



Civil Resolution Tribunal

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Type: Strata

Civil Resolution Tribunal

Indexed as: *Lee v. The Owners, Strata Plan EPS2809, 2023 BCCRT 338*

BETWEEN:

EUGENE LEE

APPLICANT

AND:

The Owners, Strata Plan EPS2809

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

J. Garth Cambrey, Vice Chair

INTRODUCTION

1. This is a strata property dispute about a strata corporation's alleged failure to properly investigate and repair common property.
2. The applicant, Eugene Lee, co-owns strata lot 294 (SL294) in the respondent strata corporation, The Owners, Strata Plan EPS2809 (strata). Mr. Lee represents himself. A strata council member represents the strata.

3. Mr. Lee says the strata has failed to properly investigate and repair common property, which has resulted in sewer gas entering SL294. He specifically says there were excessive delays in the strata's investigation of his sewer gas complaint, which affected his use and enjoyment of SL294 and "damaged" his health.
4. Mr. Lee seeks orders that the strata repair "defective" common property, the bedroom wall of SL294, and his air conditioner. He also seeks an order that the strata pay him \$5,000 for the loss of use and enjoyment of SL294, ill effects on his health and mental stress, and "the hundreds of hours" of time in dealing with the strata on the issue. Mr. Lee did not provide a breakdown of his compensation request.
5. The strata says it properly and reasonably exercised its authority under the *Strata Property Act* (SPA) and bylaws. In particular, the strata admits there was a sewer gas odour in SL294, but says it reasonably investigated Mr. Lee's sewer gas complaint and was unable to further investigate the source of the smell because the strata failed to approve the expense. The strata says Mr. Lee has failed to prove his claims. It denies any liability and requests that Mr. Lee's claims be dismissed.
6. As explained below, I find the strata must continue to investigate the sewer gas smell in SL294 and repair the second bedroom wall at the conclusion of the strata's investigation.

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 Issue – Document Disclosure

11. In his submissions, Mr. Lee alleges the strata did not provide him with documents he requested under SPA section 36. However, this allegation did not form part of the Dispute Notice. I find it would be procedurally unfair for me to make any findings about Mr. Lee's document requests because the strata did not have a reasonable opportunity to respond. Therefore, I find Mr. Lee's alleged claim for document disclosure is not properly before me, and I do not address it in my reasons below.

ISSUES

12. The issues in this dispute are:
 - a. Does the strata have a duty to investigate the smell of sewer gas in SL294 and, if so, did the strata breach its duty?
 - b. What is an appropriate remedy, if any?

BACKGROUND, EVIDENCE AND ANALYSIS

13. As applicant in a civil proceeding such as this, Mr. Lee must prove his claims on a balance of probabilities, meaning more likely than not. I have considered all the

submissions and evidence provided by the parties, but refer only to information I find relevant to explain my decision.

14. The strata was created under the SPA in June 2015. It consists of 295 strata lots in a high-rise tower and 2 adjacent 2-level buildings. The strata plan shows SL294 is located on the 40th level, or top floor, of the tower.
15. The strata filed a new set of bylaws with the Land Title Office (LTO) on December 12, 2016. The filed LTO document states the December 2016 bylaws are in addition to the Standard Bylaws under the SPA. I find these are the strata bylaws in force at the time of this dispute.
16. The basic facts are not at issue. I summarize them as follows.
17. On July 15, 2021, Mr. Lee emailed the strata manager and a person whom I infer is an employee of the strata's owner developer. The email noted Mr. Lee began smelling sewer gas in SL294 "about a month ago". The gas smell was intermittent but was getting more intense and allegedly causing sore throats and chest discomfort. Mr. Lee says he had checked various areas within SL294, including his air conditioner, but could not pinpoint the source of the smell. The email noted Mr. Lee had spoken to his neighbour directly below SL294 who indicated they had a similar issue and also could not pinpoint the source.
18. In the same email, Mr. Lee recalled a similar issue occurring about 5 years earlier, in 2016. He says the cause of the smell at that time was because "a device for dripping water constantly into a p-trap in the roof top mechanical room (immediately above [his] unit) was turned off", and suggested this be investigated. The strata agreed and arranged for a contractor to inspect and correct the p-trap the same day, July 15, 2021.
19. On July 20, 2021, Mr. Lee confirmed in an email to the strata that the problem smell continued but was reduced when he taped plastic over his second bedroom air conditioner. He suspected the smell was coming from the roof top vent stacks or around poorly sealed vents, into the wall cavity, and into his second bedroom from around the air conditioner. He asked the strata to investigate and repair any issues.

The strata agreed and had the poorly sealed vents corrected on July 26, 2021, but that did not solve the issue.

20. Between July 27 and August 20, 2021, Mr. Lee communicated directly with the strata's contractor, Coral Canada Wide Ltd. (Coral), about suspected sources of the smell and how to pinpoint them. Coral suggested the interior drywall in the second bedroom of SL294 be opened to expose a vent and drainpipes. However, the strata asked Coral to send a camera down the vent and drainpipes, which it did. The emails confirm that Coral did not discover any "breaks in the piping that would signal" a leak.
21. On September 2, 2021, the strata's caretaker cut open the drywall in an electrical closet next to SL294. It is unclear what they discovered if anything. On September 7, 2021, the strata manager emailed Mr. Lee that the strata believed the gas smell was coming from the wall cavity behind Mr. Lee's air conditioner and may not be related to common property. The strata suggested the next step was to cut open the drywall in SL294's second bedroom, which it said would be at Mr. Lee's expense. The strata requested Mr. Lee sign a form agreeing to take responsibility for repair costs if the cause of the smell was not the strata's responsibility.
22. In November 2021, the strata emailed Mr. Lee a copy of an email from Coral that suggested the sewer gas smell was either coming from a vent pipe located behind the second bedroom wall or from the condensate line of Mr. Lee's air conditioner. The email suggested the vent pipe was common property and the air conditioner's condensate line was Mr. Lee's responsibility. The strata requested Mr. Lee agree to allow Coral access to SL294 to open the second bedroom wall to further investigate the issue on the basis that Mr. Lee would be responsible for the repair cost if it was found to be related to the air conditioner problem. The strata agreed to take responsibility if the issue was found to be a common property problem and again requested Mr. Lee sign its liability form. In further email exchanges, Mr. Lee responded that he had lost confidence in Coral and requested another contractor be retained by the strata. He did not want his second bedroom wall opened up and appeared to insist the problem was related to a vent within the wall cavity that he believed was common property. However, Mr. Lee and the other co-owner of SL294 signed the form requested by the strata on February 9, 2022.

23. By February 16, 2022, the strata had retained Total Energy Systems (TES) to investigate the sewer gas smell, and TES had contacted Mr. Lee. An undated consolidated work order report provided by TES shows its representatives spent 22.5 hours investigating the sewer gas smell between February 16 and April 11, 2022. The report also shows that TES attended SL294 to partially cut out drywall to visually inspect and test the air quality in the second bedroom wall cavity. TES tested the air quality in the second bedroom with a “gas sniffer” and found signs of sewer gas both inside the wall and in the bedroom. The report concludes by stating the sewer gas smell continues and requests permission to fully open the bedroom wall. TES subsequently estimated the additional investigation expense would be \$1,830.
24. The strata retained RooFix to further investigate the issue. According to the April 12, 2022 RooFix invoice description, RooFix attended SL294 on March 30 and did not “find any internal issues”. However, it did find a clogged drain on the roof above SL294, which it repaired.
25. Mr. Lee and strata manager exchanged further emails and on April 29, 2022, the strata manager advised Mr. Lee that the strata had determined it required additional funds to investigate the sewer gas smell and intended to call a special general meeting (SGM) on June 15, 2022 for this purpose. It also advised it could not take any action until further funding was approved.
26. The strata held an SGM on June 15, 2022, and proposed a resolution to approve an expense of up to \$10,000 for further investigation from contingency reserve fund (CRF). The resolution was defeated. It appears the strata has taken no further action since the June 2022 SGM stating in its submissions that it has been “prevented from funding further investigations” as a result of the defeated resolution.

Does the strata have a duty to investigate the sewer gas smell?

27. Based on the action taken by the strata, I find the parties effectively agree the strata is responsible to investigate the cause of the sewer gas smell. I also note that 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, *Youlton v. The Owners, Strata Plan VIS 4390*, 2022 BCCRT 639, and *Cernes v. The Owners, Strata Plan VR 2540*, 2023 BCCRT 13.

28. 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. Based on this case law, I find a strata corporation's duty to repair includes a duty to investigate the need for repair based on a standard of reasonableness.

Did the strata breach its duty?

29. The standard of care to which a strata council must adhere is one of reasonableness, such that "perfection is not required... only reasonable action and fair regard for the interests of all concerned": see *Leclerc v. The Owners, Strata Plan LMS 614*, 2012 BCSC 74 at para 61. This means that the strata's duty to investigate is based on the standard of reasonableness. So the remaining question is whether the strata acted reasonably in its investigation of the sewer gas smell. For the following reasons, I find it did not.
30. 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 paragraph 50, and *Hill v. The Owners Strata Plan KAS 510*, 2016 BCSC 1753.
31. The courts have also held that a strata corporation should not be found to have acted unreasonably in the circumstances if 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).

32. Finally, in *Leclerc*, the Court found that short of deliberate delay, slowness in repairs by a strata corporation 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.
33. Following the above-noted case law, I find up until the June 15, 2022 SGM, the strata acted reasonably when it investigated the cause of the sewer gas smell. During that time, the evidence shows the strata quickly responded to Mr. Lee’s concerns and took timely steps guided by its contractors to investigate the issue. I think it worthwhile to note that Mr. Lee did not initially agree to have the drywall in the second bedroom of SL294 opened for the inspection, which potentially delayed some investigation as the strata suggests, but by February 9, 2022, Mr. Lee did allow the drywall removed for the inspection.
34. The evidence is that the sewer smell continued up to and following the June 15, 2022 SGM. However, after that meeting, the strata has taken the position that Mr. Lee must prove the sewer gas smell is related to common property before it continues any investigation. It says it cannot continue investigating the issue because the strata ownership did not approve the CRF expense.
35. The strata had already incurred investigation costs and more than likely paid the expenses from its operating fund. The strata also did not explain why it needed approval to spend \$10,000 from its CRF to continue investigating the issue, when it did not require CRF funds for its earlier investigations. There is also no evidence the strata expended its operating fund budget for this type of work in June 2022. In fact, Mr. Lee asserts the strata had sufficient operating funds to continue the next step of investigation proposed by TEC at a cost of \$1,830, to which the strata did not object.

36. I find the strata's decision to abandon any further investigation into the sewer gas smell is unreasonable and contrary to its statutory obligation to repair and maintain common property, which includes a duty to investigate. Therefore, I find the strata breached its duty to repair.

What is an appropriate remedy?

37. Based on the overall evidence, I find the sewer gas smell in SL294 has not been resolved. Therefore, in the circumstances of this dispute, I find the appropriate remedy is to order the strata to continue investigating the sewer gas smell in SL294.

38. 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 9(d) 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 here. Bylaw 2(1) makes an owner responsible to repair and maintain their strata lot except for things the strata must repair. Read together, the strata's bylaws make Mr. Lee responsible for repair and maintenance of the relevant parts of SL294.

39. However, the strata has already removed some drywall in SL294's second bedroom and may need to remove additional drywall during its further investigation. At the conclusion of the strata's investigation, I order the strata to repair the drywall in SL294's second bedroom. I make this order for 2 reasons. First, the strata arranged for the drywall to be removed. Second, the strata would not likely be able to fully investigate the sewer gas smell without viewing the interior wall cavity. This conclusion is consistent with other CRT decisions that have found a strata corporation is responsible for repairing strata lot walls that are not common property, where the walls are opened by the strata corporation for investigation or common property repair purposes. See for example, *Juhala v. The Owners, Strata Plan NW 2089*, 2022 BCCRT 1208, *Ferreira v. The Owners, Strata Plan NW1769*, 2021 BCCRT 305, and *Campbell v. The Owners, Strata Plan 1086*, 2018 BCCRT 795.

40. As for Mr. Lee's request that the strata repair his air conditioner, there is no dispute the air conditioner is Mr. Lee's and not common property. There is also no evidence

the air conditioner is not working, or that he strata damaged it during its investigation of the sewer gas smell. Therefore, I decline to make an order about Mr. Lee's air conditioner.

41. Finally, Mr. Lee requests the strata pay him \$5,000 for the loss of use and enjoyment of SL294, ill effects on his health and mental stress, and "the hundreds of hours" of time in dealing with the strata on the issue. Mr. Lee did not break down his compensation claim, but I find it reasonable to infer he claims an equal amount of approximately \$1,660.00 for each element of his compensation claim.
42. Except for his assertion, Mr. Lee provided no evidence about the effects the sewer gas smell had on his physical or health, such as doctor's note, so I find his claim is unproven and I dismiss it. I also dismiss his claim for time spent. CRT Rule 9.5(5) says the CRT will not order a party to pay another party compensation for time spent dealing with the CRT proceeding, except in extraordinary circumstance, which I find are not present here.
43. As for Mr. Lee's claim for loss of use and enjoyment of SL294, I find when a strata corporation has failed in its statutory obligations, and an owner has suffered a loss of use and enjoyment of their strata lot, the CRT may award damages to compensate for this loss. The CRT has awarded damages in cases a strata corporation's failure to enforce its bylaws: see for example, *Kenkel v. The Owners, Strata Plan NW2777*, 2023 BCCRT 112 citing *Bahmutsky v. Petkau*, 2020 BCCRT 244. I find that damages may be an appropriate way to remedy a strata corporation's breach of its statutory obligations, such as is the case here.
44. The strata did not comment on this aspect of Mr. Lee's claim, but I find it is well-established that an owner has a right to reasonably use and enjoy their strata lot. I find the sewer gas odour interfered with Mr. Lee's use and enjoyment of the second bedroom of SL294, which has continued since the strata abandoned its investigation into the cause of the gas smell in June 2022, or approximately 9 months. The damage amounts awarded in other CRT decisions generally range from about \$750.00 to \$2,500.00 depending on length of time of the lost use and enjoyment and the severity of the disruption. On a judgement basis, I find it reasonable to award the strata to pay

Mr. Lee \$1,000.00 in damages in this case, and I so order.

CRT FEES AND EXPENSES

45. Under CRTA section 49 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 that general rule here. Mr. Lee was the successful party and paid \$225 in CRT fees, so I order the strata to reimburse him that amount.
46. In addition to Mr. Lee's claim for CRT fees and compensation for time spent noted above, he also claimed a total of \$390.81 for dispute-related expenses, which I summarize below. I note Mr. Lee provided copies of receipts for these expenses.
- a. City of Burnaby - \$53.60 (\$51.14 + \$2.46) to purchase building plans and related documents
 - b. Payments to Rancho - \$63.17 (\$13.44, \$25.10 + \$24.63) to pay costs of copying documents
 - c. Sewer Gas Detector - \$184.93 for the cost of a gas detector (converted from \$US 118.00), including \$24.93 for Canada Post taxes and handling fees
 - d. Bio Enzyme drain strips - \$11.19 to clean p-trap/condensate pipe blockages, as suggested by LG air conditioner manufacturer (measure failed because there was nothing wrong with p-trap/condensate pipe)
 - e. Descaling citric acid - \$13.54 to clean air conditioner, as suggested by LG air conditioner manufacturer (measure failed because there was nothing wrong with air conditioner)
 - f. Foam and drywall filler - \$15.99 to block sewer gas leak from entering bedroom, as suggested by Coral in July 2021 (measure failed because sewer gas still seeps into bedroom)
 - g. More Foam for drywall holes and weather strip plates for electrical outlets - \$19.40 to block sewer gas from entering into bedroom, as suggested by Coral

- in July 2021 (measure failed again because sewer gas still seeps into bedroom)
- h. Land Title Office - \$19.24 to obtain Strata's official mailing address for the Tribunal to send Notice to Strata
 - i. Registered mail - \$9.75 plus tax to send our request for hearing with Council (paid January 27, 2022)
47. I do not allow the expenses paid to Rancho of \$63.17 because it is unclear from the evidence what documents Mr. Lee paid for. I do not allow the expenses of \$24.73 relating to the air conditioner as that is Mr. Lee's responsibility. I also do not allow the \$9.75 registered mail expense as that expense was about a strata council hearing and the SPA does not require owners to submit written requests for strata council hearings by registered mail.
48. I allow the remaining expenses totalling \$317.89 as I find they are reasonable and related to this dispute. I order the strata pay Mr. Lee that amount.
49. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against Mr. Lee.

ORDERS

50. Within 30 days of the date of this decision, I order the strata to:
- a. Pay Mr. Lee a total of \$1,542.89 broken down as follows:
 - i. \$1,000.00 in damages,
 - ii. \$225.00 for CRT fees, and
 - iii. \$317.89 for dispute-related expenses,
 - b. Continue to reasonably investigate the sewer gas smell in SL294, and
51. I order the strata to complete drywall repairs to the second bedroom wall of SL294 at the conclusion of its investigation, including painting the repaired wall.

52. I dismiss Mr. Lee's remaining claims.

53. Mr. Lee is entitled to post-judgement interest under the *Court Order Interest Act*, as applicable.

54. 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.

J. Garth Cambrey, Vice Chair