



Civil Resolution Tribunal

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Type: Strata

Civil Resolution Tribunal

Indexed as: *D.E. Pezzot Inc., Inc. No. 296176 v. Turko*, 2021 BCCRT 179

B E T W E E N :

D.E. PEZZOT INC., INC. NO. 296176

APPLICANT

A N D :

JANICE TURKO and The Owners, Strata Plan VR 1973

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Lynn Scrivener

INTRODUCTION

1. This dispute is about repair and maintenance in a strata-titled residential duplex. The applicant, D.E. Pezzot Inc., Inc. No. 296176 (Pezzot) owns a strata lot in the respondent strata corporation, The Owners, Strata Plan VR 1973 (strata). The respondent, Janice Turko, owns the strata's other strata lot. Pezzot and Ms. Turko

disagree about the necessity and extent of repairs to a rooftop deck, as well as who is responsible for the cost of the repairs. Pezzot asks for an order that the strata proceed with and fund the deck repairs, that the wooden railings be replaced with metal and glass railings, and that the respondents reimburse it for its legal fees. Ms. Turko and the strata deny that they are responsible for the costs associated with the rooftop deck and ask that Pezzot's claims be dismissed.

2. Pezzot is represented by its principal, Don Pezzot, whom I will refer to as Dr. Pezzot to distinguish him from the corporate entity. Ms. Turko represents herself and the strata. She provided a Dispute Response on behalf of the strata, and submissions on her own behalf.

JURISDICTION AND PROCEDURE

3. 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.
4. 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.
5. 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.
6. 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.

7. Both Pezzot and Ms. Turko provided late evidence. It appears that the evidence was late due to the parties' personal circumstances and some technical issues with the parties uploading their evidence. Whatever the reasons for the late evidence, I am satisfied that the parties had the opportunity to review the late evidence and provide submissions in response. Keeping in mind that the CRT's mandate includes flexibility, I find that there is no prejudice to either party in allowing the late evidence.
8. The evidence includes video footage and documents that provide information about some interactions between Dr. Pezzot and Ms. Turko. Ms. Turko says this evidence should be disregarded. I find that this evidence is not determinative of any of the issues before me. Like the other evidence and information before me, I will discuss this evidence only to the extent that it is relevant and necessary to provide context to my decision.

ISSUES

9. The issues in this dispute are:
 - a. Whether the dispute should be dismissed due to Pezzot's alleged failure to comply with the requirements of the *Strata Property Act* (SPA) and bylaws,
 - b. Whether the strata is responsible for the repair and maintenance of the rooftop deck,
 - c. Whether repairs to the rooftop deck are necessary and, if so, to what extent, and
 - d. Whether the respondents should reimburse Pezzot for its legal fees.

EVIDENCE AND ANALYSIS

10. The strata is comprised of 2 strata lots in a single residential building that was constructed around 1988. Ms. Turko owns strata lot 1 and Pezzot owns strata lot 2. Each strata lot holds 50% of the strata's unit entitlement.

11. According to the strata plan, the front yard is designated as limited common property (LCP) for strata lot 1 and the rear yard is designated as LCP for strata lot 2. There are LCP walkways at each edge of the property to provide access to the strata lots. Each strata lot has an LCP deck on the top level of the residential building. At the rear of the property, there is a detached garage in which each strata lot has a portion of LCP space. A rooftop deck that is designated as LCP for strata lot 2 is located on top of the garage structure. The rooftop deck is surrounded by a wood railing and is accessed by a set of wood stairs.
12. Section 121(1) of the SPA says that the bylaws of a strata corporation are the Standard Bylaws (as set out in a schedule to the SPA) except to the extent that different bylaws are filed at the Land Title office. As no bylaws have been filed at the Land Title Office for the strata, the Standard Bylaws apply.
13. Bylaw 8 of the Standard Bylaws says that a strata corporation must repair and maintain LCP except for repair and maintenance that in the ordinary course of events occurs less often than once a year. Bylaw 8 also requires the strata corporation to maintain chimneys, stairs, balconies and other things attached to the exterior of a building (8(c)(ii)(C)), as well as fences and railings that enclose patios, balconies and yards (8(c)(ii)(E)), no matter how often the repair or maintenance ordinarily occurs.
14. There is no dispute that, in the past, the strata did not follow the governance processes set out in the SPA. Until recently, the strata did not have formal meetings. It also does not have an operating budget or a contingency reserve fund. Dr. Pezzot and Ms. Turko had an informal arrangement that saw each strata lot bear the repair and maintenance costs for the LCP areas. Dr. Pezzot and Ms. Turko also shared expenses that related to common property (CP) on a 50/50 basis and, for a period of time, Dr. Pezzot paid Ms. Turko and her spouse for gardening work done on his portion of LCP.
15. The evidence before me suggests that Dr. Pezzot and Ms. Turko sometimes obtained permission from each other for alterations (such as screen doors and fences).

However, on some occasions, alterations were done without consulting the other owner (such as the installation of a gas line).

16. The evidence shows that the previous LCP repair and maintenance was related to minor issues and the strata had not been faced with any major repair or maintenance projects. In 1999, Ms. Turko had some work done on her LCP deck area. In 2003, Dr. Pezzot had a vinyl decking surface installed on the rooftop deck. The vinyl apparently had a 10-year guarantee. It appears that Ms. Turko and Dr. Pezzot each bore the costs of the work to their LCP. It also appears that Dr. Pezzot paid for drains to be installed on the rooftop deck on 2 occasions.
17. In March of 2016, Dr. Pezzot emailed Ms. Turko about his view that the wood railing on the rooftop deck needed to be replaced. Dr. Pezzot and Ms. Turko did not agree about whether the existing railing should be replaced with wood or glass and metal. They did not come to an agreement, and the railing remained in its original state.
18. In 2018, Dr. Pezzot arranged for some repairs on the seams of the deck's surface material. These repairs were intended to extend the life of the deck and did not address what Dr. Pezzot felt were safety issues with the deck, railing, and stairs.
19. Dr. Pezzot decided to get a quote for the rooftop deck repairs. The contractor provided a June 1, 2018 quote of \$17,540 plus GST to replace the deck surface, railing and stairs. The quote included a wood railing.
20. Dr. Pezzot and Ms. Turko did not agree about the extent of the work that was needed on the deck, or who was responsible to pay for it. Dr. Pezzot obtained legal advice about the rooftop deck and an unrelated issue that Ms. Turko raised about the building envelope (which was the subject of a separate CRT dispute). In April of 2019, Dr. Pezzot's lawyer sent Ms. Turko a letter about the necessity of the repairs and the impact of bylaw 8, but this did not result in an agreement.
21. Dr. Pezzot requested a hearing about the need for repairs to the rooftop deck under section 34.1 of the SPA. The hearing apparently started on May 11 and continued on May 15, 2019. Apparently, Dr. Pezzot and Ms. Turko verbally agreed on May 15,

2019 to continue the historic practice of each strata lot funding their own LCP repairs. In a May 17, 2019 letter, Dr. Pezzot stated that he had agreed to this proposal, subject to a number of conditions about any repair work being done by licenced and insured contractors, in compliance with bylaws, and not significantly changing the use or appearance of the LCP. It is not clear whether Ms. Turko agreed to these conditions.

22. On May 24, 2019, Ms. Turko, on behalf of the strata, wrote to Pezzot and Dr. Pezzot to advise of what she described as the strata council's decision that there was no need to repair the rooftop deck.
23. Dr. Pezzot says he became concerned that Ms. Turko did not intend to carry out any repairs to the deck. Dr. Pezzot obtained a May 30, 2019 opinion from NSDA Architects (NSDA) about the condition of the rooftop deck. NSDA stated that the exposed wood components of the stairs and guardrails were well beyond their expected service life and were too decayed to repair. It also said that the stairs and guardrails did not meet current municipal bylaw standards, were dangerous, and should not be used until they were "fully rebuilt". NSDA also said that the vinyl roof membranes were due for replacement to avoid leakage, particularly around the seams.
24. At some point, Dr. Pezzot obtained legal advice that he said changed his view that he could take responsibility for the LCP rooftop deck. On September 12, 2019, Dr. Pezzot wrote to Ms. Turko to advise that the rooftop deck required immediate attention for safety reasons and that he was now agreeable to the glass and metal railing that Ms. Turko preferred. He stated that, as it was a strata matter, the work to the deck would involve "cost sharing".
25. Ms. Turko and Dr. Pezzot continued to disagree about whether their past practice of paying for minor repairs to LCP set a precedent for major repairs and about the extent of work that was required on the deck. In November of 2019, Ms. Turko performed some maintenance work on the rooftop deck by applying a sealant over the seams on the vinyl surface. Dr. Pezzot raised the issue of payment to Ms. Turko in a

December 1, 2019 email message, but it is not clear who paid for the labour and materials involved with this work.

26. Ms. Turko suggested that the strata have a special general meeting to pass a bylaw that would shift the obligation to repair and maintain LCP from the strata to individual owners. Dr. Pezzot did not agree to this proposed bylaw amendment. Pezzot commenced this dispute at the CRT in April of 2020.
27. Pezzot's view is that the strata has the responsibility to repair and maintain the rooftop deck under bylaws 8(c)(ii)(C) and 8(c)(ii)(E) and section 72(1) of the SPA. It also says that the strata council (being the 2 owners) must exercise its duties with respect to repair and maintenance, and meet the appropriate standard of care in doing so. Pezzot submits that the rooftop deck is at the end of its lifespan and must be replaced.
28. Ms. Turko denies that she is responsible for the rooftop deck. Ms. Turko says that Dr. Pezzot agreed to pay for the deck himself, and that Pezzot did not comply with the SPA or the bylaws. She also says that Dr. Pezzot refused to attend strata meetings and did not disclose to the CRT the fact that he agreed to fund all deck repairs. Ms. Turko says that Dr. Pezzot's behaviour has frustrated the process so that both she and the strata "reject" this dispute. Ms. Turko's position is that the entire dispute "must be rendered incompetent and invalid and dismissed by the CRT".

Should Pezzot's claims be dismissed for failing to comply with the SPA and the bylaws?

29. Ms. Turko says that Pezzot did not request a hearing under section 34.1 of the SPA, and therefore did not comply with section 189.1(2)(a), which requires an owner or tenant to request a council hearing under section 34.1 before asking the CRT to resolve a dispute. She also says that Dr. Pezzot refused to attend strata meetings and "did not execute section 43" (which addresses a special general meeting called by voters). Ms. Turko says that Pezzot did not comply with bylaw 14 (calling council meetings) or bylaw 6 (obtaining approval before altering CP) before initiating this dispute. Her view is that this dispute is premature and should be dismissed. Pezzot disagrees.

30. Section 189.1(2)(a) provides that an owner or tenant may not ask the CRT to resolve a dispute unless they have requested a council hearing under section 34.1 of the SPA. Pezzot did request a hearing about the rooftop deck. It appears that the deck's condition and the responsibility for the cost of repairs were both discussed at the hearing in May of 2019. I also note that there was a July 26, 2020 hearing at Ms. Turko's request and that various maintenance issues, including the rooftop deck, were discussed at that time. Ms. Turko's position is that Pezzot was required to request another hearing after the changing its agreement to fund the repairs.
31. Section 189.1(2)(a) does not require that an owner or tenant make more than 1 hearing request for a particular issue. In any event, the CRT's Registrar has waived the requirement for a hearing and the dispute may proceed.
32. There is nothing in the SPA or the Standard Bylaws that requires compliance with bylaws before asking the CRT to resolve a dispute. I will not order that Pezzot's dispute be dismissed on this basis.

Who is responsible for the repair and maintenance of the rooftop deck?

33. There is no dispute that some of the strata's common expenses must be, and have been, shared equally between the strata lots. At issue in this dispute is the LCP.
34. Section 72(1) of the SPA sets out that a strata corporation must repair and maintain CP (which includes LCP) and common assets. According to section 72(2), a strata corporation may, by bylaw, make an owner responsible for the repair and maintenance of LCP that the owner has a right to use.
35. Although Ms. Turko raised the possibility of changing the bylaws in early 2020, there has been no bylaw amendment to shift the responsibility for LCP maintenance and repair to owners. As such, the strata remains responsible for the repair and maintenance of LCP as set out in Standard Bylaw 8. I find that the rooftop deck, stairs, and railings fall within the categories described in 8(c)(ii)(C) and (8(c)(ii)(E), and are therefore the strata's responsibility.

36. Ms. Turko submits that it would be unfair for her to pay to repair Pezzot's LCP as she has paid for the repair and maintenance of her own LCP over the years. I accept that, as a result of their arrangement, Pezzot and Ms. Turko have both incurred expenses in respect of repair and maintenance of LCP for their respective strata lots. However, I find that a verbal or written agreement about cost splitting does not affect the strata's responsibilities under the bylaws or the SPA. Despite the parties' historical practice and any formal agreement that came out of their discussions about the deck, the strata remains responsible for its repair and maintenance under the SPA and bylaws. There is no mechanism for the parties to contract out of the SPA or the bylaws. The fact that Ms. Turko views the deck as a "luxury" that Pezzot rarely uses does not change my conclusion.
37. I acknowledge Ms. Turko's submission that the work to the rooftop deck is an alteration that must be approved by the strata rather than a repair and maintenance project. She provided evidence that suggests that the municipality views the work as an alteration that requires a permit. I do not find that this is determinative.
38. Alterations, repair and maintenance are not defined terms in the SPA or the Standard Bylaws. The British Columbia Supreme Court has held that the duty to repair in the SPA "includes the operation of making an article good, regardless of whether the article had been sound or good before" (see *The Owners of Strata Plan NWS 254 v. Hall*, 2016 BCSC 2363 at paragraph 22). The duty to repair can also involve a duty to replace (*Hall* at paragraph 23). *Hall* also found that the term "alteration" as used in the Standard Bylaws "applies where there is a change to the structure of the common property or a strata unit".
39. The scope of work proposed by Pezzot involves removing the existing deck surface, railing and stairs and installing a new deck surface, railing and stairs. Even if there is a change to the materials (such as the railing), the deck would still be a rooftop deck of the same dimensions and fit for the same purpose. There would be no new structure or use. I find that this is consistent with the duty to replace discussed in *Hall*, even if some modifications are required to bring the structure to current municipal

requirements. I find that the proposed work to the deck is within the scope of repair and maintenance, and is not an alteration.

40. I find that the strata is responsible for the repair and maintenance of the LCP rooftop deck, stairs and railings, with each strata lot bearing 50% of the expenses in accordance with their unit entitlement. This reasoning applies to not only the rooftop deck, but to other LCP items described in bylaw 8 that require repair and maintenance (including replacement).

What is the extent of the necessary repairs?

41. Pezzot says that the deck surface, railing and stairs all need to be replaced. Ms. Turko's position is that this work is not yet necessary, and that the deck requires a smaller range of maintenance work.
42. I find that the question of what repairs are necessary on the rooftop deck are outside the scope of ordinary knowledge and requires expert evidence to determine (see *Bergen v. Guliker*, 2015 BCCA 283).
43. In addition to the May 30, 2019 report from NSDA, Pezzot obtained an August 6, 2020 report from NSDA that it submitted as expert evidence. The NSDA report was authored by Derek Neale, an architect and accredited building envelope professional who has experience in building restoration and remediation projects. I also note that Mr. Neale has been accepted as an expert by the British Columbia Supreme Court.
44. I find that the August 6, 2020 report meets the requirements for expert evidence set out in CRT rule 8.3. I also find that this opinion was disclosed to Ms. Turko as required by rule 8.3(4).
45. Ms. Turko says the NSDA report was made without her participation and therefore is a "conflict of interest" because it was obtained by Pezzot. While I acknowledge her concerns, I note that Mr. Neale specifically stated that he was aware of his role in assisting the CRT and was not an advocate for either party. This is consistent with the contents of CRT rule 8.3(7). I accept the August 6, 2020 NSDA report authored by Mr. Neale as expert evidence.

46. Mr. Neale's opinion was that the existing stairs are "well beyond their service life and must be replaced". Further, he stated that the stairs are not compliant with municipal requirements and unsafe. Mr. Neal's view was that the railings had "well exceeded their 15-year life cycle", cannot be repaired and must be replaced. Like the stairs, he felt that the railings were not compliant with municipal requirements and unsafe. Mr. Neale commented that glass and metal railings would have a longer lifespan and require less maintenance than wood railings, but he did not provide an opinion that glass and metal would be the best option for the rooftop deck.
47. As for the deck surface, Mr. Neale stated that the existing vinyl roof membranes are worn and degraded from exposure to ultraviolet light. Mr. Neale's opinion was that the vinyl membrane was at the end of its service life and is in need of replacement.
48. NSDA's opinion is that the deck surface, railings and stairs all need to be replaced. There is no competing expert report for me to consider. I give NSDA's opinion significant weight.
49. I acknowledge Ms. Turko's submission that Pezzot installed "the majority of those components" on the deck and that she should not be responsible for its "shoddy workmanship". NSDA's uncontroverted opinion is that the elements of the deck have reached the end of their respective life spans. The opinion did not state that the previous work was of poor quality or hastened the deterioration of the deck, railing or stairs. I prefer NSDA's expert opinion to Ms. Turko's statement in this regard.
50. I find that the strata must remove the existing deck surface, railing, and stairs and replace them with new materials. Pezzot asks for an order that the strata pay \$26,178.92 for this work, which it says is the approximate cost based on quotes it received. The quotes in evidence are for \$17,540 plus GST and \$16,951 (exclusive of upgrades such as glass panels) for this scope of work. There is no quote in evidence that matches the \$26,178.92 figure, and I find that this amount has not been proven.
51. Even if the \$26,178.92 cost was established in evidence, I would not make an order for that amount. Since the quotes were generated, there may have been changes in

material or labour costs that could impact the cost of the project. Further, there may be issues that arise during the project that affect the cost. Similarly, I will not order that the existing wooden railings be replaced with glass and metal as there may be issues with the deck that impact the selection of materials. Further, although the evidence before me suggests that a metal railing would be more durable, it does not establish that it would be necessary. It will be up to Dr. Pezzot and Ms. Turko to agree on the materials used in the project.

52. In summary, the strata must remove the existing deck surface, railing, and stairs and replace them with new materials. Work must commence within 6 months of the date of this decision.

Legal Fees

53. Pezzot says that Ms. Turko has been “retaliatory” and behaved in a way that was “unprofessional and vexatious”. Pezzot also says that Ms. Turko sent malicious and condescending correspondence both to Dr. Pezzot and his legal counsel. Pezzot asks for reimbursement of its legal fees in addition to “special costs”.
54. Pezzot asked for reimbursement of \$9,993.40 in legal costs and disbursements. His counsel provided a September 23, 2020 letter that describes \$16,550 in fees and \$222.40 in disbursements. Pezzot did not provide an explanation for the differing amounts, or comment on whether any of the fees and disbursements relate to the previous CRT dispute.
55. CRT rule 9.4(3) says that, except in extraordinary circumstances, the CRT will not order a party to pay another party’s legal fees in a strata property dispute. This is different from the concept of special costs, where a court will order a party to pay all or part of another party’s legal costs. The CRT does not have the jurisdiction to order special costs as they arise under the British Columbia Supreme Court Rules, which do not apply to the CRT (see *The Owners, Strata Plan VR 766 v. Hayatshahi*, 2020 BCCRT 451 at paragraph 53).

56. The factors to consider when determining whether a party should reimburse another party for their legal fees include the complexity of the dispute, and whether a party's conduct has caused unnecessary delay or expense.
57. This dispute involved the interpretation of the SPA and bylaws around LCP, which I find is not an unusually complex issue, and did not involve an unusually large amount of evidence or submissions.
58. It is apparent that Ms. Turko has a strong belief in her position in this dispute and about her responsibilities under the SPA and bylaws. In addition, she asked for correspondence to be delivered by post rather than email. While this may have been inconvenient, there is no indication that she attempted to suppress evidence or thwart the process. Indeed, Ms. Turko has consistently asked for a resolution to the matter (although not for the same resolution that Pezzot wanted). Based on the evidence before me, I find that Ms. Turko did not cause unnecessary delay or expense as contemplated by Rule 9.5.
59. The evidence contains information about an incident where Ms. Turko attempted to prevent a contractor retained by Dr. Pezzot from attending his residence. While I do not doubt that the situation was unpleasant for all involved, the information before me does not indicate that this incident was directly related to this dispute and I do not find it appropriate to consider it in my analysis.
60. I find that the circumstances of this dispute are not extraordinary. Accordingly, I dismiss Pezzot's claim for reimbursement of its legal costs.

CRT FEES AND EXPENSES

61. Under section 49 of the CRTA, and the CRT rules, the CRT generally will order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. I see no reason in this case not to follow that general rule. I therefore order Ms. Turko to reimburse Pezzot for CRT fees of \$225.00.

62. Pezzot paid NSDA \$525 for the August 6, 2020 opinion, which I have accepted as an expert opinion and relied upon in my analysis. In the circumstances, I find that it would be appropriate for Pezzot and Ms. Turko to bear equal shares of the cost of this report. I order Ms. Turko to reimburse Pezzot for half of the cost of NSDA's report, or \$262.50.

ORDERS

63. I order that:

- a. The strata is responsible for the cost of the maintenance and repair of the LCP rooftop deck, including the stairs and railings, in accordance with each strata lot's unit entitlement,
- b. The strata must replace the deck surface, railing and stairs on the LCP rooftop deck, with work to commence within 6 months of the date of this decision, and
- c. Ms. Turko must reimburse Pezzot \$225 for CRT fees and \$262.50 for the NSDA report, for a total of \$487.50.

64. The remainder of Pezzot's claims are dismissed.

65. Pezzot is entitled to post-judgment interest under the *Court Order Interest Act*.

66. 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.

Lynn Scrivener, Tribunal Member