



# Civil Resolution Tribunal

Date Issued: February 9, 2024

File: ST-2022-009311

Type: Strata

Civil Resolution Tribunal

Indexed as: *Delcon (Plaza Del Mar) Investments Ltd. v. The Owners, Strata Plan VR 414*, 2024 BCCRT 129

B E T W E E N :

DELCON (PLAZA DEL MAR) INVESTMENTS LTD.

**APPLICANT**

A N D :

The Owners, Strata Plan VR 414

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

J. Garth Cambrey, Vice Chair

## INTRODUCTION

1. This strata property dispute is about exterior building repair and maintenance.
2. The applicant, Delcon (Plaza Del Mar) Investments Ltd. (Delcon), owns strata lot 38 (1301) in the respondent strata corporation, The Owners, Strata Plan VR 414 (strata). Delcon is represented by Stephen Lister, a director. A strata council member represents the strata.

3. Delcon says the strata acted negligently and in a significantly unfair manner when the strata failed to reasonably repair and maintain common property doors, windows, and balconies, including the balcony of 1402 located immediately above 1301, and exterior concrete panels. Delcon says the strata's actions caused water ingress and mould in 1301, which Delcon paid \$225,031 to repair. Delcon seeks orders that the strata:
  - a. Reimburse Delcon \$225,031 for expenses it paid to correct emergency water ingress and mould issues in 1301,
  - b. Treated Delcon significantly unfairly when it failed to reasonably address exterior building repairs,
  - c. Perform its statutory obligations to repair and maintain the building's balcony sliding doors, windows, balcony waterproofing, roof decks, and concrete panels based on reports dated October 19, 2021, and October 28, 2022, from Sense Engineering Ltd. (Sense),
  - d. Engage Sense to re-tender building envelope repair work set out in Sense's October 19, 2021 report and assess a special levy in an amount recommended by Sense to complete the recommended work,
  - e. Assess a \$359,000 special levy to repair the balcony of unit 1402 as recommended in Sense's October 28, 2022 report, and
  - f. In the alternative, assess a \$6,010,000 special levy to complete building envelope repairs as outlined in the October 19, 2021 Sense report.
4. The strata denies it was negligent or treated Delcon significantly unfairly and disagrees it is responsible for any damages or repairs to 1301. It says it was not necessary for Delcon to undertake any repairs and that some repairs were improvements for which the strata is not responsible. The strata also says it did not authorize Delcon to complete repairs to common property, so it is not legally responsible to reimburse Delcon for such expenses.
5. In submissions, the strata says 1402's owner is responsible for any damage to 1301 that resulted from the construction of an enclosure on 1402's balcony. As for the

exterior building repairs, the strata says its owners have approved a special levy to replace all exterior windows and sliding patio doors. It also says it will engage Sense or another engineer to prepare specifications and drawings required to have the 1402 balcony enclosure removed and the balcony membrane repaired. The strata says it will then hold a general meeting to propose a special levy to complete necessary repairs to stop water ingress. The strata says Delco's claims are premature because the strata is in the process of resolving 1301's water leaks. It asks that Delcon's claims be dismissed.

6. As explained below, I find the strata was negligent in its repair of the 1402 common property balconies. I order the strata to reimburse Delcon a total of \$8,719.72 for expenses, prejudgement interest, and Civil Resolution Tribunal (CRT) fees. I also order the strata to start the 1402 balcony repairs by October 1, 2024. I dismiss Delcon's remaining claims, including the rest of its damages claim.

## **JURISDICTION AND PROCEDURE**

7. 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.
8. 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. I am satisfied an oral hearing is not required as I can fairly decide this dispute based on the evidence and submissions provided.
9. CRTA section 42 says the CRT may accept as evidence information that it considers relevant, necessary, and appropriate, whether or not the information would be admissible in court.

10. Through CRT staff, I asked the parties to provide additional submissions on the current status of repairs, which they did. They also provided additional evidence, which they each had the opportunity to review, so I find there were no procedural fairness issues as a result. The CRT received final reply submissions on January 23, 2024. I have relied on the additional submissions and evidence in my decision below.

## **ISSUES**

11. The issues in this dispute are:

- a. Who is responsible for repair and maintenance of the exterior building components at issue?
- b. Did the strata act negligently or significantly unfairly?
- c. Must the strata reimburse Delcon \$225,031, or any amount, for expenses Delcon paid to address issues in 1301?
- d. What remedies are appropriate?

## **BACKGROUND, EVIDENCE AND ANALYSIS**

12. As applicant in a civil proceeding such as this, Delcon must prove its claims on a balance of probabilities, meaning more likely than not. I have considered all the parties' submissions and evidence but refer only to information I find relevant to explain my decision.
13. The strata plan shows the strata consists of 41 residential strata lots in a single 15-storey tower. There is evidence the building was constructed in 1965, but the strata was created in February 1977 under the *Strata Titles Act* (STA) and continues to exist under the *Strata Property Act* (SPA). 1301 occupies the entire 13<sup>th</sup> floor of the building except for a common property area in the centre of the floor consisting of 2 elevators, a hallway, and stairs. There are 3 2-storey strata lots above 1301, including 1401 and 1402. The evidence is that the strata approved the installation of a balcony enclosure on 1402's northwest balcony in January 1982. The strata plan shows this balcony is common property. The 1402 balcony enclosure is located directly above 1301's main bedroom. The enclosure remains a significant issue largely because the strata is

unclear who is responsible to repair and maintain it, especially considering 1402's current owner did not enclose the balcony. I address the 1402 balcony enclosure in more detail below.

14. On April 26, 2019, the strata filed a complete new set of bylaws with the Land Title Office, except bylaws about pet and rental restrictions, which were renumbered but not replaced. Subsequent bylaw amendments filed after April 26, 2019, do not apply here. I find the Standard Bylaws also do not apply. I discuss the relevant bylaws below, as necessary.
15. Between 2011 and 2020, the strata retained various engineering firms and consulting professionals to review the condition of the building envelope. It also prepared a depreciation report. The only reports prepared during this time frame that are before me are a 2011 Aqua-Coast Engineering Ltd. report on specific suites and areas of the building envelope, a July 2018 Omicron Architecture Engineering Construction Ltd. condition assessment report, and a November 16, 2020 Omicron field review report.
16. The 2011 Aqua-Coast report was based on visual inspections and primarily consisted of photographs of areas the author considered deficient. It made general recommendations to replace caulking as soon as possible, address roof repairs, retain a glazing contractor to assess and replace damaged windows, and replace the membranes of some balconies. The report did not identify any specific issues with 1301. It does identify issues with 1402 balconies and windows but does not mention the balcony enclosure.
17. The 2018 Omicron report was also based on visual inspections. Of significance to this dispute, the report identified 3 critical issues. First, it recommended replacement of window frames and glass in the next 1 to 5 years, or by 2023. Second, it recommended repairs to failed or improperly installed caulking around windows even though the caulking was recently replaced. Third, it recommended repairs to 17 chipped or cracked precast concrete panels. The report did not identify any specific issues with 1301.

18. The strata also asked Omicron to investigate whether the 1402 balcony enclosure was constructed in general conformance with contract documents, which I infer were the enclosure drawings the strata approved in 1981. Omicron first provided a field review report on this dated December 20, 2019. It updated the report on November 16, 2020. It is the November 2020 updated report that is before me. The report states that leaks were reported in 1301 in December 2018. Omicron found the enclosure was approved as a greenhouse but is used as additional living space. Omicron investigated the 1301 leaks by removing parts of the wooden floor of the enclosure to expose the balcony membrane below. There were 3 active leaks into 1301 in November 2019. Omicron identified 5 potential leak sources below the enclosure after the enclosure floor was removed. It recommended the enclosure be removed to allow for proper repair to the balcony membrane. Omicron's recommendations did not change in November 2020, but it stated the repairs should be completed before September 2021 to mitigate the risk of further water damage occurring in 1301 during the winter months.
19. Delcon purchased 1301 on September 22, 2020.
20. On January 21, 2021, Delcon's agent wrote to the strata advising its contractor would remove kitchen cabinets from 1301 that had been affected by water ingress and mould. The stated intent of the work was to allow for investigation into the water ingress and damage in 1301.
21. The January 25, 2021 strata council meeting minutes describe that the strata was working with Omicron and another engineering firm to finalize specifications for the installation of new exterior windows and sliding doors, and for removal of the 1402 balcony enclosure.
22. On January 30, 2021, Delcon's agent wrote to the strata about concerns over ongoing water ingress and mould in 1301. The correspondence referenced several of the earlier engineering reports about water ingress and provided a January 5, 2021 report from Phoenix Restorations Ltd. The Phoenix report showed elevated moisture levels at various locations in 1301, and photographs of mould found behind plaster that had been removed. Delcon requested the strata's permission to replace the exterior

windows and doors of 1301 at its own cost subject to certain conditions. It does not appear that the strata responded to the correspondence.

23. The strata held an annual general meeting (AGM) on April 14, 2021. At the meeting, the strata proposed a  $\frac{3}{4}$  vote to raise a \$5,000,000 special levy to replace all windows, balcony railings and balcony coatings, including remediation of 1402's balcony. The owners did not approve the proposed resolution. The voting results were 11 in favour, 23 opposed, and 1 abstention or about 32% in favour. The minutes reflect discussion about separating the window and door repairs from the balcony membrane repairs, the amount of the special levy, concern over the ability of the engineering firm, and concern about the proposed repair method using a fixed-priced contract.
24. On May 4, 2021, Delcon wrote to the strata again requesting permission to replace the exterior windows and doors of 1301 at its own cost. Although the strata ultimately approved the request and the parties entered into an alteration and indemnity agreement in October 2021, Delcon did not proceed with the work at that time.
25. The strata held a special general meeting (SGM) on August 17, 2021. It considered a  $\frac{3}{4}$  vote resolution to raise a \$700,000 special levy to remove the 1402 enclosure and repair common property building envelope items associated with 1402, including the 1402 balcony membrane. The strata did not approve the proposed resolution. The voting results were 4 in favour, 22 opposed and 2 abstentions or about 15% in favour. At the same SGM, the strata proposed a  $\frac{3}{4}$  vote resolution to approve an expense of \$35,000 from its contingency reserve fund to commence legal action for an order that the current 1402 owner remove the enclosure. That resolution was approved.
26. By July 2021, the strata retained Sense to provide a window, door, and balcony design report. Sense provided its report on October 19, 2021. The report recommended replacement of most windows, patio doors, and balcony membranes, and removal of the 1402 balcony enclosure. Sense proposed the work be completed in 2 phases over a 3-year period. Sense tendered its recommended scope of work and received bids in February 2022. Based on the bids received, the strata held an SGM on April 13, 2022, to consider a  $\frac{3}{4}$  vote resolution to raise a \$6,150,000 special

levy. The proposed resolution did not pass. The voting results were 9 in favour, 28 opposed and 1 abstention or about 24% in favour.

27. At a June 16, 2022 SGM, the strata approved a  $\frac{3}{4}$  vote resolution to create an owner “task force” (committee) to investigate an alternative window, door, and balcony replacement project. The strata approved a special levy of \$15,000 to fund the committee’s investigation expenses.
28. About the same time, Delcon retained Drinkwater Engineering Ltd. to investigate leaks into 1301. Drinkwater provided a report dated July 27, 2022, based on visual inspections which identified water ingress mostly at floor levels near balcony doors. The report does not conclusively identify any sources of water ingress and makes speculative findings that suggest water is coming through the exterior concrete walls, defects in door frames, and “plumbing, roofing, or other exterior membrane failures”. It recommended replacement of all windows and doors of 1301 at the same time the strata completed other strata lot windows and doors repairs. Due to the unknown timeline for building repairs, Drinkwater recommended Delcon complete temporary window and door repairs and replace balcony membranes. Drinkwater did not provide a cost estimate for the temporary repairs.
29. On August 17, 2022, Delcon wrote to the strata that it would complete repairs to remediate water ingress issues and resultant damage within 1301 as a stop-gap measure until the strata completed permanent repairs. The letter stated Delcon would seek recovery of \$35,000 for mould remediation and restoration work for kitchen walls. Delcon requested formal approval of its remediation work, and practical support such as access to the 14<sup>th</sup> level for water testing. Although it appears the strata council discussed Delcon’s letter at its September 2022 council meeting, there is no evidence the strata approved the work or arranged the requested access.
30. By July 8, 2022, the strata retained Sense to provide a report on the 1402 balcony and enclosure. Sense provided its report on October 28, 2022. The report’s purpose was to determine the scope of work required to restore the building envelope and stop water ingress into 1301. Sense found that leaks were occurring at multiple locations and recommended prompt removal of the enclosure to allow for necessary



repairs. Sense also identified load capacity issues related to the enclosure. Sense estimated the work to remove the enclosure and repair the building would cost \$359,000.

31. On February 22, 2023, Sense provided an updated report on the 1402 balcony that included an option to rebuild the enclosure after addressing load capacity issues. Sense estimated the cost of this work was \$520,000.
32. On March 15, 2023, Delcon emailed the strata to inform it there were 2 new water leaks into 1301. Delcon did not provide the location of the new leaks but stated they were from the 14<sup>th</sup> floor and that Drinkwater would assess the issues and provide a report. Drinkwater provided a final report to Delcon dated April 14, 2023. I infer the report includes investigation of the leaks reported on March 15, 2023. Drinkwater reported 2 unresolved leaks in the 1301 kitchen and 2 unresolved leaks in the 1301 main bedroom. The report states Delcon elected to proceed with targeted emergency repairs to 1301 due to the strata's delay in obtaining approval to complete necessary building envelope repairs. According to the report, Delcon retained Remdal Painting and Restoration to complete its recommended repairs to the exterior windows and doors and to remove tiles from 1301's balconies and replace the balcony membranes. It is unclear whether the balconies were leaking.
33. The report states the total cost of the completed work was \$80,747, excluding Drinkwater's fees. The evidence is that Delcon agreed to pay for Sense to oversee some of the work although no details were provided. I infer the amount Delcon paid Sense is included in the total amount paid. Drinkwater also recommended Delcon seek reimbursement of \$90,353 from the strata for paid repair expenses (\$58,756) and for Drinkwater's fees (\$31,597). I discuss reimbursement of Delcon's expenses below.
34. At a May 10, 2023 SGM, the strata considered its committee's recommendations and approved a  $\frac{3}{4}$  vote resolution to impose a \$3,050,000 special levy to replace all

windows and sliding glass doors in the building, including those of 1301. The approved work did not include any balcony or precast concrete repairs.

35. The strata received another report from Sense dated May 16, 2023, following Sense's investigation into leaks associated with 1301 and another strata lot. Sense identified a leak in 1301's kitchen and recommended repairs to cracks and joints in exterior concrete panels as well as balcony crack repairs and waterproofing to the 1401 balconies above.
36. The work approved at the May 2023 SGM to replace all exterior windows and sliding glass doors began in January 2024. The strata has not approved any other exterior building repairs since, which the parties confirm in their additional submissions.

***Who is responsible for repair and maintenance of the various building components?***

37. The exterior building components at issue in this dispute are exterior windows and sliding glass doors, exterior precast concrete walls, the 14<sup>th</sup> floor balcony membranes, and the 1402 balcony enclosure. I find all of these building components are common property and therefore, the strata's responsible to repair and maintain. My reasons follow.
38. Common property is defined under SPA section 1(1) to also include that part of the land and buildings shown on the strata plan that is not part of a strata lot. As noted, the balconies are shown as common property on the strata plan. SPA section 72 and bylaw 11 make the strata responsible for repair and maintenance of common property.
39. Section 68(1) of the SPA defines the boundaries of a strata lot and states:

Unless otherwise shown on the strata plan, if a strata lot is separated from another strata lot [or] the common property... by a wall, floor or ceiling, the boundary of the strata lot is midway between the surface of the structural portion of the wall, floor or ceiling that faces the strata lot and the surface of the structural portion of the wall, floor or ceiling that faces the other strata lot [or] the common property....

40. The strata plan does not specify a different strata lot boundary, so the exterior of the concrete panels are also common property.
41. Bylaw 11 also makes the strata responsible for doors and windows of a strata lot on the exterior of the building, so even if the doors and windows are part of a strata lot the strata is responsible for their repair and maintenance.
42. That leaves the 1402 balcony enclosure. Based on my review of the reports in evidence, although the enclosure has certain reported deficiencies, none of the reports identify the 1402 balcony enclosure as being a source of water ingress into 1301. Rather, the evidence is that the enclosure is constructed on top of a 1402 balcony, and it is the balcony membrane below the enclosure that needs repair to stop water entering 1301. At least 2 engineering firms state the 1402 balcony enclosure must be removed to allow for proper repair of the balcony membrane.
43. I acknowledge the strata has had difficulty in determining who is responsible for the 1402 balcony enclosure. At times, the strata has held the 1402 owners responsible for its repair and approved legal action at its August 2021 SGM to have the 1402 owner remove the enclosure. At other times, the strata appears to have taken responsibility for its repair by proposing to pay for the enclosure's removal to allow for the proper repair of the balcony and membrane below it. For example, the proposed  $\frac{3}{4}$  vote resolutions at the April 2021 AGM, August 2021 SGM, and April 2022 SGM.
44. The only evidence about the enclosure's installation is minutes of the November 30, 1981 AGM and a January 8, 1982 letter agreement between the strata and then-owner of 1402. The minutes note the enclosure would be the sole responsibility of the 1402 owner and that the strata council would get legal advice to outline the strata's "conditions and guidelines" with the 1402 owner. The January 8, 1982 letter states the proposed enclosure plans were approved at the November 1981 AGM, subject to a number of conditions, which I infer met the requirements approved by the strata owners. The relevant conditions of the approval set out in the letter include that the 1402 owner:
  - a. Take full responsibly for the maintenance and repair of the enclosure, and

- b. Indemnify the strata against all claims, liabilities, damages, and costs that may arise from the enclosure, including the eventual removal of the enclosure with such indemnity binding on the owner's "heirs, assigns or successors in title".
45. For the following reasons, I find the enclosure is common property.
46. Under the STA, the strata was responsible for repair and maintenance of common property (section 19(1)(d)). The First Schedule (of bylaws) under the STA also required the strata to maintain all common areas (section 2(c)) and "the exterior of the building" (section 2(f)).
47. Based on the language of the January 1982 letter, the then-owner of 1402 took full responsibility for the enclosure's repair and maintenance expenses and agreed to indemnify the strata for several things including its eventual removal. However, the agreement did not expressly state the enclosure was the owner's property, nor did it say the enclosure is part of the strata lot. Given this, and that the enclosure is constructed on a common property balcony next to the building exterior for which the strata is responsible, I find the enclosure must also be common property.
48. A similar analysis would apply under the SPA if the enclosure were constructed today, so I find the change in legislation to the current SPA does not make the enclosure something other than common property. CRT decisions have found that common property alterations become common property that the strata is required to repair and maintain. See, for example, *Muller v. The Owners, Strata Plan NW 281*, 2021 BCCRT 807 at paragraph 34 and *Previer v. The Owners, Strata Plan NW651*, 2023 BCCRT 601 at paragraph 16). Although CRT decisions are not binding on me, I agree with the reasoning in these decisions and rely on it.
49. Finally, I find the January 1982 letter is akin to an assumption of liability agreement between the strata and the former 1402 owner. It is not clear whether the 1982 agreement is enforceable against the current 1402 owner, but I find I do not have consider that issue. In *Vairo v. The Owners, Strata Plan EPS 2102*, 2023 BCCRT 1122, another vice chair found a strata corporation cannot make owners responsible for repair and maintenance of common property that has not been designated as

limited common property. I agree with the vice chair's finding which I find supports my conclusion that the enclosure is common property.

***Did the strata act negligently or significantly unfairly?***

50. Delcon argues the strata has acted negligently and significantly unfairly when conducting its repair and maintenance obligations. The strata argues it has met its obligation to repair and maintain common property, was not negligent, and did not act significantly unfairly. For the following reasons, I find the strata was negligent in its repair of the 1402 balcony, including not removing the 1402 balcony enclosure, but not in its other repair obligations.

***The strata's duty to repair***

51. The BC Supreme Court has found that a strata corporation has a fundamental duty to repair and maintain common property under SPA section 72. In *Slosar v. Strata Plan KAS 2846*, 2021 BCSC 1174, the Court summarized a strata corporation's duty to repair at paragraph 66.

The standard against which the Strata's actions are to be measured in assessing its duty under s. 72 of the SPA is objective reasonableness, which requires, among other things, balancing interests to achieve the greatest good for the greatest number given budget constraints. Contrary to the petitioner's arguments, there is no requirement that repairs be performed immediately or perfectly: *Hirji v. Strata Plan VR 44*, 2015 BCSC 2043 at para. 146. Steps required to be taken are dictated by the circumstances at the time. The standard is not perfection nor is it to be judged with the benefit of hindsight.

***Negligence***

52. To be successful in an action for negligence, Delcon must demonstrate that the strata owed it a duty of care, that the strata breached the standard of care, that Delcon sustained damage, and that the damage was caused by the strata's breach: see *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at paragraph 3.

53. There is no question SPA section 72 and bylaw 11 require the strata to repair and

maintain the building components at issue here. So, the strata clearly owes Delcon a duty of care. The next question is whether the strata acted in an objectively reasonable manner when conducting its repair and maintenance obligations.

54. The strata first became aware of leaks into 1301 in 2018. In November 2020, Omicron determined 5 leak sources from the 1402 balcony membrane located below the enclosure. Omicron did not identify window leaks but did recommend window replacement by 2023. By January 2021, the strata was finalizing specifications to address the window, door, and 1402 balcony issues. However, the strata owners did not approve the proposed work at the April 14, 2021 AGM. Based on discussion at the April 2021 AGM, the strata held an SGM in August 2021 to consider the removal of the 1402 balcony to allow for the membrane repairs. The owners did not approve the proposed resolution for reasons that are not clear.
55. The evidence shows the strata retained Sense in July 2021 to provide recommendations on the windows, doors, and balconies. Sense's investigation included a window and door survey of all owners, to which 35 of the 41 owners responded. As noted, Sense provided an October 19, 2021 report which recommended replacement of most windows, doors, and balcony membranes. Based on bids received for Sense's recommended repairs, the strata held an SGM on April 13, 2022 to consider a  $\frac{3}{4}$  vote resolution to raise a \$6,150,000 special levy to replace the exterior windows and doors, including removing the 1402 balcony enclosure and repairing the balcony waterproofing. As noted, the strata did not approve the proposed resolution.
56. Strata council meeting minutes of April 19 and May 2, 2022, clearly show the strata was aware of its difficult position. That is, it was aware of its obligation to repair and maintain common property but was unable to obtain funding to complete required repairs after 3 attempts. It obtained legal advice regarding a number of questions, which it shared with the owners as part of the minutes. Based on the legal advice it received, the strata recommended the committee be established to investigate an alternative repair proposal. The strata approved establishing the committee at a June 2022 SGM.

57. The evidence also shows the strata retained Sense to further investigate the 1402 balcony enclosure based on its lawyer's advice. Sense provided the results of its investigation in an October 28, 2022 report, which included an estimated cost to remove the balcony enclosure of \$320,000. It is clear from the December 13, 2022 strata council meeting minutes that the strata's lawyer was in discussion about the balcony enclosure removal and repairs with the lawyer of 1402's owner. Sense updated its report on February 23, 2022, to include an estimated cost to remove the balcony enclosure, repair the membrane, and replace the enclosure of \$520,000.
58. The strata also retained Sense to investigate water leaks into 1201 and 1301 based on a February 10, 2023 proposal. The proposal is not before me, but Sense completed its site investigation in March 2023 and issued a report dated May 16, 2023. Sense identified a leak in 1301's kitchen and recommended repairs to cracks and joints in exterior concrete panels as well as repairs to balcony cracks and waterproofing of 1401 balconies.

#### Exterior Window and Door Repairs

59. I will first address the exterior window and door repairs.
60. In *Leclerc v. The Owners, Strata Plan LMS 614*, 2012 BCSC 74, the Court found that slowness by a strata corporation in completing repairs may still be reasonable. *Leclerc* was a case of water ingress from common property into a strata lot over an extended period of time. The Court said that although the strata corporation could perhaps have hastened its investigations of the problem, there was no evidence of deliberate "foot-dragging", and found the strata took reasonable action with fair regard for the interests of all concerned.
61. Omicron did not identify window leaks in its 2018 report but did recommend window replacement by 2023. By January 2021, the strata was finalizing specifications to address the window and door issues. However, the strata owners did not approve the proposed work at the April 14, 2021 AGM.
62. The strata retained Sense in July 2021 to provide recommendations on the windows, doors. Sense's investigation included a window and door survey of all owners, of

which 35 of the 41 owners responded. In its October 19, 2021 report, Sense recommended replacement of most windows, doors and obtained bids on its recommended work that were considered at an April 13, 2022 SGM. However, the strata did not approve the proposed resolution for the recommended work.

63. The strata then established its committee in June 2022 and approved the committee's recommendations to replace all windows and doors in May 2023. The repairs are now underway.

64. In this dispute, I find the strata took an objectively reasonable and methodical approach to investigate water ingress concerns from exterior windows and doors. The strata followed the direction of its professionals and its owners. There is no evidence the strata intentionally delayed the process. It was reasonable for the strata to regroup and take a different approach to the necessary repair program after the owners failed to approve its original approaches. This does not prove negligence for the window and door repairs. The delay here was unavoidable largely because the strata needed time to obtain reports, have proper designs and specifications prepared and tendered, receive quotations for the repairs, and put those before the strata owners. In particular, I find the strata's actions to address exterior window and door repairs reasonably balanced the competing interests of Delcon with all other owners to achieve the greatest good for the greatest number given the significant expenses at issue. I also note the strata's decision to address the exterior windows and doors was made within the 1-5 year timeframe suggested by Omicron.

65. Therefore, the strata was not negligent in attending to the exterior window and door repairs. I dismiss this aspect of Delcon's claim.

#### Exterior Concrete Panel Repairs

66. I will next address the exterior concrete panel repairs.

67. Omicron first identified required repairs to exterior concrete panels in 2018 although it reported no active leaks. I find the recommended repairs were precautionary in nature given the report states caulking repairs were completed to the panels in 2017 and 2018. Other than speculative comments made in the July 2022 Drinkwater report,



there is no evidence water ingress occurred through the exterior concrete panels until May 2023 when Sense reported a leak into the 1301 kitchen and recommended panel cracks be repaired. In light of the limited and very recent issues identified with exterior concrete panel repairs, I cannot find the strata negligent for these repairs. I dismiss this aspect of Delcon's claim.

### Balcony Repairs

68. I turn now to the balcony repairs. I will consider the balcony repairs identified at 1401, at 1402 below the enclosure, and the repairs completed by Delcon to 1301's balconies. I begin with the 1401 balcony.
69. Although Drinkwater identified leaks from the 14<sup>th</sup> floor in April 2023, it did not identify the sources of the leaks. Sense first identified leaks at 1401 balconies in May 2023, after the strata approved window and door repairs. Given the 1401 balcony leaks were only recently identified, I find the strata was not aware of the 1401 balcony leaks until 2023, so I do not find the strata's actions were unreasonable.
70. I reach a different conclusion about the 1402 balcony repairs. Aqua-Coast identified membrane issues with the balconies in 2011. Omicron identified 1402 balcony leaks into 1301 in its 2019 field review report. A year later, Omicron identified 5 leak sources from the 1402 balcony and recommended removal of the balcony enclosure.
71. In its October 2022 report, Sense found multiple leaks into 1301 from the 1402 balcony. It recommended prompt removal of the balcony enclosure to allow membrane repairs and to address load capacity issues. To date, the strata has not taken any meaningful steps to address the balcony enclosure removal to allow proper repairs to the balcony below it. Significantly, the strata did not address the 1402 balcony enclosure or balcony repairs at the May 10, 2023 SGM, even though the strata was well aware of water ingress into 1301 from the common property balcony of 1402 since 2019. Given my finding that the balcony enclosure is common property, I find the strata has authority to remove it in order to make repairs to the 1402 balcony below it.
72. In summary, the strata made 3 attempts to address the leaks in 2021 by proposing

the enclosure be removed to allow for necessary repairs, but they all failed. A fourth resolution to take legal action to remove the enclosure was approved, but the strata has not taken any formal legal action. The leaks did not stop, yet in 2023 when the strata finally approved a repair program, the 1402 balcony enclosure removal and balcony repairs were not included.

73. There is no question that the strata has failed to address leaks into 1301 from the 1402 balcony in a reasonable manner and the strata's breach has caused damage in 1301. Therefore, I find the strata was negligent in repairing the common property balcony membranes of 1402. I address an appropriate remedy below.
74. As for the 1301 balcony repairs completed by Delcon, the April 14, 2023 Drinkwater report states that tiles were removed, and the membrane was replaced. There is no evidence the balconies were leaking into 1301. There is also no clear evidence Delcon obtained permission to complete repairs. The report also states that Delco agreed to complete the repairs at its cost because the tiling was an improvement for which the strata is not responsible. For these reasons, I do not find the strata was negligent in repairing the 1301 balconies.
75. In summary, I find the strata was negligent by not repairing the 1402 balcony, which included first removing the 1402 balcony enclosure.

### Significant Unfairness

76. I turn now to Delcon's claim of significant unfairness. Given my finding of negligence for the 1402 balcony repairs above, I do not need to consider if the strata acted significantly unfairly for those repairs. I also do not need to consider alleged significant unfairness about the 1301 balcony repairs given Delcon agreed the repairs were its responsibility. Therefore, I will only consider if the strata's actions about replacement of exterior windows and doors of 1301, or its decision not to address 1401 balcony leaks or precast concrete panel repairs, were significantly unfair to Delcon. For the following reasons, I find they were not.
77. 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. 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.

78. 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 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.
79. 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, *King Day Holdings Ltd. v The Owners, Strata Plan LMS3851*, 2020 BCCA 342, and *Kunzler v. The Owners, Strata Plan EPS 1433*, 2021 BCCA 173.
80. 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?
81. In *King Day*, the Court determined the reasonable expectations test set out in *Dollan* is not determinative. Rather, the Court found the test 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.
82. I will first address the window and door repairs. Delcon argues the strata’s decision not to address the windows and doors in 1301 was significantly unfair. I take this to

be an argument that because the strata did not meet its repair and maintenance obligations, the strata acted significantly unfairly. However, I have already found the strata reasonably met its obligations to repair and maintain the exterior windows and doors. So on that basis, Delcon's argument must fail. I was not able to locate a court or CRT decision that found a strata corporation had met its repair and maintenance obligations but also found the strata corporation acted significantly unfairly. So, if Delcon had expectations that the strata should have gone beyond its statutory obligations to address its exterior windows and doors, I find that expectation was not reasonable.

83. Further, the recommendations of the strata's professionals were to replace the exterior windows and doors. There is no evidence that water ingress from failed windows and doors of 1301 was any more urgent than other strata lots. So, to the extent Delcon believes the strata should have addressed the windows and doors in 1301 as a priority and before other strata lots, I disagree. I also note that Drinkwater, Delcon's own professional, recommended 1301's exterior windows and door be replaced at the same time as other strata lots.
84. Further, the strata's delay in approving a repair program did not affect Delcon any more than other strata lot owners.
85. For all these reasons, I do not find that the strata's actions about the exterior window and door repairs were significantly unfair.
86. As for the precast concrete panel repairs, there is no objective evidence that proves water ingress occurred in 1301 through the panels until the May 2023 Sense report. Given this relatively recent date, I find significant unfairness has not occurred and I dismiss Delcon's claims.
87. For the same reason, I reach the same conclusion about the 1401 balcony repairs.
88. Therefore, I dismiss Delcon's claims that the strata acted significantly unfairly.

***Must the strata reimburse Delcon \$225,031, or any amount, for expenses Delcon paid to address issues in 1301?***

89. Delcon submitted a list of remediation costs accompanied by receipts and invoices totaling \$225,031.57. It claims this amount from the strata. The strata says it owes Delcon nothing. The strata disagrees with Delcon that Delcon was forced to complete repairs and says the strata did not authorize any repairs to common property, so it says the strata is not obligated to reimburse Delcon for any expenses. The strata also says some of Delcon's expenses were for betterments to 1301, which the strata is also not responsible to pay. For the reasons that follow, I largely agree with the strata.
90. I find it likely that Delcon was aware of the water damage when it purchased 1301 and took steps to repair it while the strata was considering appropriate repairs. Given I have found the strata was negligent in its repair of the 1402 balcony, the strata is responsible for damage resulting from that balcony. Since the 1402 balcony is above 1301's main bedroom, it follows that the strata is responsible for damage to 1301's main bedroom.
91. According to Drinkwater's final April 2023 report, there were 2 leaks in the ceiling of the main bedroom that were not resolved or repaired. The first leak resulted in damaged ceiling finishes in the main bedroom at the dressing room door. The second leak is identified in the middle of the bedroom ceiling from "long-term water ingress through the slab". Drinkwater suggests this is a structural repair due to "rebar corrosion and concrete spalling", although it did not identify the damage in its July 2022 report. However, Omicron identified spalling concrete in the main bedroom ceiling in 2018 and Sense did the same in its October 2022 report. Sense expressly stated that water is leaking through the slab into 1301 and is causing damage to concrete and interior finishes in the bedroom.
92. Based on my review of Delcon's receipts and invoices, I cannot specifically identify expenses relating to the main bedroom. The expenses generally relate to "emergency" water damage, cabinet removal and repair, hazardous materials and mould testing, exterior repairs, project management fees, and engineering fees.
93. I decline to award any reimbursement of the "emergency" expenses. These expenses

relate to the cost of Phoenix attending 1301 in 2021 primarily to take moisture readings and set up drying equipment throughout 1301. Aside from identifying moisture readings around the main bedroom exterior windows, Delcon has not proved Phoenix completed any repairs in the bedroom.

94. I decline to award any reimbursement for cabinet removal and repair as the evidence is that the cabinets were not located in the main bedroom. From the photographs, the cabinets appear to be part of 1301 for which the strata is not responsible. In any event, Delcon has not provided any evidence to support that the strata is responsible for repairing and maintaining the cabinets.
95. I also decline awarding reimbursement of project management fees because it is unclear what the project management involved. Considering there were no repairs completed to the main bedroom, I find it likely that project management fees relate to the other repairs Delcon completed.
96. I decline to award reimbursement for hazardous material testing because the strata is not responsible for the interior of 1301. Delcon is responsible for any hazardous materials found in the interior finishes of 1301.
97. Delcon retained Sterling IAQ Consultants to test for mould. Sterling provided 2 reports dated September 28, 2022, and November 14, 2022. The September 2022 report assessed airborne mould only. Sterling reported that airborne mould within 1301 was “well below the outdoors measurements” and made no recommendations about 1301. Therefore, I find the strata is not responsible for cost of the mould testing completed for the September 2022 report. Sterling’s November 2022 report addressed testing of airborne mould in the common property hallway near the elevators on the 13<sup>th</sup> floor. Although Sterling found airborne mould in the common area and completed more testing in 1301 as a result, Delcon did not claim for this additional testing. Therefore, I decline to order reimbursement for mould testing.
98. Other than Delcon’s claim for Sense’s engineering fees discussed below, I do not find the strata is responsible for exterior expenses because of my findings about negligence and significant unfairness, and that Delcon agreed to complete the

repairs. I agree with the strata that Delcon acted prematurely by proceeding with 1301 interior repairs while water continued to enter 1301, and, for the most part, without the strata's approval. However, part of Delcon's claimed expenses included \$6,494.21 for Sense's engineering costs set out in a January 31, 2023 invoice. Sense's invoice says the work was for "[1301] exterior repair technical review" and "[1301] window and door replacement specifications". The invoice is addressed to the strata.

99. Based on Sense's invoice, I cannot accept that the strata did not agree to at least the exterior repair work. On one hand, it was prudent and sensible for the strata to have Sense oversee any work to common property that Delcon wished to do because the strata is likely responsible for future repairs to these areas. For these reasons, I find it likely that the strata approved Sense's involvement. On the other hand, it was ultimately Delcon's decision to move forward with the repairs with Sense's oversight, so I cannot agree Delcon was forced to pay Sense's invoice. In the circumstances, I find it reasonable that the parties split Sense's January 31, 2023 invoice equally. Therefore, the strata must reimburse Delcon \$3,247.10 for this expense.
100. As for other engineering fees, Delcon claims a total of \$42,658.06 Drinkwater's fees. The receipts and invoices show that Drinkwater participated in most repairs, which I have found largely do not relate to the main bedroom. However, Drinkwater did investigate and report on the bedroom leaks, and I have relied on its reports. So, on a judgement basis, I find the strata must reimburse Delcon \$5,000 for Drinkwater's fees.
101. In summary, I order the strata to reimburse Delcon a total of \$8,247.10 for engineering fees it paid. The strata must do this within 30 days of the date of this decision.

***What other remedies are appropriate, if any?***

102. The parties' have confirmed in their additional submissions that the approved work to repair the exterior doors and windows started in January 2024. Therefore, I decline to make any of Delcon's requested orders about that work. I note Delcon objects to

the order in which the work is scheduled but I make no findings about that since that is a matter for the strata's engineer and contractor to determine.

103. I have found the strata is responsible for repair and maintenance of the 1402 balcony including removing the balcony enclosure to allow for the repairs. I consider these repairs to be urgent. The strata says it intends on addressing this repair and provided additional evidence about ongoing discussions with the 1402 owners or their lawyer and the strata's lawyer about the enclosure's removal. I acknowledge removal of the balcony enclosure has delayed the balcony repair and that its removal may not be straightforward. However, the strata's obligation to remove the common property enclosure and repair the common property balcony is long overdue. I order the strata to complete these repairs as discussed below.
104. Delcon's requested remedy here is for the CRT to impose a \$359,000 special levy as recommended in Sense's October 28, 2022 report. I decline to make this order for 4 reasons. First, the estimate provided by Sense is likely out of date.
105. Second, there are other repairs, such as to the 1401 balconies (possibly the 1403 balconies) and the exterior concrete panels that the strata might want to consider addressing at the same time. Nothing in this decision restricts the strata from pursuing additional common property repairs at the same time it addresses the repairs I have ordered.
106. Third, the strata can raise funds to pay for the repair in ways other than a special levy. For example, it can spend money from its contingency reserve fund (CRF) for all or part the expense, borrow funds, or use a combination of these methods to pay the repairs. Such a decision is best left to the strata owners.
107. Finally, it is not clear the CRT has jurisdiction to order the strata to impose a special levy without the need to pass a  $\frac{3}{4}$  vote, even though the CRT has previously made such an order. See for example, *James MacArthur v. The Owners, Strata Plan K588*, 2016 BCCRT 2, *Dickson et al v. The Owners, Strata Plan K 671*, 2018 BCCRT 147, and my decision in *MacArthur v. The Owners, Strata Plan K 588*, 2018 BCCRT 491.
108. The noted CRT decisions do not address the difference between the Supreme



Court's powers under SPA section 165 and the CRT's powers under CRTA section 123. The CRT does not have jurisdiction under SPA section 173, which includes reconsidering a failed special levy vote for common property repairs that was approved by more than a majority vote but less than the required  $\frac{3}{4}$  vote. If the CRT does not have jurisdiction in those close-vote circumstances, it would be nonsensical if it had jurisdiction in circumstances where the vote was well below a majority, such as here.

109. However, given I have found the strata was negligent about the 1402 balcony repairs and that the repairs are urgent, I find it appropriate to set a deadline for the strata to start the balcony repairs. I find October 1, 2024 is a reasonable deadline and I order the 1402 balcony repairs must start by October 1, 2024, unless the parties agree to different date. This should give the strata adequate time to prepare and tender work specifications.

110. Nothing in this decision restricts the strata from seeking reimbursement of the cost to remove the 1402 balcony from the 1402 owner and I make no findings about any possible reimbursement.

## **CRT FEES, EXPENSES, AND INTEREST**

111. 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. Delcon was partially successful and paid \$225.00 in CRT fees. I order the strata to reimburse Delcon  $\frac{1}{2}$  of its CRT fees, or \$112.50 within 30 days of the date of this decision. Neither party claimed dispute-related expenses.

112. The *Court Order Interest Act* (COIA) applies to the CRT. Delcon is entitled to pre-judgement interest under the COIA on the engineering fees I have ordered the strata to pay it. For the Sense invoice, interest on \$3,247.10 from January 31, 2023, the date of the invoice, to the date of this decision equals \$159.31. For the Drinkwater fees, I have calculated interest on the \$5,000.00 from April 14, 2023, the date of its final report to the date of this decision, which equals \$200.81. So, the total pre-judgement interest is \$360.12.

113. Under section 189.4 of the SPA, the strata may not charge any dispute-related expenses against Delcon.

## **DECISION AND ORDER**

114. Within 30 days of the date of this decision, I order the strata to pay Delcon \$8,719.72 broken down as follows:

- a. \$8,247.10 for reimbursement of engineering fees,
- b. \$360.12 for pre-judgement interest under the COIA, and
- c. \$112.50 for CRT fees.

115. I order the strata to remove the 1402 balcony enclosure and repair the 1402 balcony below it. The work must start by October 1, 2024, unless the parties agree to a different date.

116. I dismiss Delcon's remaining claims.

117. Delcon is entitled to post-judgement interest under the COIA, as appropriate.

118. 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.

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J. Garth Cambrey, Vice Chair