



# Civil Resolution Tribunal

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Type: Strata

Civil Resolution Tribunal

Indexed as: *Ricci v. The Owners, Strata Plan LMS 3940*, 2021 BCCRT 755

B E T W E E N :

JONATHAN RICCI and KIERAN MORRIS

**APPLICANTS**

A N D :

The Owners, Strata Plan LMS 3940

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

J. Garth Cambrey, Vice Chair

## INTRODUCTION

1. This is a strata property dispute about repairs to common property (CP) and limited common property (LCP).

2. The applicants, Jonathan Ricci and Kieran Morris, co-own the penthouse strata lot (SL11) in the respondent strata corporation, The Owners, Strata Plan LMS 3940 (strata). SL11 comprises the top floor of the strata's 6-storey building. Mr. Ricci was not a strata council member when this dispute was started, but later became and is now the strata council president.
3. The applicants say repair and maintenance of the main roof of the building is the strata's responsibility and is in urgent need of replacement. They say the strata has refused to complete the repairs. The applicants also say that multiple exterior windows of the building, including a roof-top glass enclosure for SL11, are also the strata's responsibility. They say the double pane seal glazing units of some windows have failed and require replacement, but the strata has refused to replace them. I summarize the applicants' requested orders as follows:
  - a. That a special levy be assessed against all strata lots in the total amount of \$180,000 to fund the roof replacement on an urgent basis as recommended in 3 assessment reports obtained by the applicants,
  - b. That the strata reimburse the applicants \$1,758.75, the amount they paid to obtain 3 roof assessment reports,
  - c. That the strata provide the applicants with copies of completed window assessments or, alternatively, that a special levy in the total amount of \$28,000.00 be assessed against all strata lots to repair and replace windows as recommended by recent window assessments less than 3 years old, and
  - d. That the strata reimburse the applicants \$1,260.00 for the cost of cleaning the windows of SL11.
4. The strata agrees the roof will need replacement but says it is not urgent and that it must obtain further window assessments. It says a glass enclosure associated with SL11 located on the roof level is not original to the building and therefore, any window issues related to the enclosure are not the strata's responsibility. The strata says that window replacement for which it is responsible, is estimated at \$5,000.00 and further window assessments are required by the strata before a decision on replacement will

be made. The strata says it will replace windows where necessary and “when reasonable”. The strata objects to reimbursing the applicants for their expenses to obtain roof reports and to clean the SL11 windows. I infer the strata seeks dismissal of the applicants’ claims.

5. The applicants are represented by Mr. Ricci, and the strata is represented by a strata council member.
6. For the reasons that follow, I dismiss the applicants’ claims and this dispute.

## **JURISDICTION AND PROCEDURE**

7. 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.
8. 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.
9. 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.
10. 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 Matters***

### **Requested Special Levies**

11. During submissions, the applicants uploaded information that changed the amount of their requested special levy orders. The roof replacement levy amount was increased from \$150,000 to \$180,000 and the window replacement levy amount, originally unspecified, was set at \$28,000. I have noted the updated amounts above because I find the strata had the information before providing its response submissions and therefore was not prejudiced because it had the opportunity to address the updated special levy amounts. Also, given my decision, I find the amount of the special levies requested by the applicants is not material in resolving this dispute.

### **Late Evidence**

12. The strata provided a roof assessment report from Cal Weldon Consulting Ltd. (Weldon) dated May 13, 2021, after the deadline given to it by CRT staff to submit evidence. The applicants provided several comments on the report's content that I address below, but expressly state they do not object to report being used to support the strata's position. Given the applicants expressly accepted the late evidence and responded to it, I find there is no reason not to accept the report as submitted. I have relied on the report in my reasons below and will refer to it as the Weldon report.

13. In their response to the Weldon report, the applicants made several additional allegations about the strata's bad faith and deception that were not included in the Dispute Notice or raised in their submissions. They also provided additional evidence about these allegations. Given the strata has not had an opportunity to respond to these additional allegations or comment on the additional evidence, for reasons of procedural fairness, I decline to address the allegations and refuse to admit the additional evidence. The applicants could have amended the Dispute Notice to include the allegations but did not do so.

## **ISSUES**

14. The remaining issues in the dispute are:

- a. Who is responsible for the roof repairs and maintenance, and is urgent replacement required?
- b. Is the strata responsible to reimburse the applicants \$1,758.75 for the 3 roof reports?
- c. Who is responsible for the window repairs and maintenance, and are urgent repairs required?
- d. Is the strata responsible to reimburse the applicants \$1,260.00 for the SL11 window cleaning expense?

## **BACKGROUND, EVIDENCE AND ANALYSIS**

15. 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.
16. The strata is a residential strata corporation created in July 1999 under the *Condominium Act* that continues to exist under the *Strata Property Act (SPA)*. As noted, it contains 11 strata lots in a 6-storey building. The strata plan shows the applicants' SL11 is located on the entire 6th floor except for 1 level of stairs that is shown as CP. I find the stairs are the only access from level 6 to the roof. The strata plan also shows the entire roof area, including a swimming pool and area identified as a pool pump, is LCP designated for the use of SL11 owners. Other than the swimming pool and pool pump area, the remaining LCP roof area is also labelled as a roof deck.
17. On May 6, 2007, the strata filed with the Land Title Office (LTO) a completely new set of bylaws, which I find are relevant to this dispute. Subsequent bylaw amendments filed with the LTO on December 11, 2020 are not relevant. I infer the Standard Bylaws under the SPA do not apply. I address the applicable bylaws below, as necessary.
18. According to LTO documents, the applicants purchased SL11 on February 6, 2020.

19. It is undisputed that the strata held its annual general meeting (AGM) on January 14, 2021 and separate  $\frac{3}{4}$  vote resolutions to replace the roof and windows were defeated. Only 4 of the 11 owners (36%) voted in favour of replacing the roof and 3 of 11 owners (27%) voted in favour of replacing windows. Neither the January 2021 AGM notice nor minutes were provided in evidence.

### Duty to Repair and Maintain

20. Before deciding the issues in this dispute I will first set out the obligations about repair and maintenance of CP and LCP as they apply to both the roof and windows the applicants allege need immediate replacement.

21. Under SPA section 72, the strata is responsible for repair and maintenance of CP. CP is defined under SPA section 1(1) as “that part of the land and buildings shown on the strata plan that is not part of a strata lot” and includes certain pipes, wires, and other similar facilities that do apply here.

22. Section 72 also states the strata may make an owner responsible for the repair and maintenance of LCP the owner has a right to use, and may take responsibility for certain parts of a strata lot. LCP is defined as CP designated for the exclusive use of the owners of 1 or more strata lots. In order to make an owner responsible for LCP or take responsibility for parts of a strata lot, section 72 requires the strata to pass a bylaw to that effect. The strata has not adopted bylaws that require it repair and maintain parts of a strata lot, but as I discuss below, the strata has bylaws that require owners to repair and maintain LCP they use. For completeness, I note the strata cannot make an owner responsible for CP that is not LCP, because there are currently no regulations that permit it as required in section 72.

23. Strata bylaws 3(1) and 3(2) state an owner must repair and maintain their strata lot and LCP they have use of, except for repair and maintenance that is the strata’s responsibility under the strata’s bylaws.

24. Bylaw 9 addresses repair and maintenance that is the strata’s responsibility, which includes CP under bylaw 9(1)(b). Under bylaw 9(1)(c)(i), the strata is also responsible for LCP if the repair and maintenance ordinarily occurs less often than once per year.

25. The courts have addressed CP repairs on several occasions, and it is well-settled law that the strata's obligation is based on a reasonableness standard. (see *Wright v. The Owners, Strata Plan #205*, 1996 CanLII 2460 (BC SC)). Therefore, in order to be successful in their repair claims, the applicants must prove the strata has acted unreasonably.

***Who is responsible for roof repairs and maintenance, and are urgent repairs required?***

26. To summarize the repair obligations for the roof, the SPA and strata bylaws require the strata to repair and maintain the entire roof area, including the swimming pool and pump area, when the repair or maintenance occurs less often than once per year, which includes replacement. Repair and maintenance of the entire roof area that occurs more often than once per year is the applicants' responsibility as owners of SL11. This is undisputed and the strata says addressing the roof is a priority for it in 2021.

27. There are a total of 4 roof reports in evidence. Three were obtained by the applicants and 1, the Weldon report, was obtained by the strata. The reports provided, who obtained them, and the date of each report are summarized as follows:

- a. September 16, 2019 – Lower Mainland Roof Inspection and Consulting Ltd. (LM Report), obtained by the applicants, apparently prior to their purchase of SL11.
- b. September 23, 2020 – ATC Consulting Inc. (ATC report), obtained by the applicants.
- c. November 6, 2020 - BC Roof Inspections (BC Roof report), obtained by the applicants.
- d. May 13, 2021 – Weldon report, obtained by the strata.

28. Of the 4 reports, only the credentials of the Weldon report author were provided in evidence. However, I find that the authors of all 4 reports have specialized expertise

in roofing. Therefore, I accept all 4 reports constitute expert opinion under CRT rule 8.3, noting I have discretion to depart from the specific requirements of that rule.

29. There is no dispute among the experts about the roof construction. It is an inverted roof system with a modified bitumen (torch-on) membrane applied directly to the concrete roof structure of the building. There is a layer of 1½ to 2” of styrofoam insulation directly above the membrane and concrete-topped insulation board (CT board) of approximately 1½ to 2” above that.
30. The applicants say the real issue is not whether there is an urgent need to replace the roof, but whether the strata has failed in its obligation to repair and maintain the roof. I disagree, and find that both issues are related and equally important.
31. I do not agree with the applicants that the roof reports indicate any urgency. Generally speaking, the reports indicate the CT board is cracked in several places and replacement, possibly with a different system, will be necessary. Although the reports state the CT board used is wrong for the roof deck, none suggest urgent replacement of the CT board. Rather most suggest the CT board be replaced when the roof membrane is replaced. Further, there is an area next to the pool where the CT board and styrofoam insulation have been removed and the membrane exposed. The applicants suggest that the membrane was exposed to allow for repairs or investigation of the membrane. While this may be true, there is no evidence, and the reports do not say, the membrane was repaired at this location. The reports suggest that at this area, the granular surface of the membrane is worn at some locations and shows signs of aging. In one report, the membrane was also noted to be delaminating from the concrete roof structure. Not surprisingly, water was observed ponding in this area and 1 other area where the CT board and insulation was removed.
32. The reports differ on the general condition of roof and its expected remaining life.
33. The LM report states there was 5-10 years life remaining at the time of the inspection in September 2019, projecting replacement about 2024 to 2029. LM was unable to report on the overall condition of the membrane without removing the insulation and CT board.



34. The ATC report provided a general statement that poor design and execution of the roof has resulted in excessive water ponding and drainage issues. The report says the entire roof should be replaced immediately. I find the conclusions in the ATC report do not align with its content and appear to be based on previous leaks into SL11, which are not supported as I discuss below.
35. The BC Roof report states the overall condition of the membrane is “moderate to poor” but notes the majority of the system is below the insulation and was not viewed. It states the membrane “likely has some life in the material however perimeters and penetrations require repair”. It also notes it will likely be more cost effective to replace the roof system than remove the overburden to inspect and repair the membrane.
36. Finally, the Weldon report concludes by saying the roof is expected to last 25 years and “there is no indication of anything out of the ordinary on this roof” except possibly the increased granule loss on the exposed membrane. I note a 25 year life span would end in 2024. I do not agree with the applicants that this conclusion is unsupported by the report’s content. For example, the fact the CT board is the wrong type and has failed in some areas does not necessarily mean the entire roof system has failed.
37. As for current roof leaks, the applicants say there is a leak in the stairwell from the roof level to SL11 on level 6. From photographic evidence of the applicants’ building inspection completed before their purchase in February 2020, this leak appears to be minor. Further, the Weldon report states the leak is likely a glazing leak rather than a roof leak. In any event, I do not find the leak at the stairwell to be significant. I find it likely that temporary repairs can be completed to stop it until the roofing and window repairs are completed.
38. There is 1 other leak into SL11 identified by the applicants, but it is unclear if it remains active or if the strata has repaired it. A photograph taken by the applicants’ building inspector shows efflorescence at a concrete ceiling near a window in SL11, but the location is not clearly identified.

39. Based on the overall evidence and roof reports, it appears the roof system is nearing the end of its expected life, but I do not find there is an urgent need to replace it. This is the same conclusion reached by the strata. In an April 2020 email from a strata council member, the applicants were advised the strata would not be attending to “non essential repairs” until the end of the COVID-19 pandemic. Ultimately, the roof membrane will need replacement, but I find the applicants have not established a need for urgent replacement at this time.
40. The strata’s obligation to repair and maintain CP and LCP is measured by the test of what is reasonable in all circumstances and can include replacement when necessary (see *The Owners of Strata Plan NWS 254 v. Hall*, 2016 BCSC 2363). The standard is not one of perfection. When deciding whether to repair or replace CP, the strata has discretion to approved “good, better or best” solutions. The court (and CRT) will not interfere with a strata’s decision to choose a “good”, less expensive, and less permanent solution although “better” and “best” solutions may have been available (see *Weir v. Owners, Strata Plan NW 17*, 2010 BCSC 784).
41. That the  $\frac{3}{4}$  vote resolution proposed at the January 2021 AGM was defeated does not mean the strata has breached its duty to repair. It simply means the necessary 75% majority did not approve the roof replacement proposed, the details of which are not before me. It is unclear from the evidence and submissions why the owners did not approve the roof replacement or if any of the available roof reports were provided for their review. It is also unclear if the owners were given any other options but to replace the roof as was suggested in some of the roof reports. Based on *Weir*, I find the strata may have less-permanent options to repair the roof available to it, other than full replacement, that it may see fit to pursue.
42. As found in *Weir* at paragraph 29, in carrying out its duty to repair, the strata must act in the best interests of all the owners and endeavour to achieve the greatest good for the greatest number. That involves implementing necessary repairs within a budget that the owners as a whole can afford and balancing competing needs and priorities: Citing *Sterloff v. Strata Corp. of Strata Plan No. VR 2613*, 38 R.P.R. (3d) 102, [1994] B.C.J. No. 445 and *Browne v. Strata Plan 582*, 2007 BCSC 206, 70 B.C.L.R. (4th)

102. Again, it is unclear if the  $\frac{3}{4}$  vote failed because of budget or affordability concerns of the owners, but the strata must take these factors into consideration.

43. Finally, I do not agree with the applicants that because the strata council members held 27% of the strata's votes (3 of 11), future  $\frac{3}{4}$  vote resolutions on the roof are doomed to fail. The composition of the strata council has now changed to include Mr. Ricci, so that argument cannot succeed.

44. In the circumstances of this dispute, I do not find the strata's actions have been unreasonable. I accept the strata will consider the roof repairs a priority as it stated.

45. For these reasons, I dismiss the applicants' claim that the roof requires immediate replacement.

***Is the strata responsible to reimburse the applicants \$1,758.75 for the 3 roof reports?***

46. The applicants provided copies of paid invoices for the 3 roof reports they obtained that total their claimed amount of \$1,758.75. There is no evidence the strata agreed to reimburse the applicants for the cost of any of the reports.

47. Under section 49 of the CRTA, and the CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party reasonable dispute-related expenses. In order to qualify as a dispute-related expense, the expense must have been incurred after the dispute was started, which is not the case here. In any event, the applicants were not successful.

48. For these reasons, I dismiss the applicants' claim for reimbursement of the roof report expenses.

***Who is responsible for the window repairs and maintenance, and are urgent repairs required?***

49. Except for the glass enclosure at the top of the stairway leading from SL11 to the roof, the parties agree the windows are CP. I agree as this is supported by the definition of CP and SPA section 68, which identifies the boundaries of a strata lot. I

find the glass enclosure is also CP because the stairway is identified as CP on the strata plan.

50. The applicants say the glass enclosure is original to the building construction and provided a written statement from a representative of the owner developer to that effect. There is nothing in evidence to support the strata's position that the enclosure was added by a previous owner. If that was the case, I would have expected the strata to provide information about the alteration to the CP glass enclosure, whether it was approved or not. Absent a bylaw that the applicants are responsible for the repair and maintenance of the glass enclosure, which does not exist, I find the enclosure is the strata's responsibility. That being said, I have noted above there could be a minor leak at the base of the glass enclosure related to the glazing. If the leak has not been repaired, the strata must investigate and repair it, whether or not it is caused by the glazing.
51. The applicants' main concern with their windows is the failed seals of the glazing units. From the photographs they provided, there are several windows that are difficult to see through because of condensation marks and discolouration on the glass. I accept the marks and discolouration are between the double panes of glass as claimed by the applicants, as the strata did not object or say otherwise. The strata agrees there are several other exterior windows relating to other strata lots that also have failed seals, and says the window replacement will be completed once the strata council decides on which quotation to accept.
52. The applicants' requested remedy for this claim is for the strata to provide them with previous quotations it had obtained for window glass replacement. The strata has provided quotations it obtained from Vancouver Glass (1990) Ltd. dated May 1, 2019 and Action Glass Inc. dated May 27, 2019 in evidence. I find these are likely the quotations the applicants requested. Since they have now been provided as part of this dispute, I find the applicants' request for previous window quotations has been met and decline to make the requested order.
53. As an alternative order, the applicants requested the CRT impose a total special levy of \$28,000, against all strata lots, to repair and replace windows as recommended by

what they say are “recent window assessments”. They refer to the May 27, 2019 Action Glass quotation of \$4,482.45 for 6 windows and another quotation they obtained for 16 windows of SL11 and “Unit #9” from Wesco Glass Restorations Ltd. dated April 9, 2021 in the amount of \$21,907.31.

54. The applicants say the same argument they used for the roof replacement applies to the windows. I find that means the applicants believe the windows are in urgent need of replacement, which I find has not been established.
55. I dismiss the applicants’ claim for window glass replacement for the following reasons.
56. First, I find the applicants have not established the windows are in urgent need of replacement. While the sealed glazing units may have failed, there is no evidence that the failed seals affect the windows’ performance, such as to cause them to leak. I agree it is likely that the affected windows impair the applicants’ view, however, I am not satisfied that is sufficient reason for urgent replacement of the glazing units.
57. Second, the established caselaw for repair and maintenance, or replacement of CP discussed above, applies equally to the glazed units of the CP windows. Namely, that the strata’s decision to choose a “good”, less expensive, and less permanent solution although “better” and “best” solutions may have been available is reasonable as set out in *Weir*. In a March 16, 2020 email from Mr. Ricci to the now former strata council president, Mr. Ricci made the following statement:

Given the size and associated cost with replacing [the failed sealed units], my general contractor advised that we may want to try re-gassing the window as this may work. I understand it is a relatively new process but something we should discuss given the cost of replacing the glass.

There is no evidence the alternative solution mentioned by Mr. Ricci was discussed or pursued as an option. I also find Mr. Ricci’s statement is further evidence the window glass replacement is not urgent.

58. Third, as mentioned above, *Weir* has established that the strata must act in the best interests of all the owners and endeavour to achieve the greatest good for the

greatest number when exercising its duty to repair. That includes considering budget and affordability issues of the strata owners. Again, that a  $\frac{3}{4}$  vote to replace window glass failed, does not mean the strata has failed in its obligation to repair the windows. It is unclear why the  $\frac{3}{4}$  vote to replace certain window glass failed, but the strata must include affordability in its assessment of how to approach the window glass replacement.

59. As with the applicants' argument about the roof, I do not agree future  $\frac{3}{4}$  vote resolutions on the window glass replacement are doomed to fail because a strata council of 3 owners hold 27% of the strata's votes.

60. The applicants' claim for window glass replacement is dismissed.

***Is the strata responsible to reimburse the applicants \$1,260.00 for the SL11 window cleaning expense?***

61. I dismiss the applicants' claim for reimbursement of their window cleaning expense.

62. In an August 21, 2020 email from a previous strata council member to the applicants, the applicants request to clean their windows was given by the strata, provided it was done at the applicants' expense, among other things. The invoice provided by the applicants for window cleaning says the cleaning was performed on September 29, 2020. Based on this evidence, I find the applicants agreed to complete the window cleaning at their own expense.

**CRT FEES AND EXPENSES**

63. 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 reasonable dispute-related expenses, and for CRT fees. I see no reason to deviate from this general rule. Other than the roof report and window cleaning expenses discussed above, no party claimed other dispute-related expenses, so I order none. The strata was the successful party in this dispute but did not pay CRT fees, so I make no order for CRT fees.

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

**ORDER**

65. I order the applicants' claims and this dispute dismissed.

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J. Garth Cambrey, Vice Chair