



Civil Resolution Tribunal

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Civil Resolution Tribunal

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B E T W E E N :

VASILE CONSTANTIN ZAMFIRESCU and IRINA DZGOEVA

APPLICANTS

A N D :

The Owners, Strata Plan LMS 4078

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Micah Carmody

INTRODUCTION

1. The applicants, Vasile Constantin Zamfirescu and Irina Dzgoeva, own a strata lot in the respondent strata corporation The Owners, Strata Plan LMS 4078 (strata).

2. The applicants say there are significant stains on the limited common property (LCP) balcony attached to their strata lot. They say the stains are the result of the strata's failure to repair and maintain the balcony. The applicants want an order that the strata hire a qualified contractor to remove the stains. They give this remedy a value of \$2,900. Mr. Zamfirescu represents the applicants.
3. The strata says there is no legal basis for an order to remove cosmetic staining from the balcony. A council member represents the strata.
4. As I explain below, I find the applicants have not shown that the strata has breached its duty to repair and maintain the balcony or that the strata is otherwise required to remove the stains, and I dismiss their claim.

JURISDICTION AND PROCEDURE

5. 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.
6. 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. Based on the evidence and submissions provided, I am satisfied that I can fairly decide this dispute without an oral hearing.
7. 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 the parties and witnesses questions of and inform itself in any other way it considers appropriate.

8. 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.

ISSUE

9. The issue in this dispute is whether the strata is required to remove the stains from the LCP balcony.

EVIDENCE AND ANALYSIS

10. In a civil proceeding like this one, the applicants must prove their claims on a balance of probabilities, meaning more likely than not. While I have considered all the parties' evidence and submissions, I only refer to what is necessary to explain my decision.
11. The strata was created in 2000 and includes 103 strata lots in a 4-level building. The applicants purchased strata lot 33 in May 2021. The strata plan shows an LCP deck that is roughly 8 feet by 6 feet attached to strata lot 33. Although the strata plan identifies it as a deck, the parties call it a balcony and I will do the same.
12. The off-white balcony surface is stained. Photos show numerous small, dark spots and a handful of larger, faded grey spots. The applicants have tried unsuccessfully to remove the stains by scrubbing with detergent.
13. In June 2021, the applicants asked the strata about options to remove the stains. The strata said the applicants could not paint without strata approval because the paint could interfere with the waterproofing membrane on the balcony's surface. The strata also told the applicants they could not repair or modify the membrane without the strata's approval.
14. After a July 22, 2021 hearing, council decided to hire an engineering firm, WSP, to inspect the deck membrane. The inspection happened on January 7, 2022.
15. Following the inspection, WSP emailed its findings to the strata. It said there was significant staining on the balcony, but it was "primarily an aesthetic issue." However,

there was a small area at the centre of the balcony where the membrane had bubbled and torn, exposing the plywood floor sheathing below. WSP recommended a patch repair in this spot. From the applicants' photos, I find the patch would be about 10% of the balcony's total area.

16. I pause to note that the applicants say one of the WSP employees who inspected the balcony agreed with them that the damaged area is larger than WSP originally identified. However, WSP's January 14 email addressed this other possible defect in the membrane and found that there were no other tears or damage. I accept this conclusion and note that WSP did not recommend repairs other than the localized patch.
17. WSP noted that a localized membrane patch would "likely be noticeable". It said if aesthetics mattered, the entire balcony membrane could be recoated. WSP also noted that a warranty would not likely cover a localized patch repair, so if the strata preferred to obtain a warranty, the entire balcony surface would need to be recoated.
18. Neither party suggests any alternative way to remove the stains, so I accept for the purposes of this dispute that the only way to remove the stains is by removing and replacing the membrane. At the same time, neither party suggests the stains affect the membrane's performance, and based on the WSP email, I find they do not.
19. On April 14, 2022, the strata manager told the applicants that council had approved a localized patch repair only. The parties discussed full membrane replacement but disagreed about who should pay. They postponed further discussion until the outcome of this proceeding.

Is the strata required to remove the stains from the LCP balcony?

20. The applicants argue that the staining and bubbling are different issues but each, independently, is a legitimate reason to replace the balcony membrane. The applicants say given the staining, bubbling, and visibility of a localized patch, the only appropriate response is for the strata to replace the entire membrane. The strata says

it does not need to remove the stains, which it calls cosmetic or aesthetic, and says a membrane patch will address the bubbling issue.

21. Section 72 of the *Strata Property Act* (SPA) says the strata generally must repair and maintain common property and common assets. The strata may, by bylaw, make an owner responsible for the repair and maintenance of LCP that the owner has a right to use. However, here, bylaw 11.1(c) says the strata must repair and maintain LCP balconies.
22. The strata has a fundamental duty to repair and maintain its common property (see *Weir v. Owners, Strata Plan NW 17*, 2010 BCSC 784, at paragraphs 23 to 32). In performing this duty, strata corporations are not measured against a standard of perfection. They must only act reasonably. The courts have recognized that strata corporations must act in the best interests of owners and try to achieve the greatest good for the greatest number. That involves making necessary repairs within a budget the owners can afford and balancing competing needs and priorities. Courts (and by extension, the CRT) should be cautious before inserting themselves into the process. The court in *Weir* also noted that in addressing repair and maintenance problems, there can be “good, better or best” solutions available. Choosing a “good” solution rather than the “best” solution does not make an approach unreasonable (paragraph 28). The issue here is whether it is reasonable to patch the balcony membrane and to leave the stains given they can only be removed by replacing the entire membrane.
23. As the applicants point out, the designation of LCP for an owner’s exclusive use gives the owner a substantial degree of control and something approaching a beneficial or equitable interest (*Frank v. The Owners Strata Plan LMS 355*, 2016 BCSC 1206). However, since LCP is still common property, I find the standard of reasonableness for common property repair and maintenance applies equally to the LCP balcony. I also agree with previous CRT decisions, though they are not binding on me, which held that a strata corporation is not required to repair LCP in accordance with any particular owner’s requirements (see *Laatsch v. Strata Plan K 173*, 2021 BCCRT 399, and *Swan v. The Owners, Strata Plan LMS 410*, 2018 BCCRT 241).

24. The applicants say that “repair” means to make good, regardless of whether the thing was good or sound before, as described in *Taychuk v. Owners, Strata Plan LMS 744*, 2002 BCSC 1638, at paragraph 29. I accept that definition, but I find good does not mean perfect. In *Taychuk*, the owners were experiencing discoloured water flowing from their taps. There was no evidence of a health risk and the court said the problem was “aesthetic only,” so it was reasonable for the strata to take more time to address it. In *Shields v. Strata Plan VIS 5030*, 2017 BCSC 1522, another case involving water discolouration, the court expanded on the statement in *Taychuk* and said a serious health risk might require a strata corporation to incur very substantial expense, whereas a purely aesthetic concern might justify a more limited response (paragraph 166). Here, I find the balcony stains here are a less significant concern than discoloured water. I say this because it is common knowledge that people drink and wash with water every day but most people do not use balconies every day, year-round.
25. The applicants argue that the stains are not an aesthetic issue but rather a maintenance issue. They say the stains are present because the strata neglected to conduct adequate maintenance procedures. They argue that the strata should have provided owners with instructions for cleaning balcony membranes as it did for sink drains, gas fireplaces, and garburators. However, there is no expert evidence here about what kind of balcony maintenance or owner education the strata should have done to prevent these types of stains. There is also no evidence that if the strata or the previous owner had done more frequent cleaning the stains would have been prevented. I find the stains were not caused by any strata negligence.
26. The applicants say terms like “cosmetic” and “aesthetic” are subjective. They analogize their stained balcony to a stained white dress shirt or hood of a car. They say it would be unreasonable not to do anything just because the stain was considered aesthetic. One difference is that dress shirts and cars are not usually communally-owned, so making decisions about whether and how to repair them is more straightforward. In contrast, section 66 of the SPA says that all owners own the common property, including the applicants’ balcony, as tenants in common. This means that 1 owner cannot unilaterally make repair decisions about their LCP

balcony, the way they can with their shirt or car. Those decisions are generally made by the strata council, which exercises the powers and performs the duties of the strata, subject to the SPA, regulations, and bylaws.

27. The applicants also argue that the bylaws do not contain an exception to the strata's maintenance and repair responsibilities for aesthetic reasons. They argue that if significant stains appeared on the carpet of one of the building's common property corridors, the strata would obviously remove them, although the stains would be a purely aesthetic issue. The applicants also say that the strata's recent decision to repaint the building's exterior is inherently aesthetic. I agree that the strata's common property repair and maintenance obligations include aesthetic issues affecting common property. But I do not find that this means a decision not to immediately address an aesthetic issue that poses no threat of structural damage is inherently unreasonable. Corridors and the building's exterior are seen by many strata residents and members of the public, while the applicants' balcony is primarily seen by the applicants. Exterior paint may also serve to protect the building. Strata corporations must make decisions about when to clean or replace corridor carpets and to repaint, and need not do so on any particular owner's timeline. As noted in *Weir*, the strata is best positioned to make decisions about how to spend the owners' money among competing priorities. Here, I find this means the strata can weigh the importance of a warranty on the membrane and the visual benefit of stain removal against the cost savings of a patch repair. I do not consider it appropriate to make the decision for the strata, particularly where there is little evidence of what the different options will cost.
28. The strata is also entitled to rely on the advice of experts and professionals. WSP gave options, any of which the strata reasonably could have chosen. But WSP recommended a patch repair. I find the patch repair approach is reasonable even though it may create further minor aesthetic issues on the balcony. I find the strata is not required to remove the stains or replace the membrane.
29. Although the applicants did not directly say the strata has treated them significantly unfairly, I considered the law of significant unfairness. In *Kunzler v. The Owners, Strata Plan EPS 1433*, 2021 BCCA 173, the court confirmed that significantly

unfair actions or decisions 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 objectively reasonable expectations are a relevant factor but are not determinative.

30. 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 owners' expectation?
- b. Was that expectation objectively reasonable?
- c. Did the strata violate that expectation with a significantly unfair action or decision?

31. I find the applicants' expectation was that the strata would replace their balcony membrane entirely because it was stained. It was later discovered to also be damaged, but the damage can be repaired with a patch. As discussed above, the stains are a cosmetic issue with no risk of structural damage. For that reason, I find it was not reasonable for the applicants to expect the strata to replace their balcony membrane entirely. So, I find the strata's approach was not significantly unfair to the applicants.

32. For these reasons, I dismiss the applicants' claim.

CRT FEES AND EXPENSES

33. Based on the CRTA and the CRT's rules, as the applicants were unsuccessful, I find they are not entitled to any reimbursement. The strata did not pay CRT fees.

34. The strata claims \$5,703.27 in legal fees. The CRTA generally requires parties to represent themselves and the CRT's procedures are as informal and simplified as possible to facilitate self-representation. Consistent with that principle, rule 9.5(3) says that the CRT will not order one party to pay another party's legal fees in a strata property dispute unless there are extraordinary circumstances. Those

circumstances include the dispute's complexity, the lawyer's degree of involvement, whether a party or representative's conduct has caused unnecessary delay or expense, and any other factor the CRT considers appropriate.

35. The strata says the applicants' claim is a spurious one that the applicants should not have made in the first place. I find this argument does not assist the strata because the strata does not explain how a less valid claim increases the need for a lawyer's involvement. The fact that a claim has little merit is not in itself a reason for awarding special costs. Something more is required, such as improper allegations of fraud, improper conduct of the proceedings, or improper motive (see *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352). None of those things exist here. The strata also says the applicants were unwilling to accept the strata's good faith offer to resolve the underlying dispute before the CRT proceeding began. It is not pre-dispute conduct but conduct during the dispute that matters. In any event, the other factors weight against awarding legal fees. In particular, as the strata concedes, this dispute was not factually or legally complex. The strata's submissions were appropriately brief. Overall, I find the circumstances of this dispute are not extraordinary. I dismiss the strata's claim for dispute-related expenses.
36. The strata must comply with SPA section 189.4, which includes not charging dispute-related expenses against the applicants.

ORDER

37. I dismiss the applicants' claims, the strata's claim for dispute-related expenses, and this dispute.

Micah Carmody, Tribunal Member