



Civil Resolution Tribunal

Date Issued: September 8, 2020

File: ST-2020-000951

Type: Strata

Civil Resolution Tribunal

Indexed as: *Danesh-Bakhsh v. The Owners, Strata Plan BCS 3699*, 2020 BCCRT 1009

B E T W E E N :

MAHIN DANESH-BAKHSB

APPLICANT

A N D :

The Owners, Strata Plan BCS 3699

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

J. Garth Cambrey, Vice Chair

INTRODUCTION

1. This is a strata property dispute about responsibility for an insurance deductible.
2. The applicant, Mahin Danesh-Bakhsh, owns a strata lot (SL31) in the respondent strata corporation, The Owners, Strata Plan BCS 3699 (strata). Ms. Danesh-Bakhsh is self-represented, and the strata is represented by a strata council member.

3. Ms. Danesh-Bakhsh says the strata has improperly charged SL31 \$25,000 for an insurance deductible relating to a plugged kitchen sink drain line that occurred February 5, 2018. She says she is not responsible under the strata bylaws because she was not negligent, which is what she says the bylaws require. She asks for an order that the strata remove its \$25,000 insurance deductible charge against SL31.
4. In submissions, the strata acknowledges its bylaws require an owner to be negligent in order for the strata to recover an insurance deductible. The strata submits Ms. Danesh-Bakhsh was negligent because of her “inappropriate use of the in-suite garburator or [her] failure to repair and/or maintain a garburator”. The strata asks that Ms. Danesh-Bakhsh’s claims be dismissed.
5. For the reasons that follow, I find Ms. Danesh-Bakhsh is not responsible for the insurance deductible and order the strata to remove its \$25,000 charge from the account of SL31.

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, email, 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.

ISSUE

10. The sole issue in this dispute is who is responsible to pay the strata's \$25,000 insurance deductible.

BACKGROUND, EVIDENCE AND ANALYSIS

11. In a civil proceeding such as this, the applicant, Ms. Danesh-Bakhsh, must prove her claim on a balance of probabilities.
12. I have read all the submissions and evidence provided but refer only to information I find relevant to provide context for my decision.
13. The strata is an air space parcel strata corporation created in January 2010 under the *Strata Property Act*. (SPA). It consists of 175 residential strata lots in a single high-rise building located in downtown Vancouver, BC. SL31 is located on the 27th floor.
14. The strata filed bylaw amendments with the Land Title Office (LTO) on July 15, 2016 that repealed and replaced all registered bylaws. I infer the Schedule of Standard Bylaws does not apply. LTO records show 2 subsequent bylaw amendments were filed on October 24, 2018 and October 30, 2019. I find these bylaw amendments are not relevant to this dispute because they were filed after the February 5, 2018 water damage incident occurred.
15. The applicable bylaws in this dispute are bylaws 2(1), 3(3), 8, and 39.
16. Bylaw 2(1) states an owner is responsible for repair and maintenance to their strata lot, among other things, except for repairs that are the strata's responsibility under the bylaws. Bylaw 8 states the strata is responsible for common assets, common property, and certain parts of a strata lot that do not apply here.

17. Bylaw 3(3) addresses insurance deductibles and states, in its entirety (my emphasis added):

An owner shall indemnify and save harmless the strata corporation from the expense, including insurance deductibles, of any maintenance, repair or replacement rendered necessary to the common property or to any strata lot resulting from an owner's wilful act, carelessness, negligence or that of any tenant or occupant of a strata lot or any visitors, customers, clients, employees or contractors of an owner, tenant or occupant, but only to the extent that such an expense is not recovered from proceeds of insurance carried by the strata.

18. Bylaw 39 also addresses responsibility for insurance deductibles, and states, in its entirety:

- a. If an owner is responsible for any loss or damage to a strata lot, common property, limited common property or common assets, that owner must indemnify and save harmless the strata corporation from the expense of any maintenance, repair or replacement rendered necessary to the strata lot, common property, limited common property or common assets but only to the extent that such expense is not reimbursed from the proceeds received by operation of any policy of strata insurance or section insurance. Without limiting the generality of the word "responsible", an owner is responsible for the owner's acts or omissions, as well as those of any of the tenants, occupants, visitors, agents, contractors or employees of the strata lot or the owner.

- b. For the purposes of these bylaws, any insurance deductible paid or payable by the strata corporation will be considered an expense not covered by the proceeds of strata insurance or any applicable section insurance received by the strata corporation or the separate section and will be charged to the owner.

19. I note that while bylaw 39(b) refers to separate section insurance, there are no separate sections created under the strata's bylaws.
20. Section 158(2) of the SPA allows a strata to recover the deductible portion of an insurance claim from an owner, if the owner is responsible for the loss or damage that gave rise to the claim.
21. Ms. Danesh-Bakhsh specifically cites bylaw 3(3) when she says the bylaws require her to be negligent in order for the strata to find her responsible to pay the \$25,000 deductible. She also relies on *Strata Plan LMS 2446 v. Morrison*, 2011 BCPC 519. In *Morrison*, the Provincial Court was asked to determine if section 158(2) was affected by the strata's bylaws. In particular, if a strata corporation's bylaws required the strata corporation to show the strata lot owner was negligent, as opposed to "responsible for" a loss under section 158(2) of the SPA before being able to recover its insurance deductible. The Provincial Court concluded that the strata bylaws do affect section 158(2) of the SPA and can import a negligence standard. The BC Supreme Court confirmed this concept in *The Owners, Strata Plan BCS 1589 v. Nacht*, 2019 BCSC 1785.
22. Based on *Morrison*, I find the language used in bylaw 3(3) imports a negligence standard to section 158(2) of the SPA. But what about bylaw 39?
23. The strata says only that it agrees its bylaws import a standard of negligence with respect to charging back insurance deductibles. Neither party addressed bylaw 39.
24. The BC Supreme Court has found that the principles of statutory interpretation apply to strata corporation bylaws and that determining the meaning of an individual bylaw, the bylaws must be read as a whole. See *Semmler v. The Owners, Strata Plan NES3039*, 2018 BCSC 2064 at paragraph 18. Citing paragraph 25 in *Carnahan v. Strata Plan LMS522*, 2014 BCSC 2371, the Court in *Semmler* found that an interpretation which allows the bylaws to work together harmoniously and coherently should be preferred.

25. I do not find that bylaw 39 conflicts with bylaw 3(3). Rather, I find that bylaw 39(a) clarifies that an owner is also responsible for the “acts or omissions” of the tenants, occupants, visitors, agents, contractors or employees of the strata lot. Bylaw 39(b) simply restates what is found in bylaw 3(3), that an owner can be found responsible for insurance deductibles, which is also set out in section 158(2) of the SPA. Therefore, I find bylaw 3(3) establishes the standard of negligence and bylaw 39(a) extends that standard to include other people related to a particular strata lot.
26. Reading bylaws 3(3) and 39 together, I find the only reasonable interpretation of the strata’s bylaws is that the owner, or another person related to the owner’s strata lot, must have acted in a negligent manner in order for the strata to charge an insurance deductible to the owner’s strata lot. For these reasons, I agree with the parties that Ms. Danesh-Bakhsh must have negligently caused the kitchen sink to backup into SL31 in order to be responsible for the \$25,000 deductible under section 158(2) of the SPA.
27. The relevant facts that follow are not disputed.
28. The parties agree that on about February 5, 2018, water backed up into the kitchen sink of SL31 that “caused a water event”. The parties also agree that Ms. Danesh-Bakhsh was not home at the time and SL31 was unoccupied. This fact is supported in the email exchanged between the concierge and the property manager dated May 21, 2020 that forms part of the property manager’s written statement. In the concierge’s email, he states he had to gain access to SL31 on the evening of February 5, 2018, which I find implies SL31 was not occupied at the time.
29. Water damage was sustained to SL31, the strata lot immediately below, and possibly to other strata lots and common property, that resulted in a water damage claim against the strata’s insurance policy. The evidence shows the total claim was about \$175,000, which the parties agree was covered by the strata’s insurance policy, subject to a \$25,000 deductible.
30. The strata paid the \$25,000 insurance deductible. According to the arrears statement for SL31 provided in evidence, the strata charged the deductible to SL31

in April 2018. If the strata wrote to Ms. Danesh-Bakhsh explaining the deductible chargeback, that letter is not before me.

31. Since that time, the parties have been in dispute over who is responsible for the \$25,000 insurance deductible. They have provided opinions from several contractors. I note that none of the opinions provided in evidence meet the criteria for expert evidence set out in CRT rule 8.3. Therefore, I find the opinions are not expert evidence. Even so, I accept the opinions are from persons knowledgeable in building plumbing systems and I address the weight given to the opinions in my reasons below.

Who is responsible to pay the \$25,000 insurance deductible?

32. The dispute is simple. The strata claims that Ms. Danesh-Bakhsh's use of her garbage disposal or lack of maintaining it, caused the kitchen sink to back up on February 5, 2018. Ms. Danesh-Bakhsh disagrees. For the following reasons, I agree with Ms. Danesh-Bakhsh.
33. Given my conclusion about the strata's bylaws above, this dispute turns on whether Ms. Danesh-Bakhsh's negligence somehow caused the February 5, 2018 kitchen sink backup in SL31 that resulted in the claim against the strata's insurance policy. In order to be found negligent, it must be shown that Ms. Danesh-Bakhsh owed the strata a duty of care, that she breached the standard of care, and the strata sustained damage that was caused by her breach. See *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27.
34. Ms. Danesh-Bakhsh says the building piping, particularly that of SL31's kitchen drain line, is different from what is shown in the construction drawings. She says the piping is constructed in a manner that allows buildup of grease in the main plumbing stack that can cause water to backup into the kitchen sink of SL31. Ms. Danesh-Bakhsh provided 4 letter reports. I find only 2 are relevant and I summarize them below.
35. The first letter report provided by Ms. Danesh-Bakhsh is a June 6, 2018 letter from PAPA Plumbing, Heating and Drainage Ltd. to ServiceMaster Restorations (PAPA

opinion). According to Ms. Danesh-Bakhsh, her insurer retained the opinion. PAPA observes the kitchen sink was disconnected and the drain line was cleaned at the time of its inspection. This is consistent with Ms. Danesh-Bakhsh's submissions that she did not return to occupy SL31 until July 1, 2018, when the water damage repairs were completed. Despite this observation, the PAPA opinion goes on to say that the writer believed the "main stack leading from [SL31] downwards must have been plugged with sewer debris" and this caused the backup.

36. The strata says there is no indication the PAPA opinion is connected to the February 5, 2018 loss. Although I disagree with the strata, I place no weight on the PAPA opinion given it appears to be speculative, and based solely on a visual inspection of the kitchen sink after the drain line had been unplugged by others.
37. The second report is a December 8, 2018 letter Ms. Danesh-Bakhsh received from National Hydronics Ltd. (National). Ms. Danesh-Bakhsh says she hired National to investigate "gurgling noises" she continued to hear after July 1, 2018 when she moved back into SL31 following its repair. As the National opinion states, it attended SL31 on November 18, 2018, 3 days before a scheduled appointment, because a second backup occurred on November 18, 2018. The opinion states that grease and other material was found "past this suite and into the main line". National returned to SL31 on November 21, 2018 to complete a full investigation with camera equipment. The opinion states that National concluded the SL31 kitchen drain line was at the bottom of a main plumbing stack and not at the top of a main plumbing stack as was shown on the plumbing drawings it had earlier reviewed. National recommended further destructive investigation to confirm plumbing code violations did not exist and hydro flushing of the main plumbing drain lines to ensure the lines were free from grease. It suggested that cleanouts might need to be installed to properly clean the main drainpipe. Neither the drawings nor the camera video were provided in evidence
38. In response submissions, the strata says that National did not provide any evidence that it reviewed the plumbing configuration before the backup occurred. It says this somehow makes the National opinion inaccurate and therefore not relevant, but does not explain why. It is unclear to me how the timing of National's inspection of

the plumbing system of SL31's kitchen affects the accuracy of its opinion on the plumbing configuration. The plumbing configuration did not change from the time of the February 5, 2018 backup to December 8, 2018, the date of the National opinion. As explained below, I do not agree with the strata and I reach a different conclusion about the National opinion.

39. I turn now to the 2 letter reports the strata relies on, which I summarize below.
40. The first report is a March 29, 2019 letter from Besant and Associates Engineers (BAE). I note that 2 copies of the letter were provided in evidence: 1 by the strata and 1 by Ms. Danesh-Bakhsh. Even though the letter provided by Ms. Danesh-Bakhsh has a different electronic filename, the letters appear identical except for yellow highlights in portions of the letter provided by Ms. Danesh-Bakhsh. Neither party expressed concern that the letters were different, so for the purposes of this decision, I find the evidence is the same.
41. BAE acknowledges it reviewed as-built construction drawings and the National opinion. It comments that there were back-ups in sanitary drains affecting SL31 and 2 other strata lots, one of which is on the same floor as SL31. It also reviewed video camera footage of a different strata lot that experienced a plumbing backup and spoke with the contractor involved. The drawings, camera video, and contractor name, were not provided in evidence.
42. The BAE opinion includes schematic figures allegedly showing the as-built plumbing system for SL31s sink and the alternate plumbing system as described in the National opinion, which BAE identifies as a "probable configuration". BAE expresses concern that the configuration "may be a factor" in the SL31 sink back up.
43. I agree with Ms. Danesh-Bakhsh that neither her contractor, National, nor the strata's contractor, BAE, were able to confirm the actual plumbing configuration of SL31's kitchen sink drain line. In comparing the National opinion to the BAE opinion, I find both contractors agree the most "probable" plumbing configuration is as suggested by National and it likely contributed to the plumbing back up into SL31 on February 5, 2018. In other words, at a minimum, the 2 opinions cast doubt that

garburator use, or lack of garburator maintenance, was the sole cause of the backup.

44. Further, the National opinion does not address garburator use or maintenance. While the BAE opinion states that performance of drainage lines often deteriorates with the use of garburators and that the performance of the drainage lines is a function of the garburator performance, it discusses these items in general terms and does not specifically address the garburator use or condition in SL31. Ms. Danesh-Bakhsh emphasised this in her submissions and I agree the BAE opinion is not conclusive evidence she caused the February 5, 2018 incident. I place significant weight on both opinions but note the National opinion included a physical inspection of SL31, including a camera scope of the kitchen drain line.
45. The second letter report relied upon by the strata is a written statement from the plumber, who is also a mechanical engineer with Service Plus Mechanical Systems Ltd. (Service Plus). An undated letter attached to the written statement says they attended SL31 on the evening of February 5, 2018 and determined, after “snaking” the kitchen drain, that it was “full of rice and grease”. The letter also states, “It’s an in-suite issue, not the mainline. All of the drains of the downstairs units were ok.” Also attached to the written statement was a hand-written sketch allegedly of the SL31 kitchen drain line and cleanout. The plumber said he made the sketch on November 29, 2018, about 8 months after the incident. The sketch shows debris located in the horizontal kitchen drain line located below the floor of SL31 in the strata lot or ceiling space of the strata lot below SL31. The statement does not mention garburators.
46. Ms. Danesh-Bakhsh does not refute there may have been debris in the kitchen drain line of SL31. However, she submits that does not prove she caused the backup that occurred February 5, 2018, or that her garburator was the cause of the back. I agree.
47. Based on the opinions of National and BAE that the plumbing configuration is more than likely such that SL31 is at the bottom of the main plumbing stack rather than the top, the fact that drain lines in strata lots below SL31 were not plugged does not

matter. I find this to be so because the SL31 drain line would not be connected to the drain lines of the strata lots below but rather the drain lines of the strata lots above SL31. Further, even if the plumbing configuration was actually as shown on the drawings, which I find is unlikely, the plumber's statement does not address any inspection of the main plumbing stack, which if plugged, could have caused water to back up into SL31.

48. It is also relevant that SL31 was unoccupied at the time of the incident. If the kitchen drain line in SL31 was plugged, there was no one in SL31 who could have turned the kitchen sink water faucet on to cause the leak. The plumber's statement has a note that mentions a camera, but there is no evidence the plumber used a camera. The note also states the pipe blockage "acted as a straw to draw water in – suction", but there no explanation of how this could have occurred.
49. Finally, although not argued, if the kitchen sink drain line of SL31 is actually located in the strata lot below as shown in the Service Plus sketch, the drain line is common property by definition under section 1(1) of the SPA. Under section 72 of the SPA and bylaw 8, the strata is responsible to repair and maintain common property, which I find would include keeping the drain line clear of debris. For these reasons, I place no weight on the Service Plus plumber's written statement.
50. The strata says Ms. Danesh-Bakhsh was negligent because of her "inappropriate use of the in-suite garburator or [her] failure to repair and/or maintain a garburator". I find the evidence before me does not support this conclusion for the reasons stated above. In particular, there is no evidence there was ever an inspection done of Ms. Danesh-Bakhsh's kitchen sink garburator or that the strata gave her specific instructions on how to maintain her garburator, to sharpen or replace its blades, or replace the entire unit.
51. I also find it significant that Ms. Danesh-Bakhsh was charged the \$25,000 deductible in April 2018, almost 1 year before the strata received the BAE opinion on which it relies. There is no documentary evidence at the time of the charge back that addresses Ms. Danesh-Bakhsh's use of her garburator or that she failed to

maintain it. I find the strata only reached this conclusion after it received the BAE opinion.

52. For all of these reasons, I find Ms. Danesh-Bahksh was not responsible for the February 5, 2018 water damage incident. Given this finding, I also cannot find that Ms. Danesh-Bahksh could be negligent. Therefore, I find the strata improperly charged Ms. Danesh-Bahksh the \$25,000 insurance deductible contrary to the strata's bylaws. I order the strata immediately remove the charge from SL31.

CRT FEES AND EXPENSES

53. 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. Ms. Danesh-Bahksh was successful in this dispute, so I order the strata reimburse her \$225 for CRT fees. She did not claim dispute-related expenses, so I order none.

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

ORDERS

55. I order the strata to:

- a. Immediately remove the \$25,000 insurance deductible charge about the February 5, 2018 water damage incident from the account of SL31, and
- b. Within 15 days of the date of this decision, pay \$225 to Ms. Danesh-Bahksh for CRT fees.

56. Under section 57 of the CRTA, a validated copy of the CRT's order can be enforced through the Supreme Court of British Columbia. Under section 58 of the CRTA, the order can also be enforced by the Provincial Court of British Columbia if it is an order for financial compensation or return of personal property under \$35,000. Once

filed, a CRT order has the same force and effect as an order of the court that it is filed in.

J. Garth Cambrey, Vice Chair