



Civil Resolution Tribunal

Date Issued: December 30, 2021

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Type: Strata

Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan NW 2499 v. McConkey*,
2021 BCCRT 1347

B E T W E E N :

The Owners, Strata Plan NW 2499

APPLICANT

A N D :

LISA McCONKEY

RESPONDENT

A N D :

The Owners, Strata Plan NW 2499

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

J. Garth Cambrey, Vice Chair

INTRODUCTION

1. This strata property dispute is about recovery of a strata corporation's insurance deductible.
2. The respondent, Lisa McConkey, owns a strata lot (SL10 or 312) in the applicant strata corporation, The Owners, Strata Plan NW 2499 (strata).
3. The strata says Ms. McConkey failed to repair her kitchen sink faucet on 2 occasions and that the faucet caused damage to common property and the strata lot below (SL5 or 207). In correspondence provided in evidence the strata claims Ms. McConkey was negligent and, under bylaw 2(3), must reimburse the strata for the \$2,500 the strata paid as an insurance deductible under its policy. The strata seeks an order that Ms. McConkey pay it this amount.
4. Ms. McConkey neither confirms nor denies her kitchen sink faucet leaked. However, she relies on her insurer that says she was not negligent because she had the kitchen faucet repaired after the first leak and replaced after the second leak. By way of counterclaim, Ms. McConkey seeks an order that the strata "remove or reverse" the \$2,500 insurance deductible it charged her.
5. The strata is represented by a strata council member. Ms. McConkey represents herself.
6. For the reasons that follow, I dismiss the strata's claim against Ms. McConkey and allow Ms. McConkey's counterclaim.

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. 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.

ISSUE

11. The sole issue in this dispute is whether Ms. McConkey must reimburse the strata \$2,500 for an insurance deductible.

BACKGROUND, REASONS AND ANALYSIS

12. As applicant in a civil proceeding such as this, the strata must prove its claims on a balance of probabilities, meaning "more likely than not". I have read all the submissions and evidence provided by the parties, but refer only to information I find relevant to give context for my decision.
13. The strata is a residential strata corporation consisting of 12 strata lots in a single 3-storey building. It was created in August 2012 under the *Condominium Act* and exists

under the *Strata Property Act* (SPA). The strata plan shows Ms. McConkey's SL10 is located on the third floor of the building directly above SL5.

14. Land Title Office (LTO) documents show the strata filed a complete new set of bylaws on October 21, 2009 that repealed and replaced all previous bylaws. I infer the Standard Bylaws do not apply. Further bylaw amendments were filed with the LTO in October 2012 and April 2018, but I find these amendments are not relevant to this dispute.

15. The 2009 bylaws include bylaw 2. Bylaw 2(3), on which the strata relies, reads in its entirety:

An owner causing damage to the common property or any strata lot due to negligence will be held financially responsible for the repair of the damage and cause thereof. If a claim is made under the Strata Corporation insurance, the owner/owners of the strata lot/lot responsible for the damage will be charged back the amount of the deductible for each claim.

16. There is no disagreement between the parties on the basic facts. I summarize them as follows:

- a. On September 28, 2020, a leak occurred in 207 likely from 312.
- b. On September 29, 2020, Ms. McConkey had a plumber repair her kitchen faucet. She provided a plumber's receipt that describes the cartridge in the kitchen faucet was tightened.
- c. On November 1, 2020, a second leak occurred in 207, also most likely from 312.
- d. On November 4, 2020, Ms. McConkey had a plumber investigate the possibility of a leak and on November 9, 2020, the same plumbing company replaced the kitchen faucet in 312.

- e. The strata filed an insurance claim on its policy which applied to both leaks. On February 11, 2021, the strata wrote to Ms. McConkey demanding payment of the \$2,500 deductible citing bylaw 2(3) noted above.
- f. On March 13 and April 15, 2021, the strata again demanded payment under bylaw 2(3) on the basis of negligence “from an allegedly improperly installed kitchen tap”.

The Law on Insurance Deductible Chargebacks

- 17. SPA section 158(1) says that payment of an insurance deductible under a strata corporation’s insurance is a common expense of the strata corporation. Section 158(2) says a strata corporation can recover an insurance deductible from an owner if the owner is responsible for the loss or damage that gave rise to the claim.
- 18. In *Strata Plan LMS 2446 v. Morrison*, 2011 BCPC 519, the BC Provincial Court was asked to determine if section 158(2) was affected by the strata’s bylaws. In particular, if a strata corporation’s bylaws required the strata corporation to show the strata lot owner was negligent, as opposed to “responsible” for a loss under section 158(2) of the SPA before being able to recover its insurance deductible. The trial judge determined that the strata’s bylaw, which required a strata lot owner to indemnify the strata for expense, maintenance, repair or replacement rendered necessary “by the owner’s act, omission, negligence or carelessness” should be “read collectively and import a standard of negligence” (see paragraph 11). The court held that an owner was not responsible for expenses flowing from a water leak from a toilet in the owner’s strata lot as there was no negligence involved.
- 19. *Morrison* was also considered by the CRT in *The Owners, Strata Plan BCS 1589 v. Nacht et al*, 2017 BCCRT 88 and upheld by the B.C. Supreme Court on appeal in *The Owners, Strata Plan BCS 1589 v. Nacht*, 2019 BCSC 1785 (Nacht). The Supreme Court’s decision in *Nacht* is binding on me. Although the strata’s bylaw 2(3) in this dispute does not contain identical language considered by the courts, I find the use of the word “negligence” in bylaw 2(3) clearly means an owner must be negligent in order for the strata to be entitled to charge back an insurance deductible under the

bylaw, as was found in *Morrison* and *Nacht*. I find that the strata, by adopting bylaw 2(3) clearly intended to set out the more stringent standard of negligence, rather than the standard of responsibility contained in SPA section 158(2).

20. Based on *Nacht*, I find the language used in bylaw 2(3) imports a negligence standard to section 158(2) of the SPA.
21. As a result, in order for the owner to be responsible for the \$2,500 deductible, I must find Ms. McConkey was negligent in causing damage that is covered by the strata's insurance policy.

Negligence

22. To prove negligence, the strata must show that the owner owed it a duty of care, the owner breached the standard of care, the strata sustained damage, and the damage was caused by the owner's breach (See *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, at paragraph 33). It has not done so.
23. I find Ms. McConkey owed the strata a duty not to allow leaks to occur from within her strata lot.
24. Ms. McConkey submits that she was not negligent about repairing a leaking kitchen faucet because she had the faucet professionally inspected after being notified of both leaks into 207, and replaced the faucet after the second leak. I agree. By having the kitchen faucet repaired after the first leak, I find Ms. McConkey acted reasonably by taking steps to have the alleged source of the leak repaired. It was not until 2 months later that the second leak occurred. I do not find there was reason for Ms. McConkey to have known of or suspected an issue with her kitchen faucet, so I find she was not negligent.
25. Further, there is no direct evidence that the kitchen faucet in 312 actually caused the leaks into 207. In the strata's February 11, 2021 letter to Ms. McConkey, it stated "the water escape appeared to be from the same source, your kitchen" (my emphasis). There are no reports from insurance adjusters or contractors, including Ms.

McConkey's plumbers, that confirm the source of the leak was the kitchen faucet in 312.

26. Based on my findings above, I find the strata is not entitled to charge Ms. McConkey its \$2,500 insurance deductible.
27. For these reasons, I dismiss the strata's claim and allow Ms. McConkey's claim. I order the strata to reverse the \$2,500 deductible it charged Ms. McConkey.

CRT FEES AND EXPENSES

28. 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 not to follow this general rule. Ms. McConkey is the successful party in this dispute. She paid CRT fees of \$125 but did not claim dispute-related expenses. Therefore, I order the strata to reimburse Ms. McConkey \$125.
29. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against Ms. McConkey.

ORDERS

30. Within 30 days of the date of this decision, I order the strata to:
 - a. reverse the \$2,500 insurance deductible it charged Ms. McConkey, and
 - b. pay Ms. McConkey \$125 for CRT fees.
31. I dismiss the strata's claims.
32. Ms. McConkey is entitled to post-judgement interest under the *Court Order Interest Act*, for CRT fees.

33. 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.

J. Garth Cambrey, Vice Chair