Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan NW 2476 v. Jensen*, 2023 BCCRT 623

B E T W E E N :

The Owners, Strata Plan NW 2476

APPLICANT

A N D :

TREVOR JENSEN

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Megan Stewart

INTRODUCTION

1. This dispute is about reimbursement for the replacement of 2 skylights.

2. The respondent, Trevor Jensen, owns strata lot 1 (SL1) in the applicant strata corporation, The Owners, Strata Plan NW 2476 (strata). The strata says it paid to have 2 improperly installed skylights replaced after water entered SL1. The strata

also says under an alteration and indemnity agreement (the agreement) that SL1's previous owner signed, Mr. Jensen is responsible for the expense the strata incurred to replace the skylights. The strata seeks $1,513.05 for the cost of replacing the skylights.

3. Mr. Jensen denies responsibility for the skylight replacement expense. He says the water ingress was due to a cracked roof vent which was the strata's responsibility to repair, and the strata needlessly replaced the skylights which were not leaking. He also says the strata treated him unfairly. I infer he asks me to dismiss the strata's claims.

4. A strata council member represents the strata. Mr. Jensen is self-represented.

5. For the reasons below, I find in favour of the strata in this dispute.

JURISDICTION AND PROCEDURE

6. These are the Civil Resolution Tribunal's (CRT) formal written reasons. 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. In some respects, the parties in this dispute call into question the credibility, or truthfulness, of the other. Here, I find 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.

10. In submissions, Mr. Jensen alleges a strata council member (LB) violated his privacy by contacting his realtors about the skylight replacement. However, Mr. Jensen did not counterclaim or request a remedy for this alleged privacy breach. Even if he had done so, in *Ari v. Insurance Corporation of British Columbia,* 2015 BCCA 468, the court found there is no common law cause of action for breach of privacy. The *Privacy Act* creates a tort (civil wrong) when one person violates another's privacy, with exceptions. Section 4 of the *Privacy Act* says that such an action must be brought in the BC Supreme Court. So, I find the CRT would have had no jurisdiction to address Mr. Jensen's privacy breach claim in any event.

ISSUE

11. The issue in this dispute is whether Mr. Jensen must reimburse the strata $1,513.05 for the 2 replacement skylights.

BACKGROUND, EVIDENCE AND ANALYSIS

12. In a civil proceeding like this one, the applicant strata must prove its claims on a balance of probabilities (meaning more likely than not). I have read all the parties' submissions and evidence but refer only to the evidence and argument that I find relevant to provide context for my decision.

13. The strata was created in November 1986 under the *Condominium Act* and continues to exist under the *Strata Property Act* (SPA). The strata plan shows the strata is made up of 17 residential strata lots.

14. The strata has filed several bylaw amendments with the Land Title Office since it was created. So, I find the strata's bylaws are the Standard Bylaws except to the extent it has filed other bylaws that conflict with the Standard Bylaws (SPA section 120). The strata filed amendments to bylaws 6 and 8, both of which apply to this dispute.

15. Bylaw 6 says an owner must obtain written approval from the strata before making an alteration to common property. It also says as a condition of its approval, the strata will require the owner to take responsibility for costs related to such alteration and for its future repair and maintenance by entering into an alteration and indemnity agreement. Bylaw 8 sets out the strata's repair and maintenance obligations. It says the strata is responsible for common property not designated as limited common property.

BACKGROUND, EVIDENCE AND ANALYSIS

16. On September 18, 2021, Mr. Jensen emailed LB, the strata council's maintenance member at the time, to report water ingress into SL1. LB immediately contacted Landmark Roofing Ltd. (Landmark) who attended on September 21, 2021. Though Landmark initially concluded the 2 skylights in the roof above SL1 had caused the water ingress, Landmark's owner, DL, later determined it may have resulted from a cracked or leaking roof vent. However, DL also advised the strata the 2 skylights had been improperly installed. Specifically, DL said the skylights had previously been replaced without also replacing the flashing (surrounding metal), and that water was not being properly diverted away from the skylights. Landmark recommended replacing the skylights and flashing along with 2 vents close to the skylights to prevent water ingress in the future. None of this is disputed.

17. On September 24, 2021, LB emailed Mr. Jensen to advise him the strata intended to replace the skylights as Landmark recommended. LB also said that under the agreement, Mr. Jensen was responsible for paying for the skylight replacement.

18. The parties disagree about whether LB subsequently told Mr. Jensen the strata would pay for the skylight replacement. Mr. Jensen says LB told his realtors the strata would

pay, though he did not provide a statement from his realtors in support of this. Instead, Mr. Jensen points to his email to LB in December 2021 in which he indicated he appreciated the strata's offer, sent through his realtors, that it would cover the skylight replacement cost. Conversely, the strata says that from the start, it notified Mr. Jensen he was responsible for the cost of the skylight replacement, and that it was always the strata's intention to recover that expense from Mr. Jensen. The strata provided a September 30, 2021 email exchange between LB and one of Mr. Jensen's realtors. In the exchange, LB said the strata would pay to avoid "trouble for Landmark getting their money fair and square" but emphasized the "Strata has no intention of absorbing costs associated with the skylights at Unit 1 [SL1]". Based on the parties' submissions and email evidence, I find the strata offered to pay the skylight replacement's cost upfront so as not to inconvenience Landmark, and then collect that payment from Mr. Jensen.

19. After Landmark installed the new skylights in December 2021, the strata requested reimbursement from Mr. Jensen which he refused to provide.

Does the alteration and indemnity agreement bind Mr. Jensen?

20. The agreement purports to commit not only the owner to obligations for the skylights' maintenance and the cost of their maintenance, but also the owner's "heirs, successors and assigns". While Mr. Jensen does not deny the agreement is binding on him, I find establishing whether the agreement is binding on him is a precondition of the remaining analysis.

21. As discussed above, bylaw 6 allows the strata to require an owner to sign an indemnity agreement as a condition of approval for alterations to common property. In addition, under SPA section 59(3)(c), a strata corporation must disclose to a prospective buyer, through a Form B Information Certificate, any agreements under which the owner takes responsibility for expenses relating to the common property, among other things. I find the combined effect of SPA section 59(3)(c) and bylaw 6 is that a purchaser may become a party to an indemnity agreement about common property as long as the indemnity agreement is properly disclosed on a Form B Information Certificate and includes language about binding future owners. I note that

similar to the strata's bylaw 6(2), bylaw 6(2) in the standard bylaws says a strata corporation may require an owner to agree to take responsibility for any expenses relating to altering common property before approving the same. Together, SPA section 59(3)(c) and bylaw 6(2) in the standard bylaws suggest the legislature intended that strata corporations should be able to hold subsequent purchasers to indemnity agreements signed by previous owners.

22. Here, Mr. Jensen acknowledges the strata disclosed the agreement with the Form B Information Certificate. Given this and the agreement's wording about binding future owners, I find Mr. Jensen became a party to the agreement upon purchasing SL1 and accepted its obligations. I note that in *Nguyen v. The Owners, Strata Plan Vr 97*, 2022 BCCRT 260, a vice chair found an assumption of responsibility agreement signed by an owner for expenses the strata incurred in relation to strata lot alterations did not bind the subsequent owner, because they were not a party to the agreement. However, that decision did not discuss whether the Form B Information Certificate disclosed the assumption of responsibility agreement to the purchaser, whereas here, the agreement was undisputedly disclosed. I further note that in *The Owners, Strata Plan VR 42 v. Learmonth*, 2023 BCCRT 400, the same vice chair found that generally, a strata corporation will not be able to hold a subsequent owner responsible for a prior owner's alteration without an indemnity agreement that says otherwise. As explained above, here, the agreement was clear on this point. So, I find both decisions distinguishable from this one, and further, that the agreement binds Mr. Jensen as SL1's current owner.

Must Mr. Jensen reimburse the strata $1,513.05 for replacing the 2 skylights?

23. Mr. Jensen says the strata needlessly replaced the skylights. He says the agreement only makes him responsible for the skylights' repair costs for defective work and not for "unnecessary repairs" the strata chooses to make. Mr. Jensen argues that since the water ingress was caused by cracked or leaking roof vents and not the skylights, the strata caused Landmark to perform work that was not required. He says he cannot now be made to pay for this unnecessary work.

24. Mr. Jensen also says he is not responsible for the cost of the flashing Landmark replaced when it replaced the skylights. He says this is because when the previous owner had the skylights replaced in 2011, they did not have the flashing replaced. So, Mr. Jensen says the flashing that Landmark replaced was "original construction" and not an alteration for which he is responsible under the agreement.

25. Finally, Mr. Jensen says the strata treated him unfairly by pursuing him for reimbursement of the 2 skylights. He says in 2019, the strata paid to replace all the other common property skylights from the strata's contingency reserve fund (CRF), and so should have borne the cost of replacing the 2 skylights above SL1 when it determined they needed replacing.

26. The parties disagree about the water ingress' cause. I find it is unnecessary for me to resolve this disagreement, given my conclusion below. That is, even if the 2 skylights were not the source of the water ingress, I find the strata was entitled to reimbursement of their replacement cost from Mr. Jensen based on the strata's repair and maintenance obligations, Mr. Jensen's obligations under the agreement, and the law of significant unfairness.

The strata's repair and maintenance obligations

27. The SPA and the strata's bylaws set out the strata's repair and maintenance obligations. SPA sections 3 and 72 require the strata to repair and maintain common property and common assets. Bylaw 8(b) requires the same thing.

28. In *Previer v. The Owners, Strata Plan NW651*, 2023 BCCRT 601, a tribunal member found a strata could not, by bylaw, make an owner responsible for the repair and maintenance of common property that was not limited common property because there are no regulations allowing it (SPA section 72(2)(b)). While previous CRT decisions are not binding on me, I agree with the tribunal member's conclusion about the operation of SPA section 72(2)(b).

29. Here, bylaw 6(2) says that as a condition of approval to make alterations to common property, the strata shall require an owner to sign an alteration and indemnity

agreement to "take responsibility for any costs relating to the alteration as well as the future repair and maintenance of the same." So, I find bylaw 6(2) effectively makes an owner responsible to repair and maintain common property despite there being no regulations that allow this, contrary to SPA section 72(2)(b).

30. SPA section 121(1)(a) says a bylaw is not enforceable to the extent it contravenes the SPA. So, I find bylaw 6(2) is unenforceable to the extent it makes an owner responsible to repair and maintain common property. Consequently, I also find the part of the agreement that says SL1's owner "shall maintain" the skylights unenforceable.

31. I find bylaw 6(2) (and by extension the agreement) must be read down to comply with the SPA. That means the part of bylaw 6(2) that offends the SPA is of no force and effect but the rest of the bylaw remains enforceable. As a result of reading down bylaw 6(2), I find the strata retains responsibility for repairing and maintaining common property, including common property alterations such as the skylights above SL1, which I turn back to now.

32. The strata's obligation to repair and maintain common property is measured by the test of what is reasonable in all the circumstances, and can include replacement when necessary (see *The Owners of Strata Plan NWS 254 v. Hall,* 2016 BCSC 2363). Generally, a strata corporation may rely on professional contractors' advice in completing repairs and maintenance (see *Wright v. The Owners, Strata Plan #205*, 1996 CanLII 2460 (BCSC)). In other words, I find the strata can meet its obligation to maintain the common property skylights by hiring a qualified contractor and following its advice and recommendations.

33. Here, the strata hired Landmark to investigate and repair the cause of the water ingress into SL1. Mr. Jensen does not dispute that Landmark was a qualified roofing contractor or that the strata should not have hired Landmark. There is no evidence the strata should have doubted Landmark's competence. I find Landmark was a qualified roofing contractor.

34. During its investigation, Landmark determined the skylights in the roof above SL1 had been improperly installed without new flashing, and that regardless of what caused the water ingress on September 18, 2021, the skylights needed replacing to prevent future water ingress. Landmark wrote to the strata on at least 3 separate occasions to explain that because the flashing was not replaced at the time the skylights were replaced in 2011, the skylights had been improperly installed and needed replacement "before a catastrophic leak issue" arose. So, it did not matter if the skylights were not the cause of the water ingress on this occasion. By relying and acting on Landmark's advice, the strata worked proactively to prevent a future leak, which I find was a reasonable thing do. So, I find in these circumstances the strata met its maintenance and repair obligations.

Mr. Jensen's obligations under the agreement

35. Under the agreement, the strata allowed the previous owner to "professionally [install] on the roof two twin seal skylights replacing the original skylights". In exchange, the previous owner agreed to pay all the costs of maintaining the skylights "and all other appurtenant components", among other things. I find "appurtenant components" means all parts connected with the skylights' proper installation.

36. Mr. Jensen asserts the agreement only applies to the skylights themselves, and not to the flashing because the previous owner did not change the flashing in 2011. I do not accept this assertion. There is no evidence from the previous owner's contractor to explain why they did not replace the flashing or why replacement may not have been necessary.

37. On the other hand, evidence from DL indicates that replacing a skylight often breaks the seal with the roof. This necessitates replacement of the flashing, which provides weather protection between the skylight and the roof. That is, flashing is an essential part of proper skylight installation.

38. DL's qualifications are not set out in any of their opinion evidence provided. Under CRT rule 8.3(2), an expert must state their qualifications in any written expert opinion evidence. CRT rule 1.2(2) says that the CRT may waive or vary the

application of a rule to facilitate the fair, affordable, and efficient resolution of disputes. To the extent DL's evidence falls short of CRT rule 8.3(2), I waive this requirement under CRT rule 1.2(2), because I find DL is knowledgeable about skylight installation, given they are undisputedly Landmark's owner, and were familiar with the context and history of the skylights above SL1.

39. Based on DL's opinion, I find flashing is an "appurtenant component", since it is a key part of skylight installation. So, I find Mr. Jensen's obligation to pay for the skylights' maintenance under the agreement included paying for new flashing when Landmark replaced the improperly installed skylights. I find the fact that the previous owner did not replace the "original construction" flashing in 2011 does not relieve Mr. Jensen of this obligation.

Significant unfairness

40. Mr. Jensen alleges that the strata treated him unfairly by seeking to recover the skylight replacement expense from him. Mr. Jensen says that in 2019, the strata replaced all its common property skylights except the 2 in the roof above SL1 using money from the CRF. The strata does not dispute this, but says it does not pay for anything covered by an alteration and indemnity agreement from the CRF. So, it did not have the skylights above SL1 replaced in 2019.

41. The CRT has authority to make orders remedying a significantly unfair act or decision by a strata corporation under CRTA section 123(2). This provision contains similar language to SPA section 164, which allows the BC Supreme Court (BCSC) to make orders remedying significantly unfair acts or decisions. The BCSC recently confirmed that the legal test for significant unfairness is the same for CRT disputes and court actions (see *Dolnik v. The Owners, Strata Plan LMS 1350*, 2023 BCSC 113).

42. In *Kunzler v. The Owners, Strata Plan EPS 1433*, 2021 BCCA 173, the BC Court of Appeal said that significantly unfair actions are those that are burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith, unjust, or inequitable. In applying this test, the owner's reasonable expectations are a relevant factor, but are not determinative.

43. The test for assessing an owner's reasonable expectations is from *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44:
    a. What was the owner's expectation?
    b. Was that expectation objectively reasonable?
    c. Did the strata violate that expectation with a significantly unfair action or decision?

44. Mr. Jensen says the strata's refusal to bear the cost of the 2 skylights' replacement is unfair because he has contributed to the CRF just as the other owners have done, and so he should also have benefitted from the "free" skylight replacement in 2019.

45. I find Mr. Jensen's expectation was not objectively reasonable. It is undisputed Mr. Jensen contributed to the CRF as required. However, as noted above, Mr. Jensen was aware of the agreement when he bought SL1. So, he knew or should have known of his obligation to pay for the 2 skylights' maintenance costs. This obligation exists independent of Mr. Jensen's responsibility to contribute to the CRF through his strata fees under SPA section 99. There is no evidence the strata treated Mr. Jensen less favourably than it treated any other strata lot owner in connection with the skylight replacement project, taking account of the agreement. In these circumstances, I find the strata did not treat Mr. Jensen significantly unfairly by seeking to recover the cost of replacing the 2 skylights above SL1 from him.

46. In sum, I find the strata is entitled to reimbursement of the claimed skylight replacement expense from Mr. Jensen and I order him to pay the strata $1,513.05.

CRT FEES, EXPENSES AND INTEREST

47. 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. I order Mr. Jensen to reimburse the strata for CRT fees of $225. The strata did not claim dispute-related expenses, so I award none.

48. The *Court Order Interest Act* (COIA) applies to the CRT. The strata is entitled to pre-judgment interest on the $1,513.05 award from April 14, 2022, the date of the strata's first demand letter, to the date of this decision. This equals $52.94.

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

ORDERS

50. I order that within 30 days of the date of this decision, Mr. Jensen must reimburse the strata $1,790.99, broken down as follows:
    a. $1,513.05 for reimbursement of the cost to replace the 2 skylights in the roof above SL1,
    b. $52.94 in pre-judgment interest under the COIA, and
    c. $225 for CRT fees.

51. The strata is also entitled to post-judgment interest under the COIA, as applicable.

52. 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.

Megan Stewart, Tribunal Member