



Civil Resolution Tribunal

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Type: Strata

Civil Resolution Tribunal

Indexed as: *Neckel v. The Owners, Strata Plan BCS 2464*, 2022 BCCRT 114

B E T W E E N :

BARBARA KAREN NECKEL

APPLICANT

A N D :

The Owners, Strata Plan BCS 2464

RESPONDENT

A N D :

BARBARA KAREN NECKEL

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

Leah Volkers

INTRODUCTION

1. This is a strata property dispute about payment of an insurance deductible.
2. The applicant and respondent by counterclaim, Barbara Karen Neckel, owns a strata lot in the respondent strata corporation, The Owners, Strata Plan BCS 2464 (strata). The strata is the applicant in the counterclaim. Ms. Neckel is self-represented, and the strata is represented by a strata council member.
3. Ms. Neckel says the strata has improperly charged her strata lot \$10,000 for an insurance deductible relating to a May 1, 2020 leak from a water line connected to her toilet. She relies on advice she received from her insurer that she is not responsible under the strata's bylaws because she was not negligent. She asks for orders that the strata reverse the \$10,000 deductible from her strata lot account, remove the lien placed on her strata lot, and reverse the unexplained additional \$116.81 charged to her strata lot account.
4. The strata says Ms. Neckel is responsible for water leakage from inside her strata lot. The strata says Ms. Neckel must take responsibility for maintaining her strata lot's "internal equipment" in good repair and inspected on a regular basis. The strata says it intended to place a lien on Ms. Neckel's strata lot, but never actually did so. The strata also says the \$116.81 charge to Ms. Neckel's strata lot account was for "regular common element fees". The strata counterclaims for the \$10,000 deductible.

JURISDICTION AND PROCEDURE

5. 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.

6. 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.
7. 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.
8. Under CRTA section 123, 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.

Evidence

9. The strata initially submitted evidence that I was unable to view, which consisted of an excel spreadsheet with a summary of the water leak repair costs. At my request, CRT staff asked the strata to resubmit the evidence in a different format. The strata resubmitted the excel spreadsheet and three other documents, which I find were duplicate documents already in evidence. The CRT provided Ms. Neckel with the opportunity to review the resubmitted evidence and make submissions on it, but she did not provide any further submissions. I find there is no prejudice in admitting this resubmitted evidence and where relevant I discuss it below.

ISSUES

10. The issues in this dispute are:
 - a. Who is responsible to pay the strata's \$10,000 insurance deductible,
 - b. Did the strata place a lien on Ms. Neckel's strata lot for the \$10,000 insurance deductible, and if so, must the strata remove it, and

- c. Must the strata reverse the additional \$116.81 charged to Ms. Neckel's strata lot account?

EVIDENCE AND ANALYSIS

11. In a civil proceeding such as this, the applicant, Ms. Neckel, bears the burden of proving her claims, and the strata must prove its counterclaim, on a balance of probabilities (meaning "more likely than not").
12. I have read all the submissions and evidence provided but refer only to information I find relevant to provide context for my decision.
13. The strata is a residential strata corporation created in August 2007. It consists of 71 town-house style strata lots in several low-rise buildings. Ms. Neckel owns strata lot 27, which is a 3-storey strata lot including the basement.
14. The strata filed consolidated bylaws in the Land Title Office (LTO) on August 1, 2017. I find these are the applicable bylaws to this dispute. The strata also filed bylaw amendments in the LTO on July 24, 2018, but I find none of those amendments are relevant to this dispute. Finally, the strata also filed bylaw amendments in the LTO on March 3, 2021, which included an amendment to bylaw 3. While I find bylaw 3 is relevant to this dispute, I find the March 3, 2021 amendment to bylaw 3 is not applicable to this dispute because it was filed with the LTO after the water leak occurred and after the repairs were completed.
15. Bylaw 2.1 states that an owner is responsible to repair and maintain their strata lot, except for repair and maintenance that is the responsibility of the strata under the bylaws.
16. Bylaw 8 states, in part, that the strata is responsible to repair and maintain common property and assets, and certain parts of a strata lot that do not apply here.

17. Bylaw 3.3 addresses responsibility for insurance deductibles. As noted above, bylaw 3.3 was amended on March 3, 2021, after the May 1, 2021 water leak.
18. At the time of the May 1, 2020 water leak, bylaw 3.3 stated that an owner “shall indemnify and save harmless the [strata] from the expense, including insurance deductible, or any maintenance, repair, or replacement rendered necessary to the common, Limited Common Property or to any strata lot resulting from an owner’s wilful act or negligence...but only to the extent that such expense is not recovered from proceeds of insurance carried by the [strata]” (my emphasis added).
19. The following facts are not disputed:
 - a. On or about May 1, 2020, a toilet leaked in Ms. Neckel’s strata lot.
 - b. The toilet and water line connecting to the toilet are Ms. Neckel’s property, and are not the strata’s common property or common asset.
 - c. Water damage occurred to Ms. Neckel’s strata lot, which the strata repaired.

Who is responsible to pay the \$10,000 insurance deductible?

20. As noted, Ms. Neckel says the strata’s bylaws require her to be negligent before the strata can charge her for the insurance deductible it paid. She asks that the \$10,000 insurance deductible charge be reversed from her strata lot account. Conversely, the strata says Ms. Neckel is responsible for any water leakage that started inside her strata lot and counterclaims for payment of the \$10,000 insurance deductible.
21. The evidence indicates that the strata started an insurance claim and completed the water leak repairs to Ms. Neckel’s strata lot around September 2020. A September 30, 2020 repair invoice from Canstar Restorations indicates that Ms. Neckel’s strata lot repairs totalled \$16,796.12. This amount does not include emergency repairs paid for by the strata, which are not at issue in this dispute. The strata’s summary of repair costs indicates that the strata charged the \$10,000 insurance deductible to Ms. Neckel’s strata lot account.

22. SPA section 158(2) says the strata can sue an owner in order to recover the deductible portion of an insurance claim if the owner is responsible for the loss or damage that gave rise to the claim.
23. The BC Supreme Court has found that a strata lot owner is liable for a strata corporation's insurance deductible under SPA section 158(2) if the owner is "responsible for" the loss giving rise to the strata corporation's insurance claim. The court held that a strata lot owner is responsible for what occurs within their strata lot and that a strata corporation may look to such an owner to recover its insurance deductible where the owner's responsibility for the loss falls short of negligence. See *Wawanesa Mutual Insurance Co. v. Keiran*, 2007 BCSC 727 and *The Owners, Strata Plan LMS 2835 v. Mari*, 2007 BCSC 740. In other words, section 158(2) only requires an owner to be "responsible for" the loss in order for the strata to recover the deductible.
24. However, the BC Supreme Court did not consider the strata corporation bylaws in either *Keiran* or *Mari*. In *The Owners, Strata Plan BCS 1589 v. Nacht*, 2019 BCSC 1785, the court found a strata corporation's bylaws could import a negligence standard with respect to a strata corporation's ability to charge an insurance deductible to an owner.
25. As noted, at the time of the water leak and subsequent repairs in this dispute, bylaw 3.3 said that an owner was required to indemnify the strata where a repair is rendered necessary resulting from an owner's wilful act or negligence. Given the language in bylaw 3.3 at the time, I agree with Ms. Neckel that she is only responsible to pay the insurance deductible if she was negligent, or conducted a wilful act that caused the water leak. The strata has not alleged that any wilful act caused the water leak.
26. The parties do not dispute the May 1, 2020 water leak originated from Ms. Neckel's toilet. However, the parties dispute whether the toilet's water line itself was cracked and leaking, or whether the coupling nut connecting the water line to the toilet was loose, causing the leak. In either case, I find nothing turns on the precise location of the leak. I say this because regardless of whether it was the water line itself or the

coupling nut that caused the leak, I find the only issue is whether Mr. Neckel was negligent in maintaining and monitoring her toilet.

27. The strata says the proper maintenance and monitoring of the toilet and water line is Ms. Neckel's responsibility, not the strata's. I infer that the strata argues Ms. Neckel was negligent in monitoring her toilet and water line. As the party alleging negligence, the strata bears the burden of proving Ms. Neckel was negligent.
28. To prove negligence, the strata must show that Ms. Neckel owed it a duty of care, that she breached the standard of care, the strata sustained damage, and the damage was caused by her breach (See *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, at paragraph 33). For the following reasons, I find the evidence before me does not establish that Ms. Neckel was negligent.
29. The strata submitted a statement from a strata council member, JR. JR says they attended at Ms. Neckel's strata lot and observed the "coupling nut from the supply tube which connects to the shut off valve was loosened and water was leaking from it". JR said they shut off the water supply to stop the leak. JR also said that they did not know why this nut would be loose, and said it was not a common plumbing problem in 50 years as a plumber and gas fitter and plumbing instructor. They also said that it was not a "burst pipe" that caused the leak. I accept JR's evidence that he observed a coupling nut was loose, and that water was leaking from the supply tube.
30. However, I find JR's opinion evidence is inadmissible because it does not comply with the CRT rules for expert evidence. CRT rule 8.3 says an expert must state their qualifications in writing in order to provide expert evidence, and I need to be satisfied that they have the sufficient education, training or experience to provide their expert opinion. It also states that the role of an expert giving evidence is to assist the CRT and not advocate for any side or party in a dispute. Although JR stated in passing that they had worked as plumber and gas fitting instructor, I find JR provided their statement as a strata council member. Without a further statement of their qualifications in writing, I am not satisfied that JR has sufficient education, training or experience to provide expert evidence on the water leak.

31. Even if I did accept JR's opinion evidence, I would place little weight on it. First, because I find that as a strata council member, JR is not a neutral party in this dispute. Second, I also find JR's opinion that there was no reason for the coupling nut to be loose, and that it was the loose coupling nut that caused the leak rather than the water line itself is not helpful. I say this because JR does not say how the coupling nut became loose, or that Ms. Neckel failed to tighten the coupling nut. Even if that was the case, the strata did not provide any evidence that failing to do so would fall below the standard of care.
32. Ms. Neckel submitted an emailed statement from S. I infer S is a Hauzer Plumbing & Heating Ltd. employee. S said that Ms. Neckel hired them to repair the cause of water damage. S said they found a leak coming from the toilet supply hose. S said they replaced the toilet supply hose and tested it to check for leaks. I accept S's evidence that they observed water coming from the toilet supply hose, and replaced the toilet supply hose when they attended at Ms. Neckel's strata lot. I find this evidence is consistent with JR's evidence about the water leak's general location. However, S did not specifically say where on the water line the leak occurred.
33. I find both S's evidence and JR's evidence confirms that they observed water leaking from somewhere on the water line connecting to the toilet. I find I cannot rely on either S's evidence or JR's evidence to determine the water leak's exact origin. However, as noted above, I find that it does not matter whether the leak came from the water line itself, or the loose coupling nut attaching the water line to the toilet. I say this because I find that the available evidence does not show that Ms. Neckel was negligent in maintaining and monitoring her toilet, including both the water line and the coupling nut.
34. The strata did not provide any other evidence, expert or otherwise, to suggest that Ms. Neckel failed to monitor or maintain her toilet, or that her failure to do so resulted in the water leak.
35. The strata also says that Ms. Neckel failed mitigate the water damage because there was no attempt to turn off "a simple valve" that would have stopped the slow leak "in

minutes". The burden of proof is on the party alleging failure to mitigate. I find the strata has not met this burden. The strata acknowledges that Ms. Neckel called and reported the water leak right away. The evidence before me does not support a finding that turning off a valve sooner would have reduced the extent of water damage to Ms. Neckel's strata lot. So, I reject the strata's mitigation argument.

36. I find that there is insufficient evidence to show the water leak was a result of Ms. Neckel's negligence. Therefore, I find Ms. Neckel is not responsible under bylaw 3.3 to pay the \$10,000 insurance deductible, and the strata must reverse this charge from Ms. Neckel's strata lot account. I also dismiss the strata's counterclaim for payment of the \$10,000 insurance deductible.

Alleged lien

37. In her dispute application, Ms. Neckel alleged that the strata placed a lien on her strata lot. As noted, the strata says that a strata council member told Ms. Neckel the strata planned to place a lien on her strata lot, but says it never actually did so.
38. Ms. Neckel says she has no proof that the strata placed a lien on her strata lot. She also says her bank confirmed there is no lien on the strata lot. A land title search for Ms. Neckel's strata lot is in evidence. It is dated March 8, 2021, the same date Ms. Neckel filed her application for dispute resolution with the CRT. It does not show any strata lien. There is no other evidence that the strata placed a lien on Ms. Neckel's strata lot. So, I find Ms. Neckel has not proved the strata has, in fact, done so. Given this, I decline to make any orders about this alleged lien.

Must the strata reverse the additional \$116.81 charged to Ms. Neckel's strata lot account?

39. It is undisputed that the strata charged \$116.81 to Ms. Neckel's strata lot account.
40. In her dispute application, Ms. Neckel alleged that the strata placed this additional \$116.81 charge on her strata lot account without explanation, and questioned whether the charge was for the legal cost of filing the alleged lien, or interest on the \$10,000 insurance deductible charged to her strata lot account. However, I note that

Ms. Neckel did not address this \$116.81 charge in her submissions, and neither party provide any documentary evidence of this charged amount.

41. The strata says the \$116.81 charge is for “regular common elements fees”, and was one of the “catch-up” installment payments for “CEF”. The strata says this was required due to a “the covid delayed [annual general meeting]”, and says Ms. Neckel has paid it already. Ms. Neckel did not dispute this or otherwise address this charge in her reply submissions. I do not know what CEF payments are, but I infer the strata argues that this charge was for increased strata fees approved at an AGM. However, there is no documentary evidence to support either party’s position on the \$116.81 charge.
42. As the applicant Ms. Neckel has the burden of proving her claims. I find she has not proved that the strata placed the \$116.81 charge on her strata lot account without explanation or that the strata was otherwise not entitled to charge her this amount. So, I dismiss this aspect of Ms. Neckel’s claim and I decline to order the strata to reverse the \$116.81 charge.

CRT FEES AND EXPENSES

43. 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. Ms. Neckel is the successful party, but she did not pay any CRT fees or claim any dispute-related expenses, so I award none. As the strata was unsuccessful in its counterclaim, I find it is not entitled to any reimbursement.
44. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against Ms. Neckel.

ORDERS

45. I order that the strata immediately reverse the \$10,000 insurance deductible charged to Ms. Neckel’s strata lot account.

46. I dismiss the strata's counterclaim.

47. 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.

Leah Volkers, Tribunal Member