



# Civil Resolution Tribunal

Date Issued: March 8, 2024

File: ST-2023-000736

Type: Strata

Civil Resolution Tribunal

Indexed as: *Dunaigre v. The Owners, Strata Plan BCS1997*, 2024 BCCRT 241

**B E T W E E N :**

REMI DUNAIGRE and TRICIA GAIL DESOUZA

**APPLICANTS**

**A N D :**

The Owners, Strata Plan BCS1997

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Megan Stewart

## INTRODUCTION

1. This dispute is about a leak that damaged a strata lot.
2. Remi Dunaigre and Tricia Gail Desouza (owners) own a strata lot (SL 51) in the strata corporation, The Owners, Strata Plan BCS1997 (strata). Part of SL 51 is below another strata lot's wooden roof deck (SL 57). Pooling water on SL 57's roof deck

leaked into SL 51, damaging its ceilings, walls, carpets, and cabinets. The strata arranged and paid for SL 51's repairs, and then charged back the expense of those repairs to the owners' strata lot account. The owners say the strata was negligent in maintaining the under-deck drains, so it is responsible for the expense of SL 51's repairs.

3. The strata denies any negligence. It says it acted promptly in getting emergency services to attend once it became aware of the leak. It also says it properly charged back the expense of SL 51's emergency and final repairs to the owners, in line with its bylaws.
4. Mr. Dunaigre represents the owners. A strata council member represents the strata.

## **JURISDICTION AND PROCEDURE**

5. 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.
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. 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 I can decide this dispute without an oral hearing.
7. CRTA section 42 says the CRT may accept as evidence information it considers relevant, necessary, and appropriate, even where the information would not be admissible in court.

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.

## **ISSUES**

9. The issues in this dispute are:
  - a. Is the strata responsible to repair and maintain the under-deck drains?
  - b. If so, did the strata breach its repair and maintenance obligations and negligently damage SL 51?
  - c. If so, what is the appropriate remedy?

## **EVIDENCE AND ANALYSIS**

10. In a civil proceeding like this one, the applicant owners must prove their claims on a balance of probabilities (meaning more likely than not). I have read all the parties' submissions and evidence, but refer only to information I find necessary to explain my decision.

### ***Background and parties' positions***

11. The strata was created in 2006 under the *Strata Property Act* (SPA). It consists of 10 townhouse-style buildings and 1 apartment-style building with a total of 169 strata lots. SL 51 is a ground-floor townhouse-style strata lot. Both SL 57 and SL 58 are above SL 51, and each has a deck that forms part of SL 51's roof.
12. In 2009, the strata repealed and replaced its bylaws. There have been several bylaw amendments since then, one of which is relevant to this dispute. I discuss the relevant bylaws below.
13. On November 4, 2022, water leaked into SL 51 from above, damaging SL 51's ceilings, walls, carpets, and cabinets. The owners' tenants advised them of the leak, and the owners immediately notified the strata. The strata called Phoenix

Restorations (2015) Ltd. (Phoenix), which attended the same day to provide emergency repair services. On November 7, Design Roofing & Sheet Metal Ltd. (Design Roofing) attended to further investigate the leak, and eventually found pooling water on SL 57's roof deck and a clogged under-deck drain. Design Roofing unclogged the drain which cleared the pooled water, and the leak stopped. Phoenix returned later in November to complete final repairs to SL 51. In December 2022, the strata charged \$13,971 for Phoenix's emergency repairs back to the owners' strata lot account. In June 2023, it added \$10,997.07 for Phoenix's final repairs. The total amount of the 2 chargebacks is \$24,968.07, which remains unpaid on the owners' strata lot account. None of this is disputed.

14. The owners say the strata's negligence in maintaining and repairing SL 57's under-deck drain caused the leak and resulting damage. The strata disagrees, and says it had no reason to suspect the drain was blocked. The parties each say the other is responsible for SL 51's repair expenses.

***Is the strata responsible to repair and maintain the under-deck drains?***

15. A strata corporation's repair and maintenance obligations are set out in SPA section 72. Subsection (1) says a strata must repair and maintain common property and common assets, and subsection (2) says a strata may, by bylaw, make an owner responsible to repair and maintain limited common property (LCP) that the owner has the right to use.
16. Under SPA section 1(1), common property includes drainage pipes and other facilities for the passage of water that are within a floor, wall, or ceiling that forms a boundary between 2 strata lots, or a strata lot and common property. LCP is a type of common property designated for the exclusive use of strata lot owners. The strata plan designates roof decks as LCP. However, I find I do not need to determine whether the under-deck drains are common property or LCP, because either way, the strata is responsible to repair and maintain them. My reasons follow.

17. If the drains are common property, then the strata must repair and maintain them as described in SPA section 72(1). If they are LCP, then the question is whether the strata has enacted a bylaw making owners responsible to repair and maintain them.
18. Bylaw 4(2) says an owner who has the use of LCP must repair and maintain it, except for repair and maintenance the strata is responsible for under the bylaws. Bylaw 10(1)(c)(i) makes the strata responsible for repairs and maintenance that ordinarily occur less than once a year. Based on the parties' submissions and evidence described further below, repairs and maintenance of the under-deck drains typically appear to occur once a year or less.
19. Even if this is not the case, bylaw 10(1)(c)(ii) says the strata must repair and maintain LCP that forms part of the exterior of a building, and LCP balconies and other things attached to the exterior of a building. In *Boothroyd et al v. The Owners, Strata Plan VR 2402*, 2019 BCCRT 1009, a non-binding but persuasive decision, a tribunal member found that deck drains running under a terrace above an owner's strata lot were integral parts of the exterior of the building. This layout is the same as SL 57's under-deck drains. The tribunal member in *Boothroyd* concluded that the drains' maintenance was the strata's responsibility. I agree. I find the strata does not have a bylaw making owners responsible for the under-deck drains, even if they are LCP.

***Did the strata breach its under-deck drain repair and maintenance obligations?***

20. The owners say the strata was negligent in repairing and maintaining the LCP under-deck drains. When fulfilling its repair and maintenance obligations, the strata must act reasonably. Perfection is not required. The strata must act in the best interests of all owners, and try to achieve the greatest good for the greatest number by implementing necessary repairs within a budget the owners can afford. Because of this, the strata is entitled to some deference in its repair and maintenance decisions, since it is best placed to balance competing interests within its community (see *Dolnick v. The Owners, Strata Plan LMS 1350*, 2023 BCSC 113).
21. The owners point to several examples in support of their negligence allegation.

22. First, they say in 2014 an owner reported concerns about a patio drain in a neighbouring strata lot that had been unoccupied for over half a year. However, the strata council minutes in evidence do not detail the concerns, and there is no evidence the strata failed to take appropriate steps to resolve them.
23. Next, strata council minutes record that in 2017, an owner reported water pouring from a pipe in the soffit above their door. The strata contacted its maintenance company, which determined the water was overflowing from the secondary drain in the deck above, due to the main drain being clogged with debris. Similarly, in 2018, an owner reported water pouring out of a pipe above their entryway, which was again determined to be from an overflowing secondary drain in the deck above. Again, the strata called its maintenance company, which inspected and cleaned the drain.
24. The owners also point to 2 January 2021 invoices for under-deck drain cleaning and unclogging.
25. I find none of these examples show the strata was negligent. The evidence suggests the strata took reasonable steps to address the reported issues. There is nothing to indicate the strata was required to meet some higher standard of care to resolve the drain overflows when they occurred.
26. The owners say the strata should have had an annual drain maintenance program in place to lessen the risk of these events. There is no evidence the maintenance company recommended such a program in 2017 or 2018, nor was it recommended in either of the submitted 2017 or 2022 depreciation reports. Since strata councils are made up of lay volunteers who are not expected to have expertise in building repair and maintenance, the strata is entitled to be guided by professionals (see *Leclerc v. The Owners, Strata Plan LMS 614*, 2012 BCSC 74). If those professionals offer bad or insufficient advice, the strata will not be negligent if it acted reasonably in hiring and instructing them (see *Wright v. The Owners, Strata Plan #205*, 1996 CanLII 2460 (BC SC)).
27. However, the owners also point to a notice the strata manager posted on the “owners’ forum” in February 2021, reminding occupants of their responsibility to monitor and

clean out drains on LCP during long periods of rain. The notice also advised that expenses to repair water damage to strata lots caused by LCP drain issues would not be covered by the strata. In submissions, the strata says accessing the drains through a hatch in the wooden deck boards is easy, and strata council meeting minutes record it explained to occupants how to do it in March 2017.

28. I find all of this shows the strata was aware of the importance of regular drain cleaning as early as 2017. While it was reasonable for the strata to ask occupants to monitor drainage on their LCP decks, I find cleaning the drains fell squarely within the strata's maintenance obligations, whether or not they were easily accessible. I find it was misleading of the strata to post incorrect information about drain cleaning and its consequences in February 2021.

29. In addition, in June 2022, the strata engaged Design Roofing to conduct a roof system review and preventative maintenance report. While the report focused on the condition of the roof system generally without addressing roof decks, in the summary section it described maintenance that should be performed annually. That maintenance included "debris removal at roof surfaces, gutters, and **drains at roof level**". It is important to keep drains clear to allow for proper drainage and free flow of water" (my bold emphasis). I find that from this point, the strata was aware that yearly maintenance was its own roofing contractor's recommended standard for roof drain cleaning, including for drains under roof decks. This is supported by a November 15, 2022 email to the owners where the strata manager said "cleaning gutters and drains are maintenance items council agreed to undertake". Further, in early 2023, the strata proposed a bylaw to make occupants responsible for regular roof deck and drain maintenance, which was defeated.

30. It is undisputed that the strata did not proceed with the recommended drain maintenance until November 2023, nearly a year and half after Design Roofing's report. I find this was unreasonable and the strata should have acted immediately, since it had not previously undertaken regular maintenance of the under-deck drains. The strata provided no explanation for the delay in carrying out the recommended drain maintenance. In the meantime, the leak occurred, with the resulting damage to

SL 51. I note the strata says there is no evidence showing when SL 57's under-deck drain became blocked, so the leak may not have been preventable even with regular drain maintenance. I find this is unlikely, based on the owners' email evidence from Design Roofing that said the blockage was probably the result of debris that accumulated over time. In any case, that does not relieve the strata of its obligation to maintain the drains to the recommended standard. In these circumstances, I find the strata failed to maintain the LCP under-deck drains to its roofing contractor's recommended standard, which was negligent.

### ***Remedy***

31. The owner seeks several remedies for the strata's negligence.
32. First, it asks that I order the strata to remove the \$13,971 and \$10,997.07 chargebacks for SL 51's repairs from the owners' strata lot account. In charging back the repairs' expense to the owners, the strata relied on bylaw 62(a). Bylaw 62(a) provides, in part, that an owner will pay for a repair, replacement, or maintenance expense to a strata lot "resulting from what may be considered an Owner responsibility" to the extent the expense is not recovered from the strata's insurer. It is undisputed that the repair expenses were less than the strata's insurance deductible, so the strata did not make an insurance claim. However, I find the expenses cannot be said to have resulted from the owners' responsibility, given the strata's negligence in maintaining the under-deck drains.
33. There is no other authority in the SPA or bylaws for the chargebacks, and the owners undisputedly did not agree to pay for the repairs. So, I order the strata to remove the \$13,971 and \$10,997.07 chargebacks for SL 51's repairs from the owners' strata lot account.
34. I note the owners also ask that the strata cancel any pending chargebacks for repairs. Based on their submissions, this appears to relate to the \$10,997.07 chargeback which had not yet been added to their strata lot account at the time they filed their application for dispute resolution. I have already addressed this chargeback for final



repairs, and there is no evidence of any other pending chargebacks. So, I dismiss this part of the owners' claim.

35. Next, the owners request reimbursement of \$560 for legal fees they incurred before starting this dispute. CRT rule 9.5(3) says the CRT will not order reimbursement of lawyers' fees charged during the CRT process, unless there are extraordinary circumstances. The owners' claim is for pre-dispute expenses and not for dispute-related fees, so I assess it on that basis. There is nothing in the SPA or bylaws that makes the strata responsible for the owners' legal fees. Further, legal fees are not generally recoverable as damages (see *Voyer v. C.I.B.C.*, 1986 CanLII 1226 (BC SC)). So, I find the owners are not entitled to recover their legal fees, and I dismiss this part of their claim.
36. Next, the owners ask that the strata investigate SL 57 to prevent further problems in SL 51. The owners say since the water from the roof deck also leaked through SL 57's window and into its carpet, it could have seeped into the common wall between SL 57 and SL 51 and caused mould. Without some evidence of the alleged problem, I find this assertion speculative. So, I find the owners have not proven any loss, and I dismiss this part of their claim.
37. Finally, the owners ask that I order the strata to schedule regular maintenance of its roof drains. I find this is reasonable in the context of ensuring the strata fulfills its statutory obligations. I order the strata to implement a regular maintenance program for its roof drains, including its under-deck drains, based on the recommendation of a qualified contractor.

## **CRT FEES, EXPENSES, AND INTEREST**

38. 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. The owners were largely successful, so I order the strata to reimburse them \$225 for their paid CRT fees. The owners did not claim dispute-related expenses, so I order none.

39. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against the owners.

## **ORDERS**

40. I order that:

- a. The strata immediately remove the \$13,971 and \$10,997.07 chargebacks for SL 51's repairs from the owners' strata lot account,
- b. Within 45 days of the date of this order, the strata implement a regular maintenance program for its roof drains, including its under-deck drains, based on the recommendation of a qualified contractor, and
- c. Within 30 days of the date of this order, the strata reimburse the owners \$225 for CRT fees.

41. The owners are also entitled to post-judgment interest under the *Court Order Interest Act*.

42. I dismiss the balance of the owners' claims.

43. This is a validated decision and order. 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.

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Megan Stewart, Tribunal Member