



# Civil Resolution Tribunal

Date Issued: August 14, 2020

File: ST-2019-009849

Type: Strata

Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan LMS2617 v. Shypanski*, 2020 BCCRT 907

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

The Owners, Strata Plan LMS2617

**APPLICANT**

**A N D :**

LORI SHYPANSKI

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Julie K. Gibson

## INTRODUCTION

1. This dispute is about whether a strata lot owner must pay a strata corporation's deductible in a water damage insurance claim.
2. The respondent Lori Shypanski owns unit 312, which is strata lot 45 in the applicant strata corporation The Owners, Strata Plan LMS2617 (strata).

3. On December 27, 2017, water escaped from the unit 312 toilet. The water caused damage to common property (CP) and other strata lots.
4. The strata seeks to recover its \$15,000 insurance deductible from Ms. Shypanski.
5. Ms. Shypanski says the toilet was repaired by a plumber hired by the strata a few months prior to the leak. She submits the strata-hired plumber conducted that repair negligently. Ms. Shypanski also says that strata failed to adequately repair and maintain CP pipes, causing the toilet overflow. Ms. Shypanski says the strata is responsible to pay the deductible, and asks me to dismiss the dispute.
6. The strata is represented by lawyer Lucya Kowalewski. Ms. Shypanski is represented by lawyer Corey Bow.

## **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). The CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. The CRT must act fairly and follow the law. It must also recognize any relationships between dispute parties that will likely continue after the CRT's process has ended.
8. The CRT has discretion to decide the format of the hearing, including in writing, by telephone, videoconferencing, 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. The CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in court. The CRT may also ask the parties and witnesses questions and inform itself in any way it considers appropriate.

10. Under section 123 of the CRTA and the CRT rules, 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**

11. The issue in this dispute is whether the strata is entitled to charge its \$15,000 insurance deductible to Ms. Shypanski under the SPA and strata bylaws.

## **EVIDENCE AND ANALYSIS**

12. I have read all the submissions and evidence provided but refer only to information I find relevant to provide context for my decision.
13. In a civil proceeding such as this, the strata must prove its claims on a balance of probabilities.

### ***Bylaws***

14. Because the leak occurred on December 27, 2017, I find that the bylaws filed at Land Title Office (LTO) on February 22, 2017 (Bylaws) apply.
15. Under the Bylaws, an owner is generally responsible to repair and maintain their own strata lot, while the strata must repair and maintain the CP.
16. Bylaw 27 says that an owner shall indemnify the strata from any repair expense for CP or a strata lot or their contents caused by or resulting from “acts, omissions of acts, negligence or carelessness by the Owner or by that of any member of the Owner’s family or their guests, employees, contractors, agents, tenants or volunteers” to the extent that expense is not met by the proceeds of an applicable insurance policy.
17. Bylaw 28 says that any insurance deductibles paid by the strata for owner damage done or requiring repair are an expense chargeable to the owner.

## ***Background Facts***

18. The following facts are uncontested:

- a. On December 27, 2017 a water escape originated from the unit 312 toilet causing damage to other units and CP.
- b. The strata made an insurance claim and the damage was repaired under the terms of the strata's insurance policy.
- c. The strata paid a \$15,000 deductible for the water damage claim.

19. The evidence shows that in March 2014, Ms. Shypanski had reported water backing up in her bathroom sink. She emailed with the property manager at the time who indicated that hydro flushing for the building would be arranged. The property manager suggested that Ms. Shypanski have the line snaked in the meanwhile. I mention this evidence because I find it proves that Ms. Shypanski reported a water back up issue in a timely way.

20. On October 7, 2014, Mr. Rooter Plumbing provided the strata's property management company with a report that water pressure in the building was low, causing squealing noises coming from shower diverters in the building. Mr. Rooter Plumbing recommended pressure tests.

21. On December 28, 2014, Besant and Associates Engineers Ltd. provided the strata with a report (Besant Report) on the "...design, installation and condition of the copper domestic water pipe ... to determine how effective the newly installed water treatment system is."

22. The Besant Report stated that the newly installed water treatment system halted the corrosion process, eliminating corrosion. The Besant Report says that with "proper water management", "the service life of the domestic water piping shall exceed 50 years."

23. On January 4, 2017, Absolute Building Science Strata Engineering Inc. prepared a depreciation report for the strata (2017 Depreciation Report). The Depreciation

Report describes the condition of the strata's CP and provides immediate and future replacement cost estimates. The Depreciation report noted that the water distribution system in the strata had 7 useful life years remaining.

24. On January 24, 2017, Mr. Rooter performed repairs on unit 312 toilet as follows:

Replaced the front valve and flapper in the toilet tank, also replaced the Toilet Shut Off Valve and Supply Line.

25. The strata paid \$237.55 for these repairs. Based on the Mr. Rooter invoice, I find that these repairs were conducted in response to a concern that the pipes and toilet were making an "intermittent noise".

26. On October 18, 2017, Mr. Rooter performed hydro scrubbing of the strata's 47 vertical drainage stacks to flush out any grease and debris build up. A strata maintenance person, JC, who worked at the strata from October 2014 to December 2018, explained that a company attended regularly between 2014 and 2018 to do hydroflushing of pipes to eliminate grease and debris that would cause backups.

27. On December 27, 2017, Ms. Shypanski emailed the strata to report that her toilet bowl had overflowed, causing a flood in her unit and the unit below. Ms. Shypanski discovered this when a neighbour in the unit below her reported water coming through their ceiling.

28. Ms. Shypanski wrote that it was her opinion that the plumber who repaired their toilet bowl earlier that year had "made a mistake when installing parts for the toilet that led to the toilet running and overflowing." I find that Ms. Shypanski was referring back to the January 2017 Mr. Rooter repairs. Ms. Shypanski took the position that she should not have to pay for the leak repair because it may have been caused by allegedly faulty plumbing repairs. However, I find Ms. Shypanski has not proven that the January 2017 Mr. Rooter repairs were negligent, nor is Mr. Rooter a party to this dispute.

29. In a written statement filed in evidence in this dispute, JC wrote that Ms. Shypanski told him the toilet had been running "constantly". Morpac Plumbing recorded that

Ms. Shypanski noted the toilet had been running since the January 2017 repairs. In the CRT process, both Ms. Shypanski and her spouse say that there was no problem with the toilet after the January 2017 repair, until the overflow happened. For the reasons discussed below, I find that even if the toilet was known to be running, that does not end the matter.

30. Canstar Restorations prepared an Emergency Site Inspection Report, which I find was prepared soon after they attended on December 17, 2017 listing a “Toilet overflow – Plumbers report pending” as the cause of the damage. The report also commented that the source “...seems to be a malfunction of the toilet plumbing causing water to rise out of the bowl.” The water that leaked appeared “clear” but had come from the toilet bowl.
31. On May 1, 2018, JG and JM, plumbers with Morpac Mechanical Ltd, prepared a report, after examining the toilet, to say that the most likely cause was a blockage or obstruction.
32. On June 6, 2018, the strata’s property manager wrote to Ms. Shypanski requesting that she pay the \$15,000 insurance deductible on the toilet overflow claim, pursuant to section 112 of the *Strata Property Act* (SPA) and the Bylaws.

### ***Analysis re: Expert Plumbing Evidence***

33. Ms. Shypanski’s spouse, CM, provided a written statement that he spoke to the plumber who came to investigate the December 2017 leak. CM says that the plumber told him that the leak was “caused due to the chronic plumbing problems in the building” including “silt buildup” causing the toilet overflow. I do not accept this hearsay statement as expert opinion evidence. Although the CRT is permitted to accept hearsay evidence, given there is no explanation before me about why the applicant did not obtain a statement from the plumber directly on the issue. I therefore give this evidence no weight.
34. However, JG and JM were Morpac plumbers who prepared a report for the strata on May 1, 2018. I accept their expert opinion on plumbing issues based on their

experience and qualifications. JM offered his opinion that the toilet was blocked, but he could not say whether the cause was drainage plumbing material, a lack of drain maintenance or the age of the building plumbing.

35. SK of Mr. Rooter also provided an expert opinion in this dispute. I find that he is qualified to give an opinion about plumbing, based on his 21 years of experience as an owner/operator of Mr. Rooter, where he has been responsible for service plumbing and drainage systems.
36. SK's opinion is that the leak in SL45 was likely caused by a blockage in the toilet bowl. SK explains that because the strata's pipes are hydroflushed annually, any blockages in the CP pipes would be found in the ground-floor strata lots. SK says a blockage in the Main Stack would not result in a toilet backing up and overflowing. Because SK did not examine the subject toilet, nor address the question of diameter of the immediate drainage pipe as a possible contributing problem, I prefer JG's opinion that the cause of the blockage cannot be determined on a balance of probabilities.
37. SK also notes that a toilet running constantly, absent some other obstruction, would not necessarily overflow. As such, the question of whether Ms. Shypanski should have sought maintenance attention for the toilet sooner, if she knew it was running, is not determinative.
38. Ms. Shypanski also provided a written statement. In it, she explains that she noticed a vibrating noise coming from her pipes starting in 2014. Then, in January 2017, a plumber repaired the toilet. Ms. Shypanski writes that after that she did not have any problems with the toilet up until the December 27, 2017 leak.
39. Ms. Shypanski also says that the CP pipes were hydroflushed in April 2020, but that when she "inspected" her bathroom pipes on May 20, 2020 they were "full of silt."
40. Ms. Shypanski provided some video footage from May 2020 that she says shows silt in bathroom pipes. In the video, I see fine silt-type debris in a plumbing line. However, I cannot tell whether the line was in her bathroom, kitchen or elsewhere,

nor whether the debris had come through the sink or toilet or from the CP pipes upward. Because I cannot determine the origin of the debris, the video is taken well after the December 2017 leak and there is no expert opinion commenting on it, I give this evidence little weight.

***Is the strata is entitled to charge its \$15,000 insurance deductible to the owner under the SPA and its bylaws?***

41. The strata says the owner is responsible to pay the insurance deductible because her toilet was the source of the water leak. The strata relies on Bylaws 27 and 28. The strata also alleges that Ms. Shypanski was negligent in:
  - a. failing to have the toilet properly serviced when she realized it was running constantly, or
  - b. by causing a blockage in the toilet.
42. Ms. Shypanski says she is not responsible to reimburse the strata \$15,000 for the deductible because she did not cause the leak.
43. For the reasons that follow, I agree with Ms. Shypanski.
44. The matter of insurance deductibles and responsibility for payment is set out in section 158 of the SPA. Section 158 provides that payment of an insurance deductible in a claim on the strata's insurance is a common expense contributed to by strata fees. However, under section 158(2) a strata may sue an owner to recover a deductible if the owner "is responsible for the loss or damage that gave rise to the claim."
45. As stated in *Yang v. Re/Max Commercial Realty Associates (482258 BC Ltd.)*, 2016 BCSC 2147 at paragraph 139, the term "responsible" does not mean that an owner must be liable in negligence. In *Yang*, the court considered SPA section 158(2) and noted "responsible" expands a strata's ability to pursue an owner for deductible repayment beyond circumstances where the owner is at fault.



46. In *The Owners, Strata Plan LMS 2835 v. Mari*, 2007 BCSC 740, the BC Supreme Court (BCSC) found that a strata lot owner is liable for a strata corporation's insurance deductible if the owner is "responsible" for the loss giving rise to the strata corporation's insurance claim. The court held that a strata lot owner is responsible for what occurs within their strata lot and that a strata corporation may look to such an owner to recover its insurance deductible where the owner's responsibility for the loss falls short of negligence: see *Mari* at paragraph 12.
47. In *Strata Plan LMS 2446 v. Morrison*, 2011 BCPC 519, the BC Provincial Court (BCPC) was asked to determine if section 158(2) was affected by the strata's bylaws.
48. The BCPC considered a scenario where a strata corporation's bylaws required the strata corporation to show the strata lot owner was negligent, as opposed to "responsible" for a loss under section 158(2) of the SPA before being able to recover its insurance deductible. The trial judge determined that the strata's bylaw, which required a strata lot owner to indemnify the strata for expense, maintenance, repair or replacement rendered necessary "by the owner's act, omission, negligence or carelessness" should be "read collectively and import a standard of negligence": see paragraph 11.
49. *Morrison* was also considered in *The Owners, Strata Plan BCS 1589 v. Nacht et al*, 2017 BCCRT 88 (*Nacht*), upheld by the BCSC on appeal in *The Owners, Strata Plan BCS 1589 v. Nacht*, 2019 BCSC 1785. In *Nacht*, the court held that an owner was not responsible for expenses flowing from a water leak from a failed toilet supply line in the owner's strata lot as there was no negligence.
50. Although not binding on me, I accept the tribunal's decision in *Nacht*, where the tribunal also found that the words "owner's act, omissions, negligence or carelessness" contained in a strata corporation bylaw are to be read collectively and import a standard of negligence.
51. Bylaw 27 uses the language "acts, omissions of acts, negligence or carelessness", which I find matches the language considered in *Nacht*. If the strata wanted to adopt

a lower standard, it would have adopted a bylaw echoing the language in the SPA section 158(2), using the word “responsible”.

52. Following *Nacht*, I find that the strata must prove that Ms. Shypanski negligently caused the toilet overflow, in order to recover the \$15,000 deductible.
53. To prove negligence, the strata must show that the owner owed it a duty of care, the owner breached the standard of care, the strata sustained damage, and the damage was caused by the owner’s breach: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, at paragraph 33. For the reasons discussed below, I find that the strata has not done so.
54. In submissions, the strata admits that “...the toilet overflowed and no one could say why with any definition.” This is consistent with JG’s expert opinion. The strata submits that Ms. Shypanski’s negligence can be inferred because water escaped from her strata lot, because the toilet was in her exclusive control. Given JG’s evidence that drainage pipe diameter is an important factor impacted by other causes, and the initial report from Canstar suggesting a toilet plumbing “malfunction”, I find that negligence cannot be inferred but must be proven on a balance of probabilities.
55. The strata has SK’s expert opinion that there was a blockage in the toilet bowl likely causing the overflow. On the other hand, JG comments that there was likely a blockage, but that it might have been caused by a defect of annual drain maintenance, the building’s drainage plumbing age or other factors affecting the diameter of the drainage piping. I find there is no opinion establishing the likely cause of the blockage as owner negligence.
56. To put it differently, there is a certain volume of water and waste solids that can be flushed down a toilet, which should pass through an adequate diameter drainage pipe. There is no evidence proving that Ms. Shypanski was unreasonably disposing of more than this volume of waste solids and water or that she had neglected necessary toilet maintenance in way that led to this consequence.

57. While in *Morrison* the Court held that negligence could be inferred because the owner flushed the toilet and failed to wait to see that the water had cleared, here Ms. Shypanski awoke to learn of the leak from a neighbour. I find that she was not in the bathroom with an opportunity to observe the water properly clearing the bowl.
58. I find that although the strata has proven there was a blockage, it has not proven whether the blockage was caused by a drainage pipe issue or a negligent owner-caused obstruction. As a result, I find the strata has not proven that Ms. Shypanski was negligent and so it cannot recover the \$15,000 deductible from her.

## **CRT FEES and EXPENSES**

59. 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. Because Ms. Shypanski paid no tribunal fees and did not claim dispute-related expenses, I make no order for them.
60. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against Ms. Shypanski.

## **ORDER**

61. I dismiss the strata's claims and this dispute.

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Julie K. Gibson, Tribunal Member