Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan VR1183 v. Smith*, 2022 BCCRT 649

B E T W E E N :

The Owners, Strata Plan VR1183

APPLICANT

A N D :

BRIAN SMITH

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Richard McAndrew

INTRODUCTION

1. This dispute is about water damage resulting from a toilet overflow in a strata corporation. The respondent, Brian Smith, owns strata lot 47 (SL47) in the applicant strata corporation, The Owners, Strata Plan VR1183 (strata). The strata lot was rented to a tenant when water escaped from SL47's toilet on July 14, 2019, damaging SL47 and other strata lots. In the Dispute Notice, the strata claimed reimbursement

of $22,855.68 in water remediation expenses. However, the strata has reduced its claim to reimbursement of the $15,000 insurance deductible in its submissions.

2. Brian Smith denies the strata's claim. They say that they are not responsible for the water damage expenses because the blockage causing the overflow occurred in the building's shared sanitary stack, outside of their strata lot.

3. The strata is represented by a strata council member. Brian Smith is represented by an insurance representative.

JURISDICTION AND PROCEDURE

4. 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.

5. 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.

6. 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.

7. 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.

ISSUE

8. The issue in this dispute is whether Brian Smith must reimburse the strata's $15,000 insurance deductible.

EVIDENCE AND ANALYSIS

9. In a civil proceeding like this one, the strata, as the applicant, must prove its claims on a balance of probabilities (meaning more likely than not). I have read all the parties' submissions and evidence but refer only to the evidence and argument that I find relevant to provide context for my decision.

10. The strata was created in 1982 and includes 141 residential strata lots in a 9-floor building. SL47 is on the 4th floor, above another strata lot.

11. The strata filed consolidated bylaws with the Land Title Office (LTO) in March 2018. The strata has filed further bylaw amendments at the LTO which are not relevant to this dispute. I discuss the specific bylaws relevant to this dispute in my reasons below.

12. The following is not disputed:

    - Water escaped from SL47's toilet on July 14, 2019, damaging SL47 and the strata lot directly below it. The strata also claims that the water leak damaged common property, which Brian Smith does not dispute. However, the repair evidence provided only shows water damage to the strata lots.

    - Altrex Plumbing and Heating Inc. (Altrex) provided plumbing service to SL47's toilet on July 16, 2019, unclogging a blockage.

    - The strata's insurance provider hired Phoenix Restorations Ltd. (Phoenix) to provide water remediation services to SL47 and the strata lot below.

- Phoenix issued an October 4, 2019 invoice for $13,793.02 and a November 11, 2014 invoice for $9,414.41 for water remediation at SL47 and the strata lot below.
- The strata's insurance deductible for water damage claims is $15,000.
- Brian Smith has not reimbursed the strata's $15,000 insurance deductible.

13. As set out in prior CRT decisions such as *The Owners, Strata Plan K 407 v. Kelly*, 2019 BCCRT 780 and *Chen v. The Owners, Strata Plan NW 308*, 2021 BCCRT 495, a strata lot owner is not responsible for the cost of leak repairs and related restoration services unless they:

    a. agreed to pay them,

    b. are responsible under the *Strata Property Act* (SPA) or bylaws, or

    c. were negligent.

14. Prior CRT decisions are not binding, but I find the reasoning in these decisions persuasive, and rely on it here.

15. The strata argues that Brian Smith breached bylaws 5.2, 5.3 and 5.4. Bylaw 5.2 says that a resident or visitor must not cause damage, other than reasonable wear and tear, to the common property or those parts of a strata lot which the strata must repair and maintain under the bylaws or insure under section 149 of the Act. Bylaw 5.3 says an owner is responsible for any damage caused by residents or residents' visitors. I discuss bylaw 5.4 below. SPA section 133 says the strata can recover expenses that were necessarily incurred to remedy a bylaw contravention. Further, the strata also claims that Brian Smith is responsible for the leak repair expenses because they created a nuisance and they were negligent.

16. The strata also relies on SPA section 158(2), which I will consider first. This section says 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." Whether a strata corporation can

recover against an owner under section 158(2) "must be determined by all the provisions of the applicable statute and the bylaws, rules and regulations of the strata corporation" (*The Owners Strata Corporation VR2673 v. Comissiona et al*, 2000 BCSC 1240).

17. 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."

18. *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. The Supreme Court's decision in *Nacht* is binding on me.

19. Here, strata bylaw 5.4.a says an owner must reimburse expenses and insurance deductibles relating to maintenance, repair, additional insurance, or replacement, rendered necessary to common property or strata lots caused by the "act, omission, negligence or carelessness" of the owners or their tenants to the extent that such expense is not reimbursed from insurance proceeds. Bylaw 5.4.a's wording is nearly identical to the relevant bylaws in *Morrison* and *Nacht*. I find that bylaw 5.4.a's use of the phrase "act, omission, negligence or carelessness" clearly means an owner must be negligent in order for the strata to recover an insurance deductible under the bylaw, as was found in *Morrison* and *Nacht*. I find that the strata, by adopting bylaw 5.4.a clearly intended to set out the more stringent standard of negligence, rather than the standard of responsibility contained in SPA section 158(2).

20. In light of bylaw 5.4.a, I find that if either Brian Smith or their tenant negligently caused the water leak, then Brian Smith, as the named owner in this dispute, is responsible for the damage under section 158(2) of the SPA. Following *Nacht*, I find that in order to recover the $15,000 deductible, the strata must prove that either Brian Smith or their tenant negligently caused or contributed to the water damage.

21. To prove negligence, the strata must show that Brian Smith owed it a duty of care, they breached the standard of care, that the strata sustained damage, and that the damage was caused by the breach (*Mustapha v. Culligan of Canada Ltd*., 2008 SCC 27). For the reasons that follow, I find that the strata has met its burden on a balance of probabilities.

22. I accept that, as SL47's owner, Brian Smith owed the strata a duty of care. I also accept that the applicable standard of care is reasonableness (*Burris v. Stone et al*, 2019 BCCRT 886). There is no dispute that water escaped from SL47's toilet on July 14, 2019. The issue is whether Brian Smith or their tenant breached the standard of care and, if so, whether that caused the damage.

23. The strata says that Brian Smith has admitted, in a March 18, 2021 email they sent to an insurance adjuster, that their tenant negligently let the water leak occur. Brian Smith wrote that, "The tenant at that time, clearly and accidentally plugged the toilet and then flushed and left for the weekend, unaware that the drainage pipe was blocked and the toilet was overflowing, resulting in substantial damage to several condos."

24. Brian Smith now says, through their insurance representative, that their own email message was speculative because they do not live at the strata lot and they were not present when the incident occurred. Further, Brian Smith says that they cannot now confirm that their tenant plugged the toilet or that the tenant left the toilet unattended without ensuring that the toilet had drained properly. Brian Smith also now says that their own email does not explain the basis for their email statements.

25. However, Brian Smith does not explain why they had written that the tenant had "clearly" plugged the toilet and let it overflow unattended in the email if Brian Smith

did not know that, as they now argue. I find that Brian Smith's use of the word "clearly" in the March 18, 2021 email suggests that they were making a factual assertion rather than speculating. Further, Brian Smith does not provide their own statement, or a statement from the tenant, describing their version of the event or explaining why their current submissions differ from the earlier email.

26. When a party fails to provide relevant evidence without a reasonable explanation, the CRT may draw an adverse inference against them. An adverse inference is when a decision maker, like the CRT, assumes that a party failed to provide evidence because the missing evidence would not have supported their case. Since Brian Smith is arguing that their own email is speculative, I would expect Brian Smith to explain the basis for their email's content's and describe their current understanding of the events. In the absence of a statement from Brian Smith or the tenant, and without providing an explanation for their absence, I find that it is appropriate to draw an adverse inference in these circumstances.

27. Based on the above, I find that Brian Smith's March 18, 2021 email was an admission that the toilet became clogged and overflowed after their tenant flushed the toilet. Further, I find that Brian Smith admitted that their tenant left the toilet unattended without confirming that the toilet drained properly. Since these statements are admitted, I accept them as accurate.

28. The BC Provincial Court discussed the standard of care in using a toilet in a multi-unit building in *Morrison*, cited above. In that case, the court said that owners are expected to monitor whether the plumbing fixtures within their strata lot are operating properly, and where they fail to do so, they are negligent. More specifically, the court said the owner in that case needed to ensure that each time after flushing, the waste cleared properly from the bowl and the tank and bowl refilled safely and the water from the tank into the bowl shut off appropriately. In *Morrison,* the strata lot owner was found to be negligent after their toilet overflowed from the bowl and caused damage.

29. The facts here are similar to those in *Morrison.* I find that on July 14, 2019, the toilet was within Brian Smith's tenant's control. Based on Brian Smith's March 18, 2021 email, I find that the tenant flushed the toilet and the tenant was in a position to monitor the toilet's working condition and to ensure that nothing prevented the toilet bowl from emptying or caused it to overflow. I find that the tenant owed a duty to the strata to monitor the toilet's functioning.

30. Brian Smith argues that they were not negligent because the overflow resulted from a blockage outside SL47. Brian Smith relies on Altrex's July 16, 2019 plumbing invoice which says that the toilet blockage was located 6 feet down the toilet drain line, inside the building's shared sanitary stack. Altrex's owner, LG, sent Brian Smith's insurance representative a July 6, 2021 email confirming that they performed this plumbing work and that the blockage was inside the sanitary stack. Since the invoice and email were prepared by a plumbing technician and plumbing contractor's owner, I am satisfied that these documents meet the criteria for expert reports under CRT rule 8.3.

31. In contrast, the strata provided an undated statement from R&M Mechanical Ltd. (R&M). R&M wrote that a blockage could occur in the toilet trap and then get pushed into the sanitary stack by attempts to clear it by plunger or auger. However, I find that R&M's statement does not meet the requirements for expert evidence under CRT rule 8.3 because it does not disclose the author's identity, qualifications, or experience. Further, even if R&M's statement met the requirements for an expert report, I would find it unhelpful because there is no evidence showing that R&M has any knowledge of this specific blockage or the specific plumbing in SL47 or the building. So, I give R&M's opinion very little weight.

32. Based on Altrex's invoice and email, I am satisfied that the blockage occurred in the sanitary stack. SPA section 1(1) says sewage pipes, which I find includes the sanitary stack, are common property if they are used by other strata lots or the common property. Since the sanitary stack's use is shared, I find that the blockage occurred in common property.

33. SPA section 72 and bylaw 22.1.b say that the strata is responsible for repairing and maintaining common property. Since the blockage occurred in the common property sanitary stack, Brian Smith argues that they are not responsible for the repair expenses.

34. However, though the blockage occurred in common property, I find that Brian Smith's tenant breached the standard of care by failing to ensure that the toilet drained properly after they flushed. In *Morrison*, the court held that the owner was negligent by failing to monitor the flushing of the toilet regardless of the source or location of any blockage. As discussed above, Brian's Smith admitted that the toilet overflowed as a result of a clog and that their tenant left the toilet unattended without confirming that the toilet drained properly. I find that the tenant could have readily discovered the toilet was not draining properly and could have stopped the overflow if they had exercised due care. By failing to do so, I find Brian Smith's tenant negligently caused the water damage, even though the blockage occurred outside the strata lot.

35. Based on the above finding, I find that the strata is entitled to recover its insurance deductible from Brian Smith pursuant to SPA section 158(2) for necessary water repair expenses. Based on this, I find it is unnecessary to also determine whether Brian Smith breached strata bylaws or created a nuisance.

36. Brian Smith argues that they are not responsible for the repair expenses for SL47 because they did not authorize the work for their own strata lot. Brian Smith refers to the October 2, 2019 authorization form which was only signed by the strata. However, Brian Smith has not provided a supporting statement explaining their version of events or explaining why they permitted Phoenix to access their strata lot multiple times to perform remediation work if they did not approve it. In the absence of an explanation, I find it likely that Brian Smith allowed repair access because they had authorized Phoenix's work. So, I find that Brian Smith is responsible for Phoenix's necessary repairs to both strata lots pursuant to SPA section 158(2).

37. Phoenix's September 26, 2019 billing itemization shows that it performed flood remediation work and placed humidifiers to both SL47 and the strata lot below,

costing $13,793.02. Phoenix's November 14, 2019 invoice shows that Phoenix charged an additional $9,414.41 for finishing work to both strata lots. Brian Smith does not dispute that Phoenix's repair work was necessary to fix the water damage to SL47 and the strata lot. So, I find that Phoenix performed necessary repairs to the strata lots pursuant to bylaw 5.4.a. Further, since Brian Smith does not dispute the amount of Phoenix's charges or the quality of its work, I find that Phoenix's repair charges are reasonable. Since Phoenix's repair charges exceed the strata's $15,000 insurance deductible, I find that Brian Smith owes the strata reimbursement of the $15,000 deductible under bylaw 5.4.a and SPA 158(2).

38. Based on the above, I find that Brian Smith owes the strata $15,000.

CRT FEES, EXPENSES AND INTEREST

39. 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. I therefore order Brian Smith to reimburse the strata for CRT fees of $225. Neither party claimed reimbursement of dispute-related expenses.

40. The *Court Order Interest Act* (COIA) applies to the CRT. The strata is entitled to prejudgment interest on the $15,000 debt from February 17, 2021, the date of the strata's lawyer's demand for reimbursement, to the date of this decision. This equals $86.86.

41. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against Brian Smith.

ORDERS

42. I order that, within 30 days of this decision, Brian Smith pay the strata a total of $15,311.86, broken down as follows:

    a. $15,000 for the insurance deductible,

b. $86.86 in pre-judgment interest under the COIA, and

c. $225 in CRT fees.

43. The strata is also entitled to post-judgement interest under the COIA, as applicable.

44. 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.

Richard McAndrew, Tribunal Member