



Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan LMS 1415 v. Beller, 2022 BCCRT 976*

B E T W E E N :

The Owners, Strata Plan LMS 1415

APPLICANT

A N D :

IVAN BELLER and CATHERINE BELLER

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Kate Campbell, Vice Chair

INTRODUCTION

1. This strata property dispute is about payment for incorporating existing skylights into a new roof.

2. The respondents, Ivan Beller and Catherine Bellers, own a leasehold interest in strata lot 6 (SL6) in the applicant strata corporation, The Owners, Strata Plan LMS 1415 (strata).
3. The parties agree that in 2012, the Bellers obtained the strata's permission and installed skylights in 2 areas of the roof above SL6. In 2020, the strata began replacing the original roofs on the strata buildings. The strata says Ivan Beller signed an agreement to pay \$3,823.75 to have the existing skylights incorporated into the new roof. The strata says the Bellers have only paid \$1,071.00 of this amount. The strata requests an order that the Bellers pay the remaining \$2,752.75.
4. The Bellers say the strata did not complete the work as agreed to in the contract. They say they suffered damages due to this breach, and are not required to pay any further amount. The Bellers also claim \$1,494.41 for dispute-related expenses.
5. The strata is represented by a strata council member. The Bellers are self-represented.
6. For the reasons set out below, I allow the strata's claim in full. I order the Bellers to pay the strata \$2,752.75 for the skylight installation.

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).
8. I have considered whether this dispute fits with the CRT's strata property jurisdiction, which is limited to claims "in respect of" the *Strata Property Act*. To some extent, the parties frame the issue in this dispute as about breach of contract. However, based on the wording of the contract, I find the contract was an agreement about who must pay to replace skylights in the roof above SL6 during a re-roofing project. Based on the strata plan, I find that roof, and therefore the skylights, are common property.

CRTA section 121(1)(a) specifically says the CRT's strata property jurisdiction includes claims about a strata corporation's common property.

9. Also, CRTA section 1(2) says a claim that may be either a CRT small claims dispute or a strata property dispute should be decided as a strata property dispute.
10. For these reasons, I find this dispute is properly decided under the CRT's strata property jurisdiction. However, given my reasons set out below, I find the outcome of this dispute would be the same even if I had decided it under the CRT's small claims jurisdiction.
11. 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.
12. 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 which includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice and fairness.
13. 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.
14. 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.
15. The Bellers provided late evidence and submissions in this dispute. As the strata had the opportunity to respond to this material, I find there is no prejudice in allowing it. I have therefore considered the late evidence and submissions.

ISSUES

16. The issues in this dispute are:

- a. Must the Bellers pay the strata anything more for the skylights?
- b. Must the strata reimburse the Bellers \$1,494.41 for dispute-related expenses?

BACKGROUND

17. In a civil claim like this one, the strata, as applicant, must prove its claim 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.

18. The strata was created 1994. It consists of 32 residential strata lots in 13 townhouse-style buildings. The parties agree that the roof above SL6 is common property, and is the strata's responsibility to repair and maintain.

19. Correspondence in evidence shows that in May 2012, the Bellers requested and received permission for several alterations, including adding skylights to the common property roof. The strata's May 17, 2012 permission letter said:

- The Bellers and future owners of SL6 would be responsible “for the ongoing maintenance of the improvements”.
- The Bellers would be responsible for “all work and costs for the installation, maintenance and liabilities associated with the alterations within [their] strata lot”.
- The Bellers would indemnify the strata from any liability, claim, or damage suffered or incurred as a result of the alterations within SL6.

20. Ivan Beller signed the permission letter on May 22, 2012, so I find it is an alteration agreement. There is nothing in the alteration agreement that specifically addresses what would happen when or if the roof was replaced.

21. The Bellers say the strata provided an updated approval on October 1, 2012, specifically allowing them to install a set of 3 skylights over their living room, as well as 1 skylight over their dining room. That updated approval is not in evidence, but the strata does not dispute it, or say that it addresses the current roof replacement situation. So, I find nothing turns on it.
22. The parties agree that the skylights were installed in November 2012. The evidence, including photos, shows a set of 3 parallel skylights over the living room, and 1 skylight over the dining room.
23. In 2020, the strata began a 15-month project to replace all the original cedar roofing shingles with asphalt shingles. The parties agree, and the engineering evidence shows, that this required removing the cedar shingles and then adding a new layer of plywood decking over the wooden roof strapping. This meant the new roofing assembly was thicker than the original one, and the Bellers' skylights would not fit the same way as in the old roof.
24. Emails from May 2020 indicate that 3 strata lots, including SL6, had skylights installed as alterations after the strata's original construction. The emails show that the 3 skylight owners had negotiated with the strata about how the skylights would be integrated into the re-roofing project, but had not yet reached any agreement. The emails refer to a draft written agreement (not in evidence), which owner DM wrote that no one would sign in its present form. DM signed the May 22, 2020 email on behalf of the 3 skylight owners, including Ivan Beller, and Mr. Beller was copied on the email.
25. On June 15, 2020, the strata's engineering firm, RDH, wrote a letter about the Beller's skylights, addressed to the strata and the strata's roofing contractor NavCo. RDH wrote that it had inspected the SL6 skylights and found they were deck-mounted (attached directly to the roof strapping). RDH said the skylights could not be removed without potentially damaging the interior finishing. RDH wrote that it had consulted with the skylights' manufacturer and prepared instructions to incorporate the existing skylights into the new roof assembly. RDH's letter included detailed instructions with

photos. It also included a technical drawing, dated June 15, 2020, showing how the SL6 skylights should be integrated into the roof.

26. The parties agree that the strata gave a copy of this drawing to Mr. Beller. Mr. Beller says he requested 2 changes, and the strata agrees, although it says he raised one of the changes directly with RDH. I discuss the specific changes below. The evidence shows that RDH revised the June 15, 2020 drawing and prepared a final drawing dated September 8, 2020 (September 8, 2020 RDH drawing).

27. On October 16, 2020, the strata's lawyer wrote to the Bellers, noting their request to keep their existing skylights. The letter stated:

- The strata has a duty to repair and maintain the roof, and a right to determine how to approach that work. The May 2012 alteration agreement did not contemplate replacing the roof. So, one approach would be to remove the skylights.
- The strata would agree to leave the Bellers' skylights in place and integrate them into the new roof only if the Bellers signed an attached written agreement (skylight agreement).
- If the Bellers did not sign the agreement, the strata would not replace the roof on their building in 2020.

28. The evidence shows that Ivan Beller signed the skylight agreement on October 20, 2020. Strata council president WH signed on behalf of the strata on October 25, 2020.

29. In general, the skylight agreement says the Bellers would pay a total of \$3,823.75 for the "Skylight Work". "Skylight Work" is a defined term in the skylight agreement. I discuss that definition and other specific terms of the skylight agreement in my reasons below.

30. The roof work above SL6 was performed in November and December 2020. In March 2021, the strata sent the Bellers an invoice for \$3,823.75, for payment under the skylight agreement.

31. The Bellers paid \$663.25, which the parties agree was for the engineering costs portion of the skylight agreement. Mr. Beller asked for further information about the work performed. After providing some information, the strata sent a demand letter seeking payment of the balance, and then filed this CRT dispute in September 2021.
32. The parties agree that since this dispute was filed, the Bellers paid an additional \$407.75 toward the skylight agreement, leaving an outstanding balance of \$2,752.75.

REASONS AND ANALYSIS

Must the Bellers pay the strata any further amount under the skylight agreement?

33. The strata says the work contemplated in the skylight agreement is complete, and the Bellers' skylights have been incorporated into the new roof with no problems. The strata says the Bellers now have the benefit of the skylight agreement, so they must pay the outstanding balance of \$2,752.75.
34. The Bellers say they do not have to pay any further amount, because the strata's roofing contractor did not do the work as required under the skylight agreement. Specifically, the Bellers say the contractor failed to install infill strips around the 3 living room skylights. They say installing the infill strips was a condition of the skylight agreement, because they were in the September 8, 2020 RDH drawing.
35. Having reviewed the September 8, 2020 RDH drawing, which is specifically incorporated as a term of the skylight agreement, I agree that it does say that infill strips were to be used around each skylight. A text box linked to the exploded diagram states:

NEW ROOF SHEATHING (APPROX 2") TO BE INSTALLED ON TOP OF
FACTORY INSTALLED SKYLIGHT MOUNTING BRACKING AND TIGHT
TO SKYLIGHT ASSEMBLY AND ADJACENT ROOF SHEATHING W/ 1"
EXTENSION ONTO EXISTING ROOF STRAPPING ALL AROUND.

NOTE: NOTCH PLYWOOD INFILL OVER EXISTING SKYLIGHT FLANGE
TO ENSURE PLYWOOD REMAINS FLAT.

36. The evidence shows that after Mr. Beller saw the first draft of RDH's technical drawing dated June 15, 2020, he consulted with his own skylight contractor, Steve Nicholson, and requested 2 changes. First, he requested that the plywood infill be notched to ensure the plywood remains flat. Second, he requested that screws rather than nails be used to attach the infill strips to the existing roof strapping, in order to make it easier to replace the skylights in future if necessary.

37. I find Mr. Beller's 2 requested changes were incorporated into the September 8, 2020 RDH drawing. There are specific notes, in text boxes documenting these 2 instructions on the September 8, 2020 version of the drawing. These instructions do not appear on the June 15, 2020 version of the drawing.

38. I find the evidence about these changes to the RDH drawing is significant, because it shows that Mr. Beller specifically negotiated the details of the RDH drawing, and how the SL6 skylights would be incorporated into the new roof, before signing the skylight agreement.

39. The September 8, 2020 RDH drawing forms part of the skylight agreement, as it is referenced in the skylight agreement, and was attached to it. The skylight agreement says the Bellers would pay \$3,641.67 plus GST for the costs of the "Skylight Work". "Skylight Work" is defined in paragraph E of the agreement as follows:

As part of the Roofing Work, the Existing Skylights will be left in place and incorporated with the new roof assembly (the "Skylight Work").

40. The skylight agreement also states in paragraph 1.2:

Description of Work. A detailed description of the Skylight Work is contained in the revised supplementary instruction issued by RDH Building Science Inc. dated September 8, 2020...

41. The evidence confirms that the skylights over the SL6 living room were not installed exactly as set out in the September 8, 2020 RDH drawing. Rather, in an August 18, 2021 letter to the strata, RDH wrote:

During installation (November 2020) it was determined that a 2" wide plywood infill attached by a single row of fasteners didn't provide enough rigidity. As a secure plywood substrate is required to ensure adequate support for the waterproofing membrane, the infill strip width was increased to 12" wide and fastened with three rows of screws. This revised detail was coordinated through RDH at the time of construction, continues to meet the design intent and allows for easy and effective future skylight renewals.

42. The strata says its council did not know about this design change until after the roof was complete. And the parties agree that the Bellers were not consulted about the change.

43. The strata says the change is immaterial, and there was no fundamental breach of the skylight agreement. The strata says the Bellers must still pay the remaining balance of the skylight agreement because the skylights were installed, the change does not affect the skylights' performance, and the Bellers have suffered no damages. The strata also says that under the law of contracts, if there are any damages in future, the Bellers can make that claim after it arises.

44. For the following reasons, I agree with the strata. I find that although the strata's contractor departed from the September 8, 2020 RDH drawing, the contract was not fundamentally breached, and Bellers have not proven any damages. Therefore, I find the Bellers must pay the strata the remaining \$2,752.75 for the skylight installation.

45. Not every breach of a contract is a fundamental breach. A fundamental breach only occurs where a party fails to fulfill a primary obligation of a contract in a way that deprives the other party of substantially the whole benefit of the contract: see *Hunter Engineering Co. v. Syncrude Canada Ltd.*, 1989 CanLII 129 (SCC). Put another way, a fundamental breach is a breach that destroys the whole purpose of the contract and

makes further performance of the contract impossible: *Bhullar v. Dhanani*, 2008 BCSC 1202.

46. Whether a breach of contract is a fundamental breach matters because there are different remedies available to the wronged party. For most breaches of contract, the wronged party can claim monetary damages against the other party, but the contract remains in force. However, for a fundamental breach, the wronged party can terminate the contract immediately. If the wronged party terminates the contract because of a fundamental breach, they do not have to perform any further terms of the contract, and are relieved from further performance: see *Poole v. Tomenson Saunders Whitehead Ltd.*, 1987 CanLII 2647 (BC CA). So, if the strata fundamentally breached the contract, the Bellers were entitled to terminate the contract, and refuse to pay.

47. I find the breach of contract in this case was not a fundamental breach. First, the Bellers admit they have no problem at all with the dining room skylight's installation. So, 1 of the 3 skylights is fine. The Bellers argue that at least part of the problem with the living room skylight installation is that it will be more difficult and therefore costly to replace the skylights in the future. Even accepting that, I find it is not a fundamental breach of the skylight agreement. Rather, I find the Bellers are not deprived of substantially the whole benefit of the contract, which was to install their existing skylights in the new roof.

48. The Bellers object to the way the living room skylights were installed. However, the skylights are now in place, and there is no suggestion that there is any problem with their appearance or performance (such as leaking). RDH provided an August 18, 2022 letter stating that it had coordinated the changed installation method with the contractor at the time the work was done. RDH identified no problem with the work.

49. The Bellers provided a May 9, 2022 letter from an engineer they hired, AUM Building Science (AUM). AUM's letter says the skylight installation was not completed "in accordance with RDH's instructions" and "the intent of the required work has not been fulfilled". I place limited weight on this letter. I accept that it is expert evidence as contemplated in the CRT's rules. However, I find it less persuasive than RDH's reports

because AUM only reviewed documents, and did not inspect the site. More importantly, AUM provided no reasons to support or explain its opinion. In any event, I find AUM did not identify or explain any actual problem with the skylight installation, such as a potential for leaks, or potential problems with future repairs or replacement.

50. For these reasons, I conclude there was no fundamental breach of the skylight agreement. So, I find the Bellers are bound by it and responsible for the \$2,752.75 balance owed.

Setoff – Damages

51. For a breach of contract that is not a fundamental breach, a wronged party may claim damages arising from the breach. Although they filed no counterclaim, I find the Bellers are essentially claiming damages as a setoff from the strata's payment claim.

52. Damages for breach of contract are generally intended to put the innocent party in the position they would have been in if the contract had been carried out as agreed: see *Water's Edge Resort Ltd. v. Canada (Attorney General)*, 2015 BCCA 319.

53. In this case, I find the Bellers have not proven their setoff claim for damages. As explained above, the engineering reports in evidence do not identify any actual problems with the skylights, such as leaks. The Bellers suggest the skylights will be more difficult and costly to replace in the future, but the August 18, 2022 RDH letter says otherwise. The AUM letter does not explain what future costs or difficulties might arise, if any.

54. The Bellers provided a May 11, 2022 estimate from Steve Nicholson, who I accept is a contractor specializing in skylights. The estimate shows a charge of \$9,003.75 for the following work:

55. Supply and install mat and lab to remove newly placed roof shingles to access newly placed plywood under that was not installed correctly according to roof engineer specs and drawings and additional notes regarding notching the underside of 2" plywood strips adjacent to the 3x1 Velux C08 combi system and S06 skylight. I find this evidence does not prove the Bellers suffered any damages. Steve Nicholson says that

based on photos taken during construction, and before the shingles were placed, the plywood under the roofing shingles was not installed correctly. However, Steve Nicholson's estimate and other evidence before me do not say why the shingles need to be removed and the work remediated.

56. Finally, I note the evidence that shows the strata gave the Bellers the option of replacing their skylights with new ones at the time of the 2020 re-roofing. Unlike the other 2 skylight owners, the Bellers chose not to replace their skylights in 2020. They have provided no evidence of why or when they would need to replace them in the future. So, I find any damages for difficulties with future skylight replacement, or other future skylight problems are speculative and unproven.

57. For these reasons, I find the Bellers are not entitled to any setoff. I order the Bellers to pay the strata \$2,752.75 under the skylight agreement. The strata is also entitled to prejudgment interest under the *Court Order Interest Act* (COIA). I find the interest is payable from March 23, 2021, the date of the strata's invoice. This equals \$15.78.

CRT FEES AND EXPENSES

58. CRT rule 9.5(1) says the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. The strata is the successful party. It paid \$225.00 in CRT fees so I order the Bellers to reimburse that amount.

59. The Bellers claim reimbursement of \$1,494.41 for dispute-related expenses. This includes \$960.75 for AUM's report, \$315.00 for Steve Nicholson's evidence, and \$218.66 for document charges from the strata's management company.

60. I find the Bellers are not entitled to reimbursement of these amounts under CRT rule 9.5(1), as they were not successful in this dispute. Also, under SPA section 36 and *Strata Property Regulation*, the strata is entitled to charge 25 cents per page for requested documents.

61. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses to the Bellers.

ORDERS

62. I order that within 30 days of this decision, the Bellers must pay the strata \$2,993.53, broken down as:

- a. \$2,752.75 as payment under the skylight agreement,
- b. \$15.78 in interest under the COIA, and
- c. \$225 for CRT fees.

63. I dismiss the Bellers' claims. The strata is entitled to postjudgment interest under the COIA, as applicable.

64. Under CRTA section 57, a validated copy of the CRT's order can be enforced through the British Columbia Supreme Court. Under CRTA section 58, 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.

Kate Campbell, Vice Chair