



# Civil Resolution Tribunal

Date Issued: December 14, 2022

File: ST-2021-009328

Type: Strata

Civil Resolution Tribunal

Indexed as: *Fung v. The Owners, Strata Plan LMS1101*, 2022 BCCRT 1341

BETWEEN:

YU HIN FUNG

**APPLICANT**

AND:

The Owners, Strata Plan LMS1101

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Nav Shukla

## INTRODUCTION

1. This dispute is about water ingress and repair and maintenance of a strata corporation's common property (CP).
2. The applicant, Yu Hin Fung, co-owns strata lot 135 (SL135) in the respondent strata corporation, The Owners, Strata Plan LMS1101 (strata).

3. Mr. Fung says the strata failed to maintain the building's exterior walls, contrary to its obligations under the strata's bylaws. He says this failure led to water ingress which damaged SL135's interior. Mr. Fung alleges the strata was negligent because it was aware of the potential for water damage inside SL135 and did not act. Mr. Fung seeks and order for the strata to fix the building's exterior walls to stop water from leaking into SL135. He also seeks an order for the strata to repair the areas damaged in SL135 by the exterior wall leaks at the strata's expense.
4. The strata says it has taken reasonable steps to repair and maintain the building's exterior walls. It denies it has been negligent and says it is not responsible for any damage inside SL135.
5. Mr. Fung is self-represented. A lawyer represents the strata.

## **JURISDICTION AND PROCEDURE**

6. 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.
7. 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.

8. 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.
9. 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.

### ***Preliminary Issues***

10. During the course of this dispute, Mr. Fung amended his claims against the strata in an Amended Dispute Notice. In the original Dispute Notice, Mr. Fung sought an order for the strata to fix the water ingress problems in SL135 caused by failing windows in addition to exterior wall leaks. In the Amended Dispute Notice, Mr. Fung no longer seeks a remedy for the failing windows. However, in his written submissions, Mr. Fung asks for an order that the strata repair the exterior walls and the windows.
11. While there is some of evidence of window failure before me, I find Mr. Fung specifically withdrew this claim in the Amended Dispute Notice. So, I find the window failure issue is not squarely before me and I make no findings about it. However, my refusal to make findings about the window failure issue in this decision does not change the strata's ongoing obligation under *Strata Property Act* (SPA) section 72 to repair and maintain CP.
12. Further, in the Dispute Response, the strata alleges Mr. Fung's claims are barred by the *Limitation Act*. However, this Dispute Response was issued before Mr. Fung amended his claims in the Amended Dispute Notice to clarify that the water ingress issues are ongoing. After issuing the Amended Dispute Notice, the CRT gave the strata an opportunity to amend its Dispute Response. The strata did not do so but said it would respond to Mr. Fung's amendments in its submissions. In its submissions, the strata does not argue Mr. Fung's claims are barred by the *Limitation Act*. So, I find the strata no longer relies on the *Limitation Act* as a defence to Mr. Fung's claim and I do not address it any further in this decision.

## **ISSUES**

13. The issues in this dispute are:

- a. Is the strata required to repair the exterior walls?
- b. Is the strata required to repair the water damage inside SL135 at its own expense?

## **EVIDENCE AND ANALYSIS**

14. In a civil proceeding like this one, as the applicant, Mr. Fung must prove his claims on a balance of probabilities (meaning “more likely than not”). I have reviewed all the parties’ submissions and evidence but refer only to the evidence and argument that I find relevant to provide context for my decision.

### ***Background***

15. The strata plan in evidence shows the strata was created in 1993 and consists of 3 buildings and 337 strata lots. SL135 is located in building B. On June 11, 2010, the strata filed a complete set of amended bylaws with the Land Title Office (LTO). I find these bylaws apply to this dispute. The strata filed further bylaw amendments with the LTO, but I find the later amendments are not relevant here. I discuss the relevant bylaws below.

16. A title search shows Mr. Fung became a registered co-owner of SL135 on October 31, 2019. He undisputedly moved into SL135 in early November 2019. Mr. Fung says that in December 2019, he started to notice water leaking from SL135’s walls and windows. Mr. Fung says that despite his repeated complaints by email and by phone, the strata has failed to properly address his complaints.

17. Emails in evidence show Mr. Fung first complained to the strata’s building manager on December 10, 2019 about condensation on “almost all windows” in SL135. On July 18, 2020, Mr. Fung emailed the strata manager about the window issue as well as issues with the walls in SL135’s primary bedroom and bathroom. In this email, Mr.

Fung said that the wall with the window becomes saturated with water when it rains. He further said that the baseboard heater was rusted from water coming through the wall. In this email, Mr. Fung said that the exterior wall problem should be fixed at the same time as the windows.

18. On March 16, 2021, Mr. Fung complained again to the strata manager about the issue with SL135's windows and water leaking from the exterior walls into the primary bathroom and bedroom. Mr. Fung said the exterior wall leaks had damaged his November 2019 paint job. The strata manager responded the same day and said they would redirect Mr. Fung's complaints to the strata council.
19. It is undisputed that sometime in spring 2021, the strata had someone inspect the exterior walls outside of SL135. In an October 16, 2021 email, Mr. Fung referred to this inspection and asked the strata manager if there were any updates about fixing the exterior wall and window issues. In this email, Mr. Fung told the strata manager that he replaced the baseboard heater in the ensuite bathroom, which I infer is the primary bathroom, and the drywall behind the heater was damaged from water leaks.
20. On November 19, 2021, Mr. Fung followed up with the strata management company again and said that despite him reporting the issues since December 2019, the strata had done no repairs to date. Mr. Fung requested to sit in on the next strata council meeting to address these issues. On November 27, 2021, Mr. Fung formally requested a hearing to discuss the water ingress and window failure issues in SL135.
21. This hearing took place on December 8, 2021. On December 27, 2021, the strata manager advised Mr. Fung that the exterior repairs could only be done during dry weather. The strata manager further said, "the exterior stucco will be a comprehensive project throughout the entire 3 complex exterior window seals and stucco, such project will require to have majority owners consent at a general meeting to carry the motion" (reproduced as written). The strata manager advised that the strata had AGC, a general contractor, standing by to repair the affected units once the weather permitted. Lastly, the strata manager told Mr. Fung that any interior

damage to SL135 below the strata's insurance deductible was Mr. Fung's responsibility.

22. After receiving the above email, Mr. Fung started this CRT dispute in January 2022.

***Is the strata required to repair building B's exterior walls?***

23. As mentioned above, SPA section 72 says a strata corporation is responsible for repairing and maintaining CP. It also allows a strata to make an owner responsible for CP maintenance and repairs through its bylaws, but only if it is limited common property (LCP) or if it is identified in the *Strata Property Regulations*. I find these exceptions do not apply here.

24. Strata bylaw 9(1) also requires the strata to repair and maintain all CP that has not been designated as LCP. The parties do not dispute that building B's exterior walls are CP. So, I find the strata has a duty under SPA section 72 and bylaw 9(1) to repair and maintain the exterior walls.

25. Numerous cases discuss a strata corporation's duty to repair and maintain common property. In such cases, the courts have said that a strata corporation's obligation to repair and maintain is measured against a test of what is reasonable in all of the circumstances (see *Taychuk v. Owners, Strata Plan LMS 744*, 2002 BCSC 1638 at paragraph 30). In assessing the extent of the strata's duty to repair, the standard is not perfection, but what is reasonable (see *Weir v. Owners, Strata Plan NW 17*, 2010 BCSC 784).

26. The evidence shows that after this dispute was started, in July 2022 the strata had AGC Contracting Ltd. (AGC) conduct exterior stucco repairs on building B. In its August 9, 2022 report, AGC noted there were several holes on the southeast side of building B between the 5<sup>th</sup> and 9<sup>th</sup> floor apparently opened up by woodpeckers. It is unclear from the evidence and submissions before me whether these holes were repaired by AGC.

27. The evidence includes a building inspection report completed by Nigel Greenidge, a licensed home inspector with Eng Inspections Inc. hired by Mr. Fung. Nigel Greenidge inspected building B's exterior and SL135's interior on August 19, 2022, after AGC completed its stucco repairs. In this report, Nigel Greenidge noted active leaks in SL135's south facing exterior wall in the living room, in the southeast facing exterior walls in the primary bedroom, and in the east facing exterior wall in the primary bathroom. Nigel Greenidge's report noted building B's exterior cladding was nearing the end of its service life and that the exterior had significant water damage, holes, sealant failure and damaged deck membranes. Nigel Greenidge recommended the strata contact a building envelope engineer and qualified contractor for further investigation and repairs.
28. Notably, the strata does not deny that building B's exterior requires extensive repairs. Strata council meeting minutes in evidence show that the strata has been aware of issues with all 3 buildings' exteriors since at least early 2019. The February 21, 2019 strata council meeting minutes noted "the exterior walls are deficient and many units are experiencing water ingress from exterior when raining" (reproduced as written). However, the minutes said that the strata's budget at that time did not provide funding for the exterior wall work and a "special resolution" would be required to obtain owner approval. No owner vote for the exterior wall repairs appears to have taken place to date.
29. While the strata took steps by having AGC conduct stucco repairs in July 2022, based on Nigel Greenidge's report, I find significant issues remain with building B's exterior walls that the strata has failed to address. In its submissions, the strata says that it has multiple other issues at play and must prioritize and make choices as finances are available. However, other than referring to a \$4.3 million re-piping project that was approved by the owners in 2019 and, according to the strata, completed in November 2021, the strata does not say what these other issues are that it must prioritize over the exterior wall repairs. Notably, in a November 16, 2021 email, the strata manager told the strata council that the exterior wall issues were "not an isolated case" and should be the strata's next project. Based on the above, I find the

strata has not proven that there is other more important work that it must currently prioritize over building B's exterior wall repairs.

30. Based on the evidence before me, I find the strata has not properly maintained and repaired the exterior walls as it is required to do so under SPA section 72 and bylaw 9(1). In line with Nigel Greenidge's recommendations, I order the strata to retain a building envelope engineer or qualified contractor to investigate and provide recommendations about what repairs are needed to building B's exterior walls to prevent water ingress into SL135.
31. Once the strata has received the results from the above ordered investigation, I further order the strata repair those portions of building B's exterior walls that the investigation finds are necessary to stop water from leaking into SL135. I understand from the strata's submissions and evidence before me that repair work to building B's exterior may not be possible while the exterior is wet and multiple continuous days of dry weather will likely be required. I have taken this into consideration in my order below.

***Is the strata required to repair the water damage inside SL135?***

32. As noted above, Mr. Fung also seeks an order for the strata to repair the areas in SL135 that have been damaged by the exterior wall leaks. In the Amended Dispute Notice, Mr. Fung alleges the water ingress from the exterior walls and windows have damaged SL135's drywall, ceiling, paint, windowsills, baseboards, and flooring. I find the strata is not required under the bylaws to repair these areas inside a strata lot.
33. Bylaw 2(1) says an owner must repair and maintain the owner's strata lot, except for repair and maintenance that is the strata's responsibility under the bylaws. Bylaw 9(1)(d) says the strata's duty to repair and maintain a strata lot is limited to the structure of a building, the exterior of a building, chimneys, stairs, balconies, doors and windows on the exterior of a building or that front on CP, and fences, railings and similar structures.



34. Courts have said that the strata is not an insurer, and the strata is not responsible for repairs to the interior of a strata lot unless it has been negligent (see *Kayne v. The Owners, Strata Plan LMS 2374*, 2013 BCSC 51 and *Basic v. Strata Plan LMS 0304*, 2011 BCCA 231). This is the case even where the strata lot damage was caused by a common property failure (see *Wawanesa Mutual Ins. Co. v. Keiran*, 2007 BCSC 727). I find the strata is only responsible for strata lot repairs and related expenses if Mr. Fung proves that the strata was negligent and that its negligence caused his loss.
35. For the reasons that follow, I find Mr. Fung has failed to establish his loss with sufficient certainty. In other words, Mr. Fung has failed to prove on a balance of probabilities what parts of SL135 have been damaged due to the strata's alleged negligence.
36. While Mr. Fung alleges in the Amended Dispute Notice that various areas inside SL135 have been damaged by water leaks, Mr. Fung does not explain the alleged damage in any detail in his submissions. Mr. Fung's evidence includes some photographs of areas of SL135 that he says show water damage. This includes photographs of some walls and windowsills with bubbling paint. However, I am unable to determine the cause of these issues from the photographs.
37. Nigel Greenidge's report refers to "significant water damage" inside SL135. Nigel Greenidge recommends a mold remediation contractor be contacted and for the drywall and flooring to be removed to determine the extent of damage. However, while the report implies it, Nigel Greenidge does not specifically say that the "significant water damage" in SL135 was caused by the exterior wall leaks.
38. The burden of proof is on Mr. Fung to prove his claim about water damage inside SL135. I find the evidence before me does not prove on a balance of probabilities what areas of SL135 have been damaged by the exterior wall leaks and the extent of the alleged damage. So, I find I do not need to decide if the strata has been negligent and dismiss Mr. Fung's claim for the strata to repair SL135.

## **CRT FEES AND EXPENSES**

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. Since Mr. Fung was partially successful, I order the strata to reimburse him for half of his paid CRT fees. This totals \$112.50. Mr. Fung also claims \$420 for Nigel Greenidge's report as a dispute-related expense. Based on the report's invoice in evidence and since I relied on the report, I find this expense was reasonably incurred. So, I order the strata to reimburse Mr. Fung the \$420 he paid for Nigel Greenidge's report as a dispute-related expense.
40. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against Mr. Fung.

## **ORDERS**

41. I order that within 14 days of this decision, the strata pay Mr. Fung a total of \$532.50 for \$112.50 in CRT fees and \$420 in dispute-related expenses.
42. Within 60 days of this decision, I order the strata to retain a building envelope engineer or qualified contractor to investigate and provide written recommendations about what repairs are needed to building B's exterior walls to prevent water ingress into SL135.
43. I further order that within 8 months of this decision, the strata repair those portions of building B's exterior walls that the above investigation says are necessary to stop water from leaking into SL135.
44. Mr. Fung is also entitled to post-judgment interest under the *Court Order Interest Act*, as applicable.
45. 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.

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Nav Shukla, Tribunal Member