Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Cernes v. The Owners, Strata Plan VR 2540*, 2023 BCCRT 13

B E T W E E N :

GREGORY CERNES also known as GREGG CERNES and SHAUN WILTON

APPLICANTS

A N D :

The Owners, Strata Plan NW 2494

RESPONDENT

REASONS FOR DECISION

Tribunal Member: J. Garth Cambrey, Vice Chair

INTRODUCTION

1. This strata property dispute is about a strata corporation's alleged negligence to investigate common property repairs.

2. The applicants, Gregory Cernes, also known as Gregg Cernes, and Shaun Wilton co-own strata lot 52 (SL52 or unit 409) in the respondent strata corporation, The Owners, Strata Plan NW 2494 (strata). Mr. Cernes represents the applicants and was also a strata council member at the time this dispute arose. A strata council member represents the strata.

3. The applicants say "toxic soot" entered SL52 in April 2022 from gas fireplace exhaust stacks of lower level strata lots causing them to move out of SL52. They say the strata is negligent because it "failed to act in an acceptable manor to have the issue resolved", which I find relates to investigating the soot issue as discussed below.

4. The applicants seek orders that the strata or the strata council:

    a. Immediately stop "ad hoc, part time trouble shooting" of the issue,

    b. Immediately replace all 5 gas fireplace stacks and complete associated repairs,

    c. Hire a professional project manager to oversee the work,

    d. Provide the applicants and their insurer with a letter written by a professional/authority indicating SL52 is safe for occupation,

    e. Reimburse the applicants $1,000 for their insurance deductible associated with the applicants' temporary accommodations,

    f. Provide the applicants and their insurer a detailed schedule of tasks and timelines for completion of the work, and

    g. Pay the applicants $100,000 in damages for loss of use and enjoyment of SL52.

5. The strata says it has followed the advice of its service providers and is not negligent. I infer the strata asks that the applicants' claims be dismissed.

6. As explained below, I dismiss the applicants' claim and this dispute.

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). 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.

8. 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.

9. 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.

10. 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 – Amended Dispute Notice

11. The original Dispute Notice was issued on June 8, 2022. It was amended on August 31, 2022 to increase the amount of applicants' damages claim for loss of use and enjoyment of their strata lot to $100,000 with a corresponding increase in interest claimed. Before submissions, the strata was given an opportunity to amend its Dispute Response and advised CRT staff it did not want make amendments. I find the strata

had the opportunity to respond to the amended claims in its submissions. Therefore, I find there are no procedural fairness issues to be considered.

ISSUES

12. The issues in this dispute are:

    a. Did the strata have a duty to investigate the cause of the soot?

    b. If so, was the strata negligent in its duty?

    c. If so, what is an appropriate remedy?

BACKGROUND, REASONS AND ANALYSIS

13. As the applicant in a civil proceeding such as this, the applicants must prove their claims on a balance of probabilities, meaning "more likely than not". I have considered all the submissions and evidence provided by the parties, but I refer only to information I find relevant to give context for my decision.

14. The strata plan shows the strata was created in November 1986 under the *Condominium Act* (CA). It continues to operate under the under SPA and consists of 60 strata lots in 2 separate low-rise buildings. The applicants' SL52 is located on the top floors of 1 of the buildings.

15. The strata filed a complete set of new bylaws with the Land Title Office (LTO) on January 14, 2002 that repealed and replaced all previous bylaws, including the Standard Bylaws under the SPA. Several other bylaw amendments have been filed with the LTO since January 2002, but I find none are relevant.

16. I note at the outset that under SPA section 72(3), a strata corporation is not responsible for repair and maintenance of a strata lot unless it has taken such responsibility under its bylaws. In this dispute, strata bylaw 8(2)(b) makes the strata responsible for repairs to a strata lot, but only with respect to the buildings' exterior and other things that do

not apply. Bylaw 2(1) makes an owner responsible to repair and maintain their strata lot except for things the strata must repair.

17. Read together, the strata's bylaws make the applicants responsible for repair and maintenance of SL52. However, if the strata was negligent, it may be liable for resulting damage to SL52: see *Kayne v. LMS 2374*, 2013 BCSC 51 and *Basic v. Strata Plan LMS 0304*, 2011 BCCA 231. Given my finding below that the strata was not negligent, I find the bylaws apply. Therefore, to the extent the applicants argue the strata is responsible to clean the soot from inside SL52, I dismiss that argument.

18. The applicants' entire claim is based on the length of time it took the strata to investigate the soot issue, so I have focused my analysis on the strata's duty to investigate.

19. The underlying facts are not disputed. The parties agree the applicants discovered soot in SL52 on April 11, 2022 and reported it to the strata. The evidence shows that by August 10, 2022, the strata had determined the cause of the soot issue was a disconnected gas fireplace vent related to a strata lot below and next to SL52. The evidence also shows that by September 26, 2022, the strata's insurer had accepted an insurance claim and assigned an adjuster to assist the strata with necessary repairs, subject to a $10,000 deductible. It appears from the evidence and submissions that the strata's insurer will ensure the proper repairs are completed under the insurance policy.

20. There is no issue that the fireplace vent in question is common property which the strata must repair.

Did the strata have a duty to investigate the cause of the soot?

21. The parties did not make submissions about whether the strata was responsible to investigate the cause of the soot issue. However, in other CRT decisions, I have considered whether a strata' corporation has a duty to investigate alleged common property issues and found that it does: See for example, *Barros-Harty v. The Owners,*

Strata Plan NW 962, 2022 BCCRT 569 at paragraphs 32 – 34, and *Youlton v. The Owners, Strata Plan VIS 4390,* 2022 BCCRT 639.

22. My reasons are based on case law. The BC Supreme Court has found that a strata corporation's obligation to repair and maintain common property is measured against a test of what is reasonable in all of the circumstances: see *The Owners of Strata Plan NWS 254 v. Hall*, 2016 BCSC 2363. The court has also found that what is reasonable in the circumstances depends on the likelihood of the need to repair, the cost of further investigation, and the gravity of the harm sought to be avoided or mitigated by investigating and remedying any discovered problems: see *Guenther v. Owners, Strata Plan KAS431*, 2011 BCSC 119 at paragraph 40. Read together, this case law leads me to conclude a strata corporation's duty to repair includes a duty to investigate the need for repair based on a standard of reasonableness.

Was the strata negligent?

23. All of the applicants' requested remedies flow from their allegation that the strata is negligent.

24. To be successful in an action for negligence, the applicants must demonstrate that the strata owed them a duty of care, that the strata breached the standard of care, that the applicants sustained damage, and that the damage was caused by the strata's breach: see *Mustapha v. Culligan of Canada Ltd*., 2008 SCC 27 at paragraph 3.

Strata's Duty of Care

25. As mentioned, I have found the strata has a duty to investigate based on the standard of reasonableness.

Did the *Strata* Breach the Standard of Care

26. Based on the above caselaw, the applicants must show the strata's actions to investigate the disconnected fireplace vent were unreasonable. The applicants' main argument is that the strata did not investigate the soot issue in a timely manner.

27. The courts have held that strata councils are made up of lay volunteers and that mistakes and missteps will doubtlessly occur from time-to-time. Council members are not to be expected to have expertise in the subject matter of their decisions. Accordingly, latitude is justified when a strata council's conduct is being scrutinized: see *Mitchell v. The Owners, Strata Plan KAS 1202*, 2015 BCSC 2153 at para. 50; *Hill v. The Owners Strata Plan KAS 510*, 2016 BCSC 1753.

28. The courts have also held that a strata corporation should not be found negligent if it acted reasonably in the circumstances even where its contractor failed to effectively carry out the work: see *Oldaker v. The Owners, Strata Plan VR 1008*, 2007 BCSC 669, and *Wright v. The Owners, Strata Plan #205*, 1996 CanLII 2460 (BC SC).

29. Finally, in *Leclerc v. The Owners, Strata Plan LMS 614*, 2012 BCSC 74, the BC Supreme Court found that short of deliberate delay, slowness in repairs by a strata is reasonable. *Leclerc* was a case of water ingress from common property into a strata lot over a long period of time. The court said that although the strata corporation could perhaps have hastened its investigations of the problem, there was no evidence of deliberate "foot-dragging", so the strata's actions were reasonable.

30. For the following reasons, I find the applicants have not established the strata acted unreasonably when it investigated the cause of the soot in SL52.

31. First, there is no evidence the strata had previously addressed similar soot issues or was aware of the soot in SL52 prior to the applicants bring it to its attention in April 2022. This is not a situation where the strata was aware of the issue and did nothing to address it. Rather, the evidence is that the strata acted immediately by contacting BC Fireplace Services Ltd. (BC Fireplace) to investigate the cause of the problem and making enquiries of the Condominium Home Owners Association (CHOA) about how best to address the issue, among other things.

32. Second, I agree with the strata that it has relied on professionals to assist it in locating the cause of the soot issue. The evidence shows the strata called for investigations and quotations, received recommendations from qualified sources and acted on those recommendations. At times, the strata council undertook its own sourcing of qualified

trades and professionals, based on advice it was given, which I find was reasonable in the circumstances, especially given some of the people the strata contacted were unable to assist. For example, based on the report received from BC Fireplace of 4 fireplace vents, further investigation was arranged with Onside Restoration Services (Onside) to expose the fireplace vents by opening walls. The strata also sought advice from a municipal fire protection engineer.

33. Third, I appreciate the applicants were concerned about the appearance and health concerns of soot in SL52 and wanted the repairs completed as quickly as possible. However, the applicants provided in evidence copies of articles about it's potential health effects, but they did not provide any expert evidence, such as testing results of the soot present in SL52, to prove the soot was unsafe. Instead, the applicants made a claim on their personal insurance policy, which covered the costs of cleaning SL52 and their personal belongings, as well as alternate accommodation. The strata initially made enquiries of its insurer about air quality testing and no health concerns were raised by the strata's insurer or other professionals involved in the investigation.

34. Fourth, there is no evidence the soot issue reoccurred or became worse during the time the investigation took place.

35. Finally, based on the overall evidence and submissions, I find the strata took a systematic approach based on professional advice it received to eliminate potential sources before the disconnected vent was located. That this process took about 6 months does not make it unreasonable.

36. For these reasons, I find the applicants have failed to demonstrate that the strata acted unreasonably in the circumstances, Therefore, I find their claim that the strata was negligent in investigating their soot issue must fail.

What is an appropriate remedy?

37. Given my findings above, I dismiss the applicants' claim and this dispute.

CRT FEES AND EXPENSES

38. 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 was the successful party but did not pay CRT fees, so I order none.

39. Neither party claimed dispute-related expenses, so I make no order for reimbursement.

40. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against the applicants or SL52.

ORDER

41. I dismiss the applicants' claims and this dispute.

J. Garth Cambrey, Vice Chair