



Civil Resolution Tribunal

Date Issued: August 31, 2022

File: ST-2021-006808

Type: Strata

Civil Resolution Tribunal

Indexed as: *Leaman v. The Owners, Strata Plan K 550*, 2022 BCCRT 970

BETWEEN:

GARY LEAMAN

APPLICANT

AND:

The Owners, Strata Plan K 550

RESPONDENT

AND:

JOHN McKIEL

RESPONDENT BY THIRD PARTY CLAIM

REASONS FOR DECISION

Tribunal Member:

J. Garth Cambrey, Vice Chair

INTRODUCTION

1. This strata property dispute concerns alleged negligence of a strata corporation about access to a strata lot to complete repairs.
2. The applicant, Gary Leaman, owns strata lot 16 (SL16 or unit 307) in the respondent strata corporation, The Owners, Strata Plan K 550 (strata).
3. In 2019, the strata hired a third party contractor, John McKiel, doing business as Topwurx Construction, to remove the drywall above the fireplace and the fireplace chimney of SL16 and 13 other strata lots. Mr. McKiel was also responsible to complete drywall repairs after a different contractor installed the new chimneys. I will refer to the work completed by Mr. McKiel as the “fireplace repairs”. Additional work to insulate attic spaces, re-route exhaust vents through new roof vents, and insulate the exhaust vents (attic repairs) was also completed by the strata to various strata lots including SL16, during the same timeframe.
4. Mr. Leaman says SL16 was damaged during the fireplace and attic repairs, and that the damage was caused by the strata’s negligence. He seeks an order for general and unspecified damages from the strata of \$7,826.27 for late completion of the work, inconvenience, and failure to communicate, protect, supervise and control access to SL16 during the fireplace repairs.
5. The strata disagrees with Mr. Leaman and says it was not negligent. It says any damage to SL16 was the responsibility of its contractor, Mr. McKiel, doing business as Topwurks, whom it says controlled access to SL16. In a third party claim, the strata asks that the CRT order Mr. McKiel pay the damages sought by Mr. Leaman. Mr. McKiel denies liability and asks that the strata’s claims against him be dismissed.
6. Mr. Leaman and Mr. McKiel are self-represented. A strata council member represents the strata.
7. As explained below, I find the strata is responsible to pay Mr. Leaman \$500.00 for cleaning expenses for contractors’ access or use of SL16. I dismiss Mr. Leaman’s remaining claims and refuse to resolve the strata’s third party claims.

JURISDICTION AND PROCEDURE

8. 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.
9. Under CRTA section 10, the CRT must refuse to resolve a claim that it considers to be outside the CRT's jurisdiction. A dispute that involves some issues that are outside the CRT's jurisdiction may be amended to remove those issues.
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. CRTA section 61 says the CRT may make any order or give any direction in relation to a tribunal proceeding it thinks necessary to achieve the objects of the tribunal in accordance with its mandate. In particular, the CRT may make such an order on its own initiative, on request by a party, or on recommendation by a case manager (also known as a tribunal facilitator). CRT documents incorrectly show the name of the respondent as The Owners, Strata Plan, KAS550, whereas, based on section 2 of the SPA, the correct legal name of the strata is The Owners, Strata Plan K 550. 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. Accordingly, I have amended the strata's name in the style of cause above.

13. 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.

Preliminary Matter – Late Evidence

14. Mr. Leaman submitted late evidence in the form of photographs of his fireplace in November and December 2019, after the fireplace repairs were allegedly complete. The strata objects to the late evidence simply on the basis it was submitted after the deadline for submitting evidence set by CRT staff had passed. I have reviewed the evidence and find that some of it was submitted in other photographs but based on my conclusion about claimed damages for the fireplace repairs, I find the evidence has no bearing on the outcome of this dispute. Therefore I have admitted it, but given it no weight.

ISSUES

15. The issues in this dispute are:
 - a. Was the strata negligent in completing the fireplace and attic repairs?
 - b. Does the CRT have jurisdiction to decide the strata's third party claim and if so, is Mr. McKiel responsible for Mr. Leaman's claims against the strata?
 - c. Did the strata fail to complete drywall repairs to SL16 as agreed?
 - d. What is an appropriate remedy, if any?

BACKGROUND, REASONS AND ANALYSIS

16. As applicant in a civil proceeding such as this, Mr. Leaman must prove his claims on a balance of probabilities, meaning "more likely than not". The strata must prove its third party claim to the same standard. I have reviewed all the submissions and

evidence provided by the parties, but I refer only to information I find relevant to give context for my decision.

17. The strata plan shows the strata was created in January 1993 under the *Condominium Act* by the amalgamation of 2 other strata corporations, The Owners, Strata Plan K 367 and The Owners, Strata Plan K 467. The strata continues to exist under *Strata Property Act* (SPA) and is comprised of a total of 44 residential and non-residential strata lots.
18. Land Title Office (LTO) documents show the strata filed a complete new set of bylaws with the LTO on April 23, 2014. The LTO documents confirm the Standard Bylaws under the SPA do not apply. A subsequent bylaw amendment was filed in March 2018 that I find does not apply to this dispute. Neither party raised whether the strata's bylaws address access to a strata lot, but I have considered bylaws 7(3), (4) and (5), which I find are the only bylaws that might apply here.
19. Bylaw 7(3) requires owners to provide the strata a key to their strata lot. The bylaw says the key will be kept in a lock box "only accessible by the building manager", in a location "approved and determined" by the strata council. The bylaw also describes how keys will be labelled, and what keys and other information will be stored in the lock box.
20. Bylaw 7(4) says:

Each owner must release the Strata Corporation and its employees, agents and council members from any liability with respect to loss or any other damages whatsoever related to the retention and/or use of keys contemplated by these bylaws. (My emphasis)
21. Bylaw 7(5) says a person authorized by any strata council member may, without notice, gain access to the lock box in the event of an emergency emanating from a strata lot to prevent significant damage or ensure safety.
22. Based on the bylaws' wording, I find they are only intended to address emergency access to strata lots by the strata, which is not the case here. I find it was implied by the April 4, 2019 email discussed below, that the use of owners' keys for access to

strata lots was required for the strata to complete the fireplace and attic repairs if the owner was not able to provide access during the work. Therefore, I find bylaws 7(3), (4), (5) do not apply to this dispute.

23. The following background facts are not contested.
24. The strata is located in a resort area of British Columbia. Most of the strata lot owners do not reside in their strata lots full time, but SL16 is Mr. Leaman's primary residence. He bought SL16 in January 2019.
25. In 2017 the strata began a phased repair program to replace wood burning fireboxes and chimneys in all strata lots. On April 4, 2019, the strata emailed the 14 remaining strata lot owners who had not had this work completed, including Mr. Leaman, that the work was scheduled to begin in April 2019. The email notified owners that the strata had retained John McKiel to complete the fireplace repairs and that new chimneys would be installed by a different contractor. The work started in April 2019 and according to the strata, was complete in October 2019. The attic repairs were not performed by Mr. McKiel and were completed by other contractors retained by the strata. Access to SL16 was required for both repairs.
26. The April 4, 2019 email also advised owners of their responsibilities that included:
 - a. Providing the strata with a new key or access code to their strata lot if it had been "recently changed".
 - b. Preparing the strata lot in advance of the start of construction. Recommendations included removing furniture from the living area to another room in the strata lot, providing a clear path to the fireplace, and installing protective coverings on floors and furniture. The email expressly stated the contractors would not be responsible for post-construction clean up.
 - c. Removing existing facing of the fireplace from the hearth to the ceiling.
 - d. Purchasing a new firebox.
 - e. Finishing of drywall above their fireplace "beyond the 'paint-ready' drywall provided by [Mr. McKiel]".

27. The responsibilities of the strata were also set out in the April 4, 2019 email and included:
- a. Obtaining building permits from the Regional District for the fireplace repairs.
 - b. Removing and disposing of existing chimneys and fireboxes.
 - c. Removing and reinstalling “original” mantels.
 - d. Supplying and installing new chimneys and owner-purchased fireboxes.
 - e. Reinstalling drywall surrounding the fireplace to a “paint-ready condition” once the new chimney and firebox was installed.
28. In submissions, Mr. Leaman says he left for a trip in April 2019 and that May 6, 2019 was “almost a month after my departure”. He also says the strata’s manager, the council member who was coordinating the repairs, and Mr. McKiel were all aware of his absence. These submissions were not disputed so I accept them as accurate.
29. On August 12, 2019, the strata emailed all third floor owners, including Mr. Leaman, advising that access to their strata lots would be required “this summer” to allow for the attic repairs. This is because access to the attic areas is through hatches above limited common property (LCP) decks of third floor strata lots. The notice stated that the contractors would have access to “a designated bathroom in the building” and that the work was expected to be complete by the end of September 2019. The designated bathroom was in unit #310, another strata lot in the building. Owners were also advised that Mr. McKiel would ensure that lights in strata lots were turned off and doors locked after entry.
30. On October 8, 2019, the strata emailed strata owners to advise that the fireplace repairs were complete and asked them to arrange a final inspection of their fireplace with the Regional District building inspector before using it.
31. It is undisputed that Mr. Leaman returned to SL16 from an “extended trip” on November 16, 2019, after the strata alleges the fireplace repairs and attic repairs were completed. He says the drywall repairs around the fireplace were incomplete and that SL16 was in a “shocking condition” when he returned home on November

16, 2019. Mr. Leaman confirms the drywall work in SL16 was complete in a November 30, 2019 email to the strata manager.

32. As requested by Mr. Leaman, a strata council hearing was held on March 9, 2020 to address his concerns, but the council hearing did not resolve the issues. The strata wrote to Mr. Leaman on March 16, 2020 denying his claims for lack of evidence.
33. Mr. Leaman wrote to the strata manager on June 14, 2020 setting out his position on the unauthorized use of SL16 by contractors during his absence. While the correspondence refers to an invoice in the amount of \$7,826.27, a June 14, 2020 invoice provided in evidence totals \$5,251.27. Mr. Leaman did not explain the difference. The invoice in evidence generally includes Mr. Leaman's claimed amounts for late completion of the fireplace repairs, cleaning of SL16, access, use and damage to personal property, and general and unspecified damages. I discuss these in greater detail below when considering an appropriate remedy.
34. The strata later offered Mr. Leaman \$500.00 for cleaning SL16 in a reply email, which he rejected.

Was the strata negligent?

35. In his submissions, Mr. Leaman says the strata "was negligent in managing it's trades, access to and work on [SL16]". He also says the strata "had possession of [SL16] and an over-arching fiduciary responsibility to supervise and protect [SL16]", which it failed to do. In essence, the strata says Mr. McKiel is responsible for Mr. Leaman's claims because he had full control over access to SL16 during the time the fireplace repairs and attic repairs were completed between April and October 2019

36. To prove negligence, Mr. Leaman 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: see *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, at paragraph 33.
37. Did the strata take possession of SL16 during the course of the fireplace and attic repairs as Mr. Leaman suggests? I find the answer is no. It is clear the strata took responsibility to replace the fireplace chimney and complete attic repairs, but I find there is no evidence to prove the strata took possession of SL16. There is no evidence of a written agreement between Mr. Leaman and the strata. In particular, there is no documentary evidence about how access would be provided to the strata lots, including SL16, to allow the repairs to be completed. At the time the fireplace work started in April 2019, the only mention of access was in the April 4, 2019 email that stated owners must provide a strata lot key or access code to the strata. As noted above, I find Mr. Leaman voluntarily provided his strata lot key and access code to the strata on the understanding it would be used to access SL16 to complete the repairs while he was away. I do not find Mr. Leaman intended the strata to take possession of SL16, nor do I find the strata intended to do so.
38. It is well-established that the strata's standard of care for repair and maintenance of common property or common assets is reasonableness. See for example, *Slosar v The Owners, Strata Plan KAS 2846*, 2021 BCSC 1174, at paragraph 66. I find this reasonableness standard applies equally to the fireplace and attic repairs in this dispute even if they might not be to common property or assets of the strata corporation, given the parties agree the strata was responsible for the repairs.
39. While Mr. Leaman says the strata had a fiduciary duty (one that involves trust and confidence) to supervise and protect SL16, I find I do not need to determine if a fiduciary duty existed. I find it sufficient to determine only if the strata had a duty to ensure reasonable security measures for SL16 were in place during the repairs. Given that the strata required access to SL16 to complete the repairs, and knew SL16 would be vacant because of Mr. Leaman's extended trip, I find the strata accepted responsibility to ensure reasonable security measures were in place during the course of the repairs.

40. The strata says that it did not breach any duty it owed to Mr. Leaman. However, it gives no reason other than to say Mr. McKiel was fully responsible for access to SL16 and other strata lots during the fireplace and attic repairs. Mr. McKiel acknowledges that he had access to SL16's keys and access codes, but there is no evidence before me that identifies the terms of his access arrangement with the strata. Based on the overall evidence and submissions, I find on balance, the strata provided Mr. McKiel uncontrolled access to the lock box and individual strata lots, including SL16, from April through October 2019, when the majority of repairs were undertaken. There is no evidence to suggest that the strata monitored the access in any way, so I find this was a breach of the strata's duty to ensure reasonable security measures were in place during the course of the fireplace and attic repairs.
41. The strata also admits that contractors used SL16 in September and October 2019 for bathroom and coffee breaks. Had the strata not breached its duty to control access to SL16, I find it would have been unlikely that some of the damages invoiced by Mr. Leaman would be at issue.
42. For these reasons, I find the strata's breach of its duty to ensure reasonable security measures for SL16 during the course of the fireplace and attic repairs amounts to negligence.

Does the CRT have jurisdiction to decide the strata's third party claim?

43. The strata says that Mr. McKiel was authorized to access all individual strata lots "as required" to complete fireplace and attic repairs, among other matters. As a result, the strata says Mr. McKiel was in control of the "keys and codes" for the individual strata lots, which included SL16. In reply, Mr. McKiel says the strata was at all times controlling the work through its representatives. He says he did not sign any agreement to oversee other contractors, control access or provide security for individual strata lots, but admits to "locking up the site at the end of the day".

44. Just because the dispute involves strata property does not mean it is a strata property dispute under the CRTA. CRTA Section 121 gives the CRT jurisdiction over a claim “in respect of” the SPA and sets out the scope of the CRT’s strata property jurisdiction. Under CRTA section 121(1), the CRT has jurisdiction to decide a claim “in respect of” the SPA.
45. I considered the scope of the CRT’s jurisdiction over strata property disputes. In *Alameer v. Zhang*, 2021 BCCRT 435 and found a claim “in respect of” the SPA is one that could only proceed by relying on the SPA (at paragraph 18).
46. By contrast, CRTA section 118 sets out the CRT’s small claims jurisdiction, and permits the CRT to resolve a claim for damages based in tort, meaning an act or omission that gives rise to an injury or harm to another under civil law, such as negligence, that is not “in respect of” the SPA. Claims under section 118 must have a value of \$5,000 or less.
47. In *Alameer*, I also noted that the British Columbia Court of Appeal in *The Owners, Strata Plan NW 2575 v. Booth*, 2020 BCCA 153, suggested that it may be problematic for the CRT to address tort disputes under its strata property jurisdiction that exceed the \$5,000 threshold under the CRT’s small claims jurisdiction (at paragraph 8):

It is important to note, in light of the nature of the claim, that this appeal does not address the constitutional or statutory jurisdiction of the [CRT] to exclusively, or at all, entertain a claim in tort, at least to this scale which is in excess of the [CRT’s] small claims limit.

48. I find my reasoning in *Alameer* applies to the strata’s third party claim against Mr. McKiel. Given this, and in consideration of the BC Court of Appeal’s comments in *Booth*, I find the strata’s claims in this dispute are not “in respect of” the SPA, and do not fit within the CRT’s strata property jurisdiction as set out in CRTA section 121(1). I also find the strata’s third party claim does not fit in the CRT’s small claims jurisdiction because the amount of the claim exceeds the CRT’s \$5,000 limit.
49. For these reasons, I refuse to resolve the strata’s third party claim against Mr. McKiel under CRTA section 10(1) for lack of jurisdiction.

Did the strata fail to complete drywall repairs to SL16 as agreed?

50. As noted above, Mr. Leaman says the drywall repairs were incomplete when he returned from his trip on November 16, 2019 because the drywall was not finished to a “paint-ready condition” as promised in the strata’s April 4, 2019 email. The strata agrees the drywall was not finished to a “paint-ready condition” but says this is because Mr. Leaman advised he would be installing stone facing over the drywall. The strata says it advised owners individually that if they were going to install other material, such as rock, brick or tile, over the drywall, there was no need to finish the drywall to a “paint-ready condition” because it would not be painted.
51. In an April 23, 2019 email to John McKiel, Mr. Leaman said he would be “doing the hearth and stonework” himself. There is no communication between the strata and Mr. Leaman to suggest the standard of drywall work would be different if owners were installing facing. Mr. Leaman denies being advised of the standard of drywall finish, other than what was stated in the April 4, 2019 email, which was to a “paint-ready condition”.
52. Based on the evidence and submissions on this matter, I find the strata paid Mr. McKiel to complete the drywall to a “paint-ready condition”. The parties agree the work was fully complete by November 30, 2019, which Mr. Leaman says was past the time the strata stated the repairs would be complete. However, I find the strata did not commit to a deadline for completing the work. In its August 12, 2019 email to owners, the strata did state it expected the attic repairs to be complete by the end of September, but there is no evidence before me about a completion date for the fireplace repairs, which I find were substantially complete in October 2019.
53. In any event, I find the strata did complete the drywall repairs in SL16 as agreed and any delay was the result of a misunderstanding or miscommunication about how drywall would be finished. I find the strata finished the drywall repairs as agreed and that the repairs were fully completed in a reasonable timeframe. I do not agree with Mr. Leaman that the repairs were delayed.

What is an appropriate remedy?

54. Mr. Leaman claims damages of \$7,826.27 for “Late completion of Strata’s work/inconvenience. Damage to premises during possession, failure to communicate, protect, supervise and control access, general and unspecified damages”. He did not provide a breakdown of his damages claim, but as mentioned his June 14, 2020 invoice for \$5,251.27 to the strata is in evidence.

55. Given Mr. Leaman has not provided any details of his claim, I will address the items contained in his June 14, 2020 invoice which identifies some his requested damages. Accordingly, I limit Mr. Leaman’s claim to \$5,251.27 and to the items set out in his June 2020 invoice, which are (reproduced as written):

a. Late completion of Strata fireplace work

November 16 – 30, 15 days @ \$150.00 per day	\$2,250.00
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b. From unauthorized access/use of strata lot #16

Excess cleaning 50 hours @ \$25. per hour	\$1,250.00
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Mayfair toilet seat	45.19
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Aksvoll drawer chest	169.49
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Remy Martin XO Cognac	361.59
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Base board repair / painting	75.00
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Utilities	100.00
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<i>c. General / Unspecified Damages</i>	<u>1,000.00</u>
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TOTAL	<u>\$5,251.27</u>
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Late Completion of fireplace repairs

56. Given my finding that the strata did not give a deadline date for completion and completed the fireplace repairs in a reasonable timeframe, I dismiss Mr. Leaman’s \$2,250.00 damages claim for delayed drywall repairs.

Access/use of SL16

57. Based on the timeline discussed above, I find Mr. Leaman was residing in SL16 on April 4, 2019 when the strata emailed affected owners about the fireplace repairs. Therefore, I find Mr. Leaman knew about the responsibilities the strata accepted in relation to the fireplace repairs as contained in the strata's April 4, 2019 email, summarized above. I find he was also aware of his own responsibilities described by the strata in the same email because he took steps to protect SL16 and his personal belongings by doing the things suggested by the strata, such as installing sheet plastic barriers as protective coverings. In particular, all owners were advised in the email that the contractors would not be responsible for post-construction cleanup.
58. There is no evidence that the protective coverings were intentionally damaged, and I accept it is possible that routine work completed during the repairs may have dislodged the plastic barriers as Mr. McKiel mentioned. However, in submissions, the strata acknowledged that Mr. Leaman "deserves to have his unit cleaned and paid for by the Strata due to the use by the workers and the benefit received by the Strata". The strata states this cleaning is outside the post-construction cleaning because no other owner was compensated for post-construction cleaning. I agree. I also agree that compensation based on cleaning costs paid to the owner of #310, who permitted the use of their strata lot for washroom facilities and as a lunch area, is appropriate. For these reasons, I find Mr. Leaman is entitled to \$500.00 for cleaning of SL16, and I order the strata to pay him this amount.
59. As for the rest of the claimed damages for access or use of SL16, Mr. Leaman provided no clear evidence he suffered such losses. Nor did he provide proof of the amounts, such as paid receipts. In submissions, he also notes he repaired what I infer is the Aksvoll drawer chest himself. Therefore, I dismiss his remaining damages claim resulting from access or use of SL16.

General and unspecified damages

60. To establish a claim for damages there must be evidence of a harm or loss. I find Mr. Leaman's claim lacks detail as he has not clearly stated the reasons he claims for

these damages. Without further details, I find I can not make the order requested by Mr. Leaman and I dismiss this aspect of his claim.

CRT FEES AND EXPENSES

61. 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 in this dispute. The strata did not pay CRT fees. Mr. Leaman was partially successful so I find the strata must reimburse him ½ of his \$225.00 CRT fees or \$112.50. Neither party claimed dispute-related expenses, so I order none.
62. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against Mr. Leaman.

ORDERS

63. I refuse to resolve the strata's third party claim for lack of jurisdiction under CRTA section 10.
64. I order the strata, within 30 days of the date of this decision, to pay Mr. Leaman \$612.50, broken down as follows:
- a. \$500.00 for cleaning expenses related to the use of SL16, and
 - b. \$112.50 for CRT fees.
65. Mr. Leaman is entitled to post-judgement interest under the *Court Order Interest Act*, as applicable.
66. I dismiss Mr. Leaman's remaining claims.

67. 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