Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Varshney v. The Owners, Strata Plan BCS 1677*, 2020 BCCRT 1335

B E T W E E N :

ANUPAMA VARSHNEY and LOKESH VARSHNEY

APPLICANTS

A N D :

The Owners, Strata Plan BCS 1677

RESPONDENT

REASONS FOR DECISION

Tribunal Member: J. Garth Cambrey, Vice Chair

INTRODUCTION

1. This is a strata property dispute about a water leak into a strata lot and related repairs.

2. The applicants, Anupama Varshney and Lokesh Varshney, own strata lot 4 (SL4) in the

respondent strata corporation, The Owners, Strata Plan BCS 1677 (strata). Anupama Varshney represents the applicants and a strata council member, Douglas Chiasson, who is also a lawyer, represents the strata.

3. The applicants submit that SL4 sustained water damage in March 2020 that was the same or similar damage as occurred in April 2018. They say the strata failed to properly maintain the building exterior which resulted in water damage occurring to SL4. They also say the strata refused to file an insurance claim against the strata's insurance policy because of its belief the cost to repair the SL4 damage was below the strata's $15,000 deductible. The applicants ask for orders that the strata fix the water ingress issue and pay for the damage to SL4. They also ask for orders that the strata stop its "mental harassment" of the applicants and provide assurance that future occurrences of the same issue will be fixed by strata.

4. The strata denies responsibility and says it has no legal obligation to repair SL4. The strata also says that under its bylaws, the applicants are responsible for the cost of all damage to SL4 up to the $15,000 deductible amount. The strata asks that the applicants' claims be dismissed.

5. For the reasons that follow, I refuse to resolve the applicants' claim for harassment. I find the strata treated the applicants in a significantly unfair manner by refusing to file an insurance claim and I order the strata to make an insurance claim for the March 2020 water damage to SL4.

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.

PRELIMINARY ISSUES

Harassment

10. For the following reasons, I refuse to resolve the applicants' claim that she was harassed.

11. First, section 121(1) of the CRTA says the tribunal has tribunal has jurisdiction over a claim, in respect of the *Strata Property Act* (SPA), concerning one or more listed areas included the interpretation or application of the SPA, or a regulation, bylaw or rule under the SPA, common property, use or enjoyment of a strata lot, money owing, and actions or decisions by a strata against an owner. Absent a bylaw about harassment, as is the case here, I find the applicants' claim is not listed in CRTA section 121(1). I therefore find that harassment by an owner is not a claim that falls within the tribunal's strata property jurisdiction. I find the applicants' harassment claim is more than likely against one or more strata council members.

12. The applicants did not name any strata council members as a respondent in this dispute. Therefore, no council member has had the opportunity to respond to the applicants' allegations. I find it would not be in the interests of justice and fairness for me to make an order against a non-party.

13. However, even if a council member was a named respondent, I would refuse to resolve the owner's claim. I say this because I find allegations involving a strata council member's harassment arise under section 31 of the (SPA), which in a strata property dispute such as this, is outside the CRT's jurisdiction.

14. Section 31 sets out the standard that strata council members must meet in performing their duties. It says that each council member must act honestly and in good faith, with a view to the best interests of the strata, and exercise the care, diligence, and skill of a reasonably prudent person in comparable circumstances. I find a strata council member's standard of care would capture allegations of harassment .

15. In *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc*., 2016 BCSC 32 at paragraph 267, the B.C. Supreme Court (BCSC) found that the duties of strata council members under section 31 are owed to the strata corporation, and not to individual strata lot owners. This means that a strata lot owner cannot be successful in a claim against a strata corporation for duties owed by its strata council members under section 31.

16. Further, in *Wong v. AA Property Management Ltd, 2013 BCSC 1551*, the BCSC considered a claim brought by an owner against the property management company, individual council members, and the strata corporation. The owner alleged that the defendants had acted improperly in the management of the strata's affairs. The court concluded that the only time a strata lot owner can sue an individual strata council member is for a breach of the conflict of interest disclosure requirement under section 32 of the SPA (at paragraph 36). Remedies for breaches of SPA section 32 are specifically excluded from the tribunal's jurisdiction, as set out in section 122(1)(a) of the CRTA. Thus, the CRT does not have jurisdiction over claims brought by an owner against an individual strata council member.

17. The court decisions in *Wong* and *Sze Hang* are binding precedents, and the CRT must apply them. Following, *Wong* and *Sze Hang* I would find the CRT has no jurisdiction to decide the applicants' harassment claim. Under section 10(1) of the CRTA, the CRT must refuse to resolve a claim that is not within the CRT's jurisdiction

18. For these reasons, I refuse to resolve the applicants' claims of harassment under section 10(1) of the CRTA.

Future Damage

19. The applicants' request an order that the strata provide assurance that "future occurrences of the same issue will be fixed by strata". I find such an order is too broad and premature. Any repairs required by the strata must be based on the facts and circumstances that occur at the time. Therefore, I decline to make an order about future events.

ISSUES

20. The issues in this dispute are:

    a. Who is responsible to repair and maintain the building exterior?

    b. Was the strata negligent?

    c. Did the strata treat the applicants in a significantly unfair manner?

BACKGROUND, EVIDENCE AND ANALYSIS

21. In a civil proceeding such as this, the applicants must prove their claims on a balance of probabilities. I have read all the submissions and evidence provided but refer only to information I find relevant to provide context for my decision.

22. The strata consists of 43 strata lots in a single 4-storey building located in Squamish, B.C. SL4 (or unit 104) is located on the second level, immediately above the underground parking garage.

23. The strata filed an entirely new set of bylaws at the Land Title Office (LTO) on April 26, 2007. It is unclear if the April 2007 bylaws were intended to replace the Schedule of Standard Bylaws under the SPA but, for the purposes of this dispute, I find the April 2007 filed bylaws are the applicable bylaws. I say this because the April 2007 bylaw amendments include bylaws that prevail over the Standard Bylaws as set out in section

17.11 of the *Strata Property Regulation* (regulation). I also find bylaw amendments filed after April 2007 are not relevant to this dispute.

24. I summarize the undisputed facts in this dispute as follows:

    a. In April 2018, the applicants' SL4 sustained water damage, apparently from the strata lot above. The majority of repairs to SL4, including replacement of floor coverings, were covered under the strata's insurance policy. The strata's insurance deductible for water damage was $10,000 at that time.

    b. On about March 9, 2020, SL4 sustained similar water damage that again affected its floor coverings. The strata dispatched Elevation Maintenance and Contracting (Elevation) to investigate the source of the leak. In an undated letter addressed to the strata's property manager, the owner of Elevation said he attended SL4 on March 10, 2020 but could not locate any potential sources of water from within SL4. He re-attended SL4 on March 11, 2020 and observed an overflowing gutter during a moderate-to-heavy rainfall that was causing water to run down the building exterior outside SL4. The Elevation representative said in his letter that the most likely source of water into SL4 was through the fireplace exhaust vent, but that other sources might also exist. He returned at a later date to install flashing above vent and the applicants submit that no further water ingress into SL4 occurred after the flashing was installed.

    c. On March 20, 2020, On Side Restoration (On Side) submitted a letter confirming its attendance at SL4 on that date and describing water damage sustained to "most of the laminate flooring that runs through the home" and wet areas "...in the 2nd bedroom". The letter included several photographs of the damaged flooring.

    d. The applicants submitted an insurance claim to their strata lot insurers. The claim was denied on March 25, 2020 as confirmed in a letter from the applicants' insurers to the applicants on that date.

    e. Notably, and as discussed further below, there is no evidence the strata submitted an insurance claim with its insurer for the March 2020 incident.

    f. The applicants requested a hearing with the strata council on April 12, 2020.

g. The April 23, 2020 strata council meeting minutes show, under the heading "HEARING", the "owner of [SL4] and a friend attended the meeting … to speak to the water damage to her strata lot". The meeting was held electronically by video conference and conference call consistent with Ministerial Order M114 of the Minister of Public Safety and Solicitor General for the Province of B.C. At another location in the minutes, under the heading "Water Damage – Unit 104", the minutes state:

> Heavy rains and an overflowing gutter caused water damage to the interior of [SL4]. The gutter was cleared, and some flashing was installed over the suspected entry point. The strata corporation's water deductible is $15,000. The owner was advised to open a claim under their personal insurance policy.

At another location in the minutes under the heading "CORRESPONDENCE", the minutes state the council received a letter from the owner of SL4 requesting the strata complete repairs to SL4. The minutes further state:

> Repairs and maintenance to the interior of the strata lot are the owner's responsibility. The strata corporation insures the interior of the strata lot as it was originally constructed, however the water damage deductible is $15,000. It was moved, seconded and approved by majority vote to advise the owner to open a claim under their insurance policy. [emphasis in original]

h. On April 30, 2020, the strata property manager emailed the applicants the outcome of the April 23, 2020 hearing. The email essentially restated the content of the April 23, 2020 strata council meeting minutes as I have set out above.

i. On May 5, 2020, the applicants received an email from Canstar Restorations (Canstar) estimating the water damage repairs to SL4 to cost about $15,000, excluding moving the applicants' contents.

j. On May 7, 2020, the strata property manager emailed the applicants' denying their request for another hearing stating the council had rendered its decision based on the April 23, 2020 hearing. The email stated that "until the damage exceeds the strata corporation's deductible, [the applicants] will need to pursue

this through [their] insurance company". A copy of the applicants' hearing request was not provided.

Who is responsible to repair and maintain the building exterior?

25. The parties agree that the source of the water ingress into SL4 originated from the building exterior as a result of an overflowing gutter. According to Elevation, the water likely entered SL4 through the fireplace vent but other sources such as "gaps/cracks in caulking where siding and window trim meet", could also be points of water ingress. Given the applicants admit the water ingress stopped after the fireplace vent flashing was installed, and the strata did not dispute this, I conclude the fireplace vent was the source of water ingress.

26. Under section 72 of the SPA, the strata is responsible for repair and maintenance to common property. This requirement is reiterated under bylaw 8(a)(ii). Under section 1(1) of the SPA, common property is defined to include that part of a building that is shown on a strata plan that is not part of a strata lot. Given section 68 of the SPA applies here, and establishes the boundary of a strata lot to be midway between the structural portion of an exterior wall, I find the exterior of the building, including gutters, siding, fireplace vents, and chimneys, are common property. Therefore I find the strata is responsible for the repair and maintenance of the building's exterior.

27. Based on the overall evidence, I find the strata attended to its responsibilities for the repair and maintenance of the building exterior by cleaning the overflowing gutter and installing the fireplace vent flashing.

Was the strata negligent?

28. Just because the source of the water ingress was from common property, does not mean the strata is responsible for the interior water damage to SL4. The strata correctly points out that bylaw 2 requires owners to repair and maintain their strata lots. This is subject only to bylaw 8 that sets out the strata's repair and maintenance responsibilities. Although section 72 of the SPA permits the strata, by bylaw, to take responsibility for portions of a strata lot, it has not done so except for things that do not apply here.

29. The strata is not an insurer. The strata has no liability to pay for an owner's expenses that are the owner's responsibility under the bylaws, unless the strata has been negligent in repairing and maintaining common property. See *Kayne v. LMS 2374*, 2013 BCSC 51, *John Campbell Law Corp v. Strata Plan 1350*, 2001 BCSC 1342, and *Wright v. Strata Plan No. 205*, 1996 CanLII 2460, aff'd 1998 CanLII 5823 (BCCA).

30. In order for the strata to be responsible for the SL4 repairs, the applicants must establish that the strata acted in a negligent manner. For the following reason, I find the applicants have not proved the strata acted negligently.

31. In order to establish the strata's negligence, the applicants must show that the strata owed them a duty of care, that the strata breached the standard of care, and that the owner sustained damage as a result of that breach (*Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27).

32. I find the strata owed the applicant owners a duty of care to ensure the common property building was properly maintained. The BCSC has determined that the standard of care required by a strata corporation is one of reasonableness, such that "perfection is not required... only reasonable action and fair regard for the interests of all concerned". See *Leclerc v. The Owners, Strata Plan LMS 614*, 2012 BCSC 74 at para 61.

33. There is no evidence the strata failed to act reasonably in addressing the exterior building repairs when the applicants notified it of the March 2020 water ingress. On the contrary, the evidence shows the strata dispatched Elevation the day following the applicants' noticed their water damaged flooring, that the fireplace vent flashing was installed shortly thereafter, and the applicants' agreed the vent flashing stopped the water ingress.

34. There is also no evidence source of the April 2018 water leak was the building exterior. The strata says the source was within the strata lot immediately above SL4, which the applicants do not dispute. Therefore, I find the April 2018 water leak is not relevant to this dispute. It appears the applicants' mentioned the April 2018 leak because the it resulted in similar damage to SL4.

35. Given my finding the strata met the standard of reasonableness in addressing the SL4 water ingress, I find the strata was not negligent. I dismiss this aspect of the applicants' claims.

Did the strata treat the applicants in a significantly unfair manner?

36. I turn now to the applicants' claim that the strata refused to file an insurance claim with its insurer, which the strata does not deny. There is no dispute the insurance deductible for water damage in March 2020 was $15,000. The applicants submit the strata did not explain why it refused to make an insurance claim in March 2020, as it did in April 2018, other than to say the applicants are responsible for all repair expenses up to the deductible amount of $15,000. I agree with the applicants that this is the position taken by the strata as the April 23, 2020 minutes, and April 30 and May 7, 2020 emails clearly state this.

37. The remaining question is whether the strata's refusal to file an insurance claim was significantly unfair to the applicants. For the following reasons, I find that it was.

38. First, I find the strata's position that the applicants are responsible for all expenses to repair SL4 up to the amount of an insurance deductible is not necessarily true. The amount the applicants are responsible for will depend on the insurance coverage carried by the strata, which is not addressed in the strata bylaws but is addressed in the SPA as I discuss below.

39. The CRT has jurisdiction to determine claims of significant unfairness because the language in section 164 of the SPA is similar to the language of section 123(2) of the CRTA (formerly section 48.1(2)). This gives the CRT authority to issue orders necessary to prevent or remedy a significantly unfair action. See *The Owners, Strata Plan LMS 1721 v. Watson*, 2018 BCSC 164 at paragraph 119.

40. The courts and the CRT have considered the meaning of "significantly unfair" in a number of contexts, equating it to oppressive or unfairly prejudicial conduct. In *Reid v. Strata Plan LMS 2503*, 2003 BCCA 128, the British Columbia Court of Appeal (BCCA) interpreted a significantly unfair action as one that is more than "mere prejudice" or

"trifling unfairness" and one that must be burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith and/or unjust or inequitable.

41. The BCCA has also considered the language of section 164 of the SPA in *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44. The test established in *Dollan* was restated in *The Owners, Strata Plan BCS 1721 v. Watson*, 2017 BCSC 763 at paragraph 28:

    a. The test under s. 164 of the *Strata Property Act* also involves objective assessment. [*Dollan*] requires several questions to be answered in that regard:

        i. What is or was the expectation of the affected owner or tenant?

        ii. Was that expectation on the part of the owner or tenant objectively reasonable?

        iii. If so, was that expectation violated by an action that was significantly unfair?

42. Recent case law has held that consideration of an owner's expectations is not necessary in all instances of possible significant unfairness. In *Radcliffe v. The Owners, Strata Plan KAS1436*, 2015 BCCA 448, the BCCA found that that the test set out in *Dollan*, about whether the disputed action was significantly unfair based on the owner's expectations may not apply and that only a determination of significant unfairness such as defined in *Reid*, is necessary.

43. In *Kunzler v. The Owners, Strata Plan EPS 1433*, 2020 BCSC 576, the BCSC determined that the reasonable expectations portion of the test may not be appropriate in all circumstances, but that it may make sense when a strata council is exercising its discretionary authority. As this was the case here, I will consider the reasonableness of the applicants' expectations.

44. I find the applicants' expectation was that the strata would file an insurance claim for the water damage sustained to SL4.

45. I find the applicants' expectation was objectively reasonable. I say this because the strata is required to obtain and maintain property insurance under section 149 of the SPA. That insurance ***must*** include fixtures, defined under section 9.1 of the regulation, built or installed on a strata lot by the owner developer as part of the original strata lot construction. Under section 9.1 of the regulation, original fixtures are defined to include floor coverings, which were damaged in SL4 in March 2020. The insurance ***may*** also include other fixtures not built or installed by the owner developer as set out in section 152 of the SPA.

46. The details of the April 2018 repairs to SL4 are not before me. Neither do I have the benefit of reviewing the strata's insurance policy to determine if the strata's insurance might cover the applicants' floor coverings prior to March 2020 and other damage.

47. I also find the principles of procedural fairness dictate that an owner whose strata lot is to be significantly affected by a decision of a strata corporation, such as not being repaired under a strata corporation's insurance policy, should be properly informed and given the opportunity to address the strata on the issue. I find the evidence shows the strata did not follow these principles when it advised the applicants they were responsible for all repairs to SL4 up to the amount of the deductible and did not permit the applicants a second hearing. In essence, I find the strata's actions resulted in the insurance claim being refused without any input from the applicants or the insurer. In other words, the decision to deny the insurance claim was made by the strata and not the insurer.

48. The SPA does not expressly require the strata to consult directly with an owner about repairs to their strata lot under an insurance claim. However, I find the inclusion of an owner as a named insured under the strata's policy, as set out in section 155 of the SPA, supports a conclusion that a strata corporation reasonably ought to do so.

49. Finally, based on the May 5, 2020 email from Canstar, the estimated cost to repair SL4 as a result of the March 2020 water damage was $15,000, the same amount as the deductible. Given the estimate excludes some things, such as moving the applicants' contents, which would be expected to increase the claimed amount above the

deductible, I find it was reasonable for the applicants to expect the strata to file an insurance claim.

50. The last part of the *Dollan* test is whether the strata's actions to deny the insurance claim were significantly unfair as defined in *Reid*. I find that they were.

51. It is unclear how Canstar became involved in the SL4 repairs or if the applicants provided the strata with a copy of the Canstar estimate. However, the evidence suggests that an insurance claim under the strata's policy might still be available to the applicants due to the estimated cost of repairs and the date the water damage occurred.

52. As I have mentioned, the cost of the repairs appears to be very close to the deductible amount. Not to make a claim would result in the applicants being denied insurance coverage they are entitled to under the SPA, which would have a significant impact on the applicants' financial responsibilities. The difference to the applicants being a $15,000 or more expense to repair SL4 versus their proportionate share of a $15,000 deductible paid by the strata.

53. For all of these reasons, I find the actions of the strata to deny the applicants the opportunity to make an insurance claim meet the definition of significant unfairness set out in *Reid*, as being burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith and/or unjust or inequitable.

54. I note the applicants' stated remedy is for an order that the strata fix the water ingress issue and pay for the damage to SL4. Based on my conclusions above, I do not make such an order because the strata is not responsible for the repairs. However, I have found the strata treated the applicants significantly unfairly, so what is an appropriate remedy?

55. I find it reasonable in these circumstances to exercise my discretion under section 123(1) of the CRTA to order the strata to correct its significantly unfair actions. Accordingly, I order the strata to make an insurance claim under its policy for the March 2020 water damage sustained to SL4 within 14 days of the date of this decision.

CRT FEES AND EXPENSES

56. As noted, 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. I see no reason to deviate from this general rule. The strata was the most successful party in this dispute but did not pay CRT fees or claim dispute-related fees, so I order none.

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

ORDERS

58. I refuse to resolve the applicants' claim for harassment.

59. I order the strata, within 14 days of this decision, to make an insurance claim under its policy for the March 2020 water damage sustained to SL4.

60. I dismiss the applicants' remaining claims.

J. Garth Cambrey, Vice Chair