



Civil Resolution Tribunal

Date Issued: October 24, 2023

File: ST-2022-009358

Type: Strata

Civil Resolution Tribunal

Indexed as: *Hagen v. The Owners, Strata Plan VR 2690*, 2023 BCCRT 912

BETWEEN:

ERIN HAGEN and KYLE FINES

APPLICANTS

AND:

The Owners, Strata Plan VR 2690

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

J. Garth Cambrey, Vice Chair

INTRODUCTION

1. This is a strata property dispute about water ingress from a balcony.
2. The applicants, Erin Hagen and Kyle Fines, own and live in strata lot 16 (SL16) in the respondent strata corporation, The Owners, Strata Plan VR 2690 (strata). Ms. Hagen represents the applicants. A strata council member represents the strata.

3. The applicants say that in November 2021, significant water damage occurred to SL16 from a balcony immediately above SL16's bedroom. They say they brought concerns of water ingress to the strata's attention about a month prior to the leak happening and the strata took no action. They also say the strata retained a contractor who did not attend SL16 until 3 days after the damage occurred. According to the applicants, the contractor identified the issues as a blocked balcony drain and faulty siding, but the strata did not address these issues in a timely way or reasonably respond to their requests for information. A second water leak into SL16 occurred in March 2023, after the applicants had repaired it.
4. The applicants originally sought orders that the strata repair the faulty siding and balcony issues, which they valued at \$4,000, and reimburse them \$1,000 for the insurance deductible they paid to their insurer. However, in submissions, they say the strata has now repaired the balcony and they do not ask for the \$4,000 repair amount. They say they are now "only asking for the additional monetary amount to address personal injuries and stress caused by this ongoing issue". It is unclear if they mean the \$1,000 amount for their insurance deductible or if they wish to add a new claim and remedy. I address both possibilities below.
5. The strata disagrees with the applicant's claims. It says it has taken appropriate steps to investigate the water damage source and retained professionals to assist with the investigations and determine appropriate repairs. The strata also says it met with the applicants to advise them of its investigation and appropriate common property repairs. It expressly denies being negligent. I infer the strata asks that the Civil Resolution Tribunal (CRT) dismiss the applicants' claims.
6. As explained below, I dismiss the applicants' claims and this dispute.

JURISDICTION AND PROCEDURE

7. These are the CRT's 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.

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, whether or not the information would be admissible in court.

Preliminary Issue – Additional Claim and Requested Remedy

10. As noted, the applicants essentially withdrew their claim for the strata to complete balcony repairs and stated they seek relief for personal injuries and stress. However, I find the applicants did not originally seek damages for personal injuries and stress as such claims were not set out in the Dispute Notice. In particular, I find the applicants' requested remedy of \$4,000 for the balcony repair can only be interpreted as the applicants' estimated cost to repair the balcony and siding. It cannot be interpreted any other way, including as partial remedy for personal injuries and stress.
11. The purpose of a Dispute Notice is to define the issues and provide notice to the respondent of the claims against it. Although the CRT rules permit an applicant to amend a Dispute Notice, that was not done here. Procedural fairness requires that a party must be notified of the claims against them and have a fair opportunity to respond. Therefore, to the extent the applicants add a new claim for damages about personal injuries and stress, I find such a claim is not properly before me and I decline to address it in my decision below.

ISSUE

12. Given the applicants admit the strata completed the requested balcony repairs, the sole remaining issue in this dispute is whether the applicants are entitled to reimbursement of the \$1,000 insurance deductible they paid.

BACKGROUND, EVIDENCE AND ANALYSIS

13. As 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 parties' submissions and evidence but refer only to information I find relevant to explain my decision. I note the strata did not provide any evidence, despite having the opportunity to do so. I also note the strata provided very limited submissions that were essentially a repeat of its Dispute Response.
14. The strata plan shows the strata was created in July 1990 under the *Condominium Act* (CA), so it was over 30 years old in 2021 when the water leak occurred. It comprises 131 strata lots in an 8-level building and continues to exist under the *Strata Property Act* (SPA). Balconies are identified as limited common property (LCP) for the exclusive use of the owners of the adjacent strata lot. The building is terraced such that most strata lot balconies are partially over the living space of the strata lot immediately below. That is the case here with the LCP balcony of strata lot 30 partially above SL16.
15. The strata filed several bylaw amendments with the Land Title Office (LTO) under both the CA and the SPA. *Strata Property Regulation* section 17.11 addresses transitional matters about bylaws from the CA to the SPA that were deemed to have occurred on January 1, 2002. Based on section 17.11, I find the bylaws in force for this dispute are essentially the Standard Bylaws under the SPA with some exceptions that are not relevant here. On my review of the bylaw amendments, I find the strata's repair and maintenance bylaws 2 and 8 are relevant to this dispute and I discuss them in greater detail below.

16. I find the applicants' claim is essentially that the strata was negligent in its repair and maintenance obligations for the SL30 LCP balcony. I will first address the parties' repair and maintenance obligations.

Repair and Maintenance Obligations

17. "Common property" is defined under SPA section 1(1) and includes pipes for the passage of drainage if they are located:

- a. within a floor, wall, or ceiling that forms a boundary between a strata lot and another strata lot or common property, or
- b. wholly partially in a strata lot and are capable of being and intended to be used in connection with the enjoyment of another strata lot or common property.

18. "Common property" is also defined to include that part of the building that is not part of a strata lot. SPA section 68 says a strata lot boundary is the midpoint of the structural portion of a wall that divides a strata lot from common property unless otherwise shown on the strata plan. Based on my review of the strata plan, I find the building exterior is common property.

19. "Limited common property" is defined as common property designated for the exclusive use of the owners of one or more strata lots.

20. SPA section 72 requires the strata to repair and maintain common property of the strata. Section 72 also allows the strata, by bylaw, to make an owner responsible for the repair and maintenance of LCP that the owner has a right to use or to take responsibility for repair and maintenance of specified parts of a strata lot, but the strata has not done so here.

21. Bylaw 8 requires the strata to repair and maintain common property and LCP balconies. Therefore, based on the SPA definitions above, I find the strata is responsible for repair and maintenance of the balcony drainpipe, the balcony, and the building exterior. While the strata says in an email exchanged with the applicants that the balcony drain is not its responsibility, I find that it is because it falls with the definition of common property under SPA section 1(1).

22. As for the applicants' obligations, bylaw 2 says an owner is responsible for repair and maintenance of their strata lot unless the bylaws say otherwise. There are no bylaws that require the strata to repair and maintain parts of strata lot, so I find the applicants are responsible for repair and maintenance of SL16. This is the position the strata took in its January 10, 2023 email when it advised the applicants it would not repair SL16.

Negligence

23. 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.

24. Based on the obligations set out above, the strata clearly does not owe the applicants a duty to repair SL16. It is equally clear that the strata owes the applicants a duty to repair the common property drainpipe and siding, and the LCP balcony. The case law that follows confirms the strata's standard of care for common property repairs is reasonableness.

25. 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.

26. What is reasonable in the circumstances also 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.

27. In *Leclerc v. The Owners, Strata Plan LMS 614*, 2012 BCSC 74, the Court found that slowness in completing repairs by a strata corporation may still be reasonable. *Leclerc* was a case of water ingress from common property into a strata lot over an extended 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”, and found the strata took reasonable action with fair regard for the interests of all concerned.

28. So, did the strata act reasonably in the circumstances of this dispute? As I explain below, there are 2 leaks that caused damage to SL16. I find the strata acted reasonably with respect to the first leak in November 2021 but that it did not act reasonably about the second leak in March 2023.
29. The evidence is that the applicants emailed the strata manger about concerns of water coming into SL16 on November 7, 2021. The email says the applicants noticed “brown/black liquid seeping through from above” but does not mention the SL30 balcony above as the source of the issue. Based on the email exchanged, the strata sent a plumber to check the SL30 balcony drain on November 9, 2021. According to the strata, the plumber reported the balcony drain was “functional”, which the strata relayed to the applicants by email on November 9, 2021. The applicants did not take any further steps to investigate, or request the strata to investigate, potential water ingress in SL16.
30. About 3 weeks later on November 28, 2021, water damage occurred in SL16. According to the applicants, the strata’s contractor attended SL16 on November 30, 2021, and found 3-4 inches of standing water on the balcony. I understand the applicants to say the strata’s contractor identified that a plugged balcony drain caused water to flood the SL30 balcony and back up behind the siding into the building and SL16. While there is no evidence of the contractor’s opinion about the leak, such as a written statement or email, the strata did not object to the applicants’ assertion, so I accept it is accurate.
31. I find the 3-week period between the first report of water damage in SL16 and the strata’s attendance to rectifying the leak in late November was reasonable. There is no evidence the strata was aware of the potential balcony leak prior to the applicants’ November 7, 2021 email, so I find the strata was not negligent in its repair and maintenance obligations about the November 28, 2021 water leak.

32. The parties exchanged a series of emails about responsibility for the water damage repair in December 2021. On January 10, 2022, the strata informed the applicants that it would not take steps to repair SL16 as the repairs were the applicants' responsibility. Based on the bylaws, I agree with the strata. The applicants made an insurance claim through their own insurers and paid a \$1,000 deductible, which the evidence confirms.
33. Between January and March 2022, while the SL16 repairs were underway, the applicants continued to email the strata manager about water ponding on the SL30 balcony. In March they noted the drain was clear but questioned when the balcony would be repaired, noting a new crack and water stain appeared on the bedroom ceiling in SL16. The strata manager provided limited replies, but on March 30, 2022, advised the strata intended to retain an engineer to prepare specifications for the balcony repair. No other details were provided by the strata manager.
34. Most repairs to SL16 were completed through the applicants' insurance in May 2022. The applicants continued to email the strata manager about the planned balcony repairs between June and September 2022. Again, the strata manager provided few responses. The applicants requested a council hearing to discuss the status of the balcony repair work and other unrelated matters. The hearing appears to have been held on October 4, 2022, but neither the hearing request nor any strata council meeting minutes are before me. All repairs to SL16 were completed about this time.
35. On October 13, 2022 the strata wrote to the applicants to advise it had retained an engineer to provide specifications "for the balcony remediation project" and I infer denied reimbursement of their \$1,000 insurance deductible. These decisions comply with the parties' responsibilities I have noted above.
36. However, another water leak occurred in the living room of SL16 on March 23, 2023. It is undisputed the leak was from the SL30 balcony. Up until that date, nothing about the first leak in November 2021 had changed. That is, the applicants were responsible for repairs to SL16, and the strata was responsible for common property repairs.

37. The strata accepted responsibility for damage to SL16 as a result of the March 2023 leak as confirmed in a June 23, 2023 email. As noted, the applicants also say the balcony repairs are now complete and they have withdrawn their claim that the strata to complete them, which I infer includes any siding repairs. It is unclear when the SL30 balcony was repaired, but based on emails in evidence I find it was after July 2023.
38. Following *Hall, Geuther, and Leclerc*, I find the strata's actions after the November 28, 2021 water leak set out above were not reasonable in the circumstances. Specifically, I find the strata did not complete the SL30 balcony repair and maintenance obligations in a timely manner. It was reasonable for some delay to occur with the balcony membrane work to allow the strata to obtain engineering quotes and select an engineer to provide design and specification details, which I infer is what the strata did. I find it was not reasonable for the strata to take approximately 6 months to decide to retain an engineer and a further 8 months to have the balcony work completed. The strata provided no evidence or submissions to support why it took so long for the balcony work to be completed, or what professional recommendations it followed. So, I find I can draw an adverse inference to find the strata was responsible for the delay.
39. Following *Mustapha*, I find the strata breached its standard of care. There is no question that water damage was sustained to SL16 in March 2023 as a result of incomplete common property repairs to the SL30 balcony drain, membrane or exterior building siding, so I find the strata was negligent in its repair and maintenance obligations. I turn now to the remedy.

Remedy

40. As for communicating its actions and the status of the balcony repair, I find the strata could have done better. I acknowledge that it was frustrating to the applicants to continually have to follow up with the strata manager to get any information about the repair, especially when the strata manager did not respond to their status requests which happened regularly. However, neither the SPA or bylaws address how often a

strata must communicate with an owner or if they have to answer every enquiry or email.

41. More importantly, the \$1,000 insurance deductible paid by the applicants undisputedly relates to the first leak in November 2021, which I have found the strata was not responsible to pay. I have also found the second leak in March 2023 was as a result of the strata's negligence. However, the applicants have not suffered any loss because the strata has accepted responsibility to pay for the SL16 repairs caused by the March 2023 leak. In other words, even though the strata was negligent in its repair and maintenance obligations about the March 2023 leak, it has corrected any wrongdoing by paying for the SL16 repairs from that leak.

42. As a result, I dismiss the applicants' claim and this dispute.

CRT FEES AND EXPENSES

43. 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. Here, the strata was the successful party, but it did not pay CRT fees or claim dispute-related expenses, so I make no such orders.

44. Under section 189.4 of the SPA, the strata may not charge any dispute-related expenses against the applicants.

DECISION AND ORDER

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

J. Garth Cambrey, Vice Chair