Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Downing v. The Owners, Strata Plan VR 2356,* 2021 BCCRT 319

B E T W E E N :

CHARLOTTE ELIZABETH DOWNING

APPLICANT

A N D :

The Owners, Strata Plan VR 2356

RESPONDENT

REASONS FOR DECISION

Tribunal Member: J. Garth Cambrey, Vice Chair

INTRODUCTION

1. This is a strata property dispute about a strata corporation's investigation of water ingress into a strata lot and alleged damages suffered by the strata lot owner.

2. The applicant, Charlotte Elizabeth Downing, was the owner of strata lot 5 (SL5) in the respondent strata corporation, The Owners, Strata Plan VR 2356 (strata) until November 2020.

3. The respondent, The Owners, Strata Plan VR 2356 (strata), is a strata corporation existing under the *Strata Property Act* (SPA).

4. Ms. Downing says the strata is responsible for damages for "trespass and destruction" on or of SL5 resulting from water ingress investigation in April 2018. Ms Downing says the strata wrongfully entered and "dismantled" SL5 while SL5 was vacant and listed for sale, to investigate the water ingress issue. As a result of the strata's actions, Ms. Downing says she was unable to sell SL5 until November 2020, when the strata completed repairs to SL5. Ms. Downing also says certain common property (CP) windows next to SL5 continued to leak until the time of sale.

5. In the Dispute Notice, Ms. Downing seeks orders that the strata:

    a. pay her damages of $147,771.36 broken down as follows:

        i. $32,771.36 for pecuniary (monetary) losses arising from her inability to sell SL5,

        ii. $100,000 for the estimated loss of value of SL5,

        iii. $15,000 for mental distress, and

    b. repair the CP windows that continued to leak into SL5.

6. As discussed below, the focus of Ms. Downing's claims, and the amount of her claimed damages, changed during her submissions. The Dispute Notice was not amended.

7. The strata denies it committed trespass on SL5. The strata also says it reasonably carried out its duty to repair, and that it is not responsible for any delays in completing repairs or deficient work. The strata asks that Ms. Downing's claims be dismissed.

8. Both parties have legal representation. Ms. Downing is represented by Faith Hayman, and the strata is represented by Alex Chang.

9. For the reasons that follow, I dismiss Ms. Downing's claims and this dispute.

JURISDICTION AND PROCEDURE

10. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over strata property claims under section 121 of the *Civil Resolution Tribunal Act* (CRTA). The CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. The CRT must act fairly and follow the law. It must also recognize any relationships between dispute parties that will likely continue after the CRT's process has ended.

11. The CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I am satisfied an oral hearing is not required as I can fairly decide the dispute based on the evidence and submissions provided.

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

13. Under section 123 of the CRTA and the CRT rules, in resolving this dispute the CRT may order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the CRT considers appropriate.

BC Supreme Court Decision

14. Ms. Downing initially commenced a petition in the BC Supreme Court (BCSC) in June 2019. The strata challenged the court's jurisdiction to hear the petition and on September 27, 2019, the court found Ms. Downing claims fell within the CRT's

jurisdiction and referred the matter to the CRT. See *Downing v. Strata Plan VR2356*, 2019 BCSC 1745 (*Downing* BCSC) at paragraph 36.

15. In *Downing* BCSC, the court also found that if Ms. Downing at some point ceased to be a current owner and became a former owner of SL5, that fact would "not in itself render her no longer an "owner" under the SPA, sections 1 and 189.1, or oust the CRT's jurisdiction to decide the dispute." In reaching this conclusion, the court citied *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc*., 2016 BCSC 32, paragraphs 230 through 233. This decision is binding on the CRT. Therefore, even though Ms. Downing sold SL5 in November 2020, I find she can still bring this dispute under the SPA and CRTA.

CRT Preliminary Decisions

16. Based on *Downing* BCSC, the CRT Executive Director and Registrar (registrar) waived the SPA section 189.1 requirement that Ms. Downing request a hearing with the strata council before commencing this dispute. I accept the registrar's decision and find the request for a council hearing is not required in the circumstances of this dispute.

17. On September 24, 2020, a CRT vice chair considered 2 preliminary matters at the parties' request, which I summarize below.

18. In the first preliminary matter, Ms. Downing requested the CRT refer this dispute back to the BCSC for adjudication. The strata objected to Ms. Downing's referral request, primarily because it said the matter was already decided in *Downing* BCSC. The vice chair found that the CRT should continue hearing this dispute. She found the claims in this dispute are the same as the claims considered in *Downing* BCSC. While Ms. Downing argued additional claims, the vice chair found the CRT Dispute Notice had not been amended to add any claims. She also found the *Downing* BCSC order that the CRT adjudicate this dispute is binding on the CRT. For these and other reasons, the vice chair found the CRT should continue to hear this dispute.

19. In the second preliminary matter, the strata argued this dispute is barred under CRTA section 13.3, because it was filed too late. The vice chair found it appropriate to use her discretion under section 13.3 to allow the dispute to continue, despite the Dispute Notice date was past the 28-day deadline set out in section 13.3.

20. The vice chair's full reasons for these preliminary matters are indexed as *Downing v. The Owners, Strata Plan VR 2356,* 2020 BCCRT 1079. I accept the vice chair's preliminary decision on these 2 matters and rely on it here.

Change in Focus of Claim and Change in Remedies

21. In submissions, Ms. Downing accepts the strata's right to conduct repairs under the guidance of professional advice. She does not challenge the strata's actions in relation to its statutory obligations to repair and maintain CP and limited common property (LCP). In the words of Ms. Downing's representative:

> …this claim is not about what the strata did or did not do in terms of conducting repairs after Ms. Downing's unit was destroyed. Rather, this claim is intended to address the initial wrongful act of dismantling Ms. Downing's unit and the consequences flowing from that wrong, as well as the actions taken by Ms. Downing to mitigate her losses.

22. The strata argues the initial inspection of SL5, remediation, and subsequent repairs are "all inextricably linked". I agree. However, I interpret Ms Downing's position to be that she does not take issue with the strata's actions after the April 2018 inspection of SL5. I find she only takes issue with the strata's access to SL5 for the initial water ingress investigation (trespass) and the extent of that investigation (destruction). Put another way, I find Ms. Downing concedes that the strata acted reasonably in its repair of the CP, LCP and SL5, ***after*** it discovered water was entering SL5. This is supported by other submissions made by Ms. Downing and I find she has abandoned her claims about events that occurred after April 18, 2018, the date SL5 was inspected.

23. Given Ms. Downing's claim set out in the Dispute Notice was for trespass and destruction of SL5, I do not find Ms. Downing's claim has changed other than the change

in focus as I have mentioned. Therefore, there was no need for her to amend the Dispute Notice. As for the strata's argument that Ms. Downing added a claim for window damage prior to April 2018, I disagree. Rather, I find Ms. Downing's submission on prior window damage forms part of her negligence argument, which I discuss in greater below.

24. As earlier noted, I do find Ms. Downing has changed the damage amounts of her requested remedies. It is clear in her submissions that Ms. Downing now requests non-pecuniary (pain and suffering) damages "of between $30,000 and $50,000", and a total of $412,392.87 for pecuniary or monetary losses.

25. However, based on the documentation before me, I find the strata had sufficient notice of the amended remedies and responded to them in submissions. I therefore find there is no procedural unfairness and no prejudice to the strata in considering Ms. Downing's requested remedies as part of this dispute.

ISSUES

26. The issues in this dispute are:

    a. Did the strata trespass on SL5?

    b. Did the strata cause nuisance to Ms. Downing?

    c. Was the strata negligent?

    d. Did the strata treat Ms. Downing in a significantly unfair manner?

    e. What is an appropriate remedy, if any?

BACKGROUND, EVIDENCE AND ANALYSIS

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

28. The strata is a strata corporation created in February 1989 under the *Condominium Act* (CA). As noted, it continues to exist under the SPA. The strata consists of 72 strata lots in a single 11 storey building above a large underground parking area.

29. Strata plan VR 2356 shows SL5 is a ground floor strata lot located immediately above the underground parking area. The underground parking area extends well past the exterior wall of SL5 and is covered by landscaping features including trees, hedges and grass areas. Much of SL5 is located along the exterior wall of the building. A patio is located on the exterior of the building immediately next to SL5 that is marked on the strata plan as limited common property (LCP) designated for the exclusive use of SL5. The remaining exterior ground level area surrounding the building is CP.

30. Land Title Office (LTO) documents show the strata filed a complete new set of bylaws on July 18, 2012. On October 17, 2013, the strata filed a number of bylaw amendments with the LTO, including an amendment to bylaw 36 about insurance claims. The parties agree the 2012 bylaws govern the strata in this dispute. I find that the 2013 amendment to bylaw 36 also applies. I find other 2013 bylaw amendments and subsequent amendments filed in 2019 are not relevant here. I discuss the relevant bylaws below as necessary.

31. In 2009, the strata retained an engineering firm to complete targeted visual reviews of the building and building envelope performance that resulted in 2 separate engineering reports being produced. Both reports are dated October 16, 2009 but it is clear that the investigations were completed on separate days. As part of the initial review, the engineering firm conducted a survey of the strata owners that was summarized in the report. Based on my review of the reports, Ms. Downing responded to the survey, but did not identify any areas of moisture or water ingress in her survey response other than moisture and mould in the window troughs on the interior of SL5. The engineering firm made one exploratory opening below the den window of SL5 at the location of a previous repair. The report states the owner reported that the exterior waterproofing membrane had previously been repaired at this location. The report also states the steel stud track at floor level was corroded and the batt insulation was moist, suggesting a number of

possible water sources, including high interior humidity and failure of the exterior membrane.

32. In 2010, the strata retained JRS Engineering Ltd. (JRS) to provide a second opinion on the 2009 engineering reports it had received. JRS issued its second opinion report dated July 16, 2010 that generally concurred with the findings of the first engineer. The JRS report was authored by Kurtis Topping, a professional engineer. Two of the recommendations relevant to this dispute were to replace the ground level waterproofing membrane, which I find is the same as the parkade membrane, and to reduce the humidity levels in 4 ground level strata lots including SL5. To reduce humidity, JRS recommended improvements to existing ground level mechanical systems. It is unclear what, if any, recommendations were followed by the strata.

33. In August 2012, the strata received a report from Aqua-Coast Engineering Ltd. (ACE) indicating the parkade membrane, observed at 12 locations, had failed. ACE recommended the strata take steps to replace the entire parkade membrane or at least the areas around the building perimeter, which I find would include SL5.

34. At the strata's annual general meeting (AGM) held June 20, 2017, a ¾ vote to retain an engineer to prepare specifications and tender the parkade membrane replacement was approved. The June 2017 AGM minutes show a JRS representative was present to explain the process. The minutes also show the previous engineering reports of 2009, 2010, and 2012 mentioned above were also discussed.

35. The strata then retained JRS to verify construction details about the parkade membrane replacement and clarify the scope of work for its replacement. JRS provided a report dated December 22, 2017 setting out options for the strata to consider. There is no evidence before me of any known active leaks at this time, other than into the parkade. Mr. Topping, who also authored the December 2017 JRS report, provided a sworn affidavit that he was not made aware of any leaks into ground level strata lots at the time of his December 2017 inspection of the membrane.

36. The January 10, 2018 strata council meeting minutes report that JRS had submitted a design brief to the strata for the parkade membrane replacement with 2 repair options. The first was to replace the entire horizontal parkade membrane and the second was to include vertical walls and drainage, which I infer are the perimeter walls and drainage of the building. The minutes state the strata was considering the second option because it was less expensive. Later, in early April 2018, JRS provided the strata with design and specification documents for the parkade membrane replacement.

37. The strata also retained JRS to complete a depreciation report under section 94 of the SPA. The completed report dated March 13, 2018 was provided in evidence. The executive summary states JRS is "also working on a below-grade membrane renew" and recommend the strata consider, and start saving for, replacement of the parkade membrane among other things, over the next 3 years.

38. The undisputed evidence is that Ms. Downing, a 92 year old widow, suffered a stroke in August 2017. By April 2018, Ms. Downing had made some life changing decisions as evidenced in her affidavit and the affidavit of her friend and Power of Attorney, Ann Barclay. Ms. Downing realized that she could no longer live on her own so in April 2018, she moved out of SL5 to a nearby retirement home. Affidavit evidence of Stephen Downing, Ms. Downing's son, and Ms. Barclay detail how she came to these decisions. The affidavit evidence also identifies Ms. Downing's financial circumstances in early 2018 and that her intended plan included selling SL5 and investing the sale proceeds. Based on my conclusions below, I do not find it necessary to provide details of why Ms. Downing made these decisions or what her intended plans and financial expectations were as a result.

39. Ms. Downing listed SL5 for sale on April 5, 2018. As discussed in greater detail below, moisture was discovered in the second bedroom of SL5 about April 16, 2018 and was reported to the strata council vice president (VP). By April 18, 2018, the strata had retained a contractor, Woodcraft Contracting and Renovations Ltd. (Woodcraft) to investigate the source of the moisture.

40. Based on the photographs provided in evidence, the description contained in the May 3, 2018 Woodcraft invoice, and the affidavit provided by Woodcraft's president who attended SL5, it is apparent that an extensive investigation was conducted in an attempt to determine the source of the leak. Woodcraft opened floor level drywall areas below the windows in the second bedroom, den, living room, and kitchen to expose steel studs and the interior of the concrete walls. It also pulled back the carpet and underlay in the bedroom, den and living room, and removed the kitchen cabinets and countertops. Some of the underlay was also removed and Woodcraft left drying equipment in SL5 for about a week. I find the condition of SL5 following Woodcraft's investigative work is what Ms. Downing refers to as "dismantled" or "destroyed".

41. The strata retained JRS to further investigate the issue. Mr. Topping attended SL5 on May 4, 2018. In a report dated June 1, 2018, he described his investigation, which included localized water testing. In summary, JRS recommended replacement of the parkade membrane along the perimeter of SL5, and replacement of at least the den windows. JRS strongly recommended replacing all SL5 windows and estimated the cost of its recommended work was between about $141,000 and $191,000, depending on the number of windows replaced.

42. Given my finding above that Ms. Downing has limited her claims to work done by the strata ***before*** April 2018, I do not find it necessary to detail the repair process completed by the strata after that date.

43. I find the exterior membrane and window work proceeded very slowly, which Mr. Topping attributed to the lack of availability of the contractor and window manufacturer. JRS issued a certificate of substantial completion for the SL5 work on February 4, 2020.

44. Between February and July 2020, numerous deficiencies were addressed, including repairs to leaking windows. Mr. Topping says in his witness statement that the building permit for the SL5 work was closed about September 10, 2020 when a District of North Vancouver inspector attended the building with him to view the completed repairs.

Did the strata trespass on SL5?

45. The issue of whether the strata trespassed on, or did not have authority to investigate water ingress into SL5, is at the heart of this dispute. As Ms. Downing notes, her alleged losses flow from the initial investigation within SL5. Ms. Downing says she did not directly or indirectly authorize the strata to take the actions it did to permit Woodcraft to investigate SL5 for water ingress.

46. The strata denies it trespassed on to SL5. It says Ms. Downing's real estate agent, Mr. Panchyshyn, authorized the strata to investigate the water ingress and granted the strata access to SL5 by providing a key to the VP for the purpose of investigating the water ingress. For the reasons that follow, I agree with the strata.

47. Ms. Downing says trespass to land occurs when someone enters onto land in the possession of someone else without lawful justification, citing *Glashutter v. Bell, [2001] B.C.J. No. 2587*, at paragraph 26.

48. There are multiple affidavits and witness statements that comment on the discovery of water ingress into the second bedroom of SL5. They confirm a small carpet stain was first discovered by either Ms. Downing's son or Ms. Barclay. After unsuccessful attempts were made to address the carpet stain, it was determined by Ms Downing's son, Mr. Panchyshyn, and Ms. Barclay, that a water leak was likely affecting SL5. Ms Downing's son, who says he has been in construction for over 35 years, provided a witness statement that he "assumed [the carpet stain] might be a small water leak". In an affidavit dated November 2020, Ms. Barclay stated it might be a leak from the window. In an affidavit dated November 2020, Mr. Panchyshyn said he inspected the carpet and determined moisture was present. He also states that after consultation with Ms. Downing and Ms. Barclay, there was agreement that he bring the likely water leak to the strata council's attention. I find this is sufficient proof that Mr. Panchyshyn had authority to report Ms. Downing's wishes to the strata on her behalf.

49. Based on this material, I find the carpet stain was evidence of moisture in SL5. Given Ms. Downing was consulted by Mr. Panchyshyn, I find Ms. Downing was aware of the moisture in SL5. Although not expressly stated in the affidavits or witness statement, I

find that Ms. Downing, through Mr. Panchyshyn, requested the strata to investigate the water ingress.

50. There is evidence that Mr. Panchyshyn tried to contact the council president, but ultimately left a telephone message for the VP on about April 16, 2018. In an email dated April 16, 2018 at 7:57 pm, the VP wrote to strata property manager describing Mr. Panchyshyn's telephone message that there was moisture in the second bedroom of SL5 and that "he would like us to remedy it asap."

51. The exact sequence of events that followed are unclear. The VP says in her affidavit that she met with Mr. Panchyshyn on April 17 or 18, 2019, and that he showed her the moisture in SL5. She says Mr. Panchyshyn provided her a key to SL5 after this viewing. In his affidavit, Mr. Panchyshyn says he recalled "addressing the water spot in the second bedroom" with the VP "at some point" and put a key to SL5 under the VP's door so SL5 could be investigated.

52. Based on the 2 affidavits, I accept the more detailed description of the timing of these events contained in the VP's affidavit for 3 reasons.

53. First, the VP's affidavit was sworn in July 2019, closer to the event, while Mr. Panchyshyn's affidavit was sworn in November 2020, about 1 ½ years after the event.

54. Second, I find the VP's description is the most reasonable in the circumstances and better aligns with the overall evidence. According to the VP, she inspected the moisture with Mr. Panchyshyn before asking Westcoast to investigate the water damage. I find the VP would not have needed a key to meet Mr. Panchyshyn as he would have access to SL5 as Ms. Downing's real estate agent. Rather, I find the VP would have needed a key to arrange further investigation of water ingress, without Mr. Panchyshyn.

55. Third, I find the notion that access would be granted to SL5 without the need for investigation of the water ingress concerns to be unreasonable. It goes against Mr. Panchyshyn affidavit evidence that he "understood the [strata] was responsible for water damage to [SL5]" to expect the strata would not conduct any investigation.

56. It follows that Mr. Panchyshyn was aware of and authorized access to SL5 by both the strata and Westcoast for the purpose of investigating water ingress into SL5.

57. For these reasons, I find the strata had authority to enter SL5 and did not commit trespass.

Did the strata cause a nuisance to Ms. Downing?

58. Ms. Downing says the strata caused her nuisance when it exposed the interior of the perimeter walls of SL5. She refers to the Supreme Court of Canada when stating the law of nuisance "consists of an interference with the claimant's [here, applicant's] use or enjoyment of land that is both substantial and unreasonable". While Ms. Downing did not cite a specific Supreme Court of Canada case, she did cite *Allison v. Radtke*, [2014] B.C.J. No. 2432, (also indexed as 2014 BCSC 1832) at paragraph 19 as follows:

> [19] ...to support a claim in private nuisance the interference with the owner's use or enjoyment of land must be both substantial and unreasonable. A substantial interference with property is one that is non-trivial. Where this threshold is met, the inquiry proceeds to the reasonableness analysis, which is concerned with whether the non-trivial interference was also unreasonable in all of the circumstances.

59. I find Ms. Downing's argument is essentially that the strata's investigation that "destroyed" SL5 was both substantial and unreasonable.

60. The strata does not dispute the definition or test involved to establish nuisance but says it does not apply in the circumstances of this dispute. The strata refers to *Dodsworth v Madill*, 2019 BCSC 898 at paragraph 57 where the BC Supreme Court considered *Doug Boehner Trucking & Excavating Ltd. v. United Gulf Developments Ltd*., 2007 NSCA 92. The court in *Dodsworth* found nuisance is distinct from trespass. It found trespass is direct entry onto another's land, while nuisance is concerned with unreasonable interference with the enjoyment of land resulting from another's conduct elsewhere. The alleged interference with the plaintiff's enjoyment of land must be indirect rather than direct. Therefore, the interference must originate elsewhere from the affected land itself.

61. Following *Dodsworth*, the strata says the alleged interference in this dispute came from direct actions of the strata's trades in SL5. Since the alleged interference did not come from outside SL5, it means the tort of nuisance does not apply. I agree with the strata's analysis and its submission that this is sufficient reason to dismiss Ms. Downing's claim of nuisance.

62. Even if *Dodsworth* does not apply, I would not find the strata's actions were unreasonable. I would agree the strata's investigation of SL5 resulted in a substantial interference with the use of SL5 because of the extent of the investigation, thereby triggering the reasonableness test. However, I would find the strata took reasonable steps to investigate at the request of Ms. Downing, following the advice of its professionals. I accept the extent of the strata's investigation was not what Ms. Downing was expecting, but that does not mean the strata's actions were a nuisance.

63. I find I do not need to consider the parties remaining arguments about whether the strata caused a nuisance.

Was the strata negligent?

64. Ms. Downing says the strata was negligent when it dismantled SL5 and conducted subsequent repairs. The strata disagrees. For the following reasons, I find the Ms. Downing has not proved the strata was negligent.

65. In order to establish the strata's negligence, Ms. Downing must show that the strata owed her a duty of care, that the strata breached the standard of care, and that she sustained damage as a result of that breach (*Mustapha v. Culligan of Canada Ltd*., 2008 SCC 27).

66. Both parties agree the standard of care is reasonableness.

67. Ms. Downing specifically says her negligence claim raises the following issues:

    a. Whether dismantling of 1 strata lot, as was done by Woodcraft, can be considered part of the strata's duty to repair and maintain and, if so, whether the strata was negligent when it attempted to fulfill its duty.

b. If there was negligence, whether it was foreseeable that dismantling SL5 would prevent Ms. Downing from selling it.

c. Whether dismantling SL5 caused Ms. Downing to suffer damages.

68. Under SPA sections 3 and 72, the strata has a duty to repair and maintain common assets, CP, and LCP, subject to its bylaws. Section 72 permits the strata, by bylaw, to take responsibility to repair and maintain parts of a strata lot. Bylaw 3.1 says Ms. Downing, as strata lot owner, is responsible for repair and maintenance of SL5, except for repair and maintenance that is the strata's responsibility. Bylaw 11 addresses the strata's repair and maintenance responsibilities. I summarize the relevant parts as follows. The strata is responsible for:

    b. CP

    c. LCP, if repair and maintenance ordinarily occurs less often than once per year and all of the following, no matter how often the repair or maintenance ordinarily occurs:

        i. The exterior of the building,

        ii. Door and windows on the exterior of a building or that front on CP.

    d. The following parts of a strata lot:

        iii. The exterior of a building,

        iv. Doors and windows on the exterior of building or that front on CP.

69. Based on the strata's bylaws, the strata is clearly responsible for the exterior of the building, which I find is CP. It is unclear from the documents before me if the SL5 windows that are the subject of this dispute are part of SL5 or CP. If they are part of SL5, the strata has a duty to repair and maintain them under bylaw 11(d)(ii). I will first consider the strata's negligence if this were the case.

70. As I have noted, the strata took immediate steps to investigate the water ingress into SL5 by retaining Woodcraft and then JRS. I have found find the strata's actions in attending to the water investigation were reasonable and were initiated by Ms. Downing's request.

71. The courts have found that if a strata corporation's contractor or consultant fails to carry out work effectively, the strata corporation should not be found negligent if it acted reasonably in the circumstances. (See *Kayne v. LMS 2374*, 2013 BCSC 51, *John Campbell Law Corp v. Strata Plan 1350*, 2001 BCSC 1342, and *Wright v. Strata Plan #205*, 1996 CanLii 2460 (BC SC), aff'd 1998 BCCA 5823).

72. According to the affidavit of Woodcraft's president, who attend the April 2018 investigation of SL5, it was at his direction that the VP approved the extent of the investigation required to determine active water ingress was occurring from the building exterior and possibly exterior windows to SL5. This was not challenged by Ms. Downing. In a witness statement, Mr. Topping also confirmed the extent of investigation in SL5 was required to determine the exterior water leaks. I find Mr. Topping's statement meets the qualifications of expert evidence under CRT rule 8.3, in effect at the time of this dispute, given his Professional Engineer qualifications were provided in JRS reports and he confirmed his evidence was to assist the CRT. I note Mr. Topping's witness statement was not challenged by Ms. Downing, nor did she provide contrary expert evidence.

73. Therefore, I find the strata relied on Woodcraft and JRS when it approved the extent of the investigation necessary in SL5 to determine the cause of the water ingress. Based on the case law above, I find the strata was not negligent because it acted on advice it received from professional during the investigation of SL5.

74. In the event the strata did not have a duty to repair and maintain the SL5 windows under its bylaws because they were CP, I find it had a duty to mitigate any potential insurance claim that might have been triggered under its policy. I find this includes a duty to investigate a potential claim about water ingress from a CP source.

75. Under section 149 of the SPA, the strata had a duty to insure the building, and the fixtures in SL5 if they were built or installed on SL5 by the owner developer. Section 152 says the strata also has an option to insure fixtures if they were not built or installed by the owner developer. While it is unclear if the fixtures in SL5, such as carpet and kitchen cabinets, were installed or built by the owner developer, it is undisputed the fixtures were covered by the strata's insurance policy. Therefore, I find the strata's duty to mitigate its losses under its insurance policy included properly investigating the source of the water leak into SL5. At the end of the day, the strata's insurance policy covered the repairs to SL5, and the strata paid the associated insurance deductible under its bylaw 36.4, because the leak came from CP or LCP.

76. As earlier noted, I have found Ms. Downing has abandoned the portion of her claim that the strata acted reasonably in its repair of CP, LCP and SL5, ***after*** it discovered water was entering SL5. Therefore, I will not consider that aspect of the claim.

77. Ms Downing also suggests that the strata ought to have taken action based on the 2009 engineering reports that identified the presence of mould and water in SL5's interior window tracks. I disagree. That there is mould and water found in interior window tracks does not necessarily mean there is a leak. JRS addressed this issue in its 2010 report stating the moisture was condensation that could be addressed by modifying mechanical systems within SL5. Further, Ms. Downing's 2009 questionnaire response states there were no past or current water leaks into SL5. While it is unclear if steps were taken to address the window moisture in 2010, there is no evidence before me of any leaks into SL5 until April 2018. This is supported by a statement made by the strata's property manager in an affidavit where the property manager said there were no reports of water ingress in to SL5 prior to April 2018

78. Ms. Downing also says the strata's investigation of SL5 was not for the benefit of the strata owners as required under SPA section 3. She argued this in the context of the strata's duty to repair and maintain. It appears Ms. Downing is arguing both sides of the issue. On one hand, she asked the strata to investigate the water ingress issue, and on the other had she says the strata should not have investigated to the extent it did without a plan. As the strata points out, it had to act. It could not ignore the water ingress and

pretend it did not happen. I find the strata had to complete its investigation in order to determine the source of the water leak. Taking no action would not be reasonable and may have been negligent. That outcome would certainly not be for the benefit of all owners. For that reason, I find the strata was acting in the best interest of the owners when it investigated water leaks into SL5.

79. For all of these reasons, I find Ms. Downing has not proved the strata was negligent when it investigated SL5 at her request. I dismiss Ms. Downing's claim the strata was negligent.

Did the strata treat Ms. Downing in a significantly unfair manner?

80. My understating of Ms. Downing's argument is that it was significantly unfair for the strata to investigate SL5 for water ingress and not investigate other strata lots, suggesting the investigation into the water ingress was the reason Ms. Downing could not sell SL5. I find that conclusion is not supported by the evidence before me.

81. The basis of a significant unfairness claim is that the strata must have acted in a way that was "burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith, unjust or inequitable." See *Reid v. Strata Plan LMS 2503*, 2003 BCCA 126, *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44, and *Kunzler v. The Owners, Strata Plan EPS 1433*, 2020 BCSC 576.

82. Again, faced with a decision to investigate water ingress into SL5 as requested by Ms. Downing versus rejecting her request, the strata followed the advice of its professionals, completed the investigation, and determined the source of the water ingress. I do not find the strata's actions reach the level of significant unfairness as described by the courts in the cases noted above.

83. The strata did not single out SL5 or Ms Downing, as there is no evidence any other ground level strata lots were leaking.

84. That Ms. Downing's plan to sell her strata lot and invest the funds to meet her financial plan was delayed for 2 years as result of the investigation and repairs does not mean the strata acted in an unreasonable or significantly unfair manner when it investigated SL5.

85. Although I have found Ms. Downing has abandoned her claims for the strata's actions after its investigation of water ingress into SL5, I note for completeness the court's finding in *Leclerc v. The Owners, Strata Plan LMS 614*, 2012 BCSC 74. *Leclerc* was a case of water ingress into a strata lot. The court said that although the strata could perhaps have hastened its investigations of the problem, there was no evidence of deliberate foot-dragging, and that a strata council is not required to be perfect, only to act reasonably with fair regard for the interests of all concerned (paragraph 61).

86. For these reasons, I dismiss Ms. Downing's claim for significant unfairness.

Remedy

87. Ms. Downing's claims for damages were entirely based on the strata causing the delay in her selling SL5. She says she could not sell her strata lot while the repairs were in progress, which the strata says in not true. There is no evidence Ms. Downing attempted to sell her strata lot during the repair period and no evidence on the sale potential during the repair period, so I agree with the strata. Ms. Downing has not proven she would have had to discount the price of SL5 to sell it during the repair period. Nor has she proven any alleged discounted price was solely related to the strata's investigation of SL5 and not other repairs, such as the entire parkade membrane repair.

88. While the circumstances of Ms. Downing's losses were truly unfortunate, I have not found the strata is liable for her financial plans being interrupted by the delay in the sale of SL5, which appears to a choice she made.

89. Given I have dismissed all of Ms. Downing's claims, I find she is not entitled to any of her requested remedies.

CRT FEES AND EXPENSES

90. As noted, under section 49 of the CRTA, and the CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. I see no reason to deviate from this general rule. The strata was the successful party in this dispute, but it did not pay CRT fees or claim dispute-related fees, so I order no such reimbursement.

91. I find Ms Downing claims a total of $11,525.25 for the following expenses:

    a. $1,548.75 in psychologist fees for reports regarding the impact of the strata's actions on her health,

    b. $1,050.00 in appraiser fees regarding the values of SL5 as of April 2018,

    c. $493.50 for an electrician's expenses to repair a baseboard heater in SL5, and

    d. $8,433.00 in legal fees.

92. Under CRT rule 9.5(1), I decline to order the strata to pay any of Ms. Downing's claimed expenses because she was unsuccessful in this dispute. There are also other reasons I would not order payment of her claimed expenses.

93. I note that part of her psychologist fees ($1,076.25) were incurred in 2019, before this dispute was commenced. I find these fees are not dispute-related expenses because they not "directly related to the conduct of the tribunal process" as required under CRT rule 9.5(2).

94. I would decline to order reimbursement of $493.50 for electrician expenses because this expense related to work after April 2018, the claim for which I have found was abandoned by Ms. Downing. Also, the evidence shows the strata offered to complete the work and Ms. Downing refused the offer.

95. As for legal fees, CRT rule 9.5(4) sets out what factors the CRT may consider when determining whether, and to what degree, to order payment of legal fees. The relevant factors include:

    a. the complexity of the dispute,

    b. the degree of involvement of the representative,

    c. whether a party has caused unnecessary delay or expense, and

    d. any other factors the CRT considers appropriate.

96. Here, the legal fees claimed by Ms. Downing are not those of her legal representative. They are legal fees paid to her previous lawyer relating to work completed between June 28, 2018 and May 9, 2019. All of the legal fees were incurred prior to this dispute and largely relate to attempts to have the SL5 repairs expedited. Based on Ms. Downing's abandonment of claims against the strata after April 2018, I decline to order reimbursement of Ms. Downing's claimed legal fees.

ORDER

97. I order Ms. Downing's claims and this dispute dismissed.

J. Garth Cambrey, Vice Chair