



# Civil Resolution Tribunal

Date Issued: August 21, 2020

File: ST-2019-008021

Type: Strata

Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan NW 3130 v. Chohan*, 2020 BCCRT 937

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

The Owners, Strata Plan NW 3130

**APPLICANT**

**A N D :**

DALVIR KAUR CHOCHAN, SARABJIT SINGH CHOCHAN and SUNIL  
KUMAR

**RESPONDENTS**

**A N D :**

The Owners, Strata Plan NW 3130

**RESPONDENTS BY COUNTERCLAIM**

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## **REASONS FOR DECISION**

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Tribunal Member:

Richard McAndrew

## INTRODUCTION

1. Sunil Kumar, Dalvir Kaur Chohan and Sarabjit Singh Chohan (owners), co-own strata lot 16 (unit 206) in a strata corporation, The Owners, Strata Plan NW 3130 (strata).
2. The strata is the applicant in the primary claim, and the respondent to the counterclaim. The owners are the respondents to the primary claim. Owner, Sunil Kumar, is the applicant in the counterclaim.
3. This dispute involves the strata's claim that the owners must reimburse the strata's insurance deductible to repair water damage from an April 5, 2019 flooding incident that damaged unit 106, located below the strata lot. The strata says their contractor, Bowtie Mechanical (Bowtie) determined that water leaked from the owners' defective shower diverter valve. The strata says the owners must reimburse the strata's \$25,000 insurance deductible. The strata also initially claimed \$1,934.97 for plumbing repairs, but this issue has been resolved and is no longer part of this dispute.
4. The owners say the cause of the leak remains undetermined. The owners say Bowtie could not find the leak source. They say they are therefore not liable for the insurance deductible. In the counterclaim, Sunil Kumar requests an order that the strata's chargebacks for the insurance deductible and the plumbing repair charges be removed from their strata lot account.
5. The owners are represented by lawyer, Paul Sekhon. The strata is represented by lawyer, Veronica Franco.

## JURISDICTION AND PROCEDURE

6. 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.

7. The CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, or a combination of these. Though I found that some aspects of the parties' submissions called each other's credibility into question, I find I am properly able to assess and weigh the documentary evidence and submissions before me without an oral hearing. In *Yas v. Pope*, 2018 BCSC 282, the court recognized that oral hearings are not always necessary when credibility is in issue. Further, bearing in mind the CRT's mandate of proportional and speedy dispute resolution, I decided I can fairly hear this dispute through written submissions.
8. 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.

## **ISSUES**

9. The parties reached an agreement on the issue of the owners' responsibility for the plumbing repair costs to unit 206.
10. The remaining issue in this dispute is whether the owners must reimburse the strata the \$25,000 insurance deductible for water leak damage.

## **BACKGROUND FACTS**

11. I have read all of the evidence provided but refer only to evidence I find relevant to provide context for my decision.
12. In a civil proceeding like this one, the applicant strata must prove its claims on a balance of probabilities. Sunil Kumar has the same burden on their counterclaim.

13. The strata was created in 1989 and consists of 28 residential strata lots in 7 separate 3-storey buildings. There are 2 strata lots on each floor of the buildings. The owners' strata lot is located on the second storey of one of the buildings.
14. On December 13, 2001, the strata filed a complete new set of bylaws at the Land Title Office replacing all previous bylaws and amendments. The relevant bylaws in this dispute are:
- Bylaw 2(1) says an owner must repair and maintain the owner's strata lot, except for repair and maintenance that is the strata's responsibility.
  - Bylaw 3(2) says an owner or tenant must not cause damage, other than reasonable wear and tear, to the common property, common assets or those parts of a strata lot which the strata must repair and maintain under the bylaws or insure under section 149 of the SPA.
  - Bylaw 7(3) says that if loss or damage occurs to a strata lot, common property, limited common property or common facilities that give rise to a valid claim under the strata's insurance policy, the owners of the strata lot from where the damage originated is responsible for the deductible portion of the strata's policy relative to the loss or damage.
15. GK, an owner of unit 106, says water flooded their strata lot on April 5, 2019 while they were not home. GK says their flooring was soaked and water dripped from the ceiling of their master bedroom closet.
16. Servicemaster Restore (Servicemaster) responded to unit 106 on April 7, 2019 to begin repairing the water damage on behalf of the owners of unit 106. Servicemaster provided an initial report to unit 106's insurer on April 7, 2019 which says that all of the rooms in unit 106 were damaged by water, except the front den and master bathroom. The report provided photographs of moisture readings throughout unit 106. The report says the most likely source of the water was unit 206. The report says Servicemaster spoke with the residents in unit 206 but they did not allow access.

17. Servicemaster provided an additional initial report on April 11, 2019 for the strata's insurer. This report says that all of unit 106 was affected by the water leak. Servicemaster provided photographs showing water remediation services throughout unit 106. Servicemaster's April 11, 2019 report says that the water leak came from unit 206's toilet handle.
18. Based on the evidence, I am satisfied that the strata incurred an expense of \$25,000 for the insurance deductible for the water damage repairs to unit 106.
19. On May 21, 2019, the strata notified the owners that it had placed a \$25,000 chargeback against the owners' strata lot account for reimbursement of the insurance deductible for water leak repairs. The chargeback has been recorded in the strata's account records.

### ***Reasons and Analysis***

20. The strata argues that the owners owe the strata reimbursement of the \$25,000 insurance deductible on the basis of its bylaws and the *Strata Property Act* (SPA). Section 158(1) of SPA says that stratas' insurance deductibles are a common expense to be paid by the strata and section 158(2) of the SPA says strata corporations can recover these deductibles from owners who cause the damage. The courts have interpreted section 158(2) of the SPA to hold owners liable for a strata's insurance deductibles if the owners are responsible for the loss giving rise to the strata's insurance claim. [See *The Owners of Strata Plan LMS 2835 v. Mari* 2007 BCSC 740 and *Strata Plan KAS 1019 v. Kieran* 2006 BCPC 360 (affirmed in *Wawanessa Mutual Insurance Co. v. Kieran*, 2007 BCSC 727)]
21. In *Wawanessa*, the British Columbia Supreme Court held that being responsible is not the same as being negligent and that responsibility is a lower threshold. In *Wawanessa*, the court says that owners are "responsible" for what occurs within their strata lot. This is consistent with bylaw 7(3), which says the owners must reimburse the strata's insurance deductible if the loss originated from the owners' strata lot. So, to receive a reimbursement of the insurance deductible, the strata must prove

that the water leak came from the owners' strata lot. For the reasons that follow, I find that the strata has not done so.

22. The strata primarily relies on statements from SU, owner and plumber from Bowtie, to justify charging the insurance deductible to the owners. SU provided plumbing repairs and leak investigative services to unit 206.
23. SU provided 2 statements describing his observations in both units 106 and 206. SU also provided expert opinions based on his expertise as a red seal plumber with 25 years of experience. Based on SU's undisputed submissions regarding his credentials, I am satisfied that SU has sufficient expertise to provide expert plumbing evidence, as contemplated in CRT rule 8.3.
24. The strata submitted SU's second statement late on May 7, 2020. The strata says this second statement could not have been submitted earlier because it was prepared in response to evidence the owners had just provided.
25. The owners object to the admissibility of SU's second statement because it was delivered late. Both parties were given an opportunity to provide additional submissions regarding SU's second statement and I have reviewed and considered these submissions. Since the owners received an opportunity to review and respond to SU's second statement, I am satisfied that the owners have not been unfairly prejudiced by the strata's late submission of this evidence. In these circumstances, I find that it is appropriate to include SU's second statement as evidence. So, I have reviewed and considered SU's second statement in my decision.
26. In his April 27, 2020 statement, SU says he responded to a service call regarding a water leak at unit 106. SU says he did not find any water leaks in unit 106 when he entered. However, he says water poured down when he opened the ceiling of the master bedroom closet. SU says this location is directly below the bathtub in unit 206. Based on the water's location, SU concluded that the water most likely came from behind the bathtub of unit 206.

27. SU says he spoke with the tenants in unit 206 and they said the shower handle was repaired on April 5, 2019 by another plumber. SU says he inspected the shower handle and he noted that the handle spun freely. SU says this indicated that there was a problem with the shower diverter valve. SU says he removed the shower valve faceplate and discovered that a clip was missing from the diverter. SU says the clip had been replaced with a kitchen tie. SU says that a cartridge controls water flow and the diverter clip holds the cartridge in place. SU says full water pressure would be released if the clip and cartridge were removed. SU says he is confident that this missing clip from the shower diverter valve caused the water leak.
28. RK, a tenant from unit 206, says a resident from unit 106 told her that water was leaking down into their unit on April 5, 2019. RK says there was no apparent water leak in unit 206. RK says the shower control handle was not working that day. She says the handle was loose and became detached. RK says she contacted her landlord, who sent someone to repair it. RK says the repair person quickly reattached the handle and left. She said the repair took less than 2 minutes.
29. The owners submitted an expert plumbing opinion from RJ of Guru Service Group. RJ says he is a red seal plumber with 10 years of plumbing experience. Based on RJ's undisputed submissions regarding his credentials, I am satisfied the RJ has sufficient expertise to provide expert plumbing evidence, as contemplated in CRT rule 8.3.
30. RJ says he visited unit 206 on April 20, 2020 and he reviewed photographs taken by Servicemaster and Bowtie. RJ says the source of water leak was not determined. RJ says that if there was a leak at unit 206's bathtub, the drywall behind the shower should have been water damaged. RJ also says there are many pipes and drains located in the joist space between units 106 and 206 which could have been the source of the leak.
31. SU responded to RJ's expert opinion saying that he had determined the shower diverter valve was the source of the water leak because he tested every other possible source of the water leak for hours and ruled out other possible sources. SU

also says that the area behind the shower in unit 206 was dry because the water drained down to unit 106. Further, SU says that all the piping in the joist space between unit 106 and 206 is for unit 206.

32. The owners provided a video recorded on April 10, 2019 while SU was performing his plumbing services. SU's comments in the video differ significantly from his April 27, 2020 report. In his April 27, 2020 report, SU says that determined that the leak originated from a defective diverter valve when he entered the strata lot on April 8, 2019. However, in the video SU appears to have different opinions on April 10, 2019.
33. The video shows SU removing drywall from the kitchen in the area behind the shower. In the video, SU notes that the area behind the shower is dry. SU also says that he expected that area to be damp if the water leak occurred there. SU says that he thinks the leak more likely came from the toilet because the water puddle is closer to the toilet.
34. RK's statement corroborates the video evidence. RK says the area behind the shower was dry when SU opened the wall behind the shower, and this appeared to surprise SU.
35. In his April 27, 2020 written statement, SU says he is confident that the missing clip on the cartridge in the diverter caused the water leak. However, the video shows that when he was examining the strata lot in April 2019, he said that it did not make sense that the area behind the tub would be dry if there was a water leak from the diverter. In addition, in the video, SU said that he believed the source of water leak came from area of the toilet, not the shower.
36. I find SU's April 2019 statement that he did not believe a defective diverter valve was the source of the leak to be inconsistent with his April 27, 2020 report. I also find SU's statement in his April 27, 2020 report that the leak was directly under the diverter valve to be inconsistent with his statement that the leak was more likely in the toilet area on the video.



37. SU's second statement does not sufficiently explain why his opinion, a year after service, differs from the opinions he expressed on the video. SU says that he is sure the video was taken out of context. However, SU does not explain how the video is out of context or how additional context would change the meaning of the video. SU also says that the wall behind the tub may be dry because the water drained down into unit 106. However, this does not explain why SU expected that area to be damp during the video in 2019.
38. In his second statement, SU says he initially suspected the toilet could be the source of the water leak because something can clog a toilet without leaving evidence of a leak. SU characterized his comments on the video as an ongoing investigation to determine the source of the leak. However, this is not consistent with SU's April 27, 2020 report which indicates that he immediately determined the shower diverter valve was the source of the leak when he found the clip was missing. SU also did not explain why he expressed an opinion in the video that water was accumulating under the toilet, which is consistent with Servicemaster's April 11, 2019 report, but SU wrote that the water was accumulating behind the bathtub in his report. I find that SU has not provided a sufficient explanation why he later determined that the shower diverter valve, and not the toilet, was the source of the water leak.
39. I find that SU's written statement and his recorded statements in the video are inconsistent regarding the source of the water leak, which is the central issue in this dispute. I find that SU's video statements, made while providing plumbing services to the strata lot, are more likely to be accurate than a conflicting statement written a year later. So, I find that SU's statements are not accurate and, therefore, they are not reliable evidence. Further, since I find that SU has submitted inaccurate evidence, I find that SU is not a credible witness and I give SU's version of events and his opinion no weight.
40. For the above reasons, I am not satisfied by SU's statements. Further, I do not find Servicemaster's statement that the water leaked from the owners' toilet handle sufficient to establish that the water leak came from the owners' strata lot because

Servicemaster did not provide any explanation for the basis of this opinion. In the absence of sufficient evidence relating to the source of the water leak, I find that the strata has failed to prove that the owners are responsible for the water leak.

41. I have considered whether I should draw an adverse inference against the owners for failing to provide a statement from the person who repaired the shower handle on the day of the water leak. The courts have said that an adverse inference can be drawn against a party where, without sufficient explanation, they fail to produce evidence or call a witness expected to provide supporting evidence (see *Port Coquitlam Building Supplies Ltd. v. 494743 B.C. Ltd.*, 2018 BCSC 2146). In this matter, a statement from the person who provided plumbing services on the day that the water leak occurred would likely be very helpful evidence in determining the source of the water leak. However, in *Port Coquitlam* the court said that an adverse inference should only be drawn if a *prima facie* case has been established, which means the applicant has already provided sufficient evidence to prove their case. As stated above, the strata has failed to do so. So, I decline to draw an adverse inference against the owners.
42. For the above reasons, I find the strata has not proven its claim that the owners are liable for the \$25,000 insurance deductible. I therefore dismiss this claim and I order the strata to reverse the charges to the owners' strata lot account for the insurance deductible for the water damage repair.

## **CRT FEES AND EXPENSES**

43. 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. Since the strata was generally unsuccessful, I find it is not entitled to reimbursement of its CRT filing fees. Since Sunil Kumar was successful in their counterclaim, I find that Sunil Kumar is entitled to reimbursement of their CRT filing fees of \$125. Since no party request reimbursement of dispute-related expenses, none are ordered.

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

## **ORDERS**

45. I order that, within 30 days of the date of this decision:

- a. The strata pay Sunil Kumar \$125 for CRT fees; and
- b. The strata reverse the charges to the owners' strata lot account for the insurance deductible for the water damage repair, in the amount of \$25,000.

46. Sunil Kumar is also entitled to post-judgement interest under the *Court Order Interest Act*.

47. Under sections 57 and 58 of the CRTA, a validated copy of the CRT's order can be enforced through the Supreme Court of British Columbia. The order can also be enforced by the Provincial Court of British Columbia 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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Richard McAndrew, Tribunal Member