



Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Watson v. The Owners, Strata Plan NES 2242*, 2020 BCCRT 1404

B E T W E E N :

MARK WATSON

APPLICANT

A N D :

The Owners, Strata Plan NES 2242

RESPONDENT

A N D :

MARK WATSON

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

J. Garth Cambrey, Vice Chair

INTRODUCTION

1. This is a strata property dispute about repairs to common property (CP) and damages stemming from a strata corporation's alleged failure to address a woodpecker issue.
2. The applicant and respondent by counterclaim, Mark Watson, owns strata lot 6 (SL6) in the respondent strata corporation, The Owners, Strata Plan NES 2242 (strata). The strata is the applicant in the counterclaim. Mr. Watson is self-represented, and the strata is represented by a strata council member.
3. Mr. Watson says the strata has failed to address a woodpecker problem. He says woodpeckers damaged the exterior of the building comprising SL6 and gained access to the wall cavity between the building's exterior and SL6. As a result, Mr. Watson says bird mites were found inside SL6 causing unsafe and unsanitary conditions and that it was necessary for him to have SL6 cleaned. He says he lost the use and enjoyment of SL6 due to the continuous noise of the woodpeckers, and lost rental income generated by SL6. He also says he was required to hire a lawyer to address the strata's lack of action and compliance with the *Strata Property Act* (SPA).
4. Mr. Watson asks for orders that the strata:
 - a. Repair the building exterior and wall cavity damaged by the woodpeckers,
 - b. Take effective action to deter the woodpeckers to prevent a recurrence of their entry into the wall cavity and similar damage from happening,
 - c. Fully communicate the nature of the woodpecker problem to the strata ownership,
 - d. Reimburse him a total of \$58,100.00 in damages broken down as follows:
 - i. \$11,000.00 for loss of use and enjoyment of his strata lot,
 - ii. \$41,400.00 for lost rental income, and
 - iii. \$5,700.25 for strata lot cleaning costs, and
 - e. Reimburse him \$7,278.65 for legal expenses.

5. The strata denies any wrongdoing or that it was negligent in addressing Mr. Watson's claims. It says the woodpeckers were identified as Northern Flickers, a protected species, and that it could not lawfully remove the woodpeckers. The strata says it has addressed all repairs to the building and has cleaned SL6. The strata also says it intends to take further steps to prevent similar issues from recurring. Based on the strata's submissions, I infer the strata asks that Mr. Watson's claims be dismissed.
6. In its counterclaim, the strata says it was forced to hire a lawyer to respond to Mr. Watson's lawyer. The strata asks for an order that Mr. Watson pay its legal fees of \$5,658.97. Mr. Watson says the strata has not proved the circumstances in this dispute are exceptional such that reimbursement of legal fees could be ordered as stipulated under the Civil Resolution Tribunal (CRT) rules.
7. For the reasons that follow, I dismiss the parties' claims and this dispute.

JURISDICTION AND PROCEDURE

8. These are the formal written reasons of the 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, 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.
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.
12. The strata objected to Mr. Watson's reply submissions on the basis that they should have been made initially. The strata says Mr. Watson's reply submissions bolstered his initial submissions and created a procedural fairness issue. At my request, the parties provided further submissions on whether Mr. Watson's submissions should be accepted and both parties were offered a further opportunity to reply to the submissions received. That is, the strata was given the opportunity to provide a response to Mr. Watson's submissions and Mr. Watson was given the opportunity to provide a final reply, which they did.
13. Based on my review of the parties' further submissions, I accept Mr. Watson's reply and the further submissions of both parties. In doing so, I note the CRT's general authority under section 61 of the CRTA to make any order or give any direction in relation to a proceeding it deems necessary to achieve the objects of the CRT in accordance with its mandate, which includes providing dispute resolution services in a manner that is speedy, economical, informal and flexible. Also, since the strata had a full opportunity to respond to the disputed submission, there was no breach of procedural fairness.
14. I have issued this decision based on the evidence and submissions that were provided by the parties, including the parties' further submissions.

ISSUES

15. The issues in this dispute are:
 - a. Did the strata fail to repair and maintain the building exterior next to SL6 to stop woodpeckers from gaining access? If so, did Mr. Watson suffer damages from loss of use of SL6 and lost rental revenue?
 - b. Is the strata responsible to repair the interior walls of SL6?

- c. Is either party entitled to reimbursement of legal fees?

BACKGROUND, EVIDENCE AND ANALYSIS

16. In a civil proceeding such as this, the applicant, Mr. Watson, must prove his claims, and the strata must prove its counterclaim, on a balance of probabilities.
17. I have read all the submissions and evidence provided but refer only to information I find relevant to provide context for my decision.
18. The strata is a residential strata corporation created in May 2000 under the *Condominium Act* that continues to exist under the SPA. It consists of 30 strata lots in 4 low-rise buildings located in Kimberley, BC.
19. The strata filed bylaw amendments that are largely a reproduction of the Schedule of Standard Bylaws under the SPA in the Land Title Office (LTO) on November 3, 2008. LTO records show 6 subsequent bylaw amendments were filed at the LTO, but I find none are relevant to this dispute. I discuss the strata's bylaws below, as necessary.
20. SL6 is a 2-level strata lot located on the top 2 levels (3rd and 4th levels) at the north end of building 1. There is 1 strata lot next to SL6 on the south side and 2 strata lots immediately below it.
21. Based on the parties' documents, I summarize the basic, relevant facts of this dispute as follows:
- a. Prior to June 2019, the strata was aware of issues with woodpeckers damaging the exterior of building 1. Some required repairs to the northwest corner of building 1 were reported in the November 2, 2016 strata council meeting minutes, but the extent of the repairs is unclear. However, Mr. Watson submits holes made in the exterior siding were "covered up" in 2017. I accept the exterior siding was repaired in 2017 given the strata did not object to Mr. Watson's submission.
 - b. In February 2018, Mr. Watson wrote to the strata's property manager to advise he was having a problem with a woodpecker on the north wall of SL6,

suggesting the woodpecker had made a hole in the exterior wall and that it “sounds like it’s working on the inside wall.” Based on the evidence, Mr. Watson did not raise the woodpecker issue further with the strata for over a year.

- c. On May 27, 2019, Mr. Watson emailed the strata’s property manager stating he wanted “to bring up the issue of the wood pecker damaging the walls of [SL6]” noting the “birds have been at it for a couple of years now, so I’d like to bring up the issue again so it’s not forgotten”. Based on this email, and the lack of any prior evidence of Mr. Watson raising woodpecker concerns with the strata except for his February 2018 email, I find it was not until about June 2019 that Mr. Watson began to express a real concern about woodpeckers damaging the building exterior and potentially SL6.
- d. By June 19, 2019, the strata council requested its property manger arrange for pest control services for SL6 as Mr. Watson reported he found bird mites in SL6. Cranbrook Pest Control (CPC) attended SL6 on June 21 and confirmed the insects were bird mites, but could not confirm their source.
- e. CPC returned to address the bird mites in SL6 on June 26 and July 3, 2019. CPC billed the strata for both service dates. The description on the June 26, 2019 invoice states a “full home treatment” was completed that included “the support beam, points of entry, baseboard perimeter, cracks and crevices”. I find SL6 was fumigated on this date. The description on the July 3, 2019 invoice addresses work completed on the exterior north wall of building 1. The invoice description states the “infested bird nests” were removed from the “peak” of the roof by the use of a lift, the “void in the attic” was treated with a “fogging unit”, and 2 holes in the siding were “sealed with strong page wire”.
- f. On July 8, 2019, SL6 was cleaned by Bravo Cleaning Services as arranged through the strata property manager and paid by the strata.
- g. On September 26, 2019, Mr. Watson wrote to the strata advising the woodpecker problem was continuing and that he wanted the problem resolved. He stated his personal use of SL6 had been affected, and that he had taken

the property off the short-term rental market because of the problem, allegedly resulting in a “significant loss of income”.

- h. The strata council held an in-camera meeting to discuss the woodpecker issue on October 1, 2019. The minutes show the only issue discussed involved building 1, that the strata would confirm if any new holes were made in siding, and the woodpecker issue would be further discussed at the upcoming annual general meeting (AGM) if Mr. Watson did not take legal action against the strata. The minutes also show the strata had requested quotations on siding replacement and was also looking at other options such as bird spikes. Email correspondence exchanged among strata council members, that sometimes included Mr. Watson, leading up to this meeting confirm the strata council’s discussions about how best to address the issue.
- i. The strata held its AGM on October 19, 2019 and the woodpecker issue was discussed. A summary dated October 16, 2019 of what the strata council had done date to address the issue was distributed with the minutes. The summary included the following:
 - i. Fumigation of SL6 and the attic space, and screening of access holes by CPC as mentioned above
 - ii. Cleaning of SL6 by Bravo, as mentioned above
 - iii. Solicitation of quotations to re-side the gable portion of north exterior wall of building 1 and receipt of 2 bids that the strata was “unhappy with”
 - iv. Inspection of the north gable portion of the exterior wall by several strata council members and by camera mounted on a drone
 - v. Consultation with a second pest control firm
 - vi. Consideration of alternative solutions involving the installation of deterrents such as suspended CDs, “eyeball” balloons, netting, and coating the gable end with an “epoxy type” material

- vii. Application to the Conservation Authority for a permit to dispose of the birds, which was in progress
- j. By about November 2, 2019, the strata had discovered more evidence of woodpecker issues on other buildings within the strata.
- k. On November 5, 2019, a strata council member experienced in construction, undertook repairs to the exterior of building 1 that included removing siding, vacuuming out remnants of bird nests, repairing the vapour barrier, and reinstalling new siding and insulation on the north end of building 1 outside of SL6 and on building 4. Of note is that although the photographs show the plastic vapour was damaged on the exterior of the inside wall of SL6, there is no evidence of drywall damage to the wall.
- l. The November 6, 2019 strata council meeting minutes and attachments detail the work completed by the strata I have just mentioned, and report the strata's intention to install netting on the building exterior to deter the woodpeckers. The strata also reported that there were no signs of structural damage at the repaired areas, and it was still attempting to obtain a permit to remove or destroy the woodpeckers.
- m. A council hearing was held under section 34.1 of the SPA on December 6, 2019 via telephone to consider Mr. Watson's concerns as expressed by his lawyer in a November 21, 2019 letter to the strata. I find Mr. Watson's concerns were essentially the same as his claims in this dispute and I will not repeat them here. The strata wrote to Mr. Watson through legal counsel on December 12, 2019 denying responsibility and any liability for lost rental income or loss of use of SL6. The letter also confirmed the strata did not feel a "full-scale replacement of the building siding" was necessary, and that netting would be installed.
- n. In the strata's December 12, 2019 letter to Mr. Watson, it requested the opportunity to inspect SL6 to determine the extent of the damage. The strata suggested it might consider covering the cost to repair to SL6 if the damage was made by the woodpeckers. I discuss the outcome of the inspection below.

- o. The January 16, 2020 strata council meeting minutes show the strata was unsuccessful in obtaining a permit to remove or destroy the woodpeckers. The email evidence around that time between the strata and Canadian Wildlife Services confirms strata's permit was refused, which supports the strata's assertion about endangered birds.
- p. The netting was installed on the north end of building 1 by May 2020.

Did the strata fail to repair and maintain the building exterior next to SL6 and if so, did Mr. Watson suffer damages as a result?

- 22. As I have noted, I find the relevant period for this dispute started in June 2019, when Mr. Watson alleged that woodpecker activity had caused an insect infestation in SL6.
- 23. There is no dispute that the building exterior is common property (CP), which is the strata's responsibility to repair and maintain under section 72 of the SPA. Bylaw 2 makes an owner responsible for repair and maintenance to their strata lot except for things that are the responsibility of the strata to repair and maintain. Bylaw 8 reiterates the strata's responsibility for CP under section 72 and clearly makes the strata responsible for the exterior of the building. Although section 72 permits the strata, by bylaw, to take responsibility for other portions of a strata lot, it has not done so except for things that do not apply here.
- 24. As the strata correctly notes, in *Mitchell v. The Owners, Strata Plan KAS 1202*, 2015 BCSC 2153, at para. 50, the British Columbia Supreme Court (BCSC) stated that strata councils are made up of laypersons performing volunteer roles. Therefore, mistakes will be made, and within reason, some latitude is justified when scrutinizing its conduct. The strata also correctly noted that it is entitled to exercise its discretion to find a reasonable solution to the woodpecker problem, and is not required to adopt the best and most expensive option (*Weir v. Strata Plan NW 17*, 2010 BCSC 784).
- 25. In order for the strata to be responsible for the SL6 repairs, Mr. Watson must establish that the strata was negligent. For the following reasons, I find Mr. Watson has not proved the strata acted negligently.

26. In order to establish the strata's negligence, Mr. Watson must show that the strata owed him a duty of care, that the strata breached the standard of care, and that he sustained damage as a result of that breach (*Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27).
27. I find the strata owes Mr. Watson a duty of care to ensure the CP building exterior is 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" (*Leclerc v. The Owners, Strata Plan LMS 614*, 2012 BCSC 74 at para 61.)
28. There is no evidence to establish when the woodpeckers gained access through the exterior wall. Although Mr. Watson suggested this had occurred in his February 2018 email, he did not provide any evidence that access had actually occurred, such as a photograph of the building exterior. Most of the photographs provided by Mr. Watson are undated. The earliest evidence there was a hole through the exterior siding of building 1 is in late June or early July 2019, when CPC was investigating the insect infestation issue in SL6.
29. There is also no evidence the strata failed to act reasonably to address the exterior building repairs in June 2019 when Mr. Watson notified it of insects suspected from woodpeckers. On the contrary, the evidence shows the strata dispatched CPC 2 days after Mr. Watson first advised it of the insects. Within 1 week, SL6 was fumigated to eliminate the insects and within a further 10 days, the attic space was fumigated, the woodpecker nests were removed, and the exterior holes were covered with mesh to stop the woodpeckers from re-entering the exterior wall. The strata also arranged and paid for SL6 to be thoroughly cleaned. If woodpecker activity was occurring within the wall space for an extended period of time as Mr. Watson suggests, he did not bring the issue to the strata's attention until June 2019. I find the strata's actions to address the insect issue were reasonable.
30. The evidence also confirms the strata continued to evaluate and seek ways to address the woodpecker issue between June and November 2019, when the exterior siding repairs were completed. I do not find that the 6-month period was

unreasonable, given there did not appear to be any urgent issue to address after the holes were covered with mesh. The strata also took additional steps to help reduce the potential of woodpeckers attempting to gain access through the exterior building wall outside SL6 by installing netting in May 2020, and from the photographs and emails, bird houses, although the timing of the birdhouse installations is unclear. Finally, there is no evidence to suggest any different outcome would have occurred if the strata took steps to repair the exterior wall within a timeframe shorter than 6 months as claimed by Mr. Watson.

31. Given my finding the strata met the standard of reasonableness in addressing the building exterior and Mr. Watson's insect concerns, I find the strata was not negligent in its repair of the CP building exterior. I dismiss Mr. Watson's claim that the strata failed to repair and maintain the building exterior next to SL6.
32. It follows, and I find, the strata did not cause Mr. Watson to suffer damages from loss of use of SL6 and lost rental revenue.
33. Even if I found the strata was negligent, which I do not, I would not have ordered the strata to pay damages because Mr. Watson did not prove he suffered damages. While I appreciate that the noise caused by woodpeckers pecking at the exterior building siding can be disturbing, I do not think it reasonable to expect the strata could completely stop the woodpeckers' actions. There is no evidence to suggest SL6 could not be used during the relevant time of this dispute except for a period of days between when Mr. Watson discovered bird mites and when the strata fumigated SL6. Although, Mr. Watson claimed that debris, and possibly bird mites and larvae, "kept falling" from cracks in the drywall and around a support beam within SL6, I could not determine what the debris was from the photographs provided by Mr. Watson. Further, other than Mr. Watson's assertion, there is no evidence to prove where the debris came from, the quantity, or the length of time it appeared.
34. As for Mr. Watson's lost revenue claim, the strata notes the statements provided by previous short term renters did not identify the period they stayed in SL6. I agree. In fact, Mr. Watson confirmed in his reply submissions that all 4 of the short term renters used SL6 prior to May 2019 and 3 were prior to his February 2018 email. I find this

significant because, as mentioned earlier, Mr. Watson did not express any real concern about woodpeckers damaging the building exterior, and potentially SL6, until June 2019. In particular, Mr. Watson did not bring his short term renters' concerns about woodpeckers to the strata's attention at the time he became aware of the concerns. Nor did Mr. Watson advise the strata he was no longer advertising SL6 as a short term rental, and potentially losing rental income because of woodpecker issues, until after June 2019 when the strata was already addressing his concerns.

Is the strata responsible to repair the interior walls of SL6?

35. Section 68 of the SPA addresses strata lot boundaries. Unless otherwise stated on the strata plan, the boundary of strata lot is midway between the structural portion of a wall, floor or ceiling of a strata lot that forms a boundary with another strata lot or CP. Section 68 applies in this dispute and confirms that the interior drywall of concern to Mr. Watson is within SL6.
36. The courts have found that a strata corporation 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).
37. Mr. Watson provided photographs that show cracks in the drywall on the north-facing wall near the roof support beam and streaks on the wall he claims are from moisture. I agree with Mr. Watson that there are cracks in the drywall and faint streaks on the interior wall surface near the beam. However, I do not agree that Mr. Watson has met his burden of proof that the cracks and streaks were caused as a result of exterior siding being open to the weather or by the repairs undertaken by the strata to fix the siding.
38. I have already found the strata was not negligent in its repair of the CP building exterior. That conclusion is sufficient for me to find that, under bylaw 2, Mr. Watson is responsible for repairing the drywall in SL6.

39. Even if I found the strata was negligent in its exterior siding repair, which I do not, I would not find Mr. Watson had met his burden of proving the SL6 drywall damage was caused by the woodpecker issue.
40. As a result of the strata's December 12, 2019 letter referenced above, arrangements were made for the strata to inspect the interior of SL6 on January 28, 2019. The strata retained Tyee Log and Timber (Tyee) to inspect SL6 and provide a report. In a letter dated February 4, 2020 following the January 28, 2019 inspection, Tyee determined that the drywall cracks were likely the result of "expected settlement or a minor structural deficiency". Tyee did not comment on the streak marks on the drywall. Mr. Watson provided an April 6, 2020 report from New Dawn Restorations (New Dawn) that concludes structural damage exists "to the exterior wall and the load bearing ridge beam", and that there are "significant drywall cracks under the ridge beam and another beam that indicate movement". The New Dawn report appears to have been obtained in response to Tyee report.
41. Neither the Tyee report or the New Dawn Report concluded the interior drywall concerns of Mr. Watson (cracked drywall and streaking) were caused by the woodpeckers. In fact, both contractors stated further investigation was required to determine the cause of the damage.
42. For these reasons, I find Mr. Watson has not proved the woodpeckers caused the drywall damage. Therefore, I find the strata is not responsible to repair the interior walls of SL6 and I dismiss this claim.

Is either party entitled to reimbursement of legal fees?

43. Both parties claim the other party should reimburse them for legal fees. This is the sole issue in the strata's counterclaim.
44. Under CRT rule 9.5(3), the CRT will not order a party to pay another party's legal fees in a dispute unless extraordinary circumstances exist. Both parties acknowledge this but neither party provided any compelling argument as to why an order for reimbursement of legal fees should be granted.

45. In *Parfitt et al v. The Owners, Strata Plan VR 416 et al*, 2019 BCCRT 330, the CRT member, as she then was, set out a detailed review of what constitutes extraordinary circumstances. Although not binding on me, I find the reasoning in *Parfitt* persuasive and I accept it. Essentially, *Parfit* found that an award of legal fees is akin to an award of special costs and should only be ordered against a party when their conduct in the proceeding was reprehensible and deserving reproof or blame, citing *Hirji v. Owners Strata Corporation VR44*, 2016 BCSC 548.
46. Following the principles identified in *Parfitt*, I do not find extraordinary circumstances exist here. Therefore, I dismiss the parties' claims for reimbursement of legal fees and award none.

CRT FEES AND EXPENSES

47. 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. Both parties were unsuccessful, and I find they each must bear their own CRT fees. Aside from legal fees, which I have addressed above, neither party claimed dispute-related expenses, so I order none.
48. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against Mr. Watson.

ORDERS

49. I dismiss Mr. Watson's claims, the strata's counterclaim, and this dispute.

J. Garth Cambrey, Vice Chair