



# Civil Resolution Tribunal

Date Issued: July 14, 2021

File: ST-2020-008519

Type: Strata

Civil Resolution Tribunal

Indexed as: *Lusian v. The Owners, Strata Plan NWS743, 2021 BCCRT 769*

**B E T W E E N :**

JEFF LUSIAN

**APPLICANT**

**A N D :**

The Owners, Strata Plan N.W. 743

**RESPONDENT**

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## **REASONS FOR DECISION**

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Tribunal Member:

Julie K. Gibson

## **INTRODUCTION**

1. This dispute is about who must pay expenses associated with a series of water leaks.

2. The applicant Jeff Lusian owns strata lot 17 (SL17, unit 302) in the respondent strata corporation The Owners, Strata Plan N.W. 743 (strata). Mr. Lusian claims that the strata has wrongly charged him or his insurer \$6,418.04 for insurance deductibles and other expenses relating to several water leaks. Mr. Lusian says the water leaks are the strata's responsibility because they originated on common property (CP).
3. Mr. Lusian also claims that the strata wrongly withdrew \$460.39 in strata fees from his account twice for January 2021, \$392.68 in strata fees for a month that he says should have been a new owner's responsibility, 2-\$12.50 stop payment fees that could have been avoided, and \$630 for repairs Mr. Lusian says he would have completed himself rather than by hiring a contractor.
4. The strata says the leaks originate in Mr. Lusian's strata lot, making him responsible for the insurance deductible and repair costs under the bylaws.
5. The strata says that the division of strata fees between Mr. Lusian and the new buyer is between them, not between Mr. Lusian and the strata.
6. The strata agrees that it withdrew excess strata fees in January 2020, but says it refunded the excess fees to Mr. Lusian's lawyer. The strata says the stop payment fees are Mr. Lusian's responsibility, since he should have instructed his bank to stop automatic withdrawal of strata fees to avoid those charges. The strata asks me to dismiss the dispute.
7. Mr. Lusian represents himself. The strata is represented by a strata council member.
8. For the reasons given below I allow Mr. Lusian's claims in part, because I find that the water leaks in the main bathroom were not his responsibility. However, I find Mr. Lusian responsible for the water leak repairs in the ensuite bathrooms, where damage was caused by his washing machine overflowing. I dismiss his claims about excess or prorated strata fees and stop payment charges.

## JURISDICTION AND PROCEDURE

9. 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.
10. Some of the evidence in this dispute amounts to a "he said, they said" scenario. The credibility of interested 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. The assessment of what is the most likely account depends on its harmony with the rest of the evidence. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary. I also note that in *Yas v. Pope*, 2018 BCSC 282, at paragraphs 32 to 38, the British Columbia Supreme Court recognized the CRT's process and found that oral hearings are not necessarily required where credibility is an issue.
11. 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.
12. 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.
13. Because Mr. Lusian owned SL17 at the time of the water leaks, I find the CRT has jurisdiction to resolve this dispute: see the non-binding but persuasive decision in *Gill v. The Owners, Strata Plan EPS 4403*, 2020, BCCRT 4403 at paragraphs 19 through 24.

## **ISSUES**

14. The issues in this dispute are:

- a. Is the strata responsible to pay the claimed \$6,418.04 in deductibles and repairs for the leaks?
- b. Must the strata refund Mr. Lusian:
  - i. \$460.39 for strata fees deducted twice,
  - ii. \$392.68 for prorated strata fees for January 2021,
  - iii. 2-\$12.50 stop payment fees on his bank account, and
  - iv. \$630 for money Mr. Lusian paid for certain repairs?

## **BACKGROUND AND EVIDENCE**

15. In a civil proceeding like this one, as applicant Mr. Lusian must prove his claims on a balance of probabilities. I have read all the evidence and submissions before me, but refer only to what I find relevant to provide context for my decision.

### ***The SPA and Bylaws***

16. The strata filed the applicable bylaws at the Land Title Office on January 31, 2019.

17. Bylaw 2(1) provides that an owner must repair and maintain their strata lot, except for repair and maintenance that is the responsibility of the strata under the bylaws.

18. Bylaw 3(1) provides that an owner must not use a strata lot, the common property (CP) or common assets in a way that (a) causes a nuisance or hazard to another person or (c) unreasonably interferes with the rights of other persons to use and enjoy the CP, common assets or another strata lot.

19. Bylaw 3(2) provides that an owner must not cause damage, other than reasonable wear and tear, to CP, common assets or those parts of a strata lot which the strata must repair and maintain under the bylaws or insure under SPA section 149.

20. Bylaw 3(7) provides that if an owner is responsible for loss or damage to a strata lot, CP, limited CP or common assets, they must indemnify the strata for any repair, maintenance or replacement to the extent that such an expense is not covered by proceeds of a strata insurance policy. An insurance deductible payable by the strata is considered an expense not covered by the strata corporation and will be charged to the owner.
21. Bylaw 8(b) makes the strata responsible for repair and maintenance of the CP that has not been designated as limited common property.
22. Bylaw 8(e) says that where the strata is required to enter a strata lot to repair or renew pipes existing in the strata lot capable of being used in connection with any other strata lot or the CP, the strata must make good any damage occasioned by such work or repairs.
23. According to the strata plan, SL17 (unit 302) is situated on the third floor, above SL9 (unit 202) on the second floor. It is uncontested that unit 302 and 202 have identical floor plans, meaning the main bathroom with tub (main bathroom) is in the same location on both floors, separate from an ensuite bathroom (ensuite bathroom) which is connected to the master bedroom in both unit 302 and 202.

***Law re: Water Damage Deductibles and Repair Expenses***

24. The question in this dispute is whether the strata or Mr. Lusian must pay the strata's insurance deductibles and repair expenses associated with a series of water leaks. Below, I lay out the legal framework for analyzing this question and then consider what caused the leaks.
25. Section 158(1) of the SPA provides that the payment of an insurance deductible in a claim on the strata corporation's insurance is a common expense to which all owners contribute through strata fees. Section 158(2) states that a strata may sue an owner to recover a deductible if the owner "is responsible for the loss or damage that gave rise to the claim."

26. The courts have found that SPA section 158(2) permits a strata corporation to sue an owner for repayment of a deductible even where the owner is not at fault, on the basis that the word “responsible” does not require the strata to prove that an owner is negligent: *Yang v. Re/Max Commercial Realty (482258 BC Ltd.)*, 2016 BCSC 2147 at paragraph 139.
27. The standard of responsibility set by SPA section 158(2) may be modified by bylaw: *Strata Plan LMS 2446 v. Morrison*, 2011 BCPC 519; *The Owners, Strata Plan BCS 1589 v. Nacht*, 2019 BCSC 1785, upholding the CRT decision 2017 BCCRT 88 on appeal.
28. I find that bylaw 3(7) uses the word responsibility, which is the same language used in SPA section 158(2). I find that proving responsibility under bylaw 3(7) in this dispute requires an act or omission by the owner or someone else specified in the bylaw causing water to escape inside the strata lot and damage other strata lots or CP. There is no requirement for negligence. As I explain further below, the use of an appliance from which water escapes would be sufficient to make an owner “responsible” under bylaw 3(7).
29. Bylaw 3(7) does not modify SPA section 158(2)’s standard. Therefore, I find the decision in *Mari v. Strata Plan LMS 2835*, 2007 BCSC 740 applicable.
30. In *Mari* the owners appealed a Provincial Court decision that they pay a \$5,000 deductible to their strata for a water damage insurance claim. Their washer overflowed due to a faulty water level switch. The issue in *Mari* was the interpretation of the word “responsible” in SPA section 158(2), because there were no bylaws that modified that standard. The court considered the meaning of “responsibility” as discussed in *Beazer East Inc. v. Environmental Appeal Board et al*, 2000 BCSC 1698. In *Beazer*, the court found “responsible for” referred to legal authority and obligations with respect to something. In *Mari*, the court applied that reasoning to find the owners were “responsible” without proof of negligence because they used the washer. Where bylaws do not modify the responsibility standard, an owner is responsible “for what

occurs within their unit”: see *Wawanesa Mutual Ins. Co. v. Keiran*, 2007 BCSC 727 at paragraph 12.

### ***Water Leaks***

31. The evidence suggests multiple causes for the different water leaks that are the subject of this dispute. I will address them below.

#### *June 2020 Leak into Unit 202 Main Bathroom*

32. On June 9, 2020, unit 202’s owner emailed the strata to report a leak into his main bathroom coming through his ceiling from unit 302.

33. On June 19, 2020 the property manager forwarded the strata council an email from NE at 24HR Disaster Restoration Services who wrote that he examined the water staining and tracked the moisture to the unit 302 main bathroom toilet. NE offered his opinion that the leak was caused either by a “leaking wax gasket” or water splashing out of the shower. NE asked Mr. Lusian to replace his toilet seal.

34. Mr. Lusian did not agree that a faulty toilet seal was the cause of the June 9, 2020 leak because (a) the leak occurred once, not each time the toilet was flushed, and (b) Pristine Plumbing (Pristine), who Mr. Lusian retained to examine the situation, did not find signs of leaking around the wax seal at the base of his toilet. I discuss this evidence further below.

35. Also on June 19, 2020, Pristine replaced the unit 302 toilet wax seal. Pristine also inspected the area around the toilet and removed the toilet and observed that there were “not obvious signs of leaking from the wax seal.” The plumber explained that they would typically observe a puddle of water around the flange when lifting the toilet. Here, Pristine did not observe any such moisture. As a result, Pristine wrote that they suspected the leak was caused by something other than a faulty wax seal.

36. On June 20, 2020 NE emailed the property manager to say that when the wall behind unit 302 toilet tank was opened, there were no leaks from the pipes and the area in the wall was dry. NE said that water on the floor in unit 302 behind the toilet tank,

which Mr. Lusian reported after the June 9, 2020 leak, was caused by condensation from the toilet tank.

37. I prefer the evidence of Pristine to that of NE, because it was offered by a plumber rather than a restoration services technician. As well, NE's evidence was that the leak was either caused by the gasket or water splashing from the shower, two quite different causes. Therefore I find that the leak was not caused by the toilet gasket.
38. Relying on Pristine's evidence, I find that the evidence about the cause of the June 9, 2020 leak is inconclusive about whether the leak originated from inside unit 302 or in the CP. I make this finding based on Pristine's assessment and because of the evidence, discussed below, that periodic leaks from unit 302 into unit 202 continued to occur after the toilet wax seal was replaced.

#### Leaks in Ensuite Bathroom

39. At some point in June 2020 Mr. Lusian purchased a new washer/dryer combination, which he installed in his ensuite bathroom.
40. In late July 2020, the unit 202 owner reported a leak into their ensuite bathroom from the ceiling. Video footage from this leak shows water coming through the ceiling and dripping onto their ensuite bathroom vanity.
41. On August 7, 2020, the unit 102 owner also reported a leak in their ensuite.
42. On August 8, 2020 NE attended and documented via email that the ensuite bathroom and closet areas in unit 202 and unit 102 were both wet, and the ceiling cavity of 202 was wet in front of the drain stack. NE offered his view that water would have had to spill on the floor in 302 to cause the leak into unit 202, which included water accumulating in a hall light fixture.
43. On August 8, 2020, NE provided a report that he thought there may have been an inadequate drain for the new washer, or the new washer overflowed causing this leak.
44. On August 12, 2020, a plumber from J8 Plumbing & Heating (J8) attended at unit 302 at the strata's request. They found Mr. Lusian's washer mounted on his master

ensuite vanity with the drain fed into the sink. Mr. Lusian was asked to run a spin and rinse cycle. On his invoice, the plumber documented that “About 4 minutes into the cycle, it begun draining shortly after like 30 seconds or so, the water backed up into the sink and it overflowed & water started to leak into the sink cabinet.”

45. Mr. Lusian contests this conclusion saying that J8 “pulled the drain pipe from the drain and ran the machine with it dangling”. However, I find this inconsistent with J8’s documentation at the time. There is no indication that J8 removed the drain pipe before having Mr. Lusian run the washer cycle.
46. I accept J8’s evidence that running a cycle with the washer/dryer caused an overflow during the test, and likely also caused the leak observed in late July and early August 2020 in the master ensures in units 202 and 102.
47. The floor plans filed in evidence by the strata contain notes showing areas of water damage in both the unit 202 and 102 ensuites, separate from the water damage in the main bathroom. Based on the location of the ensuite damage, and J8’s observations, I find that the ensuite damage in units 102 and 202 was likely caused by periodic overflow or improper draining of the washer Mr. Lusian installed in his ensuite. Because the main bathroom is some distance from the master en-suite, I find that the main bathroom leak was not caused by Mr. Lusian’s washer overflowing.
48. I continue to consider the ongoing leaks in the main bathroom below.

#### *Continued Leaks in Main Bathroom*

49. On August 24, 2020 the strata held a hearing. However, the strata did not make a decision because it noted there were ongoing leaks without a proven cause.
50. On August 27, 2020, NE noted the ensuite bathroom in unit 202 was dry and so the drywall was closed up. The main bathroom was found still wet, and dripping in front of unit 202 sink.
51. On September 2, 2020, the property manager wrote to Mr. Lusian asking him to apply caulking around his cabinet.

52. On September 5 2020, the unit 202 owner reported a further leak from his main bathroom ceiling. During this time, Mr. Lusian reported that he had been running his main bathroom bathtub for more than 30 minutes but observed no leaks in unit 302.
53. The strata filed emails in evidence suggesting that Mr. Lusian's tub overflow was not working properly, causing a "small leak" above the tub in unit 202 below.
54. On September 15, 2020, J8's plumber examined the tub in unit 302 and determined that the overflow drain on the tub was "broken or undone within the wall". J8 wrote that it would need access to units 202 and 302 to replace this section of piping. Based on J8's description of the work needed, I find that the broken segment of pipe was within the wall for water and drainage travelling between the two strata lots or a strata lot and CP, and was therefore CP as defined in SPA section 1.
55. On September 24, 2020, Mr. Lusian hired MM of Maloney Home Services to inspect the leak issue. On his invoice, MM wrote that there was no plumbing leaking behind the inner wall behind the vanity in the main washroom of Mr. Lusian's unit.
56. As well, MM filled the bathtub with water and checked the unit below, and found "that the overflow in Jeff's bathtub was leaking into the tub area of the unit below."
57. Mr. Lusian paid Maloney Home Services \$63.00 for the leak consultation. On that invoice, Maloney recorded that the water damage to the bathroom vanity in the unit below did not appear to be related to Mr. Lusian's "leaking overflow" but that the exact cause was undetermined. I accept MM's uncontested opinion on this point and find that the cause of the leak above the unit 202 main bathroom vanity remains undetermined.
58. Sometime in September 2020, J8 repaired the broken overflow pipe.
59. On September 29, 2020, unit 202 again reported water accumulating in their ceiling above the main washroom vanity. Video taken on October 10, 2020 confirms continued leakage from this area.

60. Sometime in September 2020, members of strata council asked Mr. Lusian to apply caulking around his bathtub and shower walls. After this, the strata says there were no further leaks in unit 202's main bathroom. Mr. Lusian disagrees and says there were further leaks after this caulking. Without evidence upon which to base a finding one way or the other, I find that the coincidence of these events does not prove that an absence of caulking was caused the leak above unit 202's main washroom vanity. I find the cause of the leak above the unit 202 main washroom vanity remains unknown.
61. To summarize, I find that the broken bathtub overflow pipe, behind the wall, caused a leak in the bathtub area of the unit 202 main bathroom. This leak was resolved by fixing the broken overflow. However, I also find there remained a separate leak, of unknown cause, above the main bathroom vanity in unit 202.

### ***Summary of Leaks***

62. Based on my findings above, I conclude that Mr. Lusian is responsible for the water damage in the unit 202 and 102 ensuite bathrooms based on the bylaws and SPA section 158(2). I say this because the evidence proves that Mr. Lusian probably caused water to escape from unit 302 by running his washer in the ensuite bathroom, which then overflowed. I make this finding based on the washer cycle demonstration observed by J8 and the proximity of the water damage below to the area where Mr. Lusian's washer was installed. Accordingly I dismiss Mr. Lusian's claim to be reimbursed for repair or deductible costs associated with water damage to the ensuite bathrooms.
63. However, I find the leaks caused by the CP tub overflow pipe and the unknown causes are not Mr. Lusian's responsibility. SPA section 72 provides that the strata is responsible for repairing and maintaining the CP. I therefore find that the strata must reimburse Mr. Lusian for deductible and repair costs for the main bathroom leaks.
64. The difficulty is in determining the amount of such reimbursement. Although Mr. Lusian referred to insurance deductible payments in his materials, no one provided evidence showing specific deductible amounts charged or paid. Mr. Lusian did not

provide evidence that he paid the claimed \$6,418.04 for expenses associated with leaks that were the strata's responsibility. On November 2, 2020, the strata sought payment of \$6,749.57 from him, which is a slightly different amount. Mr. Lusian paid \$2,160.55 to the strata on December 4, 2020 "under protest", but did not explain what amounts this payment was to cover. Although the strata's November 2, 2020 letter lists some invoices, the invoices do not all separate restoration and repair work for the main bathroom leaks versus the en suite leak.

65. I find that invoice 9277 for \$481.05 was for J8's plumbing work to replace the broken tub overflow. Since that was a CP repair, I find that the strata must reimburse Mr. Lusian the \$481.05. I also find that the Maloney Home Services costs of \$630 relate to investigations for a leak where no cause was found. I find the strata must reimburse this \$630 to Mr. Lusian to make good his strata lot, as provided in bylaw 8(e) because the investigation damaged his strata lot.
66. I also find that the strata must reimburse Mr. Lusian any additional amount from the repair and replacement invoices or deductible payments that is for the main bathroom leak investigation or repairs, if any. I am unable to determine that precise amount based on the evidence before me.

### ***Other Claims***

67. Mr. Lusian claims that the strata must reimburse him 2-\$12.50 stop payment fees because of alleged lies and conduct by the property manager that caused the fees to be charged. I find that Mr. Lusian has not proven conduct by the property manager that would make the strata responsible for the stop payment fees. Stop payment fees are charged based on an agreement between a bank and its customer. I dismiss Mr. Lusian's claim to have the strata reimburse his 2-\$12.50 stop payment fees.
68. Mr. Lusian also claims the strata wrongly deducted strata fees twice in January 2021. The strata agrees that \$460.39 in strata fees were deducted by automatic withdrawal on January 1, 2021, and then the strata received another identical payment from the proceeds of sale of unit 302. The strata says it issued a cheque to Mr. Lusian's lawyer on January 15, 2021, refunding the excess strata fees. However, the strata says that

as of March 2, 2021, the cheque had not been cashed. Based on the strata's reconciliation document filed in evidence, I agree that the strata refunded the excess fees, to Mr. Lusian's then lawyer. I find that any remaining issue about those fees is between Mr. Lusian and his lawyer.

69. Mr. Lusian also claims \$392.68 for prorated strata fees for January 2021, which I understand is the month that he sold unit 302. I agree with the strata that the claim for prorated strata fees is something to be resolved between Mr. Lusian and the new purchaser through their statement of adjustments. I dismiss the claim against the strata.

## **CRT FEES, EXPENSES AND INTEREST**

70. 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. There was divided success here. I therefore order the strata to reimburse Mr. Lusian for half of his \$225 CRT fees, which is \$112.50, and \$6 which is half his \$12 registered mail dispute-related expense.

71. The *Court Order Interest Act* (COIA) applies to the CRT. Mr. Lusian is entitled to pre-judgement interest on the \$1,111.05 from December 4, 2020, the day that Mr. Lusian paid part of the strata's repair expense demand, to the date of this decision. This equals \$3.05.

## **ORDERS**

72. I order that, within 30 days of the date of this decision, the strata pay Mr. Lusian a total of \$1,232.60, broken down as:

- a. \$1,111.05 in repair expenses that are the strata's responsibility,
- b. \$112.50 in CRT fees, and
- c. \$6 for dispute-related expenses, and,

d. \$3.05 in pre-judgement interest under the COIA.

73. The strata is also entitled to post-judgement interest under the COIA.

74. 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.

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Julie K. Gibson, Tribunal Member