



Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Mok v. The Owners, Strata Plan BCS 3495*, 2023 BCCRT 1040

B E T W E E N :

WILLIAM MOK and JODIE CHAN

APPLICANTS

A N D :

The Owners, Strata Plan BCS 3495

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

J. Garth Cambrey, Vice Chair

INTRODUCTION

1. This strata property dispute is about who is responsible for strata lot repair expenses from a backed up kitchen sink drain.
2. The applicants, William Mok and Jodie Chan, co-own strata lot 399 (SL399) in the respondent strata corporation, The Owners, Strata Plan BCS 3495 (strata). Mr. Mok represents the applicants. A strata council member represents the strata.

3. On May 12, 2022, the kitchen sink in SL399 overflowed causing water damage to SL399 and the strata's exercise room located immediately below it. The applicants argue the strata was negligent in maintaining the common property drain lines connected to the SL399 sink drain. They say a blockage in the common property drainpipe caused the backup into the SL399 kitchen sink which overflowed and caused damage. The applicants seek an order for \$10,495.04 in damages for lost rental income, electricity expenses, and restoration costs. They did not provide a breakdown of the claimed damages, which I address below. The applicants also say they should not be responsible for paying the \$8,368.97 the strata charged them for emergency repair expenses. However, they did not expressly request relief from emergency repair expenses, which I also address below.
4. The applicants originally claimed the strata did not provide certain records and documents they requested in June 2022. However, in submissions, the applicants say this claim has been settled, except for documents they say the strata withheld.
5. The strata denies it was negligent in maintaining the drainpipes. It relies on the strata's bylaws to support its position the applicants are responsible for all damage to SL399. This includes \$8,368.97 for the emergency repair costs. The strata also says it has provided the applicants with all of their requested records and documents. The strata asks that the applicants' claims be dismissed. I note the strata did not file a counterclaim for the emergency repair costs it charged back to the applicants.
6. As explained below, I find the strata must pay the applicants \$10,972.90, including for lost rental income, repair costs, interest, and tribunal fees and remove the \$8,368.97 charge from SL399's account.

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. I am satisfied an oral hearing is not required as I can fairly decide the dispute based on the evidence and submissions provided.
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.

Preliminary matters

Late Evidence

10. The applicants provided late evidence that established the strata's plumbing, mechanical, and fire system contractor, operating under the Cobing Group of Companies had terminated its service contract with the strata in April 2022. The evidence shows Cobing terminated the contract because strata had not been paid several of its invoices. The strata had the opportunity to comment on the late evidence in its response submissions and did so. I find there is no procedural unfairness as a result. Therefore, I have admitted the late evidence and I have considered it in my reasons below.

Alleged Significant Unfairness

11. In submissions, the applicants argued the strata treated them significantly unfairly. They say the strata refused to pay for damage to SL399 but did pay for damage to other strata lots caused by pin hole leaks in common property water lines. The applicants' significant unfairness claim was not included in the Dispute Notice so it would be procedurally unfair for me to consider it. Therefore, I have not addressed this additional claim, but note nothing turns on this because of my finding of negligence.

ISSUES

12. The issues in this dispute are:

- a. Is the applicants' claim for records and documents moot (of no legal relevance)?
- b. Who is responsible to repair and maintain the blocked drainpipe?
- c. If the strata, was it negligent in its repair and maintenance of the drainpipe?
- d. If so, what is an appropriate remedy?

BACKGROUND, EVIDENCE AND ANALYSIS

13. As applicants in a civil proceeding such as this, Mr. Mok and Miss Chan 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.

14. The strata plan shows the strata was created in July 2009 under *Strata Property Act* (SPA) and consists of 642 strata lots in 3 towers. Each tower was constructed as a separate phase of the strata, which the parties identify as towers 1, 2, and 3 by order of construction. SL399 is located on the 5th floor of the tower 3.

15. On July 13, 2009, the strata's owner developer filed bylaws with the Land Title Office that replaced the Standard Bylaws under the SPA. On June 30, 2011, the strata filed bylaw amendments that included the addition of bylaws 17(1) and (2) about insurance and owners' responsibility. On December 29, 2020, the strata filed additional bylaw amendments that changed bylaw 17(1). Although it was renumbered to bylaw 17, I find the strata intended to file the amendment as bylaw 17(1) and I will refer to it as such. I find the July 2009 bylaws and the December 2020 new bylaw 17(1) are relevant to this dispute. The other bylaws are not relevant.

16. I further note the July 2009 bylaw amendments created commercial and residential sections as permitted under SPA sections 191 and 192. Although not raised by the parties, I am satisfied the strata, and not the residential section, is the correct

respondent in this dispute based on my review of the bylaws.

17. I summarize the applicable bylaws.

Bylaw 2.2(1) says an owner must repair and maintain the owner's strata lot, except for repair and maintenance that is the responsibility of the strata corporation under the bylaws.

Bylaw 3.1(2) says the strata must repair and maintain common property that has not been designated as limited common property.

Bylaw 17 essentially makes an owner strictly liable for damage that is their responsibility if it is not covered under the strata's insurance policy, including for amounts below any deductible. The bylaw allows the strata to charge such repair expenses to the responsible owner. The bylaw also requires the responsible owner to indemnify the strata for repair costs as well as other costs, such as investigation expenses, and legal and professional fees.

18. The applicants purchased SL399 on April 29, 2022. In the evening of May 12, 2022, the applicants discovered SL399 was flooded because the kitchen sink had overflowed. The strata called Xpert Mechanical & JK Lillie Ltd. to investigate, which it did. Xpert's invoice i76639 dated May 13, 2022, describes that it cleared the drainpipe blockages with a snake and pressure washer. The description says the blockages were "in the main and were very difficult to get through". The description also says there were wet spots on the ceiling of SL399, but that Xpert could gain access to the strata lot above to investigate. Finally, the invoice says further inspection to both strata lots was required and suggested "the piping most likely offsets below [SL399]" because of the exercise room below.

19. The strata also retained Phoenix Restorations (2015) Ltd. on May 12, 2022 to complete emergency repairs as a result of the backup. I infer the strata advised the applicants they were responsible for the cost of these repairs and likely gave them details of Phoenix's estimated charges.

20. In the description of invoice i76727 dated May 18, 2022, Xpert describes checking

the exercise room and then returning to SL399. Phoenix had removed the kitchen sink and peninsula, so Xpert was able to directly access the tee in the main drainpipe where the SL399 kitchen sink drainpipe enters the main pipe. The description says a grease and oil buildup started 3 inches into the main drainpipe and that Xpert's camera cable got stuck 7 feet in. Xpert then snaked the pipe with a "grease cutter head" for 35 or 40 feet, flushed the pipe with hot water, and ran the camera down the pipe again. It found some grease buildup on the side walls of the pipe between 3 feet and 12 feet, after which the pipe was clear. Xpert said water was draining away and recommended a further cleaning for the pipe's side walls and "regular cleaning" of the pipe in future.

21. On June 26, 2022, the applicants emailed the strata manager and requested all maintenance contracts, legal notices, and correspondence about common area sewer backups and preventative maintenance documents for towers 1, 2, and 3.
22. The applicants requested a council hearing on June 27, 2022. They say they requested the hearing to discuss lost rental income, BC Hydro expenses from Phoenix's dehumidifiers, and restoration costs, including those outlined by Phoenix. The strata does not dispute this. The council hearing was held on short notice on July 27, 2022. Only 2 council members were present at the hearing, which did not constitute a quorum, but the hearing still proceeded.
23. There is no evidence the strata gave the applicants a written decision about their requests within 1 week of the hearing as required under SPA section 34.1. However, the strata manager did write to the applicants on September 6, 2022. The letter stated the damage from the backup was less than the strata's insurance deductible and that the strata was not responsible for any related costs. I accept the cost of repairing the damage was less than the strata's deductible given the December 2021 annual general meeting notice contained a summary of the strata's insurance with a \$100,000 water damage deductible. The letter also suggested the applicants make a claim under their own insurance policy or deal with the necessary repairs on their own. The applicants chose to complete the repairs themselves and started this CRT dispute.

24. On November 3, 2022, the strata manager wrote to the applicants again stating they were responsible for repairs to SL399 citing bylaw 2.2(1) because, as owners, they are responsible for repair and maintenance of SL399. The letter also cited bylaw 2.2(2) but that bylaw relates to limited common property, which does not apply here. The letter also referenced the Phoenix repair invoice of \$8,368.97 and enclosed a copy of it. Finally, the letter requested reimbursement of the \$8,368.97 and provided the applicants with an opportunity to respond, including to request a council hearing prior to November 17, 2022, citing SPA section 135.
25. On November 11, 2022, the applicants emailed the strata manager disputing the charge back amount, so I accept they properly disputed it. There is no evidence a second council hearing was held, nor that the strata issued further correspondence.

Is the applicants' claim for records and documents moot?

26. A claim is considered moot when something happens after a legal proceeding starts that removes any "present live controversy" between the parties. As mentioned, the applicants submit their claim for records and documents has settled, except for the documents they say the strata withheld. However, the applicants provided the allegedly withheld records and documents as late evidence. Given the applicants clearly received the records and documents, I find their claim for records and documents is moot and I dismiss it. My reasons follow.
27. Generally, moot claims will be dismissed. However, the CRT has discretion to decide an otherwise moot claim if doing so would have a practical impact and potentially avoid future disputes. See *Binnersley v. BCSPCA*, 2016 BCCA 259.
28. Following *Binnersley*, I have considered whether deciding this claim would have any practical impact or potentially avoid future claims. I find it would not. I see no practical reason to decide the claim because the strata has already provided the documents the applicants requested. Going through an analysis of the facts to reach the same conclusion would be a purely academic exercise and wasteful of the CRT's resources.

29. As for potentially avoiding future claims, I acknowledge that the relationship between the strata and applicants is likely to continue and that future claims about records and documents may arise. However, if I were to continue to decide this claim, I do not find the potential for future claims would necessarily be avoided.

Who is responsible to repair and maintain the blocked drainpipe?

30. SPA section 72 and bylaw 3.1(2) make the strata responsible to repair and maintain common property. The applicants say the main pipe is common property and is therefore the strata's responsibility to repair and maintain. The applicants also say the main pipe stack was blocked as described in the Xpert invoices. The strata does not dispute this, and I accept the description of the blockage in Xpert's invoices is accurate.
31. The definition of common property under SPA section 1(1) includes drainpipes located wholly or partially within a strata lot, if they are capable of being and intended to be used in connection with the enjoyment of another strata lot or COMMON PROPERTY.
32. Photographs show the SL399 kitchen sink is located in a peninsula countertop attached to an interior of SL399. Photographs also show the peninsula countertop removed with the drainpipe located in the interior wall. I find it clear the main pipe stack identified by Xpert is located within the interior wall of SL399 and services other strata lots above. Based on this, there is no doubt the main pipe stack or drainpipe where the grease blockage occurred is common property as defined under the SPA, and therefore the strata's responsibility to repair and maintain.

Was the strata negligent?

33. Subject to its bylaws, a strata corporation is not responsible for repairs to the interior of a strata lot unless it has been negligent: see *Kayne v. LMS* 2374, 2013 BCSC 51 and *Basic v. Strata Plan LMS 0304*, 2011 BCCA 231. This is the case even where the strata lot damage was caused by a common property failure: see *Wawanese Mutual Ins. Co. v. Keiran*, 2007 BCSC 727.

34. On my review of the strata's bylaws, I find bylaw 3.1(4) makes the strata responsible for interior repairs to a strata lot, but only in limited circumstances that do not apply here.
35. I have also considered whether bylaw 17(1) makes the applicants responsible for damage from the backed up common property drainpipe and find that it does not. I interpret bylaw 17(1) to apply only to loss or damage that is the owner's responsibility, up to the maximum of the insurance deductible. Here, I have found the strata was responsible to repair and maintain the common property drainpipe, so I find bylaw 17(1) does not apply in these circumstances.
36. Therefore, in order for the applicants to be successful, they must prove the strata was negligent. To prove negligence, the applicants must show that the strata owed them a duty of care, the strata breached the standard of care, they sustained damage, and the damage was caused by the strata's breach: see *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, at paragraph 3.
37. The courts have clearly established a strata corporation's standard of care for repair and maintenance of common property under SPA section 72, such as the drainpipe here, is reasonableness. See for example, the BC Supreme Court decision in *Slosar v The Owners, Strata Plan KAS 2846*, 2021 BCSC 1174, at paragraph 66. This means that the applicants must prove the strata breached its standard of care by acting unreasonably when maintaining the common property drainpipe. I find that they have.
38. The strata says it has acted reasonably and cleans the main stack every 3 years based on its mechanical contractors' advice. However, the strata did not provide any details of what drainpipe cleaning was historically done, nor any direct evidence of its contractors' advice about the recommended frequency of cleaning. There is evidence some drainpipes were cleaned in 2019, but nothing before that. Invoices from Blue Mountain Services Ltd. dated in May and June 2019 describe a total of 7 days of "hydro flushing" drains but the related invoices are not in evidence. Therefore, it is unclear what drain cleaning work was performed and if the work included all drainpipes in all 3 towers.

39. The strata also provided a copy of its 3-year contract with a Cobing company dated July 9, 2020. In part, the contract included sanitary system cleaning and maintenance once in the 3-year term. The contract states the cleaning and maintenance includes the following services:
- a. Fully auger and hydro jet clear all accessible horizontal sanitary drainage lines.
 - b. Fully auger and hydro jet clear drains through all lower level units.
 - c. Minor slope adjustments as required.
 - d. Camera inspection at completion.
 - e. Report on findings and possible future concerns.
40. The November 30, 2020 financial statements show a payment made to Cobing for July and September 2020 cleaning of sanitary drains, but again, the invoices describing the work are not in evidence. Further, in a November 2020 quarterly report from Cobing, there is no mention of any drain cleaning, slope adjustments, camera inspections, or any report on drain cleaning findings or potential concerns. So, again, it is unclear what drain cleaning work Cobing completed under its contract.
41. Conversely, Mr. Mok provided email evidence that contradicts the strata's assertion it followed the advice of its contractors. In a May 6, 2020 email to the strata council, the strata's facility manager provided quotations from Blue Mountain for "the annual Sewer Hydro Flush cleaning". In the same email, the facility manager stated that Blue Mountain recommended the cleaning be done every 6 months to a year because of past claims against the strata's insurance from backups into residential strata lots [My emphasis]. In the same email chain, the facility manager reported a backup on May 9, 2020, affecting level 5 suites in tower 3 other than SL399, which I infer prompted the July and September drain cleaning by Cobing.
42. Mr. Mok also provided evidence that the strata had experienced backups in kitchen sinks of residential strata lots prior to the May 12, 2022 on at least 2 occasions. These include the following incidents based on the documentary evidence:
- a. January 19, 2019 - #508 – Tower 2

b. October 6, 2019 - #602 Tower 3

43. As noted, the strata retained Cobing to do some drain cleaning in July and September 2020. This coincides with the strata's retention of Cobing under the 3-year contract. I infer from the evidence that the strata previously used Blue Mountain for the drain cleaning. In any event, I find the May 6, 2020 email supports that Blue Mountain advised the strata that drainpipe cleaning should be done at least every year, which the strata completed in 2018 and 2019. I do not find the Cobing contract recommended drainpipe cleaning only every 3 years. Rather, I find Cobing contracted with the strata to clean the drain pipes every 3 years without any recommendation. The strata knew the drainpipes required more frequent cleaning and, in fact, appears to have been undertaking cleaning annually according to the May 2020 email chain. I also find it reasonable that as a newly retained contractor, Cobing may have been unaware of the history of backups occurring in the residential strata lots. The strata did not explain why it contracted for cleaning every 3 years when it knew more frequent cleaning was required to avoid backups.
44. The evidence also shows Cobing terminated its contract with the strata on April 15, 2022 because the strata was not paying its invoices. There is no evidence the strata had decided to have the subject drainpipes cleaned, or even intended to have them cleaned, before the before the May 12, 2022 backup occurred. In fact, there is no evidence the strata arranged cleaning until May 2023, when according to a notice to residents, the strata scheduled kitchen stack cleaning, but only for the "04" and "05" suites of the 3 towers. Put another way, I find it likely the strata arranged for drainpipe cleaning only as a result of the May 12, 2022 backup into SL399 and had abandoned its annual drainpipe cleaning maintenance.
45. I summarize my findings as follows:
- a. The strata knew annual or more frequent drainpipe cleaning was required since at least 2018.
 - b. The strata undertook annual cleaning of drainpipes in 2018, 2019 and 2020, but did not clean drainpipes in 2021 or 2022.

- c. Kitchen sinks in other strata lots had backed up before May 12, 2022, due to blocked common property drainpipes.
 - d. The strata did not have a scheduled maintenance program in place for the drainpipe cleaning.
46. As for the strata's argument that the applicants caused the backup, I disagree. The strata did not provide any support to its assertion. The evidence is that the applicants purchased SL399 on April 29, 2022. SL399 was vacant because they planned to rent out the strata lot, which is confirmed by photographs before and during the emergency repairs. The backup occurred on May 12, 2022, only 13 days after the purchase. Based on the vacancy and the descriptions in the Xpert invoices about the blockage, I find it highly unlikely the applicants caused the blockage. Rather, I find it most likely the build up of grease and oil in the main drainpipe occurred over the 2-year period since the drainpipe was last cleaned in 2020.
47. Based on this, I find on a balance of probabilities, the strata did not clean the drainpipes on a reasonable basis. Rather, I find the strata acted unreasonably in attending to the repair and maintenance of the common property drainpipes. The strata breached its standard of care which caused the kitchen sink to backup and flood SL399. Therefore, I find the strata was negligent.

What is an appropriate remedy?

48. I turn now to the remedy.
49. As mentioned, the applicants claim \$10,345.04 for lost rental income, increased electricity expenses, and repair costs, but did not provide a breakdown of their claim. I will consider each component in turn.

Lost Rental Income

50. In submissions, the applicants provided email evidence that confirms they advertised SL399 for rent on Craigslist in April and May 2022 and received some enquiries. They did not provide a copy of the advertisement itself, but from the emails, I accept the applicants intended to rent out SL399. The applicants claim they are entitled to 3 ½

months of lost rent at \$2,200 per month for a total of \$7,700. The monthly rental amount is not contained in the email evidence, but I find \$2,200 per month is reasonable. The strata did not dispute this rental rate. I infer the 3 ½ month period is May 15, 2022 through July 31, 2022, which I find is also reasonable because repair receipts were mostly dated in August and September 2022. It is clear that SL399 was uninhabitable immediately after the backup so, I find the applicants have proved they lost rental income because of the strata's negligence. I order the strata to pay the applicants \$7,700 in damages for lost rental income within 30 days of the date of this decision.

Hydro Expenses

51. The applicants submitted 2 paid invoices from BC Hydro for SL399. The first invoice shows an average daily cost of electricity of \$1.05 for the period April 30 through May 12, 2022 totalled \$28.40. The second invoice is for the period May 13 through July 13, 2022 for \$79.09, which shows an average daily cost of \$1.15. The applicants did not request a specific amount for increased electricity costs, but I infer they claim the increased daily cost for the period Phoenix had its dehumidifiers operating within SL399. I find this to be reasonable given SL399 was vacant, and the only electricity used was likely used by the dehumidifiers.
52. However, there is no evidence about the specific timeframe the dehumidifiers were operating in SL399. Therefore, it is not possible to calculate the increased electrical cost and I dismiss this aspect of the applicants' claim.

Repair Costs

53. The applicants also submitted receipts for repairs totalling \$2,731.33. On my review, I find some of the receipts totaling \$171.61 do not reasonably identify the items purchased and only identify an item number. I have not allowed these receipts and find it reasonable to order the strata to reimburse the applicants the difference of \$2,559.72 for repair costs. The strata must pay these damages within 30 days of the date of this decision.
54. The applicants did not expressly request the strata remove the Phoenix invoice

chargeback of \$8,368.97 from SL399's account. Based on the total claimed expenses for lost rental income, electricity, and repair costs, I find the applicants' claimed amount of \$10,345.04 excludes the Phoenix invoice. However, in the Dispute Notice, the applicants clearly say they should not be responsible to pay it due to the strata's negligence. They also expressly disputed the charge back in their November 11, 2023 email to the strata. The strata charged the \$8,368.97 to SL399 on October 31, 2022. The applicants did not pay the charged back amount.

55. With all this in mind, I find the strata had reasonable notice of the applicants' position they were not responsible to pay the \$8,368.97. However, the strata took no action after November 11, 2023 to consider the applicants' dispute, nor did it demand payment. Further, the strata did not directly address the Phoenix invoice in submissions other than to assert the applicants were responsible to pay the chargeback under the bylaws. On this basis, I find the applicants' omission of the \$8,368.97 chargeback amount from their requested remedy was an inadvertent omission. I order the strata to immediately remove the charge from SL399's account.

CRT FEES, INTEREST, AND EXPENSES

56. 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 find the applicants were the successful party and paid \$250 in CRT fees. I order the strata to reimburse the applicants this amount within 14 days of the date of this decision.
57. The *Court Order Interest Act* (COIA) applies to the CRT. The COIA treats "general damages" and "special damages" differently. Special damages are specific, measurable past losses that arise from the particular circumstances of a dispute. General damages are losses that are presumed to flow from every wrongful act, or losses that cannot be calculated with precision. See *William P. Crooks Consultants Ltd v. Cantree Plywood Corp.*, 1985 CanLII 434 (BC SC) and *Couchman v. Furbaby Rescues Society*, 2022 BCCRT 1269.

58. I find the lost rental income and repair expenses are special damages. Under section 1(2) of the COIA, interest on special damages must be calculated from the end of each 6-month period after the cause of action arose, which I find is May 12, 2022, the date the backup occurred. Therefore, the interest on the \$7,700.00 lost rental income and \$2,559.72 repair expenses must be calculated from November 12, 2022. I calculate pre-judgement interest to be \$463.18.
59. Neither party claimed dispute-related expenses, so I order none.
60. Under section 189.4 of the SPA, the strata may not charge any dispute-related expenses against the applicants.

DECISION AND ORDER

61. I order the strata:
- a. To immediately remove the chargeback amount of \$8,368.97 for Phoenix's emergency repairs from SL399,
 - b. Within 30 days of the date of this decision, pay the applicants \$10,972.90 broken down as follows:
 - i. \$7,700.00 for lost rental income,
 - ii. \$2,559.72 for repair costs,
 - iii. \$463.18 for pre-judgement interest under the COIA, and
 - iv. \$250.00 for CRT fees.
62. The applicants' remaining claims are dismissed.
63. The applicants are entitled to post-judgement interest under the COIA, as appropriate.

64. 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