original strata plan. Also, EV did not directly state that his father did not have a “patio” built, only that EV could not recall it.
35. Ms. McGill also says the developer replaced all windows and sliding glass doors in the phase IV strata lots, including SL 55, before they were added to the strata. Based on a date stamp on the door frames, Ms. McGill says this work was done in 1990. She says the fact that one of the sets of glass doors leads from the kitchen onto the deck proves the deck must have already been built when the glass doors were replaced.
36. The strata says the date stamp only indicates the manufacturing date of the glass doors and nothing else. I have no evidence before me about the significance of date stamps on fixtures or about when the glass doors were installed. Therefore, I place no weight on Ms. McGill’s statement.

37. Ms. McGill says the Form B Information Certificate she received when she purchased SL 55 in 2016 only disclosed an alteration agreement for the addition of a gate. Ms. McGill says the deck and balcony roof must have been present when SL 55 was added to the strata since they are not listed as alterations in the Form B. Section 59(3)(c) of the SPA states that a Form B must disclose any agreements under which the owner takes responsibility for expenses relating to alterations to a strata lot, common property, or common assets. The strata says that the deck and balcony roof were illegal because they were added without strata approval or building permits. I find that in those circumstances, it makes sense that the Form B did not refer to the deck and balcony roof if they were added without strata approval.
38. Ms. McGill says the balcony roof was built with the same materials as the original house, and this proves it was part of the strata lot when it was added to the strata. She says it would be difficult, if not impossible to replicate construction 13 years after the house was built. The strata provided a May 5, 2020 structural review report prepared by Alexander Evseev, a professional engineer. I accept that Mr. Evseev's report constitutes expert evidence pursuant to CRT Rule 8.3. According to Mr. Evseev's report, the balcony roof joists appeared to be attached to the original roof overhang fascia. Based on his report, I find the balcony roof was added to the house and was not part of the original construction.
39. The strata says no building permits were filed with the township for the deck and roof extension. It says a developer would not make such alterations without obtaining a building permit because the township could determine the house did not meet the building codes. Based on the engineering report, the strata also says the quality of construction was shoddy which suggests it was not constructed by a developer. Ms. McGill responded that since the additions were made between 1973 and 1991 it is "not surprising" that there were no permits. I infer Ms. McGill meant the building codes were not as rigorously upheld during this time period. I find Ms. McGill's statement about municipal enforcement of building codes is speculative and I give it no weight.



40. Ms. McGill also provided correspondence between a previous owner, LD, and the strata that showed the strata paid \$14,304.08 for deck repairs in 2012. She says the strata is obligated to continue paying for deck repairs since it paid for them in the past. The strata says the correspondence also shows in 2008 the strata refused to pay for repairs and denied the developer had added the deck. In any event, the strata says correspondence between previous strata council members and SL 55's former owners are hearsay and should not be considered.
41. I find the strata's history shows it inconsistently took the position that deck repair and maintenance were the strata lot owner's responsibility. Since there is conflicting evidence, I find it is an evidentiary tie. As noted above, the burden is on Ms. McGill to prove on a balance of probabilities that the strata must repair and maintain the deck and balcony roof. I find she has not met that burden based on the strata's repair history. I also find that whether the strata paid for repairs in 2012 is not determinative of whether it must pay for further repairs.
42. The second requirement under bylaw 2(3)(a) is that the addition to the exterior of the building was not on the strata plan. As mentioned above, while the registered strata plan showed SL 55 had 2 balconies, it did not show a connecting deck or that the balconies had overhangs. Ms. McGill says the developer originally intended to make SL 55 a duplex, but at the last minute decided to keep the original house due to financial difficulties. She says the developer was in a hurry and submitted the house's original plan from 1973. I infer Ms. McGill meant the developer copied the original house plan onto the strata plan. Ms. McGill says there are other errors on the strata plan as well. For instance, she says that the strata plan does not show overhang roofs for any of the other strata lots. The strata denies there are any errors in the strata plan and says it was an accurate depiction of SL 55 at the time it was added to the strata. I give Ms. McGill's argument little weight since she did not provide any evidence to support her statements.
43. Therefore, based on my reasons above, I find bylaw 2(3)(a) applies to the deck and balcony roof.

44. I must now address the conflict between bylaw 2(3)(a) and bylaw 9(1)(d)(iii). In *Semmler v. The Owners, Strata Plan NES3039*, 2018 BCSC 2064 at paragraph 18, the BC Supreme Court stated that the principles of statutory interpretation apply to strata corporation bylaws and that the bylaws must be read as a whole when determining the meaning of an individual bylaw. The court also found that an interpretation which allows the bylaws to work together harmoniously and coherently should be preferred.
45. I find when read as a whole, bylaw 2(3) holds the owner responsible for the repair and maintenance of any additions to the strata lot made by the owner that were either unauthorized, or that were authorized and the owner agreed to be responsible for.
46. By contrast, bylaw 9(1)(d) restricts the strata's responsibility to repair and maintain a strata lot to only particular areas. I note that in bylaw 9(1)(d)(v), the strata is responsible for fences, railings and similar structures that enclose patios, balconies and yards, and excludes add-ons, alterations or extensions differing from the original plan, which remain the owner's responsibility. This means that if an owner added a deck and railings around the deck, under bylaw 9(1)(d)(iii), the strata would have to repair the deck, but under bylaw 9(1)(d)(v), it would not have to repair the railings. I find this does not make sense. Based on *Semmler*, I find that a preferable interpretation of bylaw 9(1)(d) is that alterations to the exterior that differ from the original strata plan remain the owner's responsibility. Consequently, I find the strata is not responsible for repairing and maintaining the deck and balcony roof since they are alterations to the exterior of the building and differ from the original strata plan.
47. I find that bylaw 2(3)(a) applies and that Ms. McGill is responsible for the repair and maintenance of the deck and balcony roof since it was added on by an owner and not registered on the strata plan.

## **CRT FEES**

48. Under section 49 of the CRTA, and the CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. As Ms. McGill was unsuccessful, I find she is not entitled to any reimbursement
49. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against Ms. McGill.

## **ORDERS**

50. I dismiss Ms. McGill's claims and this dispute.

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Rama Sood, Tribunal Member