



Civil Resolution Tribunal

Date Issued: February 28, 2022

File: ST-2021-004933

Type: Strata

Civil Resolution Tribunal

Indexed as: *Bray v. The Owners, Strata Plan K726, 2022 BCCRT 210*

B E T W E E N :

DEBORAH BRAY

APPLICANT

A N D :

The Owners, Strata Plan K726

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Kate Campbell, Vice Chair

INTRODUCTION

1. This dispute is about flooding in a bare land strata corporation.
2. The applicant, Deborah Bray, owns strata lot 40 (SL40) in the respondent strata corporation, The Owners, Strata Plan K726 (strata).

3. Ms. Bray says that since at least 2005, SL40, it has flooded during periods of intense rain. She says the strata has made a few attempts to mitigate the flooding, including hiring a paving company to built a low asphalt berm diagonally across the common property (CP) road, but these efforts have not provided a permanent solution.
4. As remedies in this dispute, Ms. Bray asks for an order that the strata consult with a drainage engineering firm about a permanent solution, and an order that the strata reimburse her \$174.45 for “flood bags” used to divert water.
5. In her dispute application, Ms. Bray also asked for an order that the strata pay a paving company to “work with” her to raise the height of the curb bordering SL40. However, in her subsequent submissions, Ms. Bray withdrew that request, which she says would have been a “stop-gap measure” pending a properly engineered design. I have therefore not addressed that remedy request in this decision.
6. The strata says the CRT should dismiss Ms. Bray’s claims. It says it has made reasonable and sufficient efforts to address drainage issues, which have been effective. The strata also denies that SL40 has any ongoing or current problems with water runoff or flooding, and says Ms. Bray has not proven that water from CP causes the alleged flooding.
7. Ms. Bray is self-represented in this dispute. The strata is represented by a strata council member.
8. For the reasons set out below, I dismiss Ms. Bray’s claims.

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). 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.

10. 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.
11. 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.
12. 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.
13. CRT documents incorrectly show the name of the respondent as The Owners, Strata Plan, KAS 726. Based on section 2 of the SPA, the correct legal name of the strata is The Owners, Strata Plan K726. Given the parties operated on the basis that the correct name of the strata was used in their documents and submissions, I have exercised my discretion under section 61 to direct the use of the strata's correct legal name in these proceedings. So, I have amended the strata's name above.
14. Ms. Bray submitted late evidence in this dispute. The strata was given the opportunity to review the late evidence and provided submissions on it. Given the CRT's mandate that includes flexibility, I admit the late evidence and where relevant I have considered it in this decision.

ISSUES

15. The issues in this dispute are:

- a. Are Ms. Bray's claims barred under the *Limitation Act* (LA)?
- b. If not, has the strata met its duty under the *Strata Property Act* (SPA) and bylaws to address drainage and flooding?
- c. What remedies are appropriate, if any?

REASONS AND ANALYSIS

16. In a civil claim like this one, Ms. Bray, as applicant, must prove her claims on a balance of probabilities (meaning "more likely than not"). I have read all the parties' evidence and submissions, but below I only refer to what is necessary to explain my decision.
17. The strata was created in 1988, and consists of 50 bare land strata lots. Ms. Bray's SL40 is centrally located within the strata plan, and is bordered on 2 sides by a CP road. The road runs along the south and east boundaries of SL40. The driveway for SL40 is located on the southeast corner of the property, near the bend in the road. The photographs and submissions provided by Ms. Bray indicate that this bend is where she says excess rainwater accumulates and runs onto SL40.
18. The strata filed consolidated bylaws with the Land Title Office (LTO) in 2013. I find these are the bylaws applicable to this dispute. The strata filed subsequent bylaw amendments with the LTO, which I find are not relevant.

Limitation Act

19. The strata says Ms. Bray's claims are barred under the LA, since she says she has known about the alleged flooding since at least 2005. For the following reasons, I find Ms. Bray's claims are not barred. Given that I find Ms. Bray has not proven the merits of her claim, nothing turns on this. However, I include my reasons on the limitation period for thoroughness.

20. The LA applies to CRT disputes. The LA sets out limitation periods, which are specific time limits for pursuing claims. If the time limit expires, the right to bring the claim disappears, and the claim must be dismissed.
21. Section 6 of the LA says that the basic limitation period is 2 years, and that a claim may not be started more than 2 years after the day on which it is discovered. A claim is “discovered” when the applicant knew or reasonably should have known they had a claim against the respondent and a court or tribunal proceeding was an appropriate remedy.
22. As noted above, Ms. Bray’s claim in this dispute is about the strata’s alleged failure to prevent water runoff from the CP road. I find that this case turns on SPA section 72, which says that a strata corporation must repair and maintain CP. Since this duty to repair and maintain CP is ongoing, I find the claim is not barred by the LA.
23. In her submissions, Ms. Bray alleges structural damage to her home’s sunroom due to water runoff, but she did not request building repairs or compensation for building damage as part of this dispute. Therefore, I make no findings in this decision about whether those claims would be subject to any limitation period.

Has the strata met its duties to address drainage and flooding?

24. In this dispute, Ms. Bray says the strata has failed to address excess water runoff from the road onto SL40. Ms. Bray asks for orders that the strata consult with an engineer with expertise in drainage, and reimburse her \$174.45 for the cost of flood bags she has used to heighten the curb near her driveway.
25. For the following reasons, I find Ms. Bray has not proven her claims.
26. As previously noted, under SPA section 72, the strata must repair and maintain CP. Similarly, bylaw 9 says the strata must repair and maintain all CP that is not limited common property. The strata plan shows no limited common property, and there is no dispute in this case that the CP road bordering SL40 is CP. Therefore, I find it is the strata’s responsibility to repair and maintain the road, and the related drainage and curbs located on CP.

27. In her initial submissions, Ms. Bray argued that "regular flooding" occurs on SL40 due to insufficient drainage infrastructure on the CP road. Ms. Bray submitted the flooding on SL40 happens only during intense rainfalls, which may occur once or twice a year, or sometimes less than once a year.
28. The strata does not dispute its obligation to repair and maintain the road, including its drainage. However, the strata says it has met its repair and maintenance duties, in part by having a paving contractor work on the road in May 2021.
29. In its response submission, the strata argued that Ms. Bray has not proved that any flooding occurred on SL40 since it made changes in May 2021, including extending and raising the height of the berm and curb on the road, and removing a portion of an old speed bump. The strata says these changes were effective, and that no further work is required. The strata also argued that Ms. Bray has not proved that the alleged flooding was caused by runoff from CP, as opposed to runoff from a neighbouring strata lot, which it says would not be the strata's responsibility.
30. In her final reply submission, Ms. Bray did not directly contest the strata's assertion that she has not proved actual flooding onto SL40 since the May 2021 changes to the road. Rather, she argued that climate change will likely make extreme rainfall events more frequent and severe. She also disputes the strata's assertion that council president PW viewed the road outside SL40 during a November 2021 rainstorm.
31. Ms. Bray argues that the strata needs to get an engineer's opinion about how to divert water away from SL40. She says that if rainstorms occur in the fall or winter, the ground will saturate and water will take longer to drain from the soil. She says the new berm now directs water toward her side yard and the concrete foundation wall that supports her wood frame house. She says that water-saturated soil around the foundation can exert pressure on the foundation walls and can eventually result in cracks or "heaving of the structure".
32. I find Ms. Bray's submission about likely future damage unpersuasive. Ms. Bray's arguments about the potential effects of climate change are speculative. Also, Ms. Bray is not a qualified expert in climate science, engineering, building technology, or

any similar field. I find that water drainage, roadwork, and their effect on buildings and land, are matters outside ordinary knowledge and therefore require expert evidence (*Bergen v. Guliker*, 2015 BCCA 283). Ms. Bray argues the strata's May 2021 repairs were insufficient, but she not provided any expert evidence to prove this assertion.

33. As noted above, as the applicant in this dispute, Ms. Bray bears the burden of proving her claims. I find she has not proven that the strata has failed in its duty to repair and maintain the CP road and related drainage. Ms. Bray provided a photograph from August 2021 showing water on the road in front of SL40. Although some pooled water abuts the flood bags, the photo does not show that the water was above the level of the curb, or that water would have overflowed onto SL40 or caused property damaged if not for the flood bags.
34. Other photos Ms. Bray provided show wet ground, but do not show the overall amount of water, or its source. I find that the fact that SL40 is wet does not prove there is actual or likely property damage. Some of these photos appear to show water as a result of direct rainfall onto SL40, which is not the strata's responsibility.
35. Ms. Bray argues that the May 2021 work was insufficient. However, for the following reasons, I find she has not proven this assertion.
36. The standard a strata corporation must meet in performing its duty to repair and maintain CP under SPA section 72 is reasonableness: *Wright v. The Owners, Strata Plan #205*, 1996 CanLII 2460 (BC SC) and *Weir v. Strata Plan NW 17*, 2010 BCSC 784. A strata corporation is not held to a standard of perfection in its maintenance and repair obligations. The strata has a duty to make only those repairs that are reasonable in the circumstances: *Wright*.
37. As stated in *Weir* at paragraphs 23 to 32, when performing its duty to repair and maintain common property, a strata corporation must act reasonably in the circumstances. The starting point for the analysis should be deference to a decision made by the strata council as approved by the owners. In carrying out its duty, 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. When deciding whether and how to repair CP, the strata has discretion to approve “good, better or best” solutions to any given problem. The court (or tribunal) 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: *Weir* at paragraphs 28 and 29.

38. Ms. Bray argues that in doing the May 2021 roadwork, the strata failed to fully carry out all the work the strata initially proposed in correspondence with Ms. Bray’s lawyer. The strata does not dispute that point, but says that the work the strata did in May 2021 was sufficient, and that Ms. Bray has not proven otherwise.
39. I agree that the strata was not required to perform all roadwork that was discussed in legal correspondence, or in the August 9, 2020 report of the strata’s sub-committee on rainwater runoff. Rather, based on the reasoning in *Weir* and *Wright*, I find it was reasonable in the circumstances for the strata to have its contractor do some work, and see if it was effective. In making this finding, I again note that Ms. Bray has not provided expert evidence that proves her property has been damaged or is likely to be damaged by rainwater runoff. While Ms. Bray says water has damaged her sunroom, I find she has not proven that damage was caused by runoff from the CP road. I also find she has not proven that the May 2021 roadwork will not prevent future flooding.
40. On August 28, 2019, Ms. Bray obtained a report from engineer Forrest Klotzbach. In the report, Mr. Klotzbach said he visited the site in July 2019, and observed that little drainage had been installed when the strata was developed, and that a dry well installed to catch water appeared to be nearly filled with debris. He also said that after the strata was built, homeowners had installed asphalt curbs in many locations, which prevented road runoff from soaking into the shoulder as intended. Mr. Klotzbach said that instead, water from the road now concentrated at the low point near SL38 and SL40. He said the problem was worsened by a speed bump placed across the road near SL38, which directed runoff away from the drywell and towards the low point in front of SL40.

41. I find it significant that in his report, Mr. Klotzbach did not document any damage to SL40, including the sunroom damaged Ms. Bray alleges.
42. Mr. Klotzbach said the ideal solution would be to design and install an enclosed drainage system with catch basins and dry wells, which could cost up to \$100,000. Alternatively, he suggested having a vacuum truck clean out the existing dry well, and removing a portion of the speed bump.
43. An invoice in evidence shows that the strata hired a vacuum truck to clean out the dry well in September 2019. The strata also hired a paving company in May 2021 to extend and raise the height of the berm and curb, and remove a portion of the old speed bump.
44. Ms. Bray submits the work was insufficient. She says the strata should have adjusted SL38's driveway, raised the road's camber by resurfacing the road, and increased the curb height along the east side of SL40. She also says the berm is still not high enough, and now extends towards SL40, which will direct water to her home's front porch. Ms. Bray also says the paving contractor incorrectly used cold pour rather than hot pour asphalt, which will disintegrate too quickly.
45. Ms. Bray has not provided expert evidence to support her assertions about how the roadwork should have been done, and what materials should have been used. I find this work is consistent with Mr. Klotzbach's recommendations, and also includes additional modifications. There is no expert evidence before me to establish that the roadwork was incorrectly performed. There is also no expert evidence to prove Ms. Bray's assertion that her house is likely to be damaged.
46. The evidence shows that both parties contacted an engineering firm, True Consulting (True) around July 2020. A July 13, 2020 letter to the strata signed by True's engineer and an engineer-in-training says that in order to address the drainage issues identified during their site visit, True would require a topographic survey to identify high and low points, and then could investigate and identify feasible solutions. True suggested the survey and recommendations would cost approximately \$5,000.

47. Again, based on the reasoning in *Weir and Wright*, I find the strata was not obligated to obtain expert recommendations from True or another engineering firm. While that may have been ideal, I find that given the cost, it was reasonable for the strata to proceed with the May 2021 roadwork as it did.
48. In summary, I find Ms. Bray has not proved actual property damage, and has not provided expert evidence to prove that the September 2019 dry well cleanout and the May 2021 roadwork were insufficient to prevent water runoff from the road from damaging SL40. Therefore, I find Ms. Bray has not met the burden of proving her claim that the strata failed to meet its duty to repair and maintain CP. I dismiss her claims.

CRT FEES AND EXPENSES

49. Under CRTA section 49 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.
50. The strata is the successful party. It paid no CRT fees and claims no dispute-related expenses. I therefore do not award them to any party.
51. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against Ms. Bray.

ORDER

52. I dismiss Ms. Bray's claims and this dispute.

Kate Campbell, Vice Chair