



Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Chmielewski v. The Owners, Strata Plan EPS4425*, 2020 BCCRT 1376

B E T W E E N :

TADEUSZ CHMIELEWSKI

APPLICANT

A N D :

The Owners, Strata Plan EPS4425

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Micah Carmody

INTRODUCTION

1. This dispute is about a collision with a parkade gate.

2. The applicant, Tadeusz Chmielewski, co-owns a strata lot in the respondent strata corporation, The Owners, Strata Plan EPS4425. On January 16, 2020, Mr. Chmielewski was driving his vehicle down the entrance ramp to the strata's parkade when it collided with the parkade gate.
3. Mr. Chmielewski says the collision resulted from the strata's failure to keep the parkade ramp free of snow and ice. He wants the strata to reverse its \$443.23 charge against his strata lot account for parkade gate repair. He also seeks \$5,000 for pain and suffering as a result of the collision.
4. The strata says its contractor cleared the ramp of snow and ice on the day of the incident and the days before. It says it met its maintenance duties and says the dispute should be dismissed.
5. Mr. Chmielewski is self-represented. The strata is represented by a strata council member. For the reasons that follow, I dismiss Mr. Chmielewski's claim for pain and suffering but order the strata to reverse the gate repair charge.

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 by writing, telephone, videoconferencing, email, or a combination of these. In some respects, both parties in this dispute call into question each other's credibility. Credibility of witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or tribunal proceeding appears to be the most truthful. In *Yas v. Pope*, 2018 BCSC 282, the court recognized that oral hearings are not necessarily required where credibility is in issue. In the

circumstances of this dispute, I find that I am able to assess and weigh the evidence and submissions before me. Bearing in mind the CRT's mandate that includes proportionality and a prompt resolution of disputes, I decided to hear this dispute through written submissions.

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.

ISSUES

10. Mr. Chmielewski originally claimed \$500 for damage to his vehicle, but in submissions said he is no longer pursuing that claim. Therefore, the issues in this dispute are:
 - a. Was the strata negligent in maintaining the parkade ramp, and if so, what is the appropriate remedy?
 - b. Who is responsible for the cost of the parkade gate repair?

EVIDENCE AND ANALYSIS

11. As the applicant in this dispute, Mr. Chmielewski must prove his claims on a balance of probabilities. I have considered all the parties' evidence and submissions, but only refer to what is necessary to explain and give context to my decision.
12. Mr. Chmielewski says when he drove down the ramp on January 16, 2020, it was covered by slush and patches of ice where the snow had hardened in tire tracks. He says he was only driving about 5-10 km per hour. He says his vehicle slid when it reached the bottom portion of the ramp, which he says slopes more steeply. Mr.

Chmielewski says as his vehicle slid, he depressed the brake pedal while pressing on his fob to open the gate, but he could not avoid colliding with it.

13. Surveillance footage from the incident shows the parkade gate was stationary and did not lift off the ground before Mr. Chmielewski's vehicle struck it. It is not possible to tell from the video how fast Mr. Chmielewski's car was travelling, whether the brakes were engaged at any point, or whether the tires locked.
14. Mr. Chmielewski submitted photos of the ramp taken immediately after the collision. The photos confirm slush in some areas of the ramp, although other areas are bare. I cannot determine the presence or absence of ice from the photos.
15. The strata submitted a witness statement from a driver who saw the collision. That driver said they drove down the ramp without incident just before the collision. The strata also says there were no other incidents in the 2019-2020 winter season.
16. The surveillance footage also shows that after contacting the gate, Mr. Chmielewski reversed his vehicle and parked near the bottom of the ramp, in what he says is the steepest section, for 16 seconds while the gate opened, before he proceeded through. I find the fact that Mr. Chmielewski was able to reverse and park on the ramp undermines his assertion that his vehicle slid.
17. Taken together, the witness statement, lack of other incidents, photos of the ramp, and video footage establish the presence of slush on the ramp but fall short of establishing the presence of ice. I also cannot conclude that Mr. Chmielewski's vehicle slid down the ramp.
18. However, even if I found that Mr. Chmielewski's vehicle slid down the ramp, that would not change my finding, explained below, that the strata was not negligent in maintaining the parkade ramp.

Negligence

19. There is no dispute that the parkade ramp is common property, as shown on the strata plan. The question is whether the strata was negligent in failing to keep the

parkade ramp clear of snow, slush and ice. To succeed in his dispute, Mr. Chmielewski must establish that the strata owed a duty to him, failed in that duty, and that the failure caused his loss.

20. Under section 72 of the *Strata Property Act* (SPA), the strata is responsible for repair and maintenance of the common property parkade ramp. However, the standard of care is not perfection. Courts have held that strata corporations must act reasonably in the circumstances (*Weir v. The Owners, Strata Plan NW 17*, 2010 BCSC 784).
21. The strata accepts that it is an occupier under the *Occupiers Liability Act* (OLA). Section 3 of the OLA sets a similar standard of reasonableness. The question is what is reasonable based on the particular circumstances.
22. In *Binichakis v. Porter*, 2015 BCSC 750, the BC Supreme Court held that both the strata corporation's plan for snow removal and its implementation of that plan must be reasonable, in consideration of the weather conditions, the condition of the property, the foreseeability of danger, and the nature and use of the area.
23. The CRT considered a strata corporation's duty of care in a similar context in *van Bodegom v. The Owners, Strata Plan LMS 2704*, 2018 BCCRT 406, which is not binding but I find persuasive. In *van Bodegom*, the CRT member considered the strata corporation's snow removal contract and the contractor's records, witness statements about the state of the ramp, municipal snow removal bylaws, weather reports, and evidence about the condition of the driver's tires.
24. There is no dispute that the strata hired a contractor, Kennedy Landscaping Ltd. (KL), for snow removal. Terms of the strata's contract with KL are not before me. However, KL's January 2020 invoice document that it cleared and salted on January 15 and 16.
25. Mr. Chmielewski disputes that the contractor cleared the ramp on January 16 but does not explain what he bases his assertion on, other than the presence of slush. He says the "treacherous" ramp condition could be understandable early in the morning, but not at 5 p.m. when the incident occurred.

26. KL's invoices do not specify what time it cleared and salted the strata property each day. However, based on the invoices, I find that KL salted and cleared the parkade ramp both on January 15 and 16, 2020.
27. In New Westminster, where this incident occurred, the municipal bylaw governing snow removal requires sidewalks to be clear of snow by 10:00 a.m. the day following a snowfall event. I find that in order to meet a reasonableness standard, a strata parkade ramp need not be kept completely clear of snow at all times during a snowfall. Mr. Chmielewski does not suggest that snow remained on the ramp from previous days. He has not provided any weather reports for the period in question that might indicate a need for more frequent snow removal. I find it was reasonable for the strata to have its contractor clear the ramp once per day. This is supported by the video and photos, which show only small amounts of snow on the ramp.
28. Mr. Chmielewski and his wife, who provided a statement, both said the strata kept the parkade ramp sparkling clean in the days following the incident, which they say implies an awareness on the part of the strata that it was negligent. I find that inference unfounded. In any event, Mr. Chmielewski provided no evidence about the weather in the days that followed.
29. Mr. Chmielewski says his tire treads are very good, almost like new. He does not say when the tires were purchased or how many kilometers they had been driven. He submitted photos of the tires, but I am unable to determine the depth of the tire treads from the photos. The tires do not appear to have mountain or snow symbols that would indicate suitability for inclement weather. I find the condition of Mr. Chmielewski's tires a neutral factor with little bearing on whether the strata met its duty to maintain the parkade ramp.
30. In conclusion, based on the contractor's records, video footage, photos, and witness statement, I find that the strata met its obligation to maintain the parking ramp reasonably clear of snow and ice by hiring a contractor to clear the snow and ensuring that the contractor cleared the snow daily.

31. As I find the strata was not negligent, I dismiss Mr. Chmielewski's claim for damages for pain and suffering.

Gate repair costs

32. The strata's applicable bylaws are the SPA's Standard Bylaws and amendments filed in the Land Title Office in 2018.

33. There is no dispute that the parkade gate is common property or a common asset which the strata must repair and maintain.

34. Bylaw 53(2) appears to require owners to indemnify the strata for any common property loss or damage for which the owner is responsible. However, that bylaw was registered with the Land Title Office on February 18, 2020, after the parkade gate incident, so it does not apply.

35. The strata instead relies on bylaw 3(2), which says an owner must not cause damage to common property or common assets.

36. In *Ward v. Strata Plan VIS #6115*, 2011 BCCA 512, the BC Court of Appeal said that in the absence of a bylaw or rule giving it authority to do so, a strata corporation cannot charge an owner for costs it has incurred. In *Ward*, the charge in question was for legal fees. However, in *Rintoul et al v. The Owners*, Strata Plan KAS 2428, 2019 BCCRT 1007, a CRT vice chair applied the reasoning in *Ward* in a dispute where the strata had charged strata lot owners for damage to common property. The vice chair concluded that since the strata corporation had no bylaw allowing it to charge back the repair costs, the owners were not obligated to pay. He found the reasoning in *Ward* applied to repair charges, and not just to legal fees. Although *Rintoul* is not a binding precedent, I find its reasoning persuasive and rely on it. I find the strata here had no bylaw allowing it to charge back repair costs to Mr. Chmielewski. I also note the strata has not made a counterclaim for the repair costs.

37. In the absence of a bylaw allowing repair cost chargebacks, a strata may remedy a bylaw contravention and charge the owner the cost of doing so under section 129 of the SPA. However, before charging the owner, the strata must follow the procedures

set out in section 135 of the SPA. Those procedures include receiving a complaint about the contravention, giving the owner written particulars of the complaint, giving a reasonable opportunity to answer the complaint, including a hearing if requested, and providing a written decision.

38. There is no evidence before me that the strata followed section 135's mandatory procedures before charging Mr. Chmielewski's strata lot account. I therefore order the strata to reverse the \$443.23 charge for the parkade gate repair against Mr. Chmielewski's strata lot account. Mr. Chmielewski says the strata has applied additional charges, such as for administrative costs, to his account, but he does not specify the amounts. I order the strata to reverse any charges associated with the parkade gate repair.

CRT FEES AND EXPENSES

39. 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. Mr. Chmielewski was partially successful in this dispute, and I therefore order the strata to reimburse him half his \$225 CRT fees, or \$112.50. He did not claim any dispute-related expenses.
40. The strata claimed \$262.50 for its property manager's invoice for time spent responding to the CRT dispute. I find the request for property manager fees related to this dispute is analogous to a request for legal or representative fees. Tribunal rule 9.5 says that the tribunal will not order one party to pay another party any fees charged by a lawyer or another representative in the CRT dispute process unless there are extraordinary circumstances. I find this dispute was not extraordinary because it did not involve a large volume of evidence or submissions, or unusually complex legal issues. Accordingly, I do not order reimbursement of the property manager's invoice.
41. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against Mr. Chmielewski.

ORDERS

42. I order that within 14 days of the date of this order, the strata:

- a. Reverse the \$443.23 gate repair charge and any associated charges on Mr. Chmielewski's strata lot account, and
- b. Pay Mr. Chmielewski \$112.50 for half his tribunal fees.

43. 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