



# Civil Resolution Tribunal

Date Issued: October 31, 2022

File: ST-2022-001600

Type: Strata

Civil Resolution Tribunal

Indexed as: *McCarthy v. The Owners, Strata Plan NW 429*, 2022 BCCRT 1190

BETWEEN:

PAULINE MCCARTHY

**APPLICANT**

AND:

The Owners, Strata Plan NW 429

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Kristin Gardner

## INTRODUCTION

1. This dispute is about who is responsible for mould remediation costs.
2. The applicant, Pauline McCarthy, owns strata lot 149 (SL149) in the respondent strata corporation, The Owners, Strata Plan NW 429 (strata). Ms. McCarthy says she discovered mould on her kitchen walls under her sink and behind her fridge. Ms.

McCarthy says the strata is responsible for the mould growth because her sink repeatedly backed up and flooded her strata lot, and there is a problem with the building's envelope. Ms. McCarthy claims \$5,000 for the cost to fix the mould.

3. The strata denies that it is responsible for the sink backups and that there is any issue with the building's envelope. The strata says the mould was caused by high humidity and a lack of air circulation, as Ms. McCarthy had removed the fan above her stove. The strata says it is not responsible for Ms. McCarthy's mould remediation costs.
4. Ms. McCarthy is represented by a family member, LM, who is not a lawyer. The strata is represented by a strata council member.

## **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.
9. Both parties made submissions and filed evidence about an alleged fire in Ms. McCarthy's strata lot on December 30, 2021. The strata says that this is the "real reason" that Ms. McCarthy temporarily moved out of her strata lot. However, as Ms. McCarthy does not make any claims about payment of temporary accommodation costs due to mould, I find it is unnecessary to address the parties' evidence and submissions on this issue.

## **ISSUES**

10. The issues in this dispute are:
  - a. Is the strata responsible for the mould remediation in Ms. McCarthy's strata lot?
  - b. If so, must the strata pay Ms. McCarthy \$5,000 for repairs, or some other amount?

## **BACKGROUND, EVIDENCE AND ANALYSIS**

11. In a civil proceeding like this one, the applicant Ms. McCarthy must prove her claims on a balance of probabilities (meaning "more likely than not"). I have read all of the parties' evidence and submissions, but I refer only to what I find is necessary to explain my decision.
12. The strata was created in 1975 under the *Strata Titles Act*, and continues under the *Strata Property Act* (SPA). It consists of 408 strata lots in 3 high-rise buildings. The strata plan in evidence shows that SL149 is located on the first floor of the Sardis building, also referred to as the north tower.
13. The strata filed a consolidated set of bylaws at the Land Title Office on March 21, 2002, which I find are the bylaws applicable to this dispute. I find that the various

bylaw amendments filed after 2002 are not relevant. I discuss the bylaws relevant to this dispute below.

14. Ms. McCarthy bought SL149 in 1996. She says that in 2020, her strata lot was damaged by a flood that originated from the strata lot above her. There is no evidence before me about the cause of that flood. The evidence shows that Ms. McCarthy made an insurance claim for the required repairs to her strata lot, which included replacement of flooring in the living room, hallway and kitchen, drywall repairs, kitchen cabinetry replacement, and other associated repairs. However, for reasons that are not entirely clear on the evidence, the repairs were delayed.
15. Ms. McCarthy says that after the initial flood, her kitchen sink continued to back up and overflow. There is no evidence before me about any efforts Ms. McCarthy made to notify the strata or determine the cause of the back ups before mid-2021 when LM says she stepped in to assist Ms. McCarthy.
16. The evidence shows that LM emailed the strata's strata manager on September 23, 2021 to advise the strata that the sink in SL149 was still backing up. LM reported another incident to the strata manager on November 20, 2021, when Ms. McCarthy says she woke up to her find her sink had again overflowed and flooded the kitchen. On both occasions, the strata manager replied that they had forwarded LM's email to the strata. There is no evidence before me that the strata responded to LM's emails.
17. The strata admits that it received LM's emails about the flooding but says Ms. McCarthy should have called a plumber to determine the cause. The strata says in the absence of any evidence that the strata was responsible for the sink backing up, such incidents are the owner's responsibility. I address the parties' responsibilities further below.
18. Ultimately, Ms. McCarthy says her strata lot repairs for the damage from the initial flood originating in the strata lot above her, started on January 17, 2022. The evidence shows that the contractors performing the repairs discovered mould on the walls behind the kitchen cabinets under the sink, and behind the refrigerator on the opposite wall, which is an exterior wall. In a January 20, 2022 email, Ms. McCarthy's

insurer advised her that the kitchen repair work had to be put on hold until the mould issue was addressed. The insurer stated it had concerns mould could also be growing behind the wallpaper in the kitchen. I infer that mould remediation was not part of the repairs approved by the insurer. The insurer also noted that the mould behind the fridge was not where the water leak was, and that it “could” indicate an issue with the building envelope.

19. LM emailed the strata manager on January 27, 2022 about the mould and the possibility of an issue with the building envelope. On February 4 and 17, 2022, LM reported 2 additional flood incidents in SL149. The strata manager advised that they had forwarded each of LM’s emails to the strata council. Ms. McCarthy says that due to the strata’s failure to respond to these issues, she started this CRT dispute.

***Is the strata responsible for the mould remediation?***

20. I turn first to the applicable bylaws and relevant sections of the SPA.
21. Bylaw 3.1 says an owner must repair and maintain their strata lot, except for repair and maintenance that is the strata’s responsibility under the bylaws.
22. Section 72 of the SPA says that the strata must repair and maintain common property and common assets. This statutory requirement is restated in bylaw 11.1, which says the strata is responsible for repair and maintenance of common property and common assets, as well as certain limited common property that does not apply here, and certain parts of a strata lot. The relevant parts of a strata lot that are the strata’s responsibility under bylaw 11.1 are limited to the structure and exterior of the building.
23. Common property is defined in section 1(1) of the SPA as “that part of the land and buildings shown on a strata plan that is not part of a strata lot”. It also includes pipes and other facilities for the passage or provision of water, if they are located within a floor, wall or ceiling that forms a boundary between 2 strata lots or between a strata lot and the common property, or if they are located “wholly or partially within a strata lot, if they are capable of being and intended to be used in connection with the enjoyment of another strata lot or the common property”.

24. Based on sections 1(1) and 72 of the SPA, and bylaw 11.1, I find the exterior of the strata building is common property that the strata is responsible to repair and maintain. This is not disputed. Section 68(1) of the SPA identifies the boundaries of a strata lot where the strata lot is separated from common property or another strata lot by a wall, floor, or ceiling. It says the strata lot boundary is “midway between the surface of the structural portion of the wall floor or ceiling” that separates the strata lot from the common property or another strata lot, unless the strata plan identifies different boundaries. Here, the strata plan does not identify different boundaries, so section 68(1) applies.
25. Ms. McCarthy does not specifically say on what basis the strata is responsible for the mould remediation in SL149. I find the central issue is whether the mould growth resulted from the strata’s failure to reasonably repair and maintain common property, including the building’s exterior, or whether the mould was caused by something within SL149, which Ms. McCarthy was responsible to repair and maintain.
26. As there are 2 separate areas of mould with different alleged causes, I begin with the mould behind the fridge. Photos in evidence show the fridge was in a corner, with the back of the fridge on an exterior wall and the right side of the fridge on an interior wall. The mould appears located mainly behind the upper half of the fridge. In other words, the mould was not along the floor, such that it might have resulted from the flooding.
27. Ms. McCarthy says that based on her insurer’s statement, the mould behind the fridge was likely caused by an issue with the building envelope. She does not otherwise explain what the alleged envelope problem was, and she did not provide any other evidence in support of this allegation. Further, putting aside the absence of evidence about the insurer’s qualifications to determine the cause of mould and that their statement is hearsay, as noted above, the insurer stated only that the mould “could” indicate an issue with the building envelope, which I find falls short of a “likely” cause.
28. The strata retained James Neill and Associates Ltd. (JNA), to assess and report on the mould in SL149. The April 25, 2022 report (JNA report) was prepared by Duane Hatch, a professional engineer. Mr. Hatch said he conducted 2 site visits to SL149

and observed dark staining on the ceiling along the top of the exterior wall and a large dark stain on the drywall behind the fridge. During one visit, a “test section” of the 0.5-inch-thick drywall was removed from the wall behind the fridge, which showed 1.5-inch-thick insulation was adhered directly to the concrete exterior wall. He noted there was no vapour barrier between the drywall and insulation. Photos show that a channel was cut into the insulation for an electrical line to the fridge outlet. Mr. Hatch also observed that there was no stove fume hood in the kitchen.

29. Mr. Hatch stated that the colder exterior concrete wall cools the drywall on those walls. He said this makes the exterior wall more susceptible to higher moisture content, as water vapour will condense on the cool drywall surface. He concluded that high humidity from activities like cooking, and poor ventilation from the missing fan, caused the dark staining on the ceiling and mould growth behind the fridge.
30. I accept that Mr. Hatch’s professional engineer certification qualifies him to provide expert evidence in this CRT proceeding, noting that Ms. McCarthy does not specifically dispute his qualifications. So, I accept the JNA report as expert evidence.
31. Based on the JNA report and the photos of the “test section” in evidence, I find that the structural portion of the SL149 exterior wall is limited to the concrete portion of the wall. That is, I find the insulation and interior drywall are not structural. So, under section 68(1) of the SPA, I find that the strata lot boundary is midway through the concrete wall. In other words, the strata is responsible for the repair and maintenance of the exterior of the concrete wall only. Ms. McCarthy is responsible for the insulation, drywall, and any required vapour barrier between the insulation and the drywall.
32. On the evidence before me, I find that Ms. McCarthy has not established any repair or maintenance issues with the outside of the concrete exterior wall surrounding SL149 that might have caused the mould growth behind her fridge. Rather, I find the weight of the evidence suggests that this mould resulted from conditions solely within SL149 that are Ms. McCarthy’s responsibility to maintain and repair.
33. Next, I address the mould on the interior wall behind Ms. McCarthy’s kitchen sink.

34. Ms. McCarthy says this mould was likely caused by the repeated flooding from her overflowing sink. The strata does not specifically dispute this. I note that the JNA report also attributes this mould to a lack of complete drying after the sink overflowed. However, the strata says that it was not responsible for the sink backups or resulting floods, and so it is not responsible for the mould.
35. The difficulty for Ms. McCarthy is that she never determined the cause of her kitchen sink backups. She says they could have resulted from some issue in the strata lot above hers or from clogged pipes. However, there is no evidence that Ms. McCarthy hired a plumber or had any professional assess why her sink repeatedly backed up and flooded. As noted, not all pipes are common property that the strata is responsible for. I find that the pipes at issue behind Ms. McCarthy's sink were in a wall that was wholly within her strata lot. So, they are only common property if they were capable of being and intended to be used in connection with the enjoyment of another strata lot or the common property.
36. The strata says that its plumber, MPS, investigated Ms. McCarthy's reports about sink backups during annual sanitary line maintenance cleaning. MPS' December 22, 2021 invoice stated that it performed a "hydro flush" in the vertical kitchen stacks in SL149, and its camera inspected the lines to the municipal connection and detected "very little" build up, noting the pipes were 95% open. There is no indication on the invoice that MPS found anything that might have caused Ms. McCarthy's sink to back up. While it is unclear whether MPS inspected all common property pipes connected to Ms. McCarthy's kitchen, I find that the MPS invoice is some evidence that clogged common property pipes were not likely responsible for the sink backing up.
37. Ms. McCarthy also submits that some pipes might have been leaking due to age, causing additional water damage. Ms. McCarthy provided a close-up photo of a pipe that appears to have a crack in it. However, there is no evidence about where this pipe is located in SL149 or its purpose, so it is impossible to determine whether the cracked pipe is a common property pipe. In any event, there is also no evidence that the crack was the source of any water leak that might have led to the mould growth. So, I place no weight on the photo of the cracked pipe.



38. Ms. McCarthy also points to a note on MPS' invoice that it recommended the piping be replaced as a precautionary measure due to age. Even if this recommendation referred to common property pipes, in the absence of any indication that the pipes had failed or were actively leaking, I find there is insufficient evidence to prove that "old pipes" were responsible for the water damage and resulting mould, as alleged.
39. Overall, I find Ms. McCarthy has not established that the strata is responsible for her kitchen sink backups. So, I find the strata is not responsible for any mould that resulted from water damage related to the sink back ups.
40. For all the above reasons, I find Ms. McCarthy has not shown the strata is responsible for the claimed mould remediation in SL149. Given this conclusion, it is unnecessary to address Ms. McCarthy's claimed remediation costs.
41. I note that Ms. McCarthy also says the strata cut holes in the wall to access pipes for cleaning, and it has not repaired the holes. Ms. McCarthy provided a photo showing 2 holes cut into the back side of the interior kitchen wall containing the pipes. I infer that the holes relate to MPS' work. The CRT has previously found that strata corporations are responsible for the cost of repairing investigation and access holes it creates to perform common property repairs and maintenance (see, for example, *Lorenz v. Strata Plan NW 2001*, 2017 BCCRT 65 and *Hayes v. The Owners, Strata Plan BCS 4278*, 2022 BCCRT 179). However, Ms. McCarthy did not raise this claim in the Dispute Notice or request any specific remedy for it, and the strata did not specifically respond to this allegation in its submissions. So, I find this claim is not properly before me and I decline to make any findings about it.
42. I dismiss Ms. McCarthy's claims.

## **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. As Ms. McCarthy was unsuccessful, I find she is not

entitled to reimbursement of her paid CRT fees. She did not claim any dispute-related expenses.

44. The strata did not pay any CRT fees. However, it claims reimbursement of \$1,785 for “the report on the mould”. I infer this relates to the JNA report. However, the strata did not provide JNA’s invoice or any other evidence to support this expense. Therefore, I find this expense unproven, and I decline to order any reimbursement.

45. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against the owner Ms. McCarthy.

## **ORDER**

46. I dismiss Ms. McCarthy’s claims, the strata’s claim for dispute-related expenses, and this dispute.

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Kristin Gardner, Tribunal Member