



# Civil Resolution Tribunal

Date Issued: April 11, 2023

File: ST-2022-003800

Type: Strata

Civil Resolution Tribunal

Indexed as: *Jensen v. The Owners, Strata Plan NW 655*, 2023 BCCRT 294

B E T W E E N :

CATHERINE JENSEN

**APPLICANT**

A N D :

The Owners, Strata Plan NW 655

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Kate Campbell, Vice Chair

## INTRODUCTION

1. This dispute is about skylight repairs in a strata corporation.
2. The applicant, Catherine Jensen, owns strata lot 51 (SL51) in the respondent strata corporation, the Owners, Strata Plan NW 655 (strata).

3. Ms. Jensen is self-represented in this dispute. The strata is represented by a strata council member.
4. Ms. Jensen says the 2 skylights above SL51 leak and need replacement. She requests orders that the strata replace them immediately, and repair any building damage caused by the delay in repairs. She also requests a declaration that the skylights are the strata's responsibility to repair.
5. The strata says the question of who is responsible for skylight repairs is a "long-running issue" in the strata. The strata says its ownership is divided on this issue, so it is not able to take a position.
6. There is a related dispute involving skylights in the same strata corporation, filed by a different owner (dispute ST-2022-005206). As the parties are different, I have written 2 separate decisions.
7. For the reasons set out below, I order the strata to replace the 2 skylights above SL51. I dismiss Ms. Jensen's claim for additional repairs.

## **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. 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.

10. 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.
11. 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.

### ***Declaratory Order***

12. As noted above, Ms. Jensen requests that the CRT make a declaratory order that the strata is responsible for repairing the skylights above SL51, with that order to be “placed on file” for her strata lot.
13. The CRT can only make a declaratory order if it is incidental to a claim over which the CRT has jurisdiction: see *The Owners, Strata Plan VR320 v. Day*, 2023 BCSC 364, at paragraph 54. Also, the CRT does not generally make prospective orders about things that have not yet happened. I find I cannot make an order about who may be responsible for skylight repairs in the future, as future facts may be different. For this reason, I find the requested declaratory order is not incidental to Ms. Jensen’s claim for replacement of the current skylights. I therefore make no declaratory order in this decision.

### **ISSUES**

14. The issues in this dispute are:
  - a. Is the strata responsible to repair and maintain the skylights above SL51?
  - b. If so, must the strata replace the skylights?
  - c. Must the strata repair any building damage?

## REASONS AND ANALYSIS

15. In a civil claim like this one, Ms. Jensen, as applicant, must prove her claims 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.
16. The strata was created in 1976. The strata plan shows that SL51 is located in building “H”, along with 11 other strata lots. The strata plan shows that each strata lot in building H has 2 storeys, with the roof directly above the second floor. Photos in evidence show that SL51's 2 skylights are located in the roof directly above SL51's second storey.
17. In July 2008, the strata repealed and replaced all previous bylaws by filing new bylaws at the Land Title Office. I note that because the filed document says “the attached Bylaws replace all existing Bylaws”, the Standard Bylaws in the *Strata Property Act* (SPA) no longer apply to the strata.
18. The strata filed various bylaw amendments after 2008. I refer to specific bylaws where relevant in my reasons below.

### ***Is the strata responsible to repair and maintain the skylights above SL51?***

19. For the following reasons, I find the strata is responsible to repair and maintain the skylights above SL51.
20. The parties agree that the skylights are not original, and were installed by an unknown owner sometime before Ms. Jensen bought SL51 in 2012. Ms. Jensen says she was unaware when she bought SL51 that the skylights were not original to the building, but I find nothing turns on this.
21. Based on boundaries shown on the strata plan and SPA section 68, I find the roof above SL51 is common property. Specifically, SPA section 68(2) says that unless otherwise shown on the strata plan, if a strata lot is separated from the common property by a ceiling, the boundary of the strata lot is midway between the surface of

the structural portion of the ceiling and the surface of the structural portion of the ceiling that faces the common property. This means that all the area outside of the midpoint of the ceiling assembly above SL51 is common property. Based on the photos in evidence that show that the skylights are integrated into the roof, I find the skylights are primarily located in this area outside the midpoint of the ceiling assembly. In particular, their glass surface is level with or above the common property roof.

22. So, I conclude that the skylights above SL51 are common property.
23. Under SPA section 72, a strata corporation is responsible to repair and maintain common property, except limited common property, which strata bylaws may make an owner responsible to repair and maintain.
24. A Form B information certificate the strata issued in November 2011, before Ms. Jensen purchased SL51, says there are no agreements under which the owner of SL51 takes responsibility for alterations to the strata lot or common property. The strata does not dispute the accuracy of this certificate. Rather, the strata admits in its submissions that many owners installed skylights in the 1980s and 1990s, with strata permission, and that no liability agreements were signed for these skylights.
25. Since no written agreement exists, I find Ms. Jensen is not responsible for skylight repairs or replacement based on an alteration agreement.
26. For the following reasons, I also find the strata's bylaws about skylight repairs are unenforceable.
27. Strata bylaw A1 says, among other things, that the roofs above each strata lot are limited common property (LCP). Bylaw C16(a) says strata residents are responsible to repair and maintain doors, windows, and skylights.
28. SPA section 121 says a bylaw is not enforceable to the extent that it contravenes the SPA. I find these bylaws contravene the SPA, and are therefore unenforceable.

29. Most importantly, I find a strata corporation cannot designate LCP by enacting a bylaw. The strata's roofs are not shown as LCP on the strata plan, and the skylights are not shown on the strata plan at all. If an area is not designated as LCP on the original strata plan, a strata corporation can amend the strata plan, which requires a unanimous vote. This undisputedly did not occur in this case. Alternatively, under SPA section 74, a strata corporation may designate LCP by passing a  $\frac{3}{4}$  vote at a general meeting, and then filing that resolution with the Land Title Office along with a sketch plan that:

(a) satisfies the registrar of Land Titles,

(b) defines the areas of LCP, and

(c) specifies each strata lot whose owners are entitled to the exclusive use of the limited common property.

30. The evidence before me suggests that bylaw A1 existed before the SPA came into effect in 2002. However, section 53 of the previous *Condominium Act* had essentially the same requirements. There is no suggestion before me that the strata ever filed a copy of its resolution and a sketch plan with the Land Title Office, or that the registrar approved them. So, I find the roofs are not LCP.

31. SPA section 72 says a strata corporation may make a strata lot owner responsible for repairs to common property that is not LCP "only if identified in the regulations". There is no such regulation, and there never has been. So, I find bylaw C16(a) unenforceable under SPA section 121.

32. Because the skylights are common property, and not LCP, I conclude that the strata is responsible to repair and maintain the skylights above SL51.

***Must the strata replace the skylights above SL51?***

33. Ms. Jensen says the skylights began leaking in 2014 or 2015, and that the strata temporarily repaired them with caulking. She says they began leaking heavily in November 2021, and have been covered with tarps ever since.

34. Ms. Jensen says the skylights require replacement. She relies on a December 17, 2021 invoice from the strata's roofer, Mack Kirk Roofing & Sheet Metal Ltd. (MK). On the invoice, which is addressed to the strata, MK wrote that it investigated Ms. Jensen's strata lot for leaks, found 2 leaking skylights, and installed tarps. The invoice states that both skylights should be replaced, "as the inner support frame is broken and allows water and condensation to ingress".
35. I find MK's report is not expert evidence, as the author's qualifications are not in evidence. However, the strata did not dispute MK's evidence that the skylights need replacement, or provide contrary evidence. In its submissions, the strata admits there are skylights in the strata that need repair or replacement, including those above SL51.
36. So, I order that the strata must replace the 2 skylights above SL51 within 4 months of this decision.

***Must the strata repair any building damage?***

37. In her dispute application, Ms. Jensen requested an order that the strata repair any building damage caused by delay in repairing the skylights.
38. Ms. Jensen provided photos that show some water staining and ceiling discolouration around the inside of the skylights. However, she provided no evidence about the extent of this damage, what is required to repair it, or how much it might cost. For this reason, I find Ms. Jensen has not proved her claim. Specifically, she has not proved that any building damage occurred due to delay in skylight repairs.
39. I therefore dismiss this claim for building damage repairs.

**CRT FEES AND EXPENSES**

40. As Ms. Jensen was largely successful in this dispute, under the CRTA and the CRT's rules I find she is entitled to reimbursement of \$225 in CRT fees. Neither party claimed dispute-related expenses, so I order none.

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

## **ORDERS**

42. I order that:

- a. Within 4 months of this decision, the strata must replace the 2 skylights above SL51.
- b. The strata must immediately reimburse Ms. Jensen \$225 for CRT fees.

43. I dismiss Ms. Jensen's remaining claims.

44. Ms. Jensen is entitled to postjudgment interest under the *Court Order Interest Act*, as applicable.

45. 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.

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Kate Campbell, Vice Chair