Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Sleeman et al v. The Owners, Strata Plan VR 2027*, 2019 BCCRT 1162

B E T W E E N :

April Sleeman and William Sleeman

APPLICANTS

A N D :

The Owners, Strata Plan VR 2027

RESPONDENT

REASONS FOR DECISION

Tribunal Member: J. Garth Cambrey, Vice Chair

INTRODUCTION

1. The applicants, April Sleeman and William Sleeman jointly own strata lot 15 (unit 15 or SL15) in the respondent strata corporation, The Owners, Strata Plan VR2027 (strata).

2. The applicants claim against the strata for deficient repairs to SL15 as a result of a February 2014 water loss covered by the strata's insurance, the strata's alleged failure to repair and maintain common property, including the building envelope, and the strata's various alleged contraventions of the *Strata Property Act* (SPA) about financial matters.

3. The applicants also say the strata treated them in a significantly unfair manner when it removed an alleged unauthorized alteration within SL15 and charged back the $5,000 insurance deductible in 2014. The applicants say the strata's actions have caused an ongoing nuisance that adversely affects their use and enjoyment of SL15.

4. The applicants seek the following orders:

    a. Confirmation that the attic and crawlspace associated with SL15 is part of SL15 and not common property plus reimbursement of $3,855.63 for legal and survey expenses relating to attic and crawlspace ownership,

    b. That the strata repair and maintain common property specifically including the building envelope and replacement of exterior windows adjacent to SL15, attic, crawlspace including repairs to plumbing and wiring and replacement of a rotted sill plate, and installation of fire separation and fire sprinklers,

    c. That the strata reimburse the applicants $7,323.66 for crawlspace repairs and excess hydro charges relating to the crawlspace,

    d. That the strata refund the applicants' $10,162.32 for their proportionate share of 2 special levies relating to the courtyard membrane replacement.

    e. That the strata complete an audit of its financial records from December 10, 2016 to present,

    f. $10,000 in damages and punitive damages for nuisance and trespass, and

    g. That the strata provide them documents under sections 35 of the SPA.

5. The strata denies the applicants' claims and asks they be dismissed.

6. The applicants are represented by April Sleeman. The strata is represented by a strata council member.

7. For the reasons that follow, I allow the applicants claim for dispute related expenses relating to the attic and crawlspace ownership of $1,359.75. I dismiss the applicants' remaining claims.

JURISDICTION AND PROCEDURE

8. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over strata property claims brought under section 121 of the *Civil Resolution Tribunal Act* (CRTA). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.

9. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email or other electronic means, or a combination of these. I decided to hear this dispute through written submissions because I find that there are no significant issues of credibility or other reasons that might require an oral hearing.

10. The tribunal may accept as evidence information that it considers relevant, necessary, and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

11. Under section 123 of the CRTA and the tribunal rules, in resolving this dispute the tribunal may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the tribunal considers appropriate.

BACKGROUND AND EVIDENCE

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 applicants must prove each of their claims on a balance of probabilities.

14. The strata is located in Whistler, B.C. and consists of 22 strata lots. It was created in 1987 under the *Condominium Act* (CA) and exists under the SPA.

15. The strata filed a complete new set of bylaws at the Land Title Office (LTO) on January 30, 2002 that apply to this dispute. Subsequent bylaw amends were filed at the LTO that are not relevant to this dispute. The Schedule of Standard Bylaws under the SPA does not apply. I address relevant bylaws as necessary in my analysis below.

16. The applicant William Sleeman was a co-owner of SL15 with his mother, Beverly Sleeman, at a date prior to February 8, 2014, when the water damage incident described below occurred. Beverly Sleeman passed away on about July 14, 2015 and Mr. Sleeman continues to be co-owner of SL15 with the other applicant, April Sleeman, his spouse, who became a co-owner of SL15 on about May 20, 2016. Between the time of Beverly Sleeman's passing and May 20, 2016, I infer SL15 was co-owned by Mr. Sleeman and the Estate of Beverly Sleeman.

17. The original Dispute Notice for this dispute was issued December 11, 2018. During the facilitation phase of the tribunal's dispute resolution process the strata raised a *Limitation Act* (LA) defense that came before me in April 2019, prior to parties making submissions. I obtained submissions from the parties on the LA issues and rendered a preliminary decision (set out below) which the parties received by email on April 23, 2019.

18. An amended Dispute Notice was issued July 2, 2019. I have based this decision on my preliminary decision, the July 2, 2019 amended Dispute Notice, the strata's amended Dispute Response, and the parties' submissions.

PRELIMINARY DECISION OF APRIL 23, 2019

The legislation

19. Section 13 of the CRTA states the LA applies to the tribunal. The LA defines a claim to mean a claim to remedy an injury, loss or damage that occurred as a result of an act or omission. The LA applies separately to each claim.

20. Section 6 of the LA says the basic limitation period is 2 years, and that a claim may not be commenced more than 2 years after it is discovered.

21. Section 8 of the LA says that, except for special situations referred to in sections 9 to 11, a claim is discovered by a person on the first day on which the person knew or reasonably ought to have known all of the following:

    a. that injury, loss or damage had occurred;

    b. that the injury, loss or damage was caused by or contributed to by an act or omission;

    c. that the act or omission was that of the person against whom the claim is or may be made;

    d. that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek remedy for the injury, loss or damage.

22. Section 12 of the LA sets out special discovery rules for claims based on fraud. It says, in part, that the date of discovery is postponed until the beneficiary becomes fully aware that injury, loss or damage occurred and that the injury, loss or damage was caused by or contributed to by the fraud or other act or omission. The respondent must also have caused or contributed to the fraud, act or omission and a court (or tribunal) proceeding must be an appropriate means to seek remedy.

23. Section 17 of the LA addresses discovery rules for successors and predecessors. It states that the claim of a person claiming through a predecessor in right, title or

interest is discovered on the earlier of the date the claim is discovered by the predecessor or the date the claim is discovered by the person claiming.

The applicable claims

24. The main dispute involves the applicants' claims and requested outcomes relating to water damage that occurred to SL15 on about February 8, 2014 and a special levy passed in December 5, 2015, among others. I find it is only the claims relating to these 2 incidents that I must consider, given the parties LA submissions did not address all of the applicants' claims.

25. I find the LA does not apply the applicants' claim for an order that the attic and crawlspace of SL15 are part of the strata lot, as I find that claim does not fall within the definition of claim under the LA as it does not relate to loss, damage or injury.

26. Further, the applicants seek damages of $10,000 for "nuisance and trespass, aggravated and punitive damages." While it appears at least part of this claim relates to the February 8, 2014 water damage issue, it is unclear what the related amount might be. To the extent the applicants' claim relates to any statute-barred claims discussed below, I find their damages claim is also statute-barred. I find a decision on damages is best left to the tribunal member who decides the remaining applicants' claims that are not statute-barred.

27. Finally, the applicants submit that the strata intentionally hid or concealed relevant or material facts and documents at different times when the applicants reviewed strata records and documents. They say the strata's actions amount to fraudulent concealment and that postponement of any limitation periods resulting from the strata's actions in such circumstances is necessary. As noted above, section 12 of the LA addresses fraud. However, I do not find that section 12 is engaged for 2 reasons.

28. First, the case law requires there to be "clear and convincing proof" that fraud has occurred, which is not evident here. The applicants say that certain insurance documents, such as the proof of loss forms, were not provided with other strata

documents they asked the strata to view, but do not provide any evidence of the documents they requested. Therefore, I am unable to determine if the strata was asked to provide the proof of loss forms and did not provide them. There is also no evidence that the strata intended to deceive the applicants by not providing the requested documents.

29. Second, and more importantly, William Sleeman has been a registered owner of SL15 since before the first claim-related incident occurred on February 8, 2014 and continued to be a registered owner after the passing of Beverly Sleeman in 2015. As described below, I have determined the dates of discovery for the applicants' claims and find that the same discovery dates that I have found applied to Beverly Sleeman would also apply to William Sleeman, given he was also an owner and it is likely Beverly Sleeman told her son when she learned of the potential claims.

30. For these reasons, I find the applicants have not proved that the strata has committed fraud within the meaning of the LA such that discovery dates have been extended.

The February 8, 2014 water loss

31. I will first address the claim and outcomes relating to the February 8, 2014 water damage issue, which appear to result from a burst fire sprinkler line in the attic space of SL15. I do not agree there were 2 separate insurance claims for the water damage as suggested by the applicants. The claimants' suggestion is based on proof of loss forms that state the date of loss was February 9, 2014 and the applicants' submission that the strata's insurance broker discovered evidence of another insurance claim with a February 8, 2014 date of loss. The applicants did not provide any evidence to establish a second insurance claim and I infer the proof of loss documents erroneously disclose a February 9, 2014 date of loss and actually relate to the February 8, 2014 water damage issue that forms the basis for this aspect of the applicants' claim.

32. Briefly, the claim is that water damage from the burst sprinkler line (or sprinkler head) caused significant damage to SL15 and a neighbouring unit. The strata's insurance policy responded to the resultant damage subject to a $5,000 water damage deductible. Beverly Sleeman was notified by the strata's property manager in a February 14, 2014 email that she would be responsible for the deductible. The strata council meeting minutes of April 12, 2014 show the strata determined that the owners of SL15 at the time were responsible for the damage, alleging unapproved alterations completed in SL15, plus an open window in the unit, resulted in a lack of heat causing the sprinkler line to freeze and burst. The strata charged the $5,000 deductible to William Sleeman and Beverly Sleeman, the registered owners at the time. Although there is evidence that Beverly Sleeman objected to the chargeback, I find the date of discovery was more likely than not, April 12, 2014 when the strata confirmed the chargeback, over 4 years before the Original Dispute Notice was issued on December 11, 2018. The same date of discovery would apply to William Sleeman, which is more than 2 years before the original Dispute Notice was issued. The July 24, 2017 strata council minutes state, and it is undisputed, that the deductible was paid by the Estate of Beverly Sleeman. The payment would have to have been made prior to May 20, 2016, the date April Sleeman's name was added to the title of SL15 and the Estate of Beverly Sleeman was removed from title.

33. The LA sets a date (limitation period) for which a court action or tribunal proceeding must be started and if the action or proceeding is started after the limitation period has expired, the claim is said to be statute-barred because the person making the claim has waited too long. The running of time does not re-start later when the applicants paid the insurance deductible.

34. For these reasons, I find the applicants' claim for recovery of the $5,000 insurance deductible is out of time.

35. Given my conclusions above, I refuse to resolve the applicants' claims about the $5,000 deductible for the February 2014 flood, because they are out of time.

36. The alleged unapproved alterations included the installation of a separate room in the attic or loft of SL15. Because the strata found the room to be an unapproved alteration, it determined that the room had be removed and could not be reinstated as part of the insurance claim as the strata's insurance only covered original construction. The strata determined the room removal could either be completed by the owner or the strata, but that the cost of removing the room would be at the owners' cost. The applicants submitted an invoice from Walsh Restoration Services dated July 3, 2014 addressed to the property manager. The invoice totals $1,051.03 and shows the work to remove the unauthorized alteration was completed on March 28, 2014. In the original Dispute Notice, the applicants say, and I accept, that they were charged the amount of the invoice. The applicants claim is that it was not necessary to remove the room and they seek recovery of the $1,051.03 they paid to remove it.

37. I find the date of discovery for the applicants' claim for the cost to remove the unauthorized alteration to be March 28, 2014 as I find it was more likely than not that Beverly Sleeman and William Sleeman were aware of the repairs being completed to SL15 following the burst sprinkler line. As this date is more than 2 years before the December 11, 2018 Original Dispute Notice, I find the applicants' claim for recovery of the $1,051.03 paid to remove the unauthorized alteration to be out of time and therefore statute-barred. In reaching this conclusion, I rely on William Sleeman being a registered owner on March 28, 2014. I refuse to resolve this claim.

38. The applicants also say the repairs completed through the strata's insurers as part of the insurance claim were deficient and seek to recover the costs they paid to repair the alleged deficiencies.

39. Again, William Sleeman was a registered owner with Beverly Sleeman when the repairs were being completed in December 2014. The applicants do not dispute the repairs were completed in December 2014. 27. Even so, the strata says an April 20, 2015 email from April Sleeman proves she was aware of the claim at that time. I agree. The strata correctly notes that a significant part of the email relates to deficiencies in the repair work following the insurance claim, so I find the applicant

April Sleeman had discovered the claim for deficient repair work by April 20, 2015 at the latest. The April 20, 2015 email is more than 2 years prior to December 11, 2018, the date of the Original Dispute Notice. I find it likely April Sleeman told her spouse William Sleeman when she learned of the claim. I find the applicants' claim for recovery of expenses they allegedly paid to correct repair deficiencies in SL15 to be out of time and therefore statute-barred. I refuse to resolve this claim.

40. Circumstances surrounding the owners' claim for deficient or incomplete repairs to the crawlspace of SL15 and additional hydro charges related to the crawlspace being unheated are not clear. Specifically, the amount and period of hydro expense reimbursement was not provided. The owners say the crawlspace repairs completed as a result of the February 8, 2014 water damage were incomplete or were of substandard quality and that this was only discovered in September 2018 when they inspected the crawlspace as a result of being notified of a neighbour's concerns about the neighbour's crawlspace. The applicants say they had no reason to inspect their crawlspace prior to September 2018 given the strata informed all owners in December 2014 that it would inspect crawlspaces of all units. There is no evidence to suggest the required crawlspace repairs resulted from the February 8, 2014 insurance claim and the strata does not dispute the repairs are required.

41. Further, the strata has contacted its insurer about the required crawlspace repairs and those repairs are underway or have already been completed. The strata does not say the applicants are responsible for the repairs and if that is true, the applicants have no claim for reimbursement. To the extent the owners are **not**[1] responsible for any crawlspace repair expenses, I do not find such a claim is statute-barred given it is clear the issue was not discovered until September 2018.

42. As for the applicants' claim for reimbursement of hydro expenses, that will depend on the time period involved, whether the crawlspace is part of the strata lot, and whether the strata knew the crawlspace needed repair. I find a decision on that aspect of the applicants' claim is best left to the tribunal member who decides the remaining applicants' claims that are not statute barred.

[1] Missing word "not" corrected from my preliminary decision issued to the parties April 23, 2019

The December 5, 2015 special levy

43. The claim about the December 5, 2015 special levy relates to what the strata alleges to be emergency repairs to unit 9 caused by a building envelope failure at that location of the building. The applicants say the unit 9 repairs were the owner developer's responsibility as it was still "on title" and that the strata should not have approved the special levy. They claim reimbursement of their portion of the special levy and an order the strata complete an audit of its financial records from 2013 (now amended to 2016) to present.

44. The October 24, 2015 strata council minutes under the heading of "New Business", state quotes for repairs to unit 9 had been received and the strata council approved a quotation for the repair to be paid from the Contingency Reserve Fund (CRF). The minutes also state that a special levy for $40,000 would be proposed at the strata's upcoming annual general meeting (AGM) to replenish the CRF.

45. The December 5, 2015 AGM minutes show a ¾ vote resolution to replenish the CRF through a $40,000 special levy was passed. It is unclear if the applicants were represented at this meeting.

46. The December 3, 2016 AGM minutes show another ¾ vote resolution was passed to expend $56,546.50 from the CRF "for the purpose of emergency repairs to Unit 9". The minutes indicate that April Sleeman was present at this meeting as she was elected to the strata council with other owners who were not present.

47. The strata says the applicants were aware of the expenditures from the CRF by December 3, 2016 at the latest, when the cost of the repairs were known and ratified as a CRF expense by the strata ownership. The applicants say the strata did not disclose information regarding the unit 9 repairs until the applicant's inspection of the strata's records and documents on September 17, 2018 despite the applicants' request for information about unit 9 at the April 22, 2017 council meeting. I have already addressed the matter of document disclosure above and found it to be outside the tribunal's jurisdiction given the applicants' claim of fraud, so I will not address it here other than to say the applicants did not provide any evidence with

respect to the strata's failure to provide documents that the applicant may have requested under section 35 of the SPA.

48. I find the applicants' claim for reimbursement of their portion of the December 5, 2015 special levy is out of time for the reason that more than 2 years have passed since the special levy was approved by the strata. I do not find that the approval of the CRF expense in December 2016 is relevant to the special levy. The strata advised its ownership in October 2015 that CRF expenses were being made on an emergency basis for unit 9 and that a special levy would be proposed at the December 2015 AGM. The strata did what it stated it would do and the ownership approved the special levy. I find the limitation period for the applicants to claim to strike or recover the approved special levy payment started December 5, 2015. Therefore, I refuse to resolve this claim.

49. As for the applicants' request for an audit of the strata's financial records from 2013, I have already found the applicants' claim for reimbursement of the special levy passed December 5, 2015 is out of time. To the extent the applicants' claim for an audit relates to the special levy or unit 9 repairs, I find their claim is also statute-barred and I refuse to resolve it.

50. The applicants say the strata ignored an accountant's November 2017 letter that stated "the strata's accounts may require an audit due to accounting irregularities' but did not provide a copy of the account's letter. It is unclear if the accountant's letter relates to the special levy or if it relates to other matters.

51. To the extent the applicants' claim for an audit relates to matters other than the December 5, 2015 special levy, I find it is statute-barred for any claims that relate to a period before December 11, 2016, which is 2 years prior to Original Dispute Notice. I find any claims that relate to an issue that occurred after December 11, 2016 are best left to the tribunal member who may hear the balance of the applicants' claims.

52. For these reasons, I find the applicant's claims relating to water damage that occurred to SL15 on about February 8, 2014 and a special levy passed on

December 5, 2015 are out of time and that the tribunal must resolve to resolve these claims.

53. The tribunal should continue to resolve the remaining applicants' claims which I find include claims about:

    a. A determination of ownership of the attic space and crawlspace of SL15,

    b. SL15 crawlspace repairs if the applicants are responsible for expenses or allege they suffered damages from incomplete or substandard work that was the responsibility of the strata,

    c. Accounting issues unrelated to the December 5, 2015 special levy that occurred after December 10, 2016,

    d. Claims of nuisance and trespass that occurred after December 10, 2016,

    e. The strata's failure to perform maintenance and repairs to the building envelope adjacent to SL15,

    f. A November 24, 2107 special levy for replacement of the strata's courtyard membrane, and

    g. Requests for documents under section 35 of the SPA.

ISSUES

54. I have not received any new evidence that would cause me to alter my April 23, 2019 preliminary decision. However, rather than refuse to resolve the missed limitation period claims, I now dismiss them as I find that is the appropriate remedy.

55. I note the tribunal processes permit an applicant to amend their claims, which was done to a certain extent in this dispute. However, the amended Dispute Notice still contains claims that I have found to be statute-barred, such as the strata's removal of the attic alteration within SL15 and charge back of the $5,000 insurance

deductible for the February 2014 water loss. Consequently, I will not address those claims in this decision.

56. I find the issues remaining in this dispute are:

    a. Is the attic space and crawlspace associated with SL15 common property or part of the strata lot?

    b. Is the strata responsible to reimburse the applicants $3,855.63 for expenses related to determining the ownership of the attic and crawlspace?

    c. Is the strata responsible for reimbursing the applicants $7,323.66 for crawlspace repair costs and hydro expenses? If so, what amount, if any, is appropriate?

    d. Has the strata failed to provide documents requested by the applicants? If so, what is an appropriate remedy?

    e. Has the strata breached the SPA or its bylaws with respect to financial matters unrelated to the December 5, 2015 special levy and after December 10, 2016? If so, should I order the strata complete a financial audit of its books of account?

    f. Have allegations of nuisance and trespass against the strata after December 10, 2016 been proven and if so, what amount of damages, if any, are appropriate?

    g. Has the strata failed to complete common property repairs to the building envelope adjacent to SL15, and if so, what is an appropriate remedy?

    h. Should I order the strata to reimburse the applicants for their portion of the November 24, 2107 special levy relating to the courtyard membrane repair?

POSTIONS OF THE PARTIES AND ANALYSIS

Is the attic space and crawlspace associated with SL15 common property or part of the strata lot?

57. The applicants say the attic and crawlspace associated with SL15 is part of SL15 whereas the strata says the 2 areas are common property. It appears this has been a source of confusion for several years. Based on my review of the evidence, I agree with the applicants, that the attic and crawlspace associated with SL15 form part of the strata lot.

58. In May 2006, Michael Walker, a lawyer, provided the strata with an opinion about unauthorized alterations several owners had completed to attic spaces and crawlspaces. The opinion notes that that the attic spaces form part of the strata lot and some crawlspaces are designated as limited common property (LCP) on the strata plan. There is no explanation provided by Mr. Walker as to which crawlspaces were LCP or how he determined the attic spaces were part of the strata lots. I have not placed any weight on this evidence.

59. On October 24, 2108, the applicants received an opinion from Darryl Mitchell, a BC Land Surveyor (BCLS) with Axis Land Surveying Ltd. (Axis), that the crawlspace and attic associated with SL15 form part of the strata lot. This opinion was based on Mr. Mitchell's review of the strata plan and site visit, and included comparing site measurements with scaled measurements shown on the strata plan. I place significant weight on this evidence given Mr. Mitchell attended the site to take measurements and is qualified to provide an opinion on the issue because of his BCLS qualifications.

60. On November 1, 2018, the strata obtained a legal opinion from Veronica Franco on the status of the crawlspace below SL15. Ms. Franco reviewed the strata plan and common property definitions as well as advice of the strata as to the location of certain common property areas below SL15. Ms. Franco concluded that the crawlspace associated with SL15 was common property. She also noted that 5

crawlspaces were designated as LCP for strata lots 9, 10, 11, 20 and 21. It does not appear Ms. Franco was provided with the Axis opinion letter.

61. In an email dated December 10, 2018, legal counsel for the Resort Municipality of Whistler (Whistler), when addressing the permit application process for the SL15 crawlspace, confirmed that it concluded the crawlspace associated with SL15 was part of the strata lot. It appears the owner had provided Whistler with the Axis letter.

62. Based on my review of the letters referenced above and the strata plan, I agree with the conclusions of Axis that the attic and crawlspace associated with SL15 are part of the strata lot. I find the strata plan clearly shows that the attic used by SL15 is within the strata lot, given the cross section 'B- B' on page 7 of the plan shows SL15 includes all space up to the roof line. I accept that the measurements taken by Axis confirm this.

63. It is not entirely clear from the strata plan if the crawlspaces that are not designated as LCP, such as the applicants', are within the strata lot. However, the measurements taken by Axis as shown on the sketch plan provided by Axis, confirm the SL15 crawlspace is above the concrete ceiling of the parking slab and electrical room, and below the wooden floor joists of the first level of SL15. Further, my finding aligns with the strata's description that the "lowest level [of SL15] is a few steps up from the ground". The photographs of the SL15 crawlspace also support my finding given the height of the crawlspace is shown to be equivalent to "a few steps". I therefore find the crawlspace associated with SL15 is within the strata lot. Under section 68 of the SPA, the lowest boundary of the strata lot is the midpoint of the concrete slab separating SL15 from the common property areas in the parking level below.

64. I do not agree with the strata that the strata plan would necessarily need to show the crawlspace as a separate level, given its limited height. I also do not agree with the strata that the unit entitlement figures must account for the crawlspace. Under section 1 of the CA in effect at the time the strata was created, unit entitlement represents the strata lot's share of common property, facilities and assets, and is

used to calculate strata fees. Unit entitlement for residential strata lots such as SL15, is based on the habitable area of the strata lot as determined by the BCLS who prepared the strata plan. It stands to reason that a crawlspace that is "a few steps high" is not inhabitable, and therefore would not affect the unit entitlement of the associated strata lot.

65. In summary, I find the attic and crawlspace of SL15 form part of SL15 and are not common property.

66. For completeness, and to assist the strata, it is my view that the strata plan clearly shows the attic spaces of all other strata lots are within those strata lots and are not common property. Of the 22 strata lots, only the 5 strata lots listed by Ms. Franco (9, 10, 11, 20 and 21) have designated LCP crawlspaces shown on the strata plan.

67. Strata lot 22 is located in the underground parking garage and does not have a crawlspace. It is my opinion that the crawlspaces of the remaining strata lots (1-8 and 12-19) are located within the associated strata lot because these strata lots are all on the same level as SL15, whereas the strata lots with LCP crawlspaces step down in elevation on the ends of the buildings. I believe the Axis letter confirms this.

Is the strata responsible to reimburse the applicants $3,855.63 for expenses related to determining ownership of the attic and crawlspace?

68. The applicants claim $3,855.63 as reimbursement of legal fees and survey expenses associated with establishing the crawlspace and attic associated with SL15 forms part of the strata lot. However, the applicants provided copies of invoices only about survey expenses and not legal fees. I therefore order no reimbursement of legal fees. I agree the applicants are entitled to partial reimbursement of survey expenses as the part of expenses are dispute-related expenses required to establish the ownership of the attic and crawlspace. The survey expenses total $3,631.63 and include 3 separate invoices dated December 2018, February 2019, and May 2019 in the respective amounts of $1,359.75, $1,667.78, and $603.75. For the reasons that

follow, I find the applicants are only entitled to reimbursement of $1,359.75 for the December 2018 invoice.

69. The December 2018 invoice describes the work completed as “Liaison with client, Field survey to measure profile elevations of parking garage, ground and second floor, Calculations and preparation of a sketch plan.” The February 2019 invoice includes the same description but with the added description of “Field survey to locate legal boundary monument and site detail, Calculations and preparation of a draft Surveyor’s Certificate”. The May 2018 invoice includes the description “Field survey to locate perimeter of building outside of concrete foundation and revision of Surveyors Certificate”.

70. Only the October 24, 2018 letter from Axis and associated sketch drawing was provided in evidence. I find the December 2018 invoice includes the cost for October 24, 2018 letter and sketch drawing. A Surveyor’s Certificate was not provided in evidence, and the applicants did not explain why it was required or why 3 separate field surveys were necessary. I allow the applicants dispute-related expenses of $1,359.75 for the December 2018 Axis invoice and order the strata to reimburse the applicants this amount.

Is the strata responsible for reimbursing the applicants $7,323.66 for crawlspace repair costs and hydro expenses? If so, what amount, if any, is appropriate?

71. As described in my preliminary decision above, I found reimbursement of hydro expenses was dependent on a number of factors. The applicants assert SL15 hydro expenses have decreased $25 per month “for the 5 winter months of Nov to Mar… from 2015-2018” but otherwise provided no submissions about hydro costs. Nor did the applicants provide any copies of hydro bills. I dismiss the applicants’ claim for reimbursement of hydro expenses on the basis of insufficient evidence.

72. In my preliminary decision, I found the applicants claim for reimbursement of crawlspace repairs was not statute-barred because the date of discovery was

September 2018. I also found that the applicants would have no claim if they were responsible for the repairs.

73. I note that the evidence shows the applicants received partial reimbursement of their expenses from the strata's previous management firm and insurance adjuster involved in the February 2014 water loss. Given my finding below, nothing turns on this fact.

74. Section 72 of the SPA requires the strata to repair and maintain common property and common assets, unless it takes responsibility by bylaw, for parts of a strata lot or LCP. There are currently no regulations permitting the strata to make an owner responsible for repair and maintenance of CP as permitted under section 72.

75. Bylaw 2(1) requires an owner to repair and maintain their strata lot except for repair and maintenance that is the responsibility of the strata. Bylaw 11 requires the strata to repair and maintain common property and common assets, LCP in certain circumstances that do not apply here, and parts of a strata lot that involve the structure or exterior of a building and certain things attached to the exterior of the building. Based on my review of the expenses claimed by the applicants, I find none are the strata's responsibility. Specifically, it is unclear if any expenses relating to crawlspace wiring or heating involve common property.

76. I have found the that the crawlspace forms part of SL15. Given the applicants are responsible under the bylaws to repair and maintain the SL15 crawlspace, except for common property wires and pipes running through the crawlspace, I find the applicants are not entitled to reimbursement of their claimed expenses. I dismiss this the applicants' claim for reimbursement of expenses for crawlspace repairs.

77. The strata says that if the crawlspace is found to be part of SL15, the applicants were required to seek advance approval under strata bylaw 9, to alter common property wires and pipes located in the crawlspace and failed to do so. The strata did not file a counterclaim in this regard and for that reason, I decline to address this issue.

78. To the extent there are remaining issues relating to common property pipes or wires located in the crawlspace, the applicants are free to bring these to the strata's attention. Alternatively, the strata may inspect the common property at a reasonable time by providing the applicants 48 hours' notice under bylaw 10(1)(b)(i). This includes the applicants' allegation that the crawlspace requires fire sprinklers.

79. The applicants rely on *The Owners, Strata Plan VIS 4925 v Stokhof,* 2018 BCCRT 367 to support their position that the strata must install fire sprinklers in the crawlspace. I disagree. First, I do not accept the fire suppression report prepared for the owner of strata lot 4 can be relied on by the applicants with respect to the SL15 crawlspace.

80. Second, In *Stokhof*, the tribunal found the strata had a legal obligation to install fire sprinklers in the closet of an owner's strata lot. The tribunal's decision was largely based on a letter issued by the City of Victoria's Chief Plumbing Inspector, Permits and Inspections. Here, there is no such letter from a regulatory authority requiring the crawlspace to be sprinklered. Absent a work order to install fire suppression equipment in the crawlspace as set out in sections 83 to 85 of the SPA, I decline to order the strata to install fire sprinklers in the SL15 crawlspace as requested by the applicants.

Has the strata failed to provide documents requested by the applicants? If so, what is an appropriate remedy?

81. The applicants say the strata has not provided documents they have requested while the strata says the contrary. I am unable to determine what, if any, documents have been requested by the applicants that have not been provided by the strata. In their submissions, the applicants refer to several pieces of evidence, some of which contain only copies of minutes that are 50 pages in length. Other pieces of evidence are email threads that refer to document requests and information being provided that is not what the applicants requested.

82. I cannot determine, with any degree of accuracy, what specific documents the applicants claim they have not received. However, it appears at least some of the applicants' requests relate to financial documents, contracts, and quotations.

83. In order to assist the parties, I note that the strata's obligation to disclose records and documents is set out in sections 35 and 36 of the SPA. These sections state what records and documents must be prepared and kept by the strata, and how and by whom this information can be obtained. *Strata Property Regulation* (regulation) 4.1 sets out the period the strata must retain the records and documents.

84. Among other things, section 35 requires the strata to:

    a. prepare books of account showing money received and spent and the reason for the receipt or expenditure (35(1)(d),

    b. retain copies of written contracts to which the strata is a party(35(2)(g))

    c. retain copies of correspondence sent and received by the strata and strata council (35(2)(k)),

    d. retain reports obtained by the strata respecting repair and maintenance of major items (35(2)(n.2)).

85. Regulation 4.1 requires books of account and contracts to be kept for at least 6 years, correspondence for at least 2 years, and reports until the item to which the report relates is disposed of or replaced.

86. In *Kayne v. The Owners Strata Plan LMS 2374*, 2007 BCSC 1610, the B.C. Supreme Court found that a record or document that is not set out in section 35 of the SPA is generally not available to an owner. The court also found that an owner is entitled to review (and obtain copies of) books of account and financial statements but not underlying bills, invoices or receipts reflected in the financial statements. The court stated that the purpose of the SPA is to provide information as to how money is spent, and the books of account must show money received and spent.

87. The applicants say they requested a copy of the insurance policy and the that the strata did not provide it. However, based on my review of the evidence, I find the applicants did not request the insurance policy but rather "invoice statements" for the 2017 and 2018 insurance coverage. Had the owners requested a copy of the insurance policy I find it is producible under section 35(2)(g) of the SPA as a contract involving the strata.

88. As for the applicants' requests for quotations, I find a quotation is correspondence received by the strata that must be disclosed under section 35(2)(k) of the SPA and regulation 4.1.

89. I make no order for the production of documents. However, the applicants are free to make additional requests for section 35 documents, bearing in mind the foregoing. In making future requests for documents, the applicants should specify the documents they wish to review.

Has the strata breached the SPA or its bylaws with respect to financial matters unrelated to the December 5, 2015 special levy and after December 10, 2016? If so, should I order the strata complete a financial audit of its books of account?

90. The applicants request an order that the strata complete a financial audit for its books of account from December 10, 2016 to present citing several alleged irregularities in the strata's reported financial statements and alleged breaches of the SPA and bylaws. The strata says an audit is not required and provides reasonable answers to the applicants' allegations. For the reasons that follow, I agree with the strata and decline to order a financial audit as requested by the applicants.

91. Several of the applicants' allegations are unclear, or have been explained by the strata in its submissions. For example, the applicants allege accounting letters obtained by another owner suggest audits should be completed. A plain reading of the letters simply raise questions the owner may wish to raise with the strata and contrary to the applicants' assertion, do not recommend audits be completed. Other allegations are out of time, such as accounting "discrepancies" relating to a period prior to December 10, 2016, as I found in my preliminary decision and others do not clearly identify the allegation or are unsupported by any evidence. I will not address every allegation here and address only those that have been clearly stated and have some merit.

92. The applicants claim the strata is not charging 2018 strata fees to the "rightful owners on title." They reference the 2018 general ledger (GL) that shows strata fees being charged to a particular strata lot, including the names of the strata lot owners, and then payments being applied to the same strata lot by others. The strata says that payment may come from people other than the registered owners, which I accept.

93. Another example used by the applicants is their own strata lot 15. The 2018 GL shows SL15 is owned by "Sleeman, William / The Estate" and payment being made by "Sleeman, William & April". That the strata's accounting records may have

incorrectly implied SL15 was still owned by The Estate of Beverly Sleeman in 2018, when it appears title transferred to April Sleeman in 2016, does not mean the strata is charging the wrong owners. Provided the strata is charging the correct strata fees to each strata lot, as appears to be the case here, I do not find the strata's oversight in correcting the strata lot owners' name is worthy of an audit. Further, the applicants did not provide proof of ownership documents, such as copies of title search information, to prove strata lot ownership.

94. The applicants' also claim they (SL15) were overcharged $0.01 for each of October, November and December 2018. I will address this part of the applicants' claim even though the principal of proportionality might suggest otherwise. The strata says its fiscal year end is September but that its 2018 annual general meeting was not held until November 30, 2018 thus making January 1, 2019 the earliest date available to the strata to adjust automatic strata fee payments. It says the prior 2017-2018 budget approved strata fees that were $0.01 higher than 2018-2019 and that the strata collected the prior years strata fees for September through December 2018 consistent with previous years budget. The evidence shows the strata fees for SL15 in 2017 were $0.01 lower in 2017-2018 and I accept the strata's explanation as it is consistent with section 104(2) of the SPA.

95. Despite the applicants' submissions, there is nothing in the SPA or the strata's bylaws that require the strata to produce monthly financial statements. The applicants are free to request financial information and documentation permitted under section 35 of the SPA as described above. There is also nothing in the SPA or bylaws that require the strata to have an audit completed. While the BC Government's strata housing website might suggest it is good practice for the strata to consider an audit when the treasurer and property manager have been in their positions for a long time, that does not make an audit mandatory. Further, as noted by the strata, there has been a change in property managers.

96. The applicants say at least one strata lot did not pay the March 1, 2018 special levy and that the strata still transferred the entire special levy amount of $65,000 from the operating account to the special levy account for courtyard replacement. The

applicants say this action resulted in a deficit in the operating account forcing the applicants to contribute to deficit recovery resulting from an inappropriate transfer of funds. The strata says that money its property manager collected as a special levy is deposited to the operating account (current account as noted on the bank statements in evidence) and then transferred to the special levy account. This practice is permitted by the strata's property manager under the *Real Estate Services Act*. While the strata disagrees with the owner, from my review of the financial statements and bank statements in evidence, I cannot determine if there were arrears of special levy payments when the special levy was fully transferred from the operating fund. Special levy and other owner payments show as "batches" on the bank statements and a copy of the March 2018 arrear information was not provided in evidence. Therefore, I find the applicants have failed to prove their allegation that funds were transferred inappropriately creating a deficit in the operating fund account.

97. The applicants also allege that the strata breached section 108(4)(c) of the SPA by paying $4,670.93 to Rainshield Engineers Inc. (Rainshield). This section of the SPA requires the strata to use money collected by special levy only for the purpose set out in the approved resolution. The November 2017 AGM minutes show the purpose of the special levy was "replacing the courtyard membrane and carrying out any siding repairs in the courtyard as a result of this replacement." A November 3, 2018 report provided by Rainshield states it was retained by the strata "to conduct a parking garage roof slab condition review'. The report also contained an opinion of probable costs for the membrane replacement.

98. The applicants say the expense to Rainshield was for "parking roof slab" repairs and not replacement of the courtyard roof. I agree with the strata and I find the description of the work for "parking roof slab repairs" is the same as "courtyard membrane repairs" based on the report and given the courtyard is largely above the parking area. I find that the Rainshield report was not contrary to the purpose of the special levy because it relates to the courtyard membrane replacement. I also accept the strata's explanation that the report, and subsequent scope of work documents not provided in evidence, were required to establish the amount of membrane

replacement cost. I make this finding on the basis the strata's position is supported by meeting minutes in evidence and therefore ought to have been known to the applicants.

99. The strata's insurance policy runs May 1 through April 30. It is undisputed that in 2018, the strata did not pay its insurance premium until May 31, 2018, about 1 month after it was due. The applicants say the strata was uninsured for the month of May 2018. The applicants provided no support for their assertion and I find they have not proven their position. Further, I agree with the strata that the Summary of Coverage document provided by the strata's insurance broker that was included in the 2018 AGM notice package shows the insurance coverage commenced May 1, 2018. This implies there was no gap in coverage as suggested by the applicants.

100. Finally, the applicants say in September 2018, the strata's previous property manager incorrectly paid a $10,500 painting invoice from the strata's funds that related to another strata corporation. They say there is no evidence to show the funds were repaid to the strata because the October 2018 bank statements have not been provided. The strata says the property manager has never provided the October 2018 bank statement but that the GL shows the money was repaid. It would be a simple matter to review the strata's financial records to determine whether the funds were repaid, however, I do not have sufficient evidence before me to conduct such a review. Therefore, I find the applicants have not proven their position that the funds were not repaid.

101. For all of these reasons, I find a financial audit of the strata's books of account is not required and I decline the applicants requested order.

Have allegations of nuisance and trespass against the strata after December 10, 2016 been proven and if so, what amount of damages, if any, are appropriate?

102. I will first address the applicants' allegation the strata trespassed on SL15 to gain access to the crawlspace. The applicants provide no evidence to support their

assertion that trespass occurred. For this reason, I find the applicants have no claim for damages with respect to trespass.

103. As for the applicants' nuisance claim, they say the strata's ongoing failure to address crawlspace repairs amounts to nuisance.

104. The tort of nuisance in a strata setting is an unreasonable continuing or repeated interference with a person's enjoyment and use of their strata lot, and a remedy should be made without undue delay once the respondent is aware of the nuisance (see *The Owners, Strata Plan LMS 3539 v. Ng*, 2016 BCSC 2462).

105. In *Ng*, the court found that an owner brought to the strata corporation's attention facts about a water leak that required investigation, and the strata's failure to investigate amounted to an omission to use reasonable care to discover the facts.

106. I find I cannot agree that a nuisance has been established on the evidence before me. Here, the applicants raised their concerns with the strata over what they call "life safety issues" in the crawlspace because they discovered a potential fire hazard with an electric baseboard heater. They made this discovery after the strata had requested access to the crawlspace, which the applicants denied. Further, once discovered, the applicants acted in a matter of days to correct the issue and then sought to recover their expenses from the strata. Additionally, as noted earlier, the applicants were partially reimbursed their expenses by the strata's previous property management firm and insurance adjuster. While I accept the applicants found the strata frustrating to deal with, I do not find that nuisance occurred. Rather, I find the parties did not agree on the ownership of the crawlspace.

107. Having found that neither trespass or nuisance occurred, I decline to award damages. I dismiss the applicants' claim in this regard.

Has the strata failed to complete common property repairs to the building envelope adjacent to SL15, and if so, what is an appropriate remedy?

108. The applicants request an order that the strata repair the building envelope adjacent to SL15, including exterior windows and the rotted sill plate in the crawlspace. They say the strata has replaced the building envelope at other locations. They also say the strata has discussed window replacement at its meetings and that the 2017 council president stated the windows have been a concern to the strata, and the strata is monitoring their performance. I find the evidence supports the applicants' submissions that window replacement was discussed and building envelope repairs were completed at other locations. However, I disagree the strata has failed to complete common property building envelope repairs. My reasons follow.

109. The strata agrees, and I find, the areas in question are all common property which the strata is responsible to repair and maintain. The strata also does not dispute the applicants' submissions, but relies on *Wright v. The Owners, Strata Plan No. 205 (1996)*, 1996 CanLII 2460 (BC SC) to argue the standard of repair is what is reasonable in the all of the circumstances, which can include replacement when necessary. The strata also cites *Oldaker v. The Owners, Strata Plan VR 1008*, 2007 BCSC 669 to support its position that the strata is not an insurer obligated to fulfil an owner's demand for maintenance, and is entitled to consider whether and how the maintenance will be done. I would also note that the strata must balance the interests of the applicants against the interests of the strata owners as a whole (see *Weir v. Owners, Strata Plan NW 17*, 2010 BCSC 784). The BC Supreme Court decisions are binding on me and I find the decisions cited above relevant to this dispute.

110. The strata obtained a building envelope condition assessment from VVV Engineering Ltd. dated May 29, 2007. The report concluded that the strata should complete a full building envelope rehabilitation, including exterior windows and doors, among other things.

111. The strata obtained its first depreciation report from Citadel Building Consultants Ltd. In April 2014. The depreciation report included an assessment of various building components, including those comprising the building envelope. The report

concluded that the exterior stucco and wood cladding, and the exterior windows, required replacement as these components were all at the end their life expectancies. The report noted that some areas of wood cladding had been replaced with fiber-cement boards and that, although the attic fire sprinkler system had been replaced, the interior sprinkler system needed replacement. Other items nearing the end of their life expectancy were balcony membranes, wooden decks and walkways, and the asphalt driveway.

112. In addition to the courtyard membrane replacement project, the strata received a report from Sense Engineering Ltd. in 2018 about possible roof replacement.

113. In short, the evidence before is that the strata is over 30 years old and in need of much repair. I accept the strata's submissions that is reasonable for it to prioritize repairs based on necessity and any budgetary constraints of the owners consistent with the caselaw cited above.

114. Given there is no evidence the building envelope or exterior windows adjacent to SL15 are currently leaking, I do not find the strata has breached its statutory obligation to repair and maintain the building envelope. There is also no evidence the rotted crawlspace sill plate is in urgent need of repair. From the photographs provided, I find there is a short section of rotted sill plate about 1-2 feet I length. There is no evidence the sill plate is causing water ingress or is a structural concern.

115. I therefore decline to order any remedy and dismiss the applicants' claim that the strata failed to complete common property repairs to the building envelope adjacent to SL15. I dismiss this claim.

Should I order the strata to reimburse the applicants for their portion of the November 24, 2017 special levy relating to the courtyard membrane repair?

116. The applicants seek reimbursement of their portion of the November 24, 2017 special levy for 2 reasons. First, they claim that work had not started. Second, they claim the strata misrepresented the courtyard repair work.

117. The strata passed a special levy of $65,000 for courtyard membrane replacement at its November 2017 AGM. The strata soon discovered that this amount was insufficient to complete the needed repairs and took steps to determine an appropriate amount, with the assistance of Rainshield. The courtyard replacement project was not started at the time this dispute was commenced. On May 8, 2019, the strata passed a second special levy of $153,032 for the courtyard membrane replacement project based on quotations it received. Work commended about September 2019.

118. The applicants say the strata misrepresented its position in the 2018 AGM notice by stating the strata based its 2017 special levy amount on the depreciation report. The depreciation report (at page 46) estimates the courtyard repair costs for 2013 to be $56,000. I find this is the amount relied upon by the strata and that no misrepresentation was made. I accept the position of the strata that Rainshield was retained to develop a scope of work in order to obtain comparable bids as this position is supported by the evidence.

119. The applicants also say the strata vice-president stated at the May 8, 2019 special general meeting (SGM) that no quotation had been obtained by the strata when the applicants say 1 quotation had been received. There is no evidence the strata vice-president made the statement alleged by the applicants. On the contrary, the covering letter to the SGM notice, and the SGM minutes state a competitive quote was obtained from the same contractor who completed deck remediation in 2007.

120. The applicants also say the Rainshield report was not about replacing the courtyard membrane but rather the garage roof. I have already addressed this allegation of applicants and found the courtyard membrane and garage roof membrane are one and the same.

121. For these reasons, I find the strata has not misrepresented the courtyard membrane replacement project as alleged by the applicants. Given the membrane repairs have started, I dismiss the applicants claim for reimbursement of their portion of the November 24, 2017 special levy.

TRIBUNAL FEES, EXPENSES AND INTEREST

122. Under section 49 of the CRTA, and the tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. Here, the applicants were successful on their claim about ownership of the attic and crawlspace and I have awarded them dispute related expenses of $1,359.75 for survey expenses as described above. They were not successful on any other claims, but I find it reasonable to order the strata to reimburse them one half of the $225.00 tribunal fees they paid, or $112.50. I decline to order reimbursement of the applicants' claimed expenses of $200.00 for obtaining access to the sprinkler report because of my finding that the strata is not required to install sprinklers in the SL15 crawlspace. I also decline to order reimbursement of $11.35 claimed by the applicants for the cost of registered mail to serve the strata because the applicants did not provide a receipt for this amount. The applicants did not claim any other dispute related expenses.

123. The strata did not claim any dispute related expenses.

124. The *Court Order Interest Act* (COIA) applies to tribunal disputes and I find the applicants are entitled to pre-judgement interest under the COIA for survey expenses. I calculate the pre-judgement interest on the $1,359.75 from December 31, 2018, the date of the invoice, to the date of this decision, to be $20.05.

125. The strata corporation must comply with the provisions in section 189.4 of the SPA, such as not charging dispute-related expenses against the applicant owners.

DECISION AND ORDERS

126. Within 14 days of the date of this decision, I order the strata to pay the applicants $1,492.30 broken down as follows:

a. $112.50 for tribunal fees,

b. $1,359.75 for survey expenses, and

c. $20.05 in pre-judgement interest under the COIA.

127. I dismiss the applicants' remaining claims.

128. The applicants are entitled to post-judgement interest under the COIA, as applicable.

129. Under section 57 of the CRTA, a party can enforce this final tribunal decision by filing, in the Supreme Court of British Columbia BCSC, a validated copy of the order which is attached to this decision. The order can only be filed if, among other things, the time for an appeal under section 123.1 of the CRTA has expired and leave to appeal has not been sought or consented to. Once filed, a tribunal order has the same force and effect as an order of the BCSC.

130. Orders for financial compensation or the return of personal property can also be enforced through the Provincial Court of British Columbia (BCPC). However, the principal amount or the value of the personal property must be within the BCPC's monetary limit for claims under the *Small Claims Act* (currently $35,000). Under section 58 of the CRTA, a party can enforce this final decision by filing in the BCPC a validated copy of the order which is attached to this decision. The order can only be filed if, among other things, the time for an appeal under section 123.1 of the CRTA has expired and leave to appeal has not been sought or consented to. Once filed, a tribunal order has the same force and effect as an order of the BCPC.

J. Garth Cambrey, Vice Chair