



Civil Resolution Tribunal

Date Issued: September 29, 2021

File: ST-2021-002705

Type: Strata

Civil Resolution Tribunal

Indexed as: *Malcolm v. The Owners, Strata Plan NW 2068*, 2021 BCCRT 1048

B E T W E E N :

BRUCE MALCOLM

APPLICANT

A N D :

The Owners, Strata Plan NW 2068

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Trisha Apland

INTRODUCTION

1. This dispute is about water leaks in a strata lot.
2. The applicant, Bruce Malcolm, owns a penthouse strata lot in the respondent strata corporation, The Owners, Strata Plan NW 2068. In January 2021, Mr. Malcolm reported a leak and water damage in his linen closet. He says water was entering

from around an emergency exhaust vent on the strata's roof and that the strata's contractor temporarily repaired it with sealant. He says there was a second "minor" leak in the envelope on the building's North face, which also damaged his strata lot. Mr. Malcolm alleges the strata's contractor demolished parts of his strata lot to investigate the leaks and the strata should restore it to paint ready condition. He also alleges the strata intends to improperly charge him for the emergency remediation and restoration costs and they are not his responsibility to pay.

3. Mr. Malcolm seeks the following orders against the strata:
 - a. restore his strata lot to "paint ready" condition,
 - b. permanently repair the roof and envelope leaks, and
 - c. "remove and prevent any related charge backs".
4. The strata says it fully addressed the leaks and never charged back its costs to Mr. Malcolm's strata lot account. It says it is not responsible to restore Mr. Malcolm's strata lot to paint ready condition. It says Mr. Malcolm is responsible to pay for his own strata lot repairs and asks that I dismiss Mr. Malcolm's claims.
5. Mr. Malcolm is self-represented. The strata is represented by a strata council member.
6. For the reasons that follow, I dismiss Mr. Malcolm's claims.

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). CRTA section 2 says the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between the dispute's parties that will likely continue after the CRT process has ended.

8. CRTA section 39 says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. 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 in the interests of justice and fairness.
9. CRTA section 42 says the CRT may accept as evidence information that it considers relevant, necessary and appropriate, even where the information would not be admissible in court. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
10. As a preliminary issue, the strata says Mr. Malcolm is essentially seeking declaratory orders that the CRT has no authority to grant. Section 123 says that in resolving a strata property 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. I find Mr. Malcolm is primarily seeking orders that the strata do or not do something, which I find I have authority to grant under CRTA section 123.

ISSUES

11. The issues in this dispute are:
 - a. Must the strata restore any part of Mr. Malcolm's strata lot to paint ready condition?
 - b. Should I order the strata to perform further repairs to the roof or the building envelope?
 - c. Should I order the strata to remove or not charge back certain costs to Mr. Malcolm?

EVIDENCE AND ANALYSIS

12. In a civil proceeding such as this, as the applicant Mr. Malcolm must prove his claim on a balance of probabilities (this means “more likely than not”). I have read all the submissions and evidence provided but refer only to what is necessary to explain and give context to my decision.
13. The strata plan filed in the Land Title Office (LTO) shows the strata was created in 1983 under the former *Condominium Act*. The strata continues to exist under the *Strata Property Act* (SPA).
14. The strata filed a complete set of amended bylaws in the LTO on July 12, 2012, with some later amendments.
15. Bylaw 1.2(1) says an owner must repair and maintain the owner’s strata lot, except for repair and maintenance that is the responsibility of the strata corporation under the bylaws.
16. Bylaw 2.1 says the strata must repair and maintain the common property and common assets. This bylaw is consistent with SPA section 72, which also requires the strata to repair and maintain common property.

Exhaust Ventilation System Leak

17. On January 30, 2021, Mr. Malcolm emailed the strata property manager about a “serious leak” in his strata lot and asked the property manager to find the leak’s source. He described moist and soft drywall in his linen closet with signs of mould. Mr. Malcolm suggested the emergency exhaust ventilation shaft on the roof might be stuck open allowing water to enter his closet. He asked that the strata replace the drywall and bring his strata lot to “paint ready” condition.
18. On February 2, 2020, the property manager contacted Platinum Pro-Claim Restoration Services (Platinum) and asked it to send a “crew to attend for emergency”. The property manager emailed Mr. Malcolm and told him it had dispatched a contractor to determine the leak’s source and assess and dry out the

affected areas. The property manager did not give any direction to replace drywall or restore the strata lot as Mr. Malcolm requested. The parties' emails show Platinum attended to the leak that same day.

19. Neither party submitted a report or statement from Platinum about this January 2021 leak. The strata submitted a February 18, 2021 water damage incident report from Platinum but the report says nothing about the linen closet or the exhaust ventilation system. I find the Platinum report is about a separate building envelope leak incident. I discuss that separate incident below.
20. The strata submitted a statement from its strata council president who states their investigations showed the water ingress was from damage to the "exhaust connector". They say the equipment is regularly maintained by the strata twice annually but it is possible it was damaged by "a one off occasion, likely by strong wind". The president does not explain how the strata fixed the leak.
21. Mr. Malcolm says the leak in his linen closet was caused by a failed seal around the ventilation system's roof top exhaust vent. He says Platinum sprayed "temporary" sealant to stop the leak. He submitted a photograph that shows something black that looks like sealant around a joint connecting the vent on the roof. As the strata does not specifically refute that Platinum applied sealant to stop the leak, I accept this was the leak repair. So, I find the leak into Mr. Malcolm's linen closet was likely caused by a failed seal on the rooftop connector vent. The exact cause of the failed seal is not before me.
22. The parties agree the exhaust vent is common property and the strata is responsible to repair and maintain it under bylaw 2.1 and the SPA. They dispute who should pay to repair Mr. Malcolm's linen closet.

Must the strata restore Mr. Malcolm's linen closet to paint ready condition

23. Mr. Malcolm says Platinum insisted they had to remove a large section of drywall, as well as the ceiling and baseboards to source the leak. He says by the time Platinum was finished it had removed the entire rear of the closet as well as the ceiling and the

baseboards. The photographs show his linen closet with the shelves and drywall removed. There is a large rectangle cut out of the linen closet ceiling.

24. Mr. Malcolm relies on the prior non-binding CRT decision, *Lorenz v. Strata Plan NW 2001*, 2017 BCCRT 65 and argues the strata should pay to restore his linen closet to “paint ready” condition. In *Lorenz*, a common property “shower diverter” failed causing water damage in a strata building. The strata directed its contractor to open up the applicant’s strata lot bathroom wall so its council members could investigate potentially hazardous materials impacting the rest of the building and repair the common property diverter. The CRT Vice Chair ordered the strata to repair the diverter and return the owner’s bathroom to paint ready condition because the work formed part of its common property repair. However, she held that the strata was not an insurer and the owner was responsible for his own strata lot repairs. I came to a similar conclusion in *Manak v. The Owners, Strata Plan KAS 2116*, 2020 BCCRT 567 where I ordered the strata to repair intentional damage it caused to an owner’s strata lot but not any of the other strata lot damage.
25. The strata says it only had Platinum attend to the leak and did not cause intentional damage. It says any extra work Platinum might have performed inside Mr. Malcolm’s strata lot was done at Mr. Malcolm’s own direction and he is fully responsible for his own strata lot repairs.
26. I find the strata asked Platinum to do more than simply attend to the leak. Based on the property manager’s February 2, 2020 email to Mr. Malcolm, I find it likely directed Platinum to investigate the leak source as well. However, I find the evidence does not establish that the strata, or Platinum on behalf of the strata, demolished Mr. Malcolm’s strata lot to investigate the leak or repair common property. So, I find this dispute is different from the 2 CRT decisions cited.
27. First, there is no evidence, such as an invoice, report, or witness statement from Platinum corroborating Mr. Malcolm’s assertion that it removed parts of the linen closet. Second, Mr. Malcolm does not sufficiently explain why Platinum would have opened his walls or ceiling to investigate the leak when his email said the water was

probably entering from an open vent on the roof. Third, the evidence does not establish that Platinum had to access the vent within Mr. Malcolm's linen closet to investigate the leak source and the repair was done outside. Fourth, Mr. Malcolm's email to the property manager described water damaged drywall inside his linen closet that he wanted replaced. So, I find it possible the drywall and other parts of his linen closet were removed for strata lot repairs and not by Platinum to investigate the common property leak. For these reasons, I find Mr. Malcolm has not proven that it was Platinum who demolished his linen closet or that it demolished it to investigate the leak.

28. A strata corporation may be liable to an owner for strata lot damage caused by a failure of the common property if the strata corporation was negligent in repairing or maintaining it: *Basic v. Strata Plan LMS 0304*, 2011 BCCA 231 and *Kayne v. LMS 2374*, 2013 BCSC 51. However, a strata corporation is not an insurer.
29. To prove negligence, Mr. Malcolm must show that the strata owed him a duty of care, the strata breached the standard of care, he sustained damage, and the damage was caused by the strata's breach: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, at paragraph 33.
30. The standard a strata corporation must meet in performing its repair and maintenance duties is one of reasonableness: *Wright v. The Owners, Strata Plan #205*, 1996 CanLII 2460 (BCSC) and *Weir v. Strata Plan NW 17*, 2010 BCSC 784. The standard is not perfection.
31. I find the strata clearly owed Mr. Malcolm a duty of care to repair and maintain the ventilation equipment because it was part of the common property. The strata's unrefuted evidence is that it maintained the equipment bi-annually. Mr. Malcolm did not provide any evidence that the strata's maintenance was unreasonable or that a lack of reasonable maintenance caused the leak. I find the strata responded almost immediately after Mr. Malcolm notified it about the leak and it reasonably hired a contractor to stop the water from entering his strata lot. I find the strata is not negligent.

32. I find the strata has no obligation to repair Mr. Malcolm's strata lot linen closet under its bylaws or the SPA. As it is not negligent, I find the strata is also not responsible to repair Mr. Malcolm's strata lot even though the leak originated from the common property. I find Mr. Malcolm is responsible for his own strata lot repairs under bylaw 1.2. So, I decline to order the strata to restore the linen closet to paint ready condition.

Should I order the strata to further repair the roof?

33. Mr. Malcolm says Platinum told him the sealant it sprayed on the roof top vent was temporary and it needed a more permanent repair. Without explanation, Mr. Malcolm provided no statement from Platinum to corroborate its alleged advice. I find the question about whether the strata's repair is only a temporary fix is technical and beyond the knowledge of an ordinary person and requires expert evidence: *Bergen v. Guliker*, 2015 BCCA 283. There is no such expert evidence here. I find Mr. Malcolm's own non-expert opinion lacks impartiality and is not persuasive.
34. As there is no evidence of any further leak in Mr. Malcolm's linen closet, I find the strata's repair likely stopped the leak. I find Mr. Malcolm has not proven that any further roof repairs are required. So, I decline to order the strata take further action to repair the roof. I dismiss this aspect of Mr. Malcolm's claim.
35. In his submissions, Mr. Malcolm requests an additional order that the strata repair the emergency evacuation shaft behind his linen closet wall. Mr. Malcolm did not request this remedy nor raise this specific issue in the Dispute Notice. Mr. Malcolm submitted a video of the strata's evacuation shaft that shows an alleged defect (a hole) in the shaft's gyprock wall. I find the alleged defect issue is likely technical and the strata did not have a fair opportunity to respond to this new issue. So, I find it would be procedurally unfair to the strata to decide this issue as part of this dispute. I decline to resolve Mr. Malcolm's new claim for an order that the strata repair the alleged defect.

Building Envelope

36. The parties agree the strata had commenced building envelope repairs in 2020. Neither party provided any reports, documents, or statements from the strata's contractors providing the status of these repairs. I understand some repairs were ongoing at the time the parties made their submissions.
37. Mr. Malcolm's undisputed evidence is that his strata lot experienced a leak along the North face of the building due to failed caulking in the building envelope near his balcony. This leak was separate from the leak discussed above, which affected the linen closet. Mr. Malcolm provided photograph evidence of water damage inside his strata lot, plus a plan of his strata lot layout. The photographs show water marks on his living room floors. I accept a building envelope failure caused this water damage as it is not disputed. It is also reasonably supported by Platinum's February 18, 2021 report that provides an estimate for the strata lot emergency and remediation work. The report describes water damaged living room floors and walls. It says the "suspected cause of loss" is exterior flashing on the balcony. I note the strata was already repairing issues with the building envelope around this time.

Must the strata replace Mr. Malcolm's baseboards and restore his strata lot to paint ready condition?

38. Mr. Malcolm says the strata should restore his strata lot to paint ready condition because Platinum allegedly destroyed his baseboards while investigating the leak. Mr. Malcolm provided photographs of his strata lot with the baseboards removed. However, I find the photographs are insufficient to prove Platinum destroyed or removed the baseboards. While the February report states that Platinum suspected the leak was from the exterior flashing, the report does not say Platinum investigated the source or removed the baseboards. There is no statement from Platinum or any independent witness confirming that it did so. So, I find insufficient evidence that Platinum, on behalf of the strata, caused any intentional strata lot damage to investigate the leak or at all.

39. Mr. Malcolm says that the strata had not maintained the building envelope in 8 years despite multiple depreciation and engineering reports identifying the issue. I infer Mr. Malcolm means a lack of maintenance led to the leak in the exterior flashing, which is not proven.
40. It is common knowledge that a building envelope project can be large and costly. This strata complex has an office and residential tower with 146 strata lots. Mr. Malcolm submitted no evidence that 8 years was an unreasonable length of time to perform the building envelope remediation. There is also no evidence to find the strata delayed in its building envelope maintenance or repairs, acted against professional advice, or that its actions fell below the standard of care. I find the strata is not negligent. So, I find the strata is not responsible to repair the damage inside Mr. Malcolm's strata lot or restore it to paint ready condition.
41. I find Mr. Malcolm is responsible for his own strata lot repairs under the bylaws and so I dismiss this aspect of his claim.

Should I order the strata to further repair the building envelope?

42. Next, Mr. Malcolm argues that there might still be an active leak and asks for an order that the strata "permanently" repair the building envelope. The strata says it completed the building envelope work for the building's top floor and there is no ongoing leak.
43. Mr. Malcolm agrees the strata's contractor performed some caulking or other repairs on the building's North face after February 2021. However, Mr. Malcolm asserts that the contractor made no effort and did not caulk the relevant area. Mr. Malcolm submitted a May 2021 photograph of the North face area that depicts the outside of the strata building near a balcony. I cannot tell from examining the photograph that the leak was not adequately caulked or otherwise not repaired. I find such an assessment would require expert opinion evidence and there is none here.
44. Mr. Malcolm says the owner of the strata lot below his noted "continuing water ingress into his ceiling". He says this suggests that the leak was not actually repaired and

might be ongoing. There is no correspondence or witness statement from this neighbour in evidence. Mr. Malcolm does not specifically allege the leak continued in his own strata lot after the North face repairs and there is no evidence of an active leak in either strata lot. I am not persuaded there is a continuing leak by Mr. Malcolm's description about what his neighbour might have told him. I find Mr. Malcolm's assertion about an ongoing leak is not corroborated with evidence.

45. I find Mr. Malcolm has not proven that there is an ongoing leak into his strata lot. So, I find no basis to make a specific order that the strata further repair the building envelope. I dismiss this aspect of Mr. Malcolm's claim.

Charge Back

46. On February 22, 2021, the strata wrote to Mr. Malcolm and told him he would be responsible to pay for repairs to his own strata lot. It enclosed Platinum's February 18, 2021 report and notified him his strata lot would be charged the estimated amounts. Mr. Malcolm says he asked Platinum to remove its drying equipment after he learned about its estimated costs. I find Platinum likely left with its equipment and did not perform any further work in Mr. Malcolm's strata lot.
47. The strata says that despite its February letter it did not charge Mr. Malcolm for Platinum's work, which I accept. Mr. Malcolm's strata lot account from January 1, 2020 to June 24, 2021 shows no charge back.
48. Mr. Malcolm says he believes the strata still intends to charge him \$7,500 to \$8,500 for Platinum's services and asks for an order that the strata not charge him anything.
49. Mr. Malcolm relies on the CRT decision in *Chen v. The Owners, Strata Plan NW 308*, 2021 BCCRT 495 where a Vice Chair ordered the strata to remove chargebacks it applied to an owner's strata lot account to repair a leak.
50. This dispute is different from *Chen* primarily because the strata here never directly charged Mr. Malcolm's strata lot account for Platinum's work nor for any expense related to drying his strata lot or the leak repairs. I find Mr. Malcolm's concern about

what the strata might do in the future is speculative. As I find no live charge back issue, I dismiss Mr. Malcolm's claim about it.

CRT FEES AND EXPENSES

51. 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. I see no reason in this case not to follow that general rule. As Mr. Malcolm is the unsuccessful party, I dismiss his claim for paid CRT fees. The strata did not pay any CRT fees and neither party claimed dispute related expenses.
52. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against Mr. Malcolm.

ORDER

53. I dismiss Mr. Malcolm's claims and this dispute.

Trisha Apland, Tribunal Member