Civil Resolution Tribunal

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Type: Strata

Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan VR 42 v. Learmonth*, 2023 BCCRT 400

B E T W E E N :

The Owners, Strata Plan VR 42

**APPLICANT**

A N D :

CHERYL LEARMONTH

**RESPONDENT**

A N D :

The Owners, Strata Plan VR 42

**RESPONDENT BY COUNTERCLAIM**

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**REASONS FOR DECISION**

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Tribunal Member: J. Garth Cambrey, Vice Chair

## INTRODUCTION

1. This is a strata property dispute about the use of altered common property (CP).

2. The applicant strata corporation, The Owners, Strata Plan VR 42 (strata), says the respondent owner of strata lot 10 (SL10), Cheryl Learmonth, is exclusively occupying an area of common property (CP enclosure) without the strata's permission and without paying appropriate compensation. The CP enclosure is an area of CP on the south side of SL10 measuring between 63 and 77 square feet. It was undisputedly enclosed and used as part of bedroom and mudroom by SL10 , before Ms. Learmonth purchased SL10 in 2019. The strata seeks orders that Ms. Learmonth:

    a. Cease occupying the CP enclosure,

    b. At her cost, remediate the CP enclosure by removing the exterior walls, flooring, and wood support structure, and restore the interior wall between SL10 and the CP enclosure.

3. Ms. Learmonth says the strata approved the CP enclosure under the *Condominium Act* (CA). She also says the strata's claim is out of time under the *Limitation Act* (LA).

4. In her counterclaim, Ms. Learmonth says the strata is treating her in a significantly unfair manner. She also says the strata permanently approved the CP enclosure and that she is therefore not responsible to remove and restore it as the strata requests. She also says she is not responsible to pay "rent" or strata fees for use of the CP enclosure. She seeks orders that the strata:

    a. Affirm in writing its prior approval of the CP enclosure,

    b. Is prohibited from removing the CP enclosure,

    c. Set aside the strata's April 2022 resolution that approved a significant change in use or appearance of the CP enclosure in the event the strata was successful in its claim,

    d. Is deemed to have passed a ¾ vote to designate the CP enclosure as limited common property (LCP) designated for the exclusive use of the SL10 owner, and that the strata file the approved resolution with the Land Title Office,

5. As alternatives to the above requested orders, Ms. Learmonth seeks orders that the strata:

    a. Obtain owner approval to designate the CP enclosure as LCP for the exclusive use of the SL10 owner,

    b. At its cost, remove the roof overhang, restore the CP enclosure and SL10 to their original condition, or

    c. If the strata is successful, refund her a total of $1,548.57, which is the amount of fees and rent she says she has paid to use the CP enclosure.

6. She also asks that the strata be ordered to pay her legal fees of $43,360.40 and special costs.

7. The strata corporation was represented by 2 different strata council members during the CRT process, one of whom is a retired lawyer. Ms. Learmonth is represented by a lawyer, Michael D. Carter.

8. As explained below, I find both parties were partially successful and make the orders set out below.

## JURISDICTION AND PROCEDURE

9. These are the formal written reasons of the CRT. The CRT has jurisdiction over strata property claims under section 121 of the *Civil Resolution Tribunal Act* (CRTA). CRTA section 2 says the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between the dispute's parties that will likely continue after the CRT process has ended.

10. CRTA section 39 says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT's mandate that

includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice and fairness.

11. CRTA section 42 says the CRT may accept as evidence information that it considers relevant, necessary and appropriate, even where the information would not be admissible in court. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

12. 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.

## ***Preliminary Matters***

*Additional Evidence and Submissions*

13. In reply submissions for her counterclaim, Ms. Learmonth provided additional evidence. The strata also asked the I consider a recent BC Court of Appeal decision in Stratton v. Richter, 2022 BCCA 337, which was published after the exchange of submissions and evidence was complete. Through CRT staff, I asked the parties to provide brief submissions on these 2 issues, which they did. I reviewed the submissions and note they primarily deal with unregistered interests in land and proprietary estoppel, and significant unfairness. I find I do not need to address unregistered interests in land or proprietary estoppel to resolve this dispute. Therefore, I have not considered those submissions in my decision. However, I have considered the parties' submissions on significant unfairness below.

*Alleged Bylaw Breach*

14. Although not contained in its Dispute Notice, the strata made submissions about Ms. Learmonth's alleged breach of bylaw 3(1)(c), claiming her exclusive use of the CP enclosure was an unreasonable interference of other owners' use of common property. Ms. Learmonth responded to the submissions, so I find there are no procedural fairness issues created and I have addressed the allegation in my decision.

## ISSUES

15. The issues in this dispute are:

    a. Is the strata's claim out of time under the LA?

    b. Is the strata entitled to ask Ms. Learmonth to vacate the CP enclosure?

    c. Who is responsible for removing the CP enclosure?

    d. Is the strata treating Ms. Learmonth significantly unfairly by demanding she remove the CP enclosure?

    e. Is Ms. Learmonth entitled to reimbursement of fees she paid to use the CP enclosure?

    f. What remedies are appropriate?

## BACKGROUND

16. As applicant in a civil proceeding such as this, the strata must prove its claims on a balance of probabilities, meaning more likely than not. Ms. Learmonth must also prove her counterclaims on the same standard. I have considered all the submissions and evidence provided by the parties, but refer only to information I find relevant to explain my decision.

17. I note the submissions and evidence from both parties is extensive. The background facts of this dispute are also lengthy. However, I find it helpful to summarize some of the undisputed facts to give context to my decision.

18. The strata plan shows the strata was created in April 1972 under the CA. It continues to exist under the SPA. There were originally a total of 29 townhouse-style strata lots with unit entitlement (UE) of either 3 or 4. The strata plan also shows the total area of each strata lot and notes that patio and entrance areas identified on the strata plan are included in the strata lots' total area. There is no entrance area shown on the strata plan for SL10, but there are 2 patios. Based on photographs and other evidence, I find the entrance to SL10 is through the CP enclosure.

19. On March 10, 1999, the strata, then governed by the CA, repealed and replaced its bylaws. On October 28, 2003, the strata filed a complete new set of bylaws with the Land Title Office (LTO) that replaced the Standard Bylaws under the SPA. The strata filed bylaw further amendments on February 4, 2020 which appear to replace the October 2003 bylaws. I discuss the relevant bylaws below as necessary.

20. There is no question that the area where the CP enclosure is located is identified on the strata plan as CP. There is no evidence or LTO documents that suggest the strata has approved a resolution to designate the CP enclosure as LCP or part of SL10 as permitted under CA section 53 or SPA at sections 74, 80, and 253.

21. Based on a photograph dated in 1978, the CP enclosure, or at least the exterior wall and the roof, was already constructed at that time.

22. In 1979, the roofs of all strata buildings, including the CP enclosure, were replaced with a metal roof. About the same time, exterior windows were installed in some strata lots, and likely in the exterior south wall of the CP enclosure. It is undisputed that the strata paid for the roof expense, but it is unclear who paid for the window installations.

23. In 1981, the strata investigated and identified several alterations made to CP. Some of the CP alterations, including the CP enclosure, involved exclusive use of CP.

24. The strata retained a BC Land Surveyor to measure and document the size of the alterations (1981 survey). About this time, the strata changed from using the unit entitlement figures shown on the strata plan to an “area-based” approach to calculate strata fees and special levies. The “area-based” method continues to this day and was approved by the BC Supreme Court (BCSC) in *Brown v. The Owners, Strata Plan VR 42, VR 64, VR 153*, 2022 BCSC 812, discussed further below.

25. At the time of the 1981 survey, the interior wall dividing the CP enclosure and SL10 had been removed so most of the CP enclosure was directly accessible from SL10. It is undisputed that the “area-based” calculations used for strata fees and special levies for SL10 included the fully enclosed CP enclosure of about 63 square feet. According to Ms. Learmonth, the strata installed drain tile at the base of the CP enclosure and pavers on a path to SL10 entrance in 1984. A door was later installed

to create a mud room to fully complete the CP enclosure. The strata does not dispute these things and it is unclear who completed the work.

26. Between 1981 and 2003, the strata took no action to address the CP enclosure, other than to charge SL10 “strata fees” under its “area-based” approach to calculating strata fees, based on the additional area of the CP enclosure.

27. In 2003, the strata also started charging the SL10 owner a fee for the use of the CP enclosure, in addition to including the CP enclosure area in the “area-based” calculation of strata fees for SL10. It is undisputed that Ms. Learmonth has paid these fees as established by the strata since she purchased SL10.

28. In about 2010, the exterior of the strata’s buildings were re-sided, including the CP enclosure. I infer the strata arranged and paid for the re-siding work.

29. The strata says the fee to use the CP enclosure was based on an un-signed short-term exclusive use agreement for the CP enclosure between it and the SL10 owner at the time, as permitted under SPA section 76. Section 76 says a strata corporation may, for periods of up to 1 year, grant an owner exclusive use or special privilege in relation to CP that is not designated as LCP. It also says the permission may be subject to conditions, renewed for different periods and on different conditions, and be cancelled by the strata on reasonable notice. I note that the strata's authority over common property allocations under section 76 is governed by its obligation not to make significantly unfair decisions.

30. I further note that some documents refer to a “lease” of CP, which Ms. Learmonth says caused her some confusion. While I understand this may have created confusion, based on the overall evidence and submissions, I accept the unwritten agreement was captured by SPA section 76 as argued by the strata. I say this because the approved use of the CP enclosure was renewed annually, or near annually, as reported in the strata’s minutes until Ms. Learmonth purchased SL10 in November 2019.

31. In 2021, Ms. Learmonth commenced a CRT dispute against the strata, primarily because she believed the strata was not in compliance with the SPA in how it

calculated strata fees and special levies on the “area-based” approach. The CRT refused to the resolve the dispute because it found Ms. Learmonth’s CRT claim overlapped with the issues raised in the *Brown* petition. The CRT found the issues were "more appropriately dealt with alongside the BCSC petition” by the Supreme Court.

32. On May 16, 2022, the BCSC released its Reasons for Judgement in Brown. Those reasons included orders at paragraphs 102 and 103, that:

> [102] … the Schedules of UE for VR 42 be amended so that the UE of each SL shall be the total area of both floors of that SL as set out in each of the Strata Plans, excluding the area of each SL's patio, converted into square metres, and rounded to the nearest whole number.
>
> [103] … [VR 42] register this order… at the Land Title Office, effective November 1, 2019.

33. At various times since late-2021, the parties discussed ways to permit Ms. Learmonth continued use of the CP enclosure that included granting exclusive use of the CP enclosure under SPA section 76 and designating the CP enclosure as LCP for the exclusive use of the SL10 owner under SPA section 74. At one point in mid-2021, Ms. Learmonth offered to remove the CP enclosure but later withdrew that offer. The parties have not been able to reach agreement on whether or on what basis Ms. Learmonth might continue to have exclusive access to the CP enclosure.

## EVIDENCE AND ANALYSIS

### *Is the strata’s claim out of time under the LA?*

34. On March 14, 2022, another CRT tribunal member issued an unpublished preliminary decision about whether the strata’s claim was out of time under the LA. The member found that the strata’s claim that Ms. Learmonth is exclusively using the CP enclosure without permission was not out of time. She reasoned that if the LA were to apply to the strata’s claim, which is not established, the claim arose sometime after November 7, 2019, when Ms. Learmonth purchased SL10. Given the strata filed its CRT claim

on October 25, 2021, within 2 years of Ms. Learmonth's purchase, the member found the strata's claim was not out of time. I note the preliminary decision is not binding on me.

35. Briefly, section 13 of the CRTA confirms that the LA applies to CRT claims. Section 13.1 says the limitation period does not run after a request is made for dispute resolution under section 4.

36. Section 6 of the LA says that the basic limitation period to file a claim is 2 years after the claim is "discovered". At the end of the 2-year limitation period, the right to bring a claim disappears.

37. Section 8 of the LA says a claim is "discovered" on the first day the person knew, or reasonably ought to have known, that the loss or damage occurred, that it was caused or contributed to by an act or omission of the person against whom the claim may be made, and that a court (or CRT) proceeding would be an appropriate way to remedy the damage.

38. In this dispute, the strata applied for dispute resolution services on October 12, 2021. That means, if the strata discovered its claim before October 12, 2019, it was out of time under the LA.

39. Ms. Learmonth made extensive arguments about why the strata's claim was out of time, suggesting the strata discovered its claim in 1984 at the latest, when the CP enclosure was fully enclosed. She relies on the prior LA in place in 1984, which was replaced by the current LA in 2013 and set an ultimate limitation period of 30 years.

40. The strata disagrees with Ms. Learmonth's discovery date analysis and says there was no issue with the prior owner of SL10. It also says there is no case law that supports Ms. Learmonth position that she can assert a limitation defence a prior owner may have had.

41. The LA defines a claim as one that is "to remedy an injury, loss or damage that occurred as a result of an act or omission". The act or omission must be that of the person against whom the claim may be made. Here, I find the LA does not apply

because the strata's claim is not captured by the definition of a claim under the LA. In particular, I find there is no injury, loss or damage to the strata. Even if there is, I find it did not result from Ms. Learmonth's act or omission given the CP enclosure was present before she purchased SL10.

42. Therefore, I have considered the strata's claim on its merits.

### *Is the strata entitled to ask Ms. Learmonth to vacate the CP enclosure?*

43. Ms. Learmonth makes several arguments that the strata either approved the CP enclosure, or that it should be deemed to have approved the enclosure. I take that by "approved", Ms. Learmonth means the strata is not entitled to restrict her continued use the CP enclosure. In support of its request that Ms. Learmonth cease occupying the CP enclosure, the strata says it has never approved the CP enclosure and there are no meeting minutes or correspondence that confirm such approval. Ms. Learmonth does not dispute this, but argues the strata effectively approved the CP enclosure because it was in plain sight and the strata did nothing to address the enclosure's exclusive use by SL10 owners since 1984, which she says was the latest date it was completed.

44. I agree with the strata that evidence does not establish the date the CP enclosure was installed or who installed it. The parties appear to agree on this point, so I accept it. I find that is sufficient for me to make a finding that the strata never expressly approved the CP enclosure, so I turn to Ms. Learmonth's argument that the CP enclosure should be deemed approved.

45. I accept the strata was aware of the CP enclosure by 1981, when it completed the 1981 survey. I also accept the strata did nothing to address the issue between then and 2003, when it first began charging the SL10 owner to use CP enclosure. However, I do not agree that by charging a fee to use the CP enclosure necessarily means the strata approved it since it is consistent with granting short-term exclusive use. Even if it did, what would the approval mean? I find it cannot mean that the strata has permanently and formally approved the SL10 owner's conversion of the CP enclosure to become part of SL10.

*Form Bs*

46. Ms. Learmonth also argues that she relied on Form B Information Certificates (Form Bs) issued by the strata, which did not disclose any agreement she was responsible for. A Form B is issued under section 59 of the SPA, when a strata corporation is required to disclose certain information relating to a particular strata lot and the strata corporation on the request of an owner, purchaser, or person authorized by an owner or purchaser. The relevant information to this dispute is set out in section 59(3)(c), which requires the strata to include "any agreements under which the owner takes responsibility for expenses relating to alterations to a strata lot, the common property or the common assets".

47. Ms. Learmonth provided copies of 2 Form Bs in evidence. One Form B indicates there are no agreements and the other includes a handwritten notation that states "unknown". However, I do not see that these disclosures are of any assistance to Ms. Learmonth because they do not confirm the existence of any agreement. That there may have been an agreement under SPA section 76 with the previous owner does not mean the previous agreement continued with Ms. Learmonth as new owner. This is particularly true of a verbal agreement. In any event, the verbal agreement under section 76 was for use of the CP enclosure and had nothing to do about taking responsibility for expenses related to the CP enclosure.

48. I am not persuaded the Form Bs provided by the strata establish the CP enclosure was permanently approved.

*Strata's informal process*

49. I agree with Ms. Learmonth that the strata likely had a less formal process for approving alterations prior to 1981. The strata admits that from 1972 to 2018, it typically enforced bylaw and adherence to the SPA only if a complaint was received. However, I do not accept that this alone is proof the CP enclosure should be deemed approved.

50. Ms. Learmonth points to evidence that the strata had established an "Alteration Committee" leading up to the annual general meeting (AGM) held in 1980. The

strata's 1980 AGM minutes suggest the strata was going to take a firm stance on CP alterations, but the strata's November 1981 AGM agenda says the Alteration Committee was disbanded. Ms. Learmonth says the Alteration Committee "knew of and approved" the CP alterations because no further action was taken. I am not persuaded by this argument and find it is speculative at best. There is no evidence the Alteration Committee had any authority to approve the CP alterations. Even if it did, there is also no evidence the committee was disbanded because it had approved the alterations. I find it more than likely the committee was formed to identify CP alterations and was disbanded as a result of the 1981 survey, which identified the CP alterations.

51. I find the disbandment of the Alteration Committee in 1981 does not establish the CP enclosure was permanently approved.

*Prior Knowledge of Ms. Learmonth*

52. The strata argues that Ms. Learmonth was aware of the circumstances surrounding the CP enclosure at the time she purchased SL10. Ms. Learmonth says the opposite. I find Ms. Learmonth has some prior knowledge of the CP enclosure based on emails provided in evidence between strata council members, which included Ms. Learmonth's sister, who was a strata council member at the time leading up to Ms. Learmonth's purchase of SL10.

53. The emails show that in early August 2021, before Ms. Learmonth made her offer on SL10, she and her sister exchanged emails concerning the status of the CP enclosure. Ms. Learmonth also exchanged emails with the strata council president and other members. The emails clearly show that Ms. Learmonth had concerns about the CP enclosure as it did not show on the strata plan nor on the certificate of title of SL10 that she obtained. In her submissions, Ms. Learmonth said she understood and believed that:

    a. the CP enclosure was common property and that the previous SL10 owner paid a premium on their strata fees for the use of the space,

b. the CP enclosure had been approved since it was designated as an entrance on the 1981 survey, which had been "certified correct" by a professional surveyor,

c. there was no controversy regarding the SL10 owner using the space as it had been attached to SL10 since before 1981 as shown on the 1981 survey, and

d. the use of the CP enclosure was an informal arrangement but was settled and would continue indefinitely.

54. I appreciate and accept that there was confusion surrounding the use of the CP enclosure when Ms. Learmonth purchased SL10 and that it was clear the previous SL10 owner paid a premium to use the enclosure. However, the 1981 survey is not the strata plan, even though it was certified by a BC Land Surveyor. That it labeled the CP enclosure an entrance to SL10, does not mean the enclosure was part of SL10, as the strata plan clearly shows it its not.

*Exclusive Use*

55. Ms. Learmonth argued that her understanding that the use of the CP enclosure would continue indefinitely was based on section 117(f) of the CA and regulation section 17.7. The strata disagrees and says that any rights given to a previous owner under the CA did not continue past 2019, when Ms. Learmonth purchased SL10.

56. Briefly, Ms. Learmonth's argument is that CA section 117(f) governed the strata in 1981, when the strata was fully aware of the CP enclosure. CA section 117(f) said:

> 117. The strata corporation may
>
> …
>
> (f) grant an owner the right to exclusive use and enjoyment of common property, or special privileges for them, the grant to be determinable on reasonable notice, unless the strata corporation by unanimous resolution otherwise resolves;"

57. The SPA came into force on July 1, 2000. Section 17.7 of the regulation has the effect of continuing a grant given under section 117 of the CA. Therefore, to be successful in her argument, Ms. Learmonth must first establish that the SL10 owner previous to her was given an indefinite grant of exclusive use or special privilege to use the CP enclosure, and that the grant continued under the SPA and was transferred to her. I find she has not done so.

58. This transition issue was discussed in *The Owners, Strata Plan VR2062 v. Novosad et al*, 2017 BCCRT 143. Although not binding on me, I accept the approach used by the tribunal member in *Novosad* and apply it here. The plain wording of CA section 117(f) requires that there be a "grant" of exclusive use made by the strata corporation. This requires that there be a positive action or decision taken by the strata corporation, not just acquiescence to an existing state of affairs. As I have mentioned, there is no evidence that the strata council ever took any active steps to make such a grant to the previous SL10 owner during the time the CA was in force. Since there was no indefinite grant made, it could not pass to Ms. Learmonth under the provisions of regulation 17.7. I find Ms. Learmonth's argument that she has exclusive use of the CP enclosure for an indefinite period based on CA section 117(f) must fail.

59. However, given Ms. Learmonth continued to pay for use of the CP enclosure as the previous SL10 owner did, I find the strata's arrangement with Ms. Learmonth is no different than the arrangement it had with the previous owner. That is, it was an exclusive short-term agreement for use of the CP enclosure under SPA section 76.

*Unreasonable Interference*

60. As earlier noted, the strata alleges that Ms. Learmonth breached bylaw 3(1)(c) through her exclusive use of the CP enclosure. Bylaw 3(1)(c) says an owner must not use CP in a way that unreasonably interferes with the rights of other persons to use it. The strata submits that Ms. Learmonth's use to the exclusion of others is a breach of the bylaw.

61. Given my finding that Mrs. Learmonth had entered into a short-term exclusive agreement with the strata for use of the CP enclosure, I find there was no bylaw breach. As the strata had granted her exclusive use, it cannot say she unreasonably

interfered with the rights of others by not allowing them to use it. The grant of exclusive use is obviously to the exclusion of others.

62. Based on the foregoing, I find the strata is entitled to ask Ms. Learmonth to cease using the CP enclosure, provided they give her reasonable notice and absent a finding a significant unfairness. I dismiss Ms. Learmonth's claims that the strata permanently approved the CP enclosure.

### *Who is responsible for removing the CP enclosure?*

63. Who is responsible to remove the CP enclosure depends on who is responsible to repair and maintain it. There have been several CRT decisions issued about an owner's responsibility for repair and maintenance of alterations completed by prior owners, even where the strata corporation approved the alteration. Generally speaking, the CRT has held that an strata corporation will not be able to hold a subsequent strata lot owner responsible for a prior strata lot owner's alteration without an indemnity agreement that says otherwise. See for example, *Allard v. Strata Plan VIS 962*, 2017 BCCRT 111 and *Kazakoff v. Strata Plan KAS 880*, 2018 BCCRT 12. I agree with this approach

64. Here, there is no indemnity agreement, even though it is contemplated under the strata's current bylaws. Therefore, given the CP enclosure is CP, and SPA section 72 and bylaw 8 make the strata responsible to repair and maintain CP, I find the strata is responsible to remove it. This also does not mean that the parties are restricted from entering into an indemnity agreement in the future, should they choose to do so.

65. Given my conclusion, I find there is no need for me address Ms. Learmonth's additional argument that the strata is estopped from making her pay for the CP enclosure's removal.

### *Did the strata treat Ms. Learmonth significantly unfairly?*

66. The CRT has authority to make orders remedying a significantly unfair act or decision by a strata corporation under section 123(2) of the CRTA. This provision contains similar language to SPA section 164, which allows the BC Supreme Court to make

orders remedying significantly unfair acts or decisions. The Court recently confirmed that the legal test for significant unfairness is the same for CRT disputes and court actions. See *Dolnik v. The Owners, Strata Plan LMS 1350,* 2023 BCSC 113.

67. As discussed in *Reid v. Strata Plan LMS 2503*, 2003 BCCA 126, strata corporations must often utilize discretion in making decisions which affect various owners or tenants. At times, the strata corporation's duty to act in the best interests of all owners is in conflict with the interests of a particular owner, or group of owners. Following *Reid*, this means in order for the Court (or CRT) to intervene, a strata corporation must act in a significantly unfair manner, resulting in something more than mere prejudice or trifling unfairness. Conduct may be significantly unfair to one owner even if it benefits a majority of other owners.

68. The basis of a significant unfairness claim is that a strata corporation 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*, *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44, and *Kunzler v. The Owners, Strata Plan EPS 1433*, 2021 BCCA 173.

69. In *Dollan*, the BC Court of Appeal established the following reasonable expectations test:

    a. Examined objectively, does the evidence support the asserted reasonable expectations of the owner?

    b. Does the evidence establish that the reasonable expectation of the owner was violated by the action that was significantly unfair?

70. More recently in *Kunzler*, the courts determined the reasonable expectations test set out in *Dollan* is not determinative. Rather, it is a factor in deciding whether significant fairness has occurred, together with other relevant factors, including the nature of the decision in question and the effect of overturning or limiting it.

71. With this background in mind, I turn now to the parties' arguments surrounding significant unfairness.

72. The strata says that Ms. Learmonth must vacate the CP enclosure because despite its attempts to reach an agreement, she has no permission or special privilege to use the CP enclosure as contemplated in SPA sections 74 or 76. It says there is no other option. However, I have found that Ms. Learmonth did have short-term exclusive use of the enclosure under section 76, which the strata could cancel on reasonable notice. There is no evidence of any discussions between the parties about what an "appropriate amount of compensation" might be. And while it may be that the strata cancelled that agreement when it asked Ms. Learmonth to vacate the CP enclosure in June 2021, the strata's right to do so is conditional on its obligation not to make significantly unfair decisions. On that point, the strata has never considered designating the CP enclosure as LCP for the exclusive use of Ms. Learmonth, so it does not know an agreement cannot be reached. While there was clearly discussion between the parties and a draft resolution was prepared, the resolution was never put before the strata owners as it was caught up in the issue about "area-based" strata fee calculations, which *Brown* resolved. There are also other ways for the parties to reach agreement, such as lease of over 3 years and incorporating the CP enclosure into SL10, that have also not been considered, as I discuss below.

73. Contrary to strata's view that Ms. Learmonth expected to get exclusive use of the CP enclosure on terms dictated by her, I find her expectations were to be treated the same as other strata lot owners who were exclusively occupying CP without permission. There is also no evidence to suggest that Ms. Learmonth wanted to be treated the same as the previous SL10 owner as suggested by the strata. While the strata claims Ms. Learmonth is to blame for failing to reach an agreement, it admits it has not reached an agreement with other owners occupying CP without permission. For example, it is undisputed that 1 strata lot owner excavated a CP crawlspace for their exclusive use and that 2 others took over, or partially took over, CP storage areas. It is also undisputed that these owners are not paying the same extra fees, as Ms. Learmonth, and in the case of the crawlspace excavation, no extra fees have been paid.

74. The strata admits that it has yet to ask those other owners to vacate the CP or to restore it. The strata also admits other owners have not paid for CP use but essentially

says this is fair in the circumstances. I disagree with the strata on these points and find that it has treated Ms. Learmonth differently than other owners who have incorporated CP into their strata lots. The strata says each situation is different and may not be treated in the same manner, which I find is reasonable. However, it also submits it is in the process of addressing these other similar issues, but there is no evidence that is the case. Rather, the strata makes conflicting submissions and says it has not had the time to pursue the other situations. Overall, I agree with Ms. Learmonth that she is a "test case" for the strata.

75. Applying the reasonable expectations test set out in *Dollan* to the facts here, I find it was reasonable for Ms. Learmonth to expect to be treated the same as other owners in similar positions. I also find the strata's actions to ask her to vacate the CP enclosure and remove it her cost was harsh, wrongful, lacking in fair dealing and inequitable, based on the strata's treatment of the other owners.

76. I have also considered the impact of the strata's proposed course of action. I find it likely that restoring the CP enclosure to its original condition would come at considerable expense to the strata. The CP enclosure has undisputedly existed for decades in various forms and involves a strip of CP about 4.5 feet wide by 17 feet long. I find it is beneficial for the strata to pursue other options with Ms. Learmonth (and the other owners using CP) in an attempt to reach agreement on the exclusive use of the CP enclosure and to avoid the cost of removing the structure. Further, the strata ownership may take a different view than the strata council when it considers the potential cost involved to restore the CP enclosure compared to the benefits, if any, of having access to that strip of land. On that point, I note that the SPA makes it an ownership decision to designate CP as LCP (or enter into a long-term lease or add CP to a strata lot) not a strata council decision. In other words, it is reasonable and fair to allow further discussions among the strata's owners about the CP enclosure with little downside, if any.

77. For these reasons, I find the strata has treated Ms. Learmonth significantly unfairly and I dismiss its claim that she vacate the CP enclosure and remove it at her cost.

### *Refund of fees paid*

78. Given Ms. Learmonth's claim for reimbursement of fees paid to use the CP enclosure was an alternative only if the strata was successful, which it was not, I find I need not address it. Even if that was not the case, I would only order reimbursement of amounts paid by Ms. Learmonth in the event they were paid contrary to the Court's order in Brown, which I note was effective November 1, 2019.

### *Summary*

79. In summary, I have found that the strata did not approve the CP enclosure, and I have declined to deem that the enclosure was approved. I have also found the strata is entitled to ask Ms. Learmonth to cease using the CP enclosure, but that right is subject to the strata's obligation not to make significantly unfair decisions. I have also found the strata would be responsible for restoring the CP to its original state if the enclosure is removed.

80. However, I have found that the strata treated Ms. Learmonth significantly unfairly when it cancelled the parties short-term exclusive use agreement to use her situation as a test case for other owners in similar situations. I also found it was significantly unfair for the strata to say the removal of the CP enclosure was the "only option" when it had not fully considered other options. The other options include designating the CP enclosure as LCP for the exclusive use of the SL10 owner, a lease of the CP enclosure for a period greater than 3 years, and incorporating the CP enclosure into SL10.

### *Remedy*

81. Based on the overall evidence and submissions, it is clear to me that neither party wants to pay for the removal of the CP enclosure and likely does not believe it must be removed. I find the strata remains open to receiving compensation for use of the CP enclosure rather than removing it. Ms Learmonth appears to want to continue using the enclosure but under a more permanent agreement, other than under SPA section 76, where future exclusive use is uncertain. So my approach on a remedy will bear this in mind.

82. I find it appropriate to order the parties to consider and discuss the options available for Ms. Learmonth to use the CP enclosure. Unless the parties agree otherwise, this must include the designation of the enclosure as LCP for the exclusive use of the SL10 owner. Given this appears to be Ms. Learmonth's preference, it is appropriate that she bear the cost of preparing a draft ¾ vote resolution for presentation to the strata owners at a general meeting. I find the strata must pay the cost of calling and holding the meeting. The parties are not restricted from presenting other resolutions to address the CP enclosure use at the general meeting. However, If other options are also presented, they must be agreed by the parties and presented under separate resolutions.

83. I order the strata to call the general meeting referenced above within 90 days of the date of this decision at a time convenient to Ms. Learmonth, acting reasonably, unless the parties agree to resolve their issues in a way that does not require a general meeting. If the LCP resolution is approved, she must pay for the approved resolution to be filed at the LTO along with any costs to prepare any necessary documents for filing. Likewise, if any other proposed resolution to address use of the CP enclosure is approved, Ms. Learmonth must pay any LTO registration fees and associated costs.

84. If no proposed resolution for the use of the CP enclosure is approved at the general meeting or the meeting is not held, and if the parties cannot agree on a way to grant exclusive use of the CP enclosure to Ms. Learmonth, even for short-term periods, the strata shall take steps to have the CP enclosure removed at its cost within 270 days of this decision. Full removal includes:

    a. reinstating the dividing wall with at least 1 window between the CP enclosure and SL10 to a standard that meets current building code requirements,

    b. finishing the interior of the new dividing wall to a finished drywall (paint ready) state,

    c. finishing the exterior of the new dividing wall to match the exterior finishes of the building comprising SL10,

d. removing the exterior wall and floor of the enclosure, and

e. removing the roof over the enclosure to be consistent with the remaining roofs of the building comprising SL10.

85. Ms. Learmonth is not excused from paying her proportionate share of the strata's costs to remove the CP enclosure, if that is what occurs.

86. I dismiss Ms. Learmonth's alternate claim for reimbursement of fees paid to use the CP enclosure.

87. As for Ms. Learmonth's request that I set aside the strata's April 2022 resolution that approved a significant change in the use or appearance of the CP enclosure in the event the strata's claim was successful, I find it would be appropriate to order the strata not to act on the resolution. I say this because approval was contingent on the strata being successful and it was not.

## CRT FEES AND EXPENSES

88. Under CRTA section 49 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. In this dispute, neither party was entirely successful so I find they should each bear their own CRT fees.

89. Ms. Learmonth claims legal expenses of $43,360.40 and also seeks special costs, although she did not specify an amount. She provided a final invoice for legal fees but asked that it not be shared with the strata because it contained privileged information. I have considered CRT rule 9.5(3)(a) that says the CRT will not order a party to pay another party's legal fees except in extraordinary circumstances. I find there are no extraordinary circumstances here that justify an order that the strata pay Ms. Learmonth's legal fees. Rule 9.5(4) sets out factors I may consider to determine whether to order a party to pay another party's legal fees that include the complexity of the dispute, the degree involvement of the representative and whether the representative's conduct has caused unnecessary delay or expense. While the dispute contained several aspects, I don't find it was overly complex. At its basic level,

the dispute was about a CP alteration, which is an issue the CRT deals with on a regular basis. There was a lengthy history with significant submissions and pieces of evidence, but that does not mean the dispute was overly complex. While Ms. Learmonth's representative was highly involved, I do not find that the strata's representative's conduct in the dispute caused any unnecessary delay or expense. I find these factors weigh in favour of the strata. Further, Ms. Learmonth was not fully successful so I find she in not entitled to reimbursement of legal fees. I dismiss her claim.

90. I also dismiss Ms. Learmonth's claim for special costs. The CRT has previously considered special costs as Ms. Learmonth correctly notes. See for example *Napoleone v. The Owners, Strata Plan BCS 2460 et al*, 2018 BCCRT 246 and *Parfitt et al v. The Owners, Strata Plan VR 416 et al*, 2019 BCCRT 330.

91. In Parfitt, a CRT vice chair noted that special costs are set out in the *BC Supreme Court Civil Rules*, which do not apply to the CRT. However, she also found that the CRT's authority to order legal fees is analogous to an order of special costs and considered the claim on that basis. Although not binding on me, I agree with the vice chair's reasons and adopt them here.

92. In particular, I agree 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 rebuke or blame.

93. In *Hirji v. Owners Strata Corporation VR44,* 2016 BCSC 548, the court provided detailed reasons on special costs in the context of a strata property dispute. In paragraph 5, the Court stated 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 said it 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.

94. Ms. Learmonth's claim for special costs is based on the strata's actions leading up to this dispute and not on its actions during this dispute, which is what is required under Garcia. I do not find that the strata's conduct during this dispute was reprehensible, so I do not find that special costs are warranted here.

95. Under section 189.4 of the SPA, the strata may not charge any dispute-related expenses against Ms. Learmonth.

## ORDERS

96. I order the strata not to act on the ¾ vote resolution passed at its April 2022 SGM that approved a significant change in the use or appearance of the CP enclosure in the event the strata's claim in this dispute was successful.

97. Within 90 days of the date of this decision, unless the parties agree otherwise, I order the strata to call a general meeting at a time convenient to Ms. Learmonth, acting reasonably, to consider a ¾ vote resolution drafted by Ms. Learmonth proposing to designate the CP enclosure as LCP for SL10 under SPA section 74. If the proposed resolution is approved, Ms. Learmonth shall pay for the approved resolution to be filed at the LTO along with any costs to prepare any necessary documents for filing. The parties may also consider other resolutions at the general meeting that address the use of the CP enclosure by agreement. If any other proposed resolution is approved, Ms. Learmonth shall pay any LTO registration fees and associated costs related to it.

98. If no resolution proposed for the use of the CP enclosure is approved at the general meeting or if the meeting is not held, and if the parties cannot otherwise agree on a way to grant exclusive use of the CP enclosure to Ms. Learmonth, the strata shall take steps to fully remove the CP enclosure at its cost within 270 days of this decision. Full removal includes:

a. reinstating the dividing wall with at least 1 window between the CP enclosure and SL10 to a standard that meets current building code requirements,

b. finishing the interior of the new dividing wall to a finished drywall (paint ready) state,

c. finishing the exterior of the new dividing wall to match the exterior finishes of the building comprising SL10,

d. removing the exterior wall and floor of the CP enclosure, and

e. removing the roof over the CP enclosure to be consistent with the remaining roofs of the building comprising SL10.

99. Ms. Learmonth is not excused from paying her proportionate share of the strata's costs to remove the CP enclosure.

100. I dismiss the parties' remaining claims and counterclaims.

101. Under section 57 of the CRTA, a validated copy of the CRT's order can be enforced through the British Columbia Supreme Court. Under section 58 of the CRTA, the order can be enforced through the British Columbia Provincial Court if it is an order for financial compensation or return of personal property under $35,000. Once filed, a CRT order has the same force and effect as an order of the court that it is filed in.

J. Garth Cambrey, Vice Chair