Civil Resolution Tribunal

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Type: Strata

Civil Resolution Tribunal

Indexed as: *Fisher v. The Owners, Strata Plan VR 1420*, 2019 BCCRT 1379

B E T W E E N :

Dawn Fisher

**APPLICANT**

A N D :

The Owners, Strata Plan VR 1420

**RESPONDENT**

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**REASONS FOR DECISION**

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Tribunal Member: Kate Campbell, Vice Chair

## INTRODUCTION

1. The applicant, Dawn Fisher (owner) owns strata lot 12 (unit 212) in the respondent strata corporation, The Owners, Strata Plan VR 1420 (strata).

2. The owner purchased unit 212 in April 2000. At the time of purchase, unit 212 was described in the real estate listing as a 2-bedroom unit. One of these bedrooms is located in an enclosed balcony. The balcony was enclosed and finished as a dwelling room by a previous owner around 1988.

3. In 2016, the strata began a building-wide window replacement project. According to the owner, work began on unit 212, but then the strata advised her that the work on unit 212 had stopped because the windows in the balcony enclosure were not properly installed and caused damage. The strata said the owner could be liable for exterior repairs related to the enclosure, or could be required to remove the enclosure.

4. The owner also says that in 2017 she received an offer to purchase unit 212, but the offer was withdrawn because the exterior repairs were not completed, and because the Form B Information Certificate (Form B) issued by the strata said, “"'Possible Legal Action regarding unauthorized enclosure. Additional money may be charged back to this strata lot.”

5. In this dispute, the owner seeks the following remedies:

    a. A declaration that the enclosure can remain in place.

    b. A declaration that the enclosure repairs are a common expense.

    c. Compensation for enclosure repairs the owner had to complete.

    d. An order that subsequent Form Bs not include reference to the disputed enclosure or related liability.

    e. Compensation for staging fees, property taxes, mortgage payments, and strata fees the owner would not have incurred if the unit 212 sale had completed.

6. The strata denies the owner’s claims. It says that when the balcony was enclosed around 1988, the strata’s bylaws said an owner was responsible for the repair and maintenance of exclusive use areas, so the owner is therefore liable for the repairs.

Alternatively, the strata says the previous owners of unit 212, or their realtors, are liable, and any remedy lies with them rather than the strata. The strata also denies that the owner suffered any losses, and alternatively says the owner failed to mitigate such loss.

7. Both parties in this dispute are represented by lawyers.

## JURISDICTION AND PROCEDURE

8. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over strata property claims 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. The tribunal must act fairly and follow the law. It must also recognize any relationships between dispute parties that will likely continue after the tribunal's process has ended.

9. The tribunal has discretion to decide the format of the hearing, including in writing, by telephone, videoconferencing, or a combination of these.

10. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in court. The tribunal may also ask the parties and witnesses questions and inform itself in any 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, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.

## PRELIMINARY ISSUES

### *Document Disclosure Claim*

12. In the Dispute Notice, the owner included a claim about the strata's alleged failure to disclose documents under *Strata Property Act* (SPA) section 35. The strata

disclosed some documents during the tribunal facilitation process. The owner made no further submissions about document disclosure, and did not specify which, if any, further documents she seeks. So, I make no findings about that issue in this decision.

### *Oral Hearing*

13. I am satisfied an oral hearing is not required as I can fairly decide the dispute based on the evidence and submissions provided.

14. In a preliminary decision published on April 24, 2018 (2018 BCCRT 151), a tribunal vice chair denied the strata's request that the tribunal refuse to resolve the dispute on the basis that it was too complex or impractical for the tribunal to case manage or resolve, or outside the tribunal's jurisdiction. The vice chair declined the strata's request, for reasons that are set out in the published decision, so I will not repeat them here.

15. The strata now submits that an oral hearing is required in order to fairly decide this dispute. In particular, it cites the need to subpoena and cross examine witnesses. The owner disagrees, and says an oral hearing is not necessary.

16. For the reasons set out below, I find I am able to fairly decide this dispute without an oral hearing. In particular, as set out in my reasons, I find the dispute turns on questions of law, and the necessary factual information is set out in the documentary evidence before me. I find it is not necessary to make findings about credibility in order to resolve the issues in this dispute.

## ISSUES

17. The issues in this dispute are:

    a. Is the owner entitled to compensation for the loss of the sale of unit 212 in April 2017?

b. Does the tribunal have jurisdiction to make an order about what the strata may put on future Form B certificates?

c. Can the tribunal issue a declaration that the second bedroom in unit 212 remain in place?

d. Can the tribunal issue a declaration that the costs of enclosure repairs are a common expense of the strata?

e. Is the owner entitled to reimbursement for balcony enclosure repairs?

f. Is either party entitled to reimbursement of legal fees?

## BACKGROUND AND EVIDENCE

18. I have read all of the evidence provided but refer only to evidence I find relevant to provide context for my decision. In a civil proceeding like this one, the applicant must prove their claims on a balance of probabilities.

19. The strata was established in 1984 under the *Condominium Act*, a predecessor to the SPA. It is comprised of 23 residential strata lots.

20. Unit 212 is a 2-storey strata lot, located on the third and fourth floors of the strata building. Page 7 of the strata plan shows a balcony attached to strata lot 12 (unit 212), designated as limited common property (LCP) for that strata lot.

21. In 1988, a previous owner enclosed the unit 212 balcony. Neither party was able to provide any documents showing whether or not the strata expressly gave permission for the balcony enclosure.

22. The documents in evidence include a development permit issued by the City of Vancouver (City) on May 6, 1988, and a building permit issued by the City on June 6, 1988. These permits authorize “exterior alterations to enclose the existing covered deck of unit 212”. The documents show that the City’s inspector gave final approval for the work on July 25, 1988. In a January 24, 2017 report, the strata’s engineering firm confirmed that the balcony enclosure work matched the

architectural drawings submitted to the City when the building permit was issued in 1988, except it appeared that the railings in the drawing were never installed.

23. The owner purchased unit 212 in April 2000. The strata issued a Certificate of Corporation (equivalent to a current Form B) on April 19, 2000. The Certificate of Corporation does not include any reference to the balcony or its enclosure, or any indemnity or other agreement.

24. At the owner's request, the strata issued Form B certificates for unit 212 in July 2004 and July 2016. Neither of these certificates mention the balcony or an indemnity agreement.

25. At an annual general meeting (AGM) in June 2016 and a special general meeting (SGM) in August 2016, the strata ownership approved resolutions to replace all exterior windows and skylights in the building.

26. Documents show that the window replacement work started around early November 2016. In a December 15, 2016 letter to the owner, the project manager (a member of the strata's property management firm) wrote that the contractor had notified them of problems when removing the windows in unit 212. The letter states as follows:

    a. The problems were observed and reviewed by the structural engineers.

    b. There was rotten wood on the subflooring by the upper window in unit 212, as well as on the exterior wall adjacent to the window on the main floor.

    c. The entire area on the northwest corner of unit 212 was repaired, and new windows installed.

    d. A new subfloor was installed in the upper bedroom (balcony enclosure), but the actual wood flooring still needed to be replaced.

    e. The contractor advised it appeared the upper window was installed after the original construction, and not in the same manner as the original building

windows. The contractor said that it took over 6 hours to remove that window, rather than less than 1 hour for every other window in the building.

f. Because of the difficulty in dealing with this window, the window on the southeast side along the roof had not yet been replaced, and could not be replaced at the current time due to snow and low temperatures affecting the roof. The contractor hoped to complete the work the following week, when temperatures were expected to rise.

g. The unit was habitable and the tenants could move in, and the upper bedroom should be complete by the first week of January, assuming the flooring material was available and the contractor could complete the remaining window installation. The exterior repairs were slated to be completed in early 2017, and could not be completed until the temperature rose.

h. It was determined that the damage to the building structure was the result of faulty detail at the roof level, allowing water from the eavestrough to get behind the stucco, affecting the upper bedroom wall and floor as well as the vertical wall all the way to the lower level of the building. The actual damage was limited and easily repaired.

27. The stated purpose of this letter was to update the owner about the situation, and no action was requested.

28. There was a construction meeting on December 20, 2016, attended by the project manager and the contractor. According to the meeting notes, the project manager asked the contractor to put any work related to the balcony enclosure “on hold” pending further instructions. The notes say that the strata considered that the enclosure was an improvement by the owner, and all costs of repairs and restoration should be borne by the owner. The contractor agreed to break out the costs associated with the work that had been done on the balcony enclosure area, so chargebacks could be levied by the strata if deemed appropriate.

29. On January 19, 2017, the owner emailed the strata, asking when the work on unit 212 would be completed. She said the remaining issues included some missing drywall in the second bedroom, and a couple of windows that needed repairs. She also said the exterior work was still incomplete. The owner wrote that she needed to have the floor in the second bedroom repaired, so she had to make sure there was no overlap with other interior finishing work.

30. The strata replied to the owner and her rental property manager, CY, by email on January 23, 2017. The project manager wrote that the small window would be completed within the next week, but the repairs to the “modified room” on the second level were on hold. He wrote that the strata was currently in the process of attempting to obtain information on approvals for the modifications to common property to create the room. He wrote as follows:

> At best, all costs related to the repairs to this area would be the responsibility of the strata lot owner as an improvement.
>
> We encountered a number of problems with the repairs due to the manner in which the modifications were made, and were required to make significant modifications to the interphase of the south wall of the "den" with the roof (parapet wall). In addition, costs were incurred to repair rot due to water ingress from what now appears to be the modified walls.
>
> At worst, if we are unable to determine the authority and approvals for these modifications, the area may have to be restored to its original condition. This modification must be consistent with the Zoning conditions of the City of Vancouver and the approved floor/space use ratio, and be consistent with Unit Entitlement formula for the Strata Corporation.
>
> If your client can provide any information pertaining to this modification including approvals by the Strata Council, City of Vancouver building permits, City inspection certificates, and drawings submitted in support of the above approval requests, this would greatly help us in concluding our report.

31. The owner replied on February 15, 2017. She forwarded an email from a City employee setting out the permit numbers for the balcony enclosure work in 1988. The owner wrote that this information from the City proved that a previous owner did the renovations with City approval, and since the work was in an area viewable by all owners, and with full knowledge of the strata council at the time, the strata must pay for and immediately complete the wall restoration. She wrote that if she did not hear back within 24 hours, she would arrange for the work to be completed and seek reimbursement for the cost.

32. On February 16, 2017, the owner emailed the strata with photos of the work that needed to be completed. She repeated that the balcony enclosure work was done by a previous owner with permits and approvals, and could not have been done without the strata's knowledge, so the restoration should be completed by the strata.

33. The owner wrote to the strata again on March 14, 2017, stating that the exterior repairs were not yet complete, and water was leaking into unit 212.

34. The evidence shows that around March 2017, the owner listed unit 212 for sale. A March 24, 2017 invoice indicates that she paid a staging company for design services, furniture rental, and photography.

35. The owner requested a Form B from the strata, which was completed and signed by the strata property manager on April 19, 2017. A bold-type notation at the bottom of the form states, "Possible Legal Action Regarding unauthorized enclosure. Additional money may be charged back to this strata lot".

36. In a signed witness statement dated July 10, 2018, CY said the strata eventually completed all the exterior repairs to the balcony enclosure area "in or around" May 2017.

## REASONS AND ANALYSIS

### *Compensation for Lost Sale of Unit 212*

37. The owner says that if the strata had not put the note about possible legal action and chargebacks on the Form B, she would have sold her strata lot in April 2017. There are 3 copies on "contract of purchase and sale" documents in evidence. Two of these are from buyer YL, dated April 15 and April 16, 2017 (both list different prices). The third is from buyer LA, dated April 15, 2017.

38. The owner seeks compensation for costs she says she would not have incurred if the sale had completed. These include strata fees, mortgage payments, and property taxes from the planned sale closing date of May 11, 2017. The owner also seeks reimbursement for $2,130.42 staging costs, which she says were costs thrown away due to the lost sale.

39. For the reasons set out below, I refuse to resolve this claim under CRTA section 10(1), as I find it is outside the tribunal's jurisdiction.

40. In her written statement, the owner said that while LA did not give reasons for not completing the sale, they believe the statement in the Form B caused her to conclude that the strata's position would adversely affect the use or value of unit 212. Similarly, in his statement CY said that after he provided the Form B to LA's realtor, the purchaser refused to release the subject clause and the sale did not complete. CY said he believed the statement in the Form B was what finally caused LA to refuse to lift the subject, as well as the strata's delay in completing the exterior repairs. I note that LA's offer contained several subject clauses, including inspection and approval of documents, satisfactory financing, insurance approval, and inspection.

41. The owner says that she and CY, who acted as her realtor, decided to take unit 212 off the market after April 2017 because of the strata's position on the balcony enclosure, which caused a stigma on her strata lot that would prevent her from getting full value on a sale.

42. The strata submits the tribunal does not have jurisdiction to make the requested orders about or arising from the Form B certificate, based on SPA section 59(6) and following the reasoning in previous tribunal decisions. The owner disagrees, and says the tribunal does have jurisdiction.

43. For the following reasons, I find the tribunal does not have jurisdiction to make the order for damages sought by the owner, and I therefore refuse to resolve this claim under CRTA section 10(1).

44. SPA section 59 addresses Form B information certificates, and sets out the information they must contain. Section 59(6) states as follows:

> 6) On application by the strata corporation, by an owner or by a person who is affected by a certificate, the Supreme Court may make any order it considers just in the circumstances to give effect to or relieve the strata corporation from some or all of the consequences of an inaccurate certificate.

45. In *Pilehchianlangroodi v. The Owners, Strata Plan LMS 1816*, 2019 BCCRT 367, a tribunal vice chair refused to resolve a case where a strata lot owner sought damages as compensation for losses arising from an incorrect Form B. In that case, the Form B failed to disclose the fact that the strata was named as a party in ongoing litigation, contrary to SPA section 59(3)(j).

46. While the vice chair agreed the Form B was incorrect, and did not meet SPA requirements, he refused to resolve the owner's claim for damages, citing CRTA section 10(1). Section 10(1) says the tribunal must refuse to resolve a claim that is outside its jurisdiction.

47. In *Pilehchianlangroodi*, the vice chair reasoned that based on a plain reading of SPA section 59(6), a person affected by an inaccurate statement on a Form B must apply to the Supreme Court to give effect to or obtain relief from that inaccuracy. He noted that CRTA section 123, which sets out limits on the tribunal's jurisdiction, does not expressly exclude the tribunal's jurisdiction to consider SPA section 59 issues. However, the vice chair reasoned in paragraph 29 that CRTA section 123 is

a non-exhaustive list, and that just because section 59 of the SPA is not listed in CRTA section 123 does not necessarily mean the tribunal has jurisdiction under section 59 of the SPA. He concluded that the damages claim arising from an inaccurate Form B was outside the tribunal's jurisdiction.

48. In this case, the owner submits that *Pilehchianlangroodi* was wrongly decided. In particular, the owner submits that the Supreme Court and the tribunal have concurrent jurisdiction over SPA section 59, as they do over SPA sections 164, 165, and 173.

49. I do not agree. SPA section 164 sets out the orders the Supreme Court may make to prevent or remedy unfair acts. The tribunal's parallel jurisdiction to prevent or remedy unfair acts is set out in CRTA section 123(2), which says the tribunal may make orders "necessary to prevent or remedy an unfair action, decision or exercise of voting rights". Thus, the tribunal's jurisdiction is explicit in the statute. Similarly, SPA sections 165 and 173 set out orders the Supreme Court may make in a proceeding under the SPA. The tribunal's similar power to make orders in strata property disputes is specifically set out in CRTA section 123(1).

50. Unlike SPA sections 164, 165, and 173, there is no equivalent or parallel power granted to the tribunal regarding relieving from the effect of inaccurate Form B certificates. While *Pilehchianlangroodi* is not a binding precedent, I agree with and adopt its reasoning. I find that since the language in SPA section 59(6) specifically refers to the Supreme Court, and there is no equivalent provision in the CRTA, the tribunal has no jurisdiction to order damages arising from an inaccurate Form B.

51. The owner also argues that this case is distinguishable from *Pilehchianlangroodi* because in that case the owner effectively wanted to rely on the content of the original, incorrect, Form B. In this case, the owner wants the strata to stop making the statement, and pay for damages because of it. I find that this distinction does not change my view of the tribunal's jurisdiction to decide this claim. Rather, I find that based on the wording of section 59(6), the Supreme Court has sole jurisdiction to order remedies for inaccurate Form Bs.

52. The owner's written statement and submissions are clear that her claim for damages rests centrally on the disputed notation on the Form B. The owner submits that she would not have had to incur the claimed amounts "but for the notation on the Form B", so they should be reimbursed as damages.

53. For these reasons, I find the owner's claim for damages is an application for relief for an inaccurate Form B, as in *Pilehchianlangroodi*. I therefore refuse to resolve the claim under CRTA section 10(1).

### *Jurisdiction Over Form B Certificates*

54. The owner seeks an order that future Form B certificates not include the disputed notation found on the April 2017 Form B, or any similar notation.

55. First, I note that the owner is seeking a form of injunctive relief, enjoining the strata about what it can put on future Form Bs that have not yet been requested or completed. The tribunal does not generally grant prospective orders, about things that have not yet happened: *Bourque et al v. McKnight et al*, 2017 BCCRT 26; *James v. B.A. Blacktop Ltd. et al*, 2018 BCCRT 528.

56. Second, and for the same reasons as set out above, I find the tribunal does not have jurisdiction to make this order. The owner seeks a remedy about an inaccurate, or potentially inaccurate, Form B. For the reasons explained above, I find this is within the exclusive jurisdiction of the Supreme Court. In *Fung et al v. The Owners, Strata Plan NW 1294,* 2019 BCCRT 443, I found the tribunal had no jurisdiction to order a strata corporation to issue a corrected Form B, based on the wording of SPA section 59(6). I find the order requested by the owner in this case is substantially similar, and I refuse to resolve the claim for the same reasons as in *Fung.*

57. I therefore refuse to resolve this claim under CRTA section 10(1).

### *Declaration – Second Bedroom Remain in Place*

58. The owner seeks a declaration that the second bedroom in unit 212, located within the enclosed former balcony, remain in place.

59. The strata submits that the tribunal has no jurisdiction to issue that remedy, as the current use of the enclosed balcony as a bedroom may be contrary to current municipal rules or laws, and the tribunal has no jurisdiction over municipal rules, laws, or guidelines. The strata also says the requested order is premature, as it has not sought to remove or change the enclosure, and has not made a final determination about its use as a bedroom, although it plans to request that the City conduct a compliance review about the use of the former balcony as a dwelling space.

60. For the following reasons, I refuse to resolve this claim under CRTA section 10(1), as it is outside the tribunal's jurisdiction.

61. The tribunal has some authority to interpret other statutes applicable to a strata property dispute, such as municipal bylaw. However, I agree with the strata that the order sought by the owner is premature. The strata has not asked or directed the owner to remove the balcony enclosure, or to stop using it as a second bedroom. Therefore, the owner effectively seeks an order that the strata may not do so in the future. As previously explained, the tribunal does not generally make prospective orders about things that have not yet occurred.

62. More specifically, I find the order sought by the owner is an order for declaratory relief, which the tribunal has no authority to make. There is no such power in CRTA section 123, which sets out the specific remedial powers of the tribunal in a strata property dispute. In *Shantz, Gorman and Godfroid*, 2012 BCPC 81, the BC Provincial Court considered its power to order declaratory relief at paragraph 50, as follows:

> The Provincial Court is a statutory court and derives nearly its entire jurisdiction from various statutes and court rules. There is nothing in the

*Small Claims Act* or Small Claims Rules that confers upon the Provincial Court jurisdiction to grant declaratory relief. Since the Provincial Court is not a court of equity, it has no equitable jurisdiction to grant declaratory relief.

63. In reaching this conclusion, the Provincial Court relied on the reasoning in *Kaiser Resources Ltd. v. Western Canada Beverage Corp.* (1992), 71 B.C.L.R. (2d) 236. In that case, the Supreme Court said that a declaratory order as "an unusual legal animal", which has no similar common law or equitable foundation such as tort or breach of contract claims (para. 30). The court said the declaratory order's legal existence is based upon a rule of Court, and without such a rule, there can be no declaratory order.

64. CRTA section 123 sets out the orders available in a tribunal strata property claim. Unlike the Supreme Court, the tribunal has no inherent jurisdiction, and cannot make orders in a strata dispute other than the following:

    a. an order requiring a party to do something

    b. an order requiring a party to refrain from doing something

    c. an order requiring a party to pay money

    d. an order directed at the strata corporation, the council or a person who holds 50% or more of the votes…necessary to prevent or remedy a significantly unfair action, decision or exercise of voting rights (CRTA section 123(2))

65. The order sought by the owner is not an order requiring a party to do something, not do something, or pay money.

66. In *Dalla Rosa v. Town of Ladysmith*, 2017 BCPC 178, the Provincial Court said it did not have the jurisdiction to provide declaratory relief, unless the order is incidental to a claim for relief in which the court has jurisdiction, such as specific performance.

67. Thus, the tribunal cannot provide a declaratory order without authority from the CRTA, a tribunal rule, or other legislation, such as the SPA. However, the tribunal

may be able to make a declaratory order if such an order is incidental to a claim for relief in which the tribunal has jurisdiction. Based on the courts' comments in *Shantz, Gorman and Godfroid* and *Dalla Rosa*, I find the scope for such incidental orders to be very narrow.

68. I have considered whether the order could be construed as an order necessary to prevent a significantly unfair action. However, I find it cannot. Such an order can only be directed at the strata, the council, or a person who holds 50% or more of the votes. The order sought by the owner would also bind any municipal authority, which I find would be inappropriate in the circumstances of this dispute, and outside the scope of CRTA section 123(2).

69. For these reasons, I find the tribunal has no jurisdiction to make a declaration, in the context of this dispute, that the enclosed balcony in unit 212 can continue to be used as a second bedroom. I therefore refuse to resolve this claim under CRTA section 10(1).

### *Cost of Enclosure Repairs*

70. The owner requests that tribunal make a declaration that the repairs to the balcony enclosure are a common expense of the strata. For the same reasons as set out above, I find the tribunal does not have jurisdiction to make this declaration.

71. As acknowledged in CY's witness statement, the strata completed the exterior and structural repairs to the enclosure around May 2017. The strata has not asked the owner to pay more than her proportionate share, as required by unit entitlement for the entire project. The strata has not filed a counterclaim seeking payment in this dispute. As a result, I find this claim is a request for declaratory relief, which the tribunal does not have jurisdiction to give, for the reasons set out above.

72. I therefore refuse to resolve this claim, under CRTA section 10(1).

### *Reimbursement for Interior Repairs*

73. The owner seeks reimbursement for repairs to the balcony enclosure she says she had to complete. Specifically, she says she had to pay a contractor to finish the window sills and walls around where the balcony enclosure window was replaced, at a cost of $525.

74. Normally, a strata lot owner is responsible for repairs to the interior of their strata lot, subject to some exceptions which may be set out in bylaws. However, in this case I accept that some interior repairs were completed by the strata in other strata lots, as part of the window replacement project. Specifically, a December 23, 2016 letter to all owners says that the strata's contractor would repair interior walls damaged by the window replacement to a "paint ready" state, but walls would not be painted.

75. An undated invoice from United Property Maintenance Ltd. says the interior work in unit 212 was completed in March 2017. The invoice includes the following amounts claimed by the owner:

    a. Finish off 2 window walls with dry wall and window sills with wood and painted and install blinds - $400

    b. Completed painting the remaining part of the room - $60

    c. Finish of the entrance window with dry wall and paint - $40

    d. GST - $25

    e. TOTAL - $525

76. Based on the strata's December 23, 2016 letter, I find that none of the painting work is reimbursable. The letter specified that in all strata lots, the walls were prepped for painting, but no painting was completed. The December 23 letter also says that window blinds were each owner's responsibility to replace, and previous blinds would not fit since the new windows had smaller casings. For this reason, I find the blinds installation cost is also not reimbursable.

77. Drywall replacement is arguably reimbursable, since the December 23 letter says that interior walls affected by the window replacement would be left in a "paint ready" state. However, I find that the invoice in evidence does not provide sufficient detail to determine how much of the cost is attributable to drywall and sill repairs, or exactly what drywall and sill repairs were performed. There is no breakdown on the invoice about the time or materials allocated to that work, and they are lumped in with other tasks that I find are not reimbursable.

78. For these reasons, I find the owner has not established her claim for $525 in interior repairs. I therefore dismiss this claim.

## TRIBUNAL FEES AND DISPUTE-RELATED EXPENSES

79. The applicant was unsuccessful in this dispute. For that reason, under the tribunals rules, I find she is not entitled to reimbursement of tribunal fees or dispute-related expenses.

### *Legal Fees*

80. Both parties claim reimbursement of their dispute-related legal fees.

81. As noted above, since the applicant was unsuccessful, she is not entitled to reimbursement of dispute-related expenses in any event.

82. Tribunal rule 132 was in force at the time this dispute was filed, and therefore is applicable. It said that except in extraordinary cases, the tribunal will not order one party to pay to another party any fees charged by a lawyer or representative in the tribunal dispute process. The current rule, 9.4(3), is essentially the same. It also says the tribunal will not order one party to pay another party's legal fees in a strata property dispute except in extraordinary circumstances.

83. The strata argues that since the tribunal allowed the parties legal representation, legal fee reimbursement should be allowed. I disagree. There is nothing in the former or current tribunal rules which indicate such an exception to the general rule that legal fees will not be reimbursed.

84. Both parties argue that the circumstances of this case are extraordinary, such that I should order reimbursement of legal fees analogous to special costs. In particular, the strata argues that the owner's claims were proactive and pre-emptive, and have led to "burdensome legal procedures". It says the owner delayed in providing documents, and should have provided full disclosure during the preliminary application decided by the tribunal in April 2018. The strata says the owner changed her position about whether an oral hearing was appropriate, which caused expense and delay.

85. While this dispute was contentious, and had a large volume of evidence, I find it was not extraordinary as contemplated in the tribunal's rules.

86. Both the strata the owner seek an order analogous to special costs, as discussed in *Parfitt et al v. The Owners, Strata Plan VR 416 et al*, 2019 BCCRT 330. Special costs are an unusual order, in which a court will order a party to pay all or part of another party's legal costs. An award of special costs by the court is only made in exceptional circumstances, and is intended to chastise a party for reprehensible, scandalous or outrageous conduct.

87. The leading case in British Columbia with respect to special costs is *Garcia v. Crestbrook Forest Industries Ltd.*, [1994] B.C.J. No. 2486 (BCCA). The Court of Appeal said that special costs should be ordered against a party when their conduct in the litigation was reprehensible, in the sense of deserving of reproof or blame.

88. In *Hirji v. Owners Strata Corporation VR44*, 2016 BCSC 548, the court provided detailed reasons on special costs in the context of a strata dispute. The court noted prior decisions and confirmed the "reprehensible" test from Garcia. The court stated in paragraph 5 of Hirji that an award of special costs should only be made in exceptional circumstances where an element of deterrence or punishment is necessary because of the reprehensible conduct. The court cited the prior authority of *Westsea Construction*, which says the court must exercise restraint in awarding special costs, and not all forms of misconduct meet the threshold of "reprehensible". The court said reprehensibility will likely be found in circumstances where there is

evidence of improper motive, abuse of the court's process, misleading the court and persistent breaches of the rules of professional conduct and the rules of court that prejudice the applicant.

89. I find that these factors considered in *Hirji* are not present here. I do not find there was conduct that rose to the level of reprehensible, and necessitating deterrence or punishment.

90. For these reasons, I dismiss both the strata's and the owner's claims for reimbursement of legal fees.

91. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses to the owner.

## ORDER

92. I refuse to resolve the applicant's claims about future Form B certificates, and damages arising from the April 2017 Form B. I also refuse to resolve the owner's claims for declaratory orders about the future use of the balcony enclosure, and the repair costs of the balcony enclosure.

93. I dismiss the applicant's claims for interior repairs and legal fees. I also dismiss the strata's claim for legal fees.

Kate Campbell, Vice Chair