



Civil Resolution Tribunal

Date Issued: October 30, 2020

File: ST-2020-004535

Type: Strata

Civil Resolution Tribunal

Indexed as: *Hopper v. The Owners, Strata Plan 1374*, 2020 BCCRT 1226

BETWEEN:

JOAN HOPPER

APPLICANT

AND:

The Owners, Strata Plan 1374

RESPONDENT

AND:

JOAN HOPPER

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

Micah Carmody

INTRODUCTION

1. This dispute is about whether a strata lot owner must pay a strata corporation's deductible for a water damage insurance claim.
2. The applicant, Joan Hopper, co-owns strata lot 5 (unit 204) in the respondent strata corporation, The Owners, Strata Plan 1374 (strata).
3. There were 2 water leak incidents. On August 11, 2019, water escaped from unit 204's toilet and damaged unit 204 and the strata's common property below. On September 6, 2019, water escaped from the same toilet. The strata made an insurance claim for the first leak and applied its \$5,000 deductible to unit 204's strata lot account. The strata says the second leak caused no additional damage to common property.
4. Ms. Hopper was overseas during the first leak. Her son, David Hopper, was staying in unit 204. Ms. Hopper says a blocked sewer line, not her or her son's negligence, caused the flood. She asks for removal of the \$5,000 charge back to her strata lot account. She also seeks \$1,103.76 for emergency clean up costs after the August 11 flood.
5. The strata says Mr. Hopper and Ms. Hopper were negligent, and it counterclaims \$5,000 for the deductible.
6. Mr. Hopper co-owns unit 204 but does not normally live there. He is not a party to this dispute.
7. Ms. Hopper is self-represented. The strata is represented by a strata council member.

JURISDICTION AND PROCEDURE

8. 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.

9. 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.
10. 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.
11. 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.

ISSUES

12. The issues in this dispute are:
 - a. Is Ms. Hopper required to reimburse the strata for its \$5,000 insurance deductible?
 - b. Is the strata required to reimburse Ms. Hopper \$1,103.76 for emergency cleanup costs?

EVIDENCE

13. As the applicant in this civil claim, Ms. Hopper bears the burden of proof on a balance of probabilities. In the counterclaim, the strata bears the same burden. I have considered all the parties' evidence and submissions, but only refer to what is necessary to explain and give context to my decision.

14. The strata was created in 1984 and includes 20 residential strata lots in a 6-floor building. Unit 204 is on the second floor, above the common property covered exterior entrance to the building.
15. There is no dispute that at approximately 7:30 p.m. on August 11, 2019, a resident, BL, discovered the water leak. According to BL's statement, BL saw "streams of water pouring out of the lights" in the strata building's covered entrance. BL believed it had been flooding for some time judging from the amount of water on the ground. BL alerted strata council members that the entrance ceiling was leaking water. The strata's photos and video, which I accept were taken around 8:00 p.m. on August 11, 2019, show a steady stream of water from the ceiling and large puddles accumulated on the ground.
16. The following facts about the August 11, 2019 water leak are undisputed:
 - a. Mr. Hopper was the only occupant of unit 204 at the time of the water leak.
 - b. Mr. Hopper failed to notice the overflow from the toilet until strata council members entered unit 204. The 2 strata council members involved in the initial response were LK and CG.
 - c. CG first attended unit 204 and Mr. Hopper advised he was not aware of any water leaks.
 - d. LK checked for leaks in the strata lots above unit 204 but found none.
 - e. CG returned to unit 204 to find Mr. Hopper had located the leak and was mopping the ensuite bathroom floor.
 - f. The valve for the toilet water supply was not shut off and was missing the handle that would allow it to be quickly shut off without a tool.
 - g. CG had to find a tool to close the valve.
17. LK provided a witness statement dated October 1, 2019. LK said they checked the units above unit 204 and found no water problems before returning to unit 204, with a neighbour, IN. There, they found unit 204's toilet was the source of the water. LK

said there was water “running out of the whole toilet, flooding the bathroom and both bedroom floors.” She said CG turned off the water supply, and the water to the toilet stopped running. LK said Mr. Hopper acknowledged that earlier that day he had adjusted parts of the toilet tank to get more water in the bowl.

18. LK said around 11 p.m. on September 6, 2019, another resident awakened them as there was another leak through the entrance ceiling. There was no odour of sewage (LK did not comment on odour during the first leak). Upon attending unit 204, LK found Ms. Hopper and Mr. Hopper mopping up, and a “huge amount of water flooding” the bathroom and 2 bedrooms. LK said Mr. Hopper advised he had just shut off the water supply line. After that, the entrance ceiling began to stop leaking.
19. LK said they canvassed all units above unit 204 and there have been no plumbing issues “before or after” the two water leaks from unit 204.
20. CG did not provide a witness statement, but CG’s version of events is set out in email correspondence with Ms. Hopper shortly after the events. CG said the water coming from the entrance ceiling during both water leaks was clear and “not sewage.” CG attended unit 204 during the first leak and observed the source of the water was the toilet tank overflowing. CG shut off the valve to the toilet and observed as the water leaking from the entrance ceiling slowed and then stopped. It is not clear whether CG attended unit 204 during the second leak. CG said to their knowledge, no other toilets or plumbing fixtures in the building had backed up
21. IN provided a statement dated June 17, 2020. IN was a resident in the strata building when the first flood happened. For reasons that are not explained, IN attended unit 204 with LK and observed water coming from the bathroom toilet. IN said Mr. Hopper mentioned he had been trying to adjust the toilet flusher because he did not like the low flushing feature.
22. Ms. Hopper acknowledges that Mr. Hopper adjusted the toilet to raise the tank water level. However, she says this happened on August 10, not August 11. I prefer LK’s evidence that Mr. Hopper acknowledged adjusting the toilet earlier on August 11. LK was there when Mr. Hopper made the statement, while Ms. Hopper was not, and

there is no statement direct statement from Mr. Hopper in evidence, an issue I return to below. Ultimately, for reasons set out below, it does not matter whether Mr. Hopper adjusted the toilet on August 10 or August 11.

23. Ms. Hopper says there was no active leak when LK and CG attended. She says it was the removal of water from the bathroom floor that led to the eventual cessation of water leaking to the entrance below. I find there was an active leak, given the strata's three witnesses observed an active leak and described water flowing from the toilet. I find an active leak also more consistent with the strata's photos and video of the leak, and description of how the leak slowed. I further note that Ms. Hopper was not present during the first leak.
24. It appears that no repairs were made to the common property or unit 204 before the second leak on September 6, 2019. I say this because the strata provided a Servicemaster invoice for emergency services that does not say when the work was performed but is dated September 25, 2019. The invoice includes emergency response work in the exterior entrance and unit 201 (which I find was a typo and should refer to unit 204). The associated invoice was \$3,856.86. On the same date, Servicemaster provided a \$12,904.92 estimate for repairs to unit 204 and the entrance. Accordingly, the strata filed a claim with its insurer and paid its \$5,000 deductible.
25. On August 12, 2019, the insurance adjuster, DC, for the strata's insurer investigated unit 204. DC found the owner had "incorrectly connected a new toilet which resulted in [...] water damage." When it later became apparent Ms. Hopper was disputing the deductible charge, the strata followed up with DC, seeking further details on the nature of the leakage or anything Mr. Hopper may have said. DC said they met Mr. Hopper on site, and Mr. Hopper admitted that he failed to install the toilet correctly. The strata now acknowledges that DC's description was incorrect. The strata says it never asserted that Mr. Hopper incorrectly installed a new toilet, and says DC's error is simply a lack of accurate detailing. I find the error is significant. Installing a new toilet is different from adjusting the flow on an old toilet. That error goes to the root of the issue in this dispute, which is whether Mr. Hopper was negligent. Accordingly, I

give no weight to DC's report and DC's statement that there was no evidence of a sewer backup.

26. Ms. Hopper says the toilet was not used after the first water leak until September 6, 2019, when she returned from overseas. She hired Callaway Plumbing to check the toilet, which it did on September 6.
27. Callaway's September 6, 2019 invoice did not provide the name of the plumber or technician who attended. The notes said, "Fill valve was stuck and cr-19 handles were missing. Replaced fill valve with pro 45 and replaced cr-19 handles." There was no reference to the August 11 water leak and no confirmation that the fill valve being stuck caused or contributed to the leak.
28. The second leak occurred the night of September 6, 2019. Callaway returned the next day. Callaway's September 17, 2019 invoice (for September 7 service) identified BC as the plumber. BC's notes said, "Troubleshoot overflowing toilet to believe toilet was blocked therefore augered the toilet unable to clear and toilet seemed to have no blockage" [reproduced as written]. After removing the toilet, BC found the toilet elbow and 3" pipe full of water. BC's notes said, "power rooted to clear the blockage at approx. 35' then flushed with water and tested." Ms. Hopper says there have been no issues with the toilet since clearing this blockage.
29. On February 11, 2020, the strata assigned the deductible amount of \$5,000 to Ms. Hopper's strata lot account. The strata's letter said it was doing this pursuant to bylaw 32, which reads:

All owners shall place and maintain a policy of insurance covering liability for any negligent act or omission on his/her part.

Anyone making a claim against the Strata Corporation insurance policy shall be responsible for paying the deductible portion of the claim except where the claim is made by the Strata Corporation for damages to property the maintenance of which it would normally be responsible for under the bylaws.

30. It is not clear to me that bylaw 32 provided the strata the authority to charge back its insurance deductible to Ms. Hopper. However, I find it is not necessary to determine that issue given that the strata has claimed \$5,000 for the deductible in this dispute.
31. Ms. Hopper disputed the charge and was granted a hearing on May 17, 2020. The strata declined to reverse the charge.
32. Ms. Hopper's insurer denied coverage of the strata's deductible based on its conclusion that Ms. Hopper was not negligent.

ANALYSIS

33. Section 158(1) of the *Strata Property Act* (SPA) provides that the payment of an insurance deductible in a claim on the strata corporation's insurance is a common expense to which all owners contribute through strata fees. Section 158(2), however, says a strata may sue an owner to recover a deductible if the owner "is responsible for the loss or damage that gave rise to the claim."
34. Whether a strata corporation can recover against an owner under section 158(2) "must be determined by all the provisions of the applicable statute and the bylaws, rules and regulations of the strata corporation" (*The Owners Strata Corporation VR2673 v. Comissiona et al*, 2000 BCSC 1240). It is well established that a strata corporation's bylaws can modify the "responsible" standard under section 158(2) to a "negligence" standard (*Strata Plan LMS 2446 v. Morrison*, 2011 BCPC 519; *The Owners, Strata Plan BCS 1589 v. Nacht*, 2019 BCSC 1785).
35. Bylaw 2 says an owner is "responsible" for any damage to common property or their strata lot if the damage is caused by the act or neglect of the owner or their guest or invitee. The parties agree that negligence is the applicable standard, and I find their interpretation is supported by the use of the words "act or neglect" in bylaw 2.
36. In light of bylaw 2, I find that if either Ms. Hopper or Mr. Hopper (who was undisputedly a guest of Ms. Hopper's) negligently caused the water leak, then Ms. Hopper, as the named owner in this dispute, is responsible for the damage under section 158(2) of

the SPA. Following *Nacht*, I find that in order to recover the \$5,000 deductible, the strata must prove that either Ms. Hopper or Mr. Hopper negligently caused or contributed to the water damage.

37. To prove negligence, the strata must show that Ms. Hopper or Mr. Hopper owed it a duty of care and breached the standard of care, that the strata sustained damage, and that the damage was caused by the breach (*Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27). For the reasons that follow, I find that the strata has met its burden on a balance of probabilities with respect to Mr. Hopper.
38. I accept that as strata lot owners, Ms. Hopper and Mr. Hopper owed the strata a duty of care. I also accept that the applicable standard of care is reasonableness (*Burris v. Stone et al*, 2019 BCCRT 886). There is no dispute that water escaping on August 11, 2019 caused damage. The issue is whether Ms. Hopper or Mr. Hopper breached the standard of care. Most of the strata's arguments focus on Mr. Hopper.
39. Ms. Hopper argues that her insurer and Callaway concluded that she and Mr. Hopper were not negligent. She says her insurer and Callaway are experts and their conclusions should be given more weight than those of the strata. I find Ms. Hopper's insurer's conclusion about negligence is not determinative of responsibility under section 158(2) the SPA, which is squarely in the CRT's jurisdiction under section 121 of the CRTA. As for Callaway's invoices, it is clear that the authors have not attempted to explain the cause of either leak. Although BC's notes on the September 17 invoice indicate a removed blockage 35 feet from the toilet, BC does not link that blockage to the toilet leak of September 6 or August 11. I find the plumbing invoices do not establish that a blockage caused the leaks.
40. Ms. Hopper says the fact that a second leak occurred after the toilet was serviced by a plumber supports a conclusion that a sewer blockage, rather than Mr. Hopper's adjustments, caused the first leak. She also says the fact that the toilet has functioned without issue since the blockage was cleared (which was undisputed and I accept) further supports a conclusion that the blockage caused the leak. The strata says the

fact that no other strata lots experienced any plumbing issues indicates there was no blockage.

41. The parties' arguments are difficult to resolve without expert evidence. For example, the strata says the fact that the water was clear and had no odour means there could not have been a sewer blockage. Ms. Hopper says this is not necessarily so, because if there is no waste in the toilet when flushed, the clean water will encounter the blockage and work its way back up to the toilet. The strata says the toilet tank overflowed because of a failure in the float mechanism that allowed clean water to overflow the tank continuously. Ms. Hopper says even if this were the case, the flapper would have remained open to drain the water into the bowl. The strata says even if there had been a blockage that caused a back-up, if the toilet was functioning properly the damage would have been limited to the volume of water contained in one flush of the toilet. Ms. Hopper disputes this. I find these arguments relate to plumbing issues and toilet mechanical issues that are beyond the knowledge of an ordinary person and require expert evidence to prove.
42. I am unable to make a finding on the evidence about whether a downstream blockage or Mr. Hopper's adjustments caused the leak. What is undisputed is that the toilet did not overflow in the nearly one month between leaks when it was not in use. In other words, the toilet had to be flushed in order to overflow.
43. The BC Provincial Court discussed the standard of care of a "user of a toilet in a multi-unit building" in *Morrison*, cited above. In that case, the Court said that owners are expected to monitor whether the plumbing fixtures within their strata lot are operating properly, and where they fail to do so, they are negligent. More specifically, the Court said the owner in that case needed to ensure that each time after flushing, the waste cleared properly from the bowl and the tank and bowl refilled safely and the water from the tank into the bowl shut off appropriately. In *Morrison*, the strata lot owner was found to be negligent after his toilet overflowed from the bowl and caused damage, even though the source of the blockage that caused the overflow was unknown. The court's decision in *Morrison* is binding on me.

44. The facts here are similar to those in *Morrison*. I find that on August 11, 2019, the toilet bowl, tank and water supply valve were within Mr. Hopper's sole control, as he was the only occupant of unit 204. Ms. Hopper admits that Mr. Hopper was in the strata lot and used the toilet at least 3 times after making the adjustment, without incident. I find Mr. Hopper was in a position to monitor the toilet's working condition and to ensure after each use that nothing prevented the toilet bowl from emptying and nothing caused it, or the tank, to overflow. He owed a duty to the strata to monitor the functioning of the toilet.
45. Ms. Hopper says Mr. Hopper did not breach his duty of care because after adjusting the toilet he slept in the bedroom next to the toilet in question. She says the sound of water flowing over the edge of a toilet bowl is "quiet, almost inaudible," so there was no reason for Mr. Hopper to check or notice the toilet was malfunctioning. I find Ms. Hopper's evidence about what Mr. Hopper did or did not do on August 11, 2019 is hearsay evidence because she was not there to observe the events and can only relate what Mr. Hopper told her about them. The CRT has discretion to admit hearsay evidence. Ms. Hopper says Mr. Hopper read and commented on the materials in this dispute and as such, "his comments form part of this response." It is preferable for witnesses to provide separate statements to ensure their evidence is not filtered through a party's lens. However, even if I accepted all of Ms. Hopper's evidence as if it came directly from Mr. Hopper, it would not change my decision that he was negligent.
46. I find that on August 11, 2019, Mr. Hopper depressed the lever that caused the toilet to flush and subsequently overflow. Mr. Hopper failed to notice that either the bowl or tank was overflowing. Had he been properly vigilant, the problem – whether related to a blockage or to his previous adjustments to the toilet – would have been discovered and the water damage prevented or contained to unit 204. I find that by failing to observe that the toilet worked correctly, Mr. Hopper breached his duty of care to the strata. Under bylaw 2, Ms. Hopper is liable for Mr. Hopper's negligence and must pay the strata the \$5,000 deductible amount.

47. The strata also argued that Ms. Hopper was negligent in failing to maintain a handle on the water supply line to allow a quick shut-off in the event of a water leak. Ms. Hopper says the toilet was installed that way about 8 years ago. I find it is not necessary to determine this issue given I have found Mr. Hopper was negligent and Ms. Hopper is liable for his negligence under bylaw 2.

Must the strata reimburse Ms. Hopper \$1,103.76 for the emergency services invoice?

48. Section 155 of the SPA says Ms. Hopper, as an owner, is a named insured on the strata's insurance policy.

49. There is no dispute that the strata made a claim under its contract of insurance for the August 11, 2019 water leak because the cost of mitigating and repairing the damage exceeded the \$5,000 deductible.

50. The September 25, 2019 emergency repair invoice from Servicemaster (invoice 19-0607) describes work done in the exterior covered entrance as well as in unit 204. The total cost was \$3,856.86. The invoice is made out to the strata, and I find the strata, not Ms. Hopper, retained Servicemaster.

51. Ms. Hopper paid a different Servicemaster invoice, 19-0606, for emergency services to unit 204, including a floor drying mat and area rug removal and cleaning, for \$1,103.76. There are 2 versions of the invoice with different dates (August 23, 2019 and October 9, 2019). On balance, I accept Ms. Hopper's explanation that the invoice was for emergency services for the first leak and that the 2 versions of the invoice relate to her decision about how to apply her insurance deductible. The evidence clearly shows that Ms. Hopper's insurance did not cover invoice 19-0606 and Ms. Hopper paid the full invoiced amount, \$1,103.76.

52. It is unclear why Ms. Hopper was required to pay for emergency services in relation to the first leak, given the strata made an insurance claim for the same leak, covering the emergency response to unit 204. The strata has provided no explanation. I find the strata must reimburse Ms. Hopper \$1,103.76.

53. Given the connection between the two claims, I find it appropriate to set off the \$1,103.76 the strata owes Ms. Hopper against the \$5,000 Ms. Hopper owes the strata. The result is that Ms. Hopper must pay the strata \$3,896.24.

CRT FEES, EXPENSES AND INTEREST

54. 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. The parties had divided success, though the strata was successful in the larger claim. Given Ms. Hopper paid \$225 and the strata paid only \$125, I find it appropriate that each party should pay its own CRT fees. Neither party claimed dispute-related expenses.

55. The *Court Order Interest Act* (COIA) applies to the CRT. The strata is entitled to pre-judgement interest on the \$3,896.24 award from February 11, 2020, the date it charged Ms. Hopper's account, to the date of this decision. This equals \$35.21

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

ORDERS

57. I order the strata to immediately remove the \$5,000 insurance deductible charge from Ms. Hopper's strata lot account.

58. I order that, within 30 days of this decision, Ms. Hopper pay the strata a total of \$3,931.45, broken down as follows:

- a. \$3,896.24 for the insurance deductible less repair costs, and
- b. \$35.21 in pre-judgment interest under the COIA.

59. The strata is also entitled to post-judgement interest under the COIA, as applicable.

60. Under section 57 of the CRTA, a validated copy of the CRT's order can be enforced through the British Columbia Supreme Court. Under section 58 of the CRTA, the order can be enforced through the British Columbia Provincial Court 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.

Micah Carmody, Tribunal Member