Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Vuilleumier v. The Owners, Strata Plan NW 1662*, 2020 BCCRT 759

B E T W E E N :

WILMA VUILLEUMIER and JOHN FRAME

APPLICANTS

A N D :

The Owners, Strata Plan NW 1662

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Kate Campbell, Vice Chair

INTRODUCTION

1. This dispute is about balcony enclosures in a strata corporation.

2. The applicants, Wilma Vuilleumier and John Frame, each own strata lots in the respondent strata corporation, The Owners, Strata Plan LMS 1662 (strata). Ms.

Vuilleumier owns strata lot 24 (SL24). Mr. Frame and his spouse, who is not a party to the dispute, co-own strata lot 33 (SL33).

3. The applicants' strata lots each have an adjacent balcony. The applicants say the strata wrongfully removed the framed glass enclosures around the balconies. They say this was done without their consent, and without the approval of the strata ownership. They seek the following remedies in this dispute:

    - An order that the strata replace the enclosures at its expense.
    - Alternatively, the strata return the original enclosure materials, reimburse the applicants for enclosure installation costs, and replace the fly screens, floor membranes, and drains.
    - Reimbursement of $8,667 Ms. Vuilleumier paid for her balcony enclosure.
    - Reimbursement of $7,516.75 Mr. Frame paid for his balcony enclosure.
    - $750 for storage of balcony furniture.
    - $20,000 in damages for pain and suffering to Ms. Vuilleumier.
    - $20,000 in damages for pain and suffering to Mr. Frame.
    - $475 for a balcony inspection.
    - $1,575 for an engineer's report.
    - $1,350 for legal fees.

4. The strata says the balconies were enclosed without permission, contrary to strata bylaws, and without building permits. The strata says the balconies are limited common property (LCP) and the strata's responsibility to maintain and repair. It says the enclosures had ongoing water ingress problems, they needed urgent repairs, and an engineer reported that they were nearing the end of their useful life. The strata says that in August 2019 the strata ownership approved a special levy to

repair the strata's balconies, which required removing all 9 balcony enclosures in the strata, including the applicants'. The strata says the enclosures cannot be replaced because the engineer recommended against it, and because the municipality will not approve them.

5. The applicants are represented by Ms. Vuilleumier in this dispute. The strata is represented by a strata council member.

6. For the following reasons, I find the strata was entitled to remove the balcony enclosures adjacent to SL25 and SL33. I dismiss the applicants' claims.

JURISDICTION AND PROCEDURE

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

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

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

10. 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.

11. The CRT rules applicable to this dispute are those that were in effect at the time the dispute was filed in November 2019.

Preliminary Decision – Interlocutory Injunction

12. In February 2020, Ms. Vuilleumier requested that the tribunal make an interim order to stop the strata from removing her balcony enclosure, which was still in place at that time. Mr. Frame's enclosure had already been removed. The strata's contractor had begun a project to repair the strata's balconies around October 2, 2019, and the strata gave Ms. Vuilleumier notice around February 12, 2020 that it would remove her enclosure within 48 hours.

13. My unpublished preliminary decision was provided to the parties on February 13, 2020. For the reasons set out in that decision, I declined to order the requested injunction. In summary, I applied the 3-part test for an interlocutory injunction from *RJR—MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311. I concluded, based on the evidence before me, that Ms. Vuilleumier had not proven 1 part of the test: that she would suffer irreparable harm if the injunction were not granted.

14. The parties' submissions confirm that the strata has since removed Ms. Vuilleumier's enclosure.

Other Preliminary Issues

15. The applicants provided evidence about the quality of the work performed during the building remediation project in 2019 and 2020. This issue was not included as a claim in the amended Dispute Notice, so I find it is not before me to decide as part of this dispute.

16. The applicants also provided evidence and submissions about whether the balcony enclosures adjacent to some other owners' strata lots should have been removed. They say that some of these enclosures did not leak. I find that the issue of whether other balcony enclosures ought to have been removed is not before me in dispute.

Based on the Dispute Notice and amended Dispute Notice, I find the issues before me are confined to the balcony enclosures adjacent to SL24 and SL33.

ISSUES

17. The issues in this dispute are:

    a. Was the strata entitled to remove the balcony enclosures adjacent to SL24 and SL33?

    b. Must the strata replace the balcony enclosures, or alternatively return the enclosure materials and reimburse the applicants for replacement costs?

    c. Are the applicants entitled to reimbursement of the original amounts they paid for the enclosures?

    d. Must the strata reimburse the applicants $750 for balcony furniture storage?

    e. Are the applicants entitled to $20,000 each in general damages?

    f. Must the strata reimburse the applicants $475 for a balcony inspection?

    g. Must the strata reimburse the applicants $1,575 for an engineer's report?

    h. Is any party entitled to reimbursement for legal fees and expenses?

BACKGROUND AND EVIDENCE

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

19. The strata was created in 1981, under the former *Condominium Act.* It continues to exist under the current *Strata Property Act* (SPA). It consists of 36 residential strata lots in a 4-storey building. Ms. Vuilleumier's SL24 is on the second floor, and Mr. Frame's SL33 is on the first floor.

20. The strata repealed and replaced its previous bylaws by filing new bylaws at the Land Title Office (LTO) in December 2001. Since then, the strata has filed 8 subsequent bylaw amendments at the LTO. None of these amendments are relevant to this dispute.

21. The evidence shows that Mr. Frame had the enclosure around the SL33 balcony installed in 1995, and Ms. Vuilleumier had the SL24 enclosure installed in 2006. Documents in evidence, including the 2014 depreciation report, describe the enclosures as aluminum-framed glass.

22. In May 2017, the strata obtained a building envelope condition assessment (BECA) report from engineering firm McArthur Vantell Limited (MVL). MVL's report notes that there were 9 enclosed balconies in the strata. MVL reported that it appeared, based on discussions with the strata, that there were no municipal building permits for any of the balcony enclosures.

23. A December 18, 2019 email from a planner from the City of White Rock (City) to the strata council president confirms the City has no record of any building permits for balcony enclosures at the strata. Similarly, a January 29, 2020 email from the City's manager of planning to Ms. Vuilleumier states that the balcony enclosure she installed would have required a building permit, but the City had no record of such a permit.

24. In its May 2017 report, MVL said 7 of the 9 balcony enclosures had water leaks. As part of MVL's BECA investigation process, strata lot owners were asked to fill out written surveys about water ingress. Both applicants wrote on their surveys that their balcony ceilings leaked in wet weather. MVL confirmed these reported leaks, based on observed water staining in the SL24 balcony, and water collection buckets on the SL33 balcony.

25. The MVL report sets out the following problems with a number of the balcony enclosures, including those at SL24 and SL33:

- In a number of locations, no caulking between the enclosure and the cap flashing that it sits on.
- Inadequate flashing along the top of the skylight/balcony guard wall interface.
- Missing head flashings along the top of the windows, to deflect water.
- In some locations, the enclosure is secured directly onto the vinyl siding, allowing air gaps.
- At SL33, inadequate saddle detail has caused some wood rot underneath.
- Balcony soffit dryer vents vent directly into the enclosures, rather than to the outside.

26. In its conclusions section, the MVL report says that a number of poor waterproofing details were observed with the enclosures, which were causing water ingress or had the potential to cause further water ingress.

27. Page 23 of the MVL report says the strata building was originally designed to have open balconies. It says that since there were no building permits for the enclosures, if the enclosures had to be modified or removed to complete future work such as balcony deck or exterior wall repairs, the enclosures would likely have to be entirely removed and either reinstalled with building permit approval and engineered design, or disposed of.

28. The MVL report recommended removing all 9 balcony enclosures, as follows:

> Based on the problems reported and observations noted above regarding the enclosures, remedial work to all of the enclosures, balcony guard walls and adjacent exterior walls is required without further delay. We recommend the following scope of work to each enclosure (9 enclosures in total):
>
> 1. Remove entire glass enclosure (including skylight, window system and flashings) to expose and to access the exterior wall system.

2. Remove the existing vinyl siding and wood siding wall assembly from the side walls, balcony parapet walls and saddles, as required, to expose the existing framing, where water ingress has been reported, or is evident.

3. Complete structural/rot repairs, as needed, and waterproofing/flash exterior walls.

4. Install new siding.

5. Modify guard walls to match the existing (original) design (not enclosed), including new railing and cap flashing. Complete any structural/rot repairs, as needed. Waterproof/flash guard wall.

6. Should the Owner/Strata want to enclose the balcony structure again, the proper design documents will have to be submitted to the City for approval of a permitted balcony enclosure, including engineered drawings/design. The work would also require written approval by the strata corporation and be within the guidelines of the *Strata Property Act*.

29. On page 29 of its report, MVL indicated that removing the balcony enclosures was a high priority. MVL recommended a budget of $20,000 to $25,000 per enclosure to complete this work. It said the work would vary for each enclosure, depending on its size, access, the amount of rot repair required, and the exact cause or origin of the water ingress at each location.

30. In October 2018, the strata obtained a report from another engineering firm, Calysta Consulting (CC). According to the report, CC's engineer reviewed the MVL report, and also did a visual inspection of the building. CC reported several problems, including the following issues related to the balcony enclosures:

    - The balcony enclosures were nearing the end of their useful life, as they were not built for long term leak proof performance. The enclosures had

faulty seals and lacked proper flashings, and were attached to walls and balcony parapets.

- Storm water was cascading down from decks and balcony enclosures onto the ground, causing sink holes around the foundations and leakage into the parkade.

- The building is clad with vinyl siding, installed directly over the original wood siding. Any moisture that gets past the vinyl will cause the original siding to rot over time.

31. CC concluded that the building was “in dire need of repairs”, and recommended the following priorities:

    a. Remove all balcony enclosures and dispose of them. Repair balcony membranes on all levels.

    b. Install new water management system and connect to storm sewer.

    c. Remove all vinyl and wood siding from the building and install new rainscreen cladding system such as Hardi board.

32. CC said these 3 projects could be done as part of a complete building envelope repair and replacement, which was justified based on the age of the building. CC said that failure to do this work might result in ongoing deterioration of the building, and devaluation of the property.

33. At a March 14, 2019 special general meeting (SGM), the strata owners voted to hire MVL to oversee the tender process for a building remediation project. The tender documents, created by MVL, state that the scope of work for the remediation project included removing and disposing of all balcony enclosures, including skylights, windows, and flashings. The scope of work also included removing the vinyl and wood siding from the enclosed balcony areas, and storing the vinyl siding for reuse.

34. At an August 13, 2019 SGM, the strata owners passed a ¾ vote resolution to proceed with the building envelope remediation project. The owners also passed a ¾ vote resolution to fund 73% of the project through a special levy based on unit entitlement, and 27% of the project from the strata's contingency reserve fund. The total project budget was $295,000.

35. The parties agree that the building remediation project began around October 2019. The applicants filed this dispute with the CRT on November 18, 2019. The strata's property manager notified the applicants on January 9, 2020 that its contractor would access the balconies to remove the enclosures and repair the walls starting on January 20, 2020.

REASONS AND ANALYSIS

Was the strata entitled to remove the applicants' balcony enclosures?

36. The parties disagree about whether the applicants had strata permission to install the enclosures. I find that the evidence before me, particularly strata council minutes from May 30, 1995 and March 6, 2006, establishes that the applicants each had strata permission to install the enclosures. Also, since the enclosures were visible from the outside of the building from time they were installed, I find the strata knew about and accepted the enclosures.

37. The strata plan shows that the balconies adjacent to SL24 and SL33 are marked as "LCP", which is defined on page 1 of the strata plan as "limited common property". I therefore find that the balconies are LCP.

38. Since the balconies themselves are LCP, I find the balcony enclosures cannot be part of the applicants' strata lots. Rather, I find they are alterations of the LCP balconies, and form part of the LCP balconies.

39. SPA section 3 says that a strata corporation is responsible for managing and maintaining the strata's common property and common property for the benefit of all owners. Under SPA section 72, the strata has an ongoing duty to repair and

maintain common property. Under the SPA section 72(2)(a), the strata is permitted by bylaw, to make an owner responsible to repair and maintain LCP that the owner has the right to use.

40. Strata bylaw 2(2) says an owner who has the use of LCP must repair and maintain it, except for repair and maintenance that is the strata's responsibility under the bylaws.

41. Bylaw 8(1)(c)(ii) says the strata must perform all repairs and maintenance of LCP that is part of the structure of the building, the exterior of the building, "chimneys, stairs, balconies and other things attached to the exterior of a building", or "fences, railings and similar structures that enclose patios, balconies and yards." I find that bylaw 8(1)(c)(ii) captures the applicants' balcony enclosures, as they are attached to the exterior of the building, and are structures that enclose balconies. Therefore, I find the strata is responsible for their maintenance under bylaw 8(1)(c)(ii).

42. As noted above, the strata approved the balcony enclosures for SL24 and SL33. Often, when a strata corporation grants permission for an owner to alter LCP, it requires the owner to sign an agreement that they are responsible for future repairs and maintenance of the alteration. In this case, there is no copy of any indemnification agreement in evidence. Although there is some suggestion in past council minutes that owners with enclosures would be asked to sign indemnification agreements, there is no evidence that the applicants did so. No copies of indemnification agreements for either enclosure were provided in evidence.

43. Under SPA section 36(2)(g), and *Strata Property Regulation* section 4.1, the strata is required to keep a copy of any written contract to which the strata is a party for 6 years after the contract expires. I find indemnification agreements are written contracts to which the strata is a party. Since no copies of indemnification agreements were provided, I find there is no enforceable indemnification agreement between either applicant and the strata.

44. In the absence of any indemnification agreements, I find that under SPA section 72 and bylaw 8, the strata had a duty to repair and maintain both the balconies and the balcony enclosures adjacent to SL 24 and SL33.

45. The strata says that the May 2017 MVL report proves that it had to remove the applicants' balcony enclosures. The applicants say that since they had permission to install the balcony enclosures, the strata was not entitled to remove them.

46. Based on the SPA, the strata bylaws, and the evidence before me, I find the strata was entitled to remove the enclosures adjacent to SL24 and SL33.

47. As previously explained, the enclosures formed part of the LCP balconies, and were common property limited to the exclusive use of the respective applicant. Even though the applicants paid to install the enclosures, and had permission to install them, they did not form part of the applicants' properties.

48. Also as previously noted, the strata has an ongoing duty to repair and maintain the common property, including the LCP balconies. I find that the surveys provided by the applicants to MVL, and the engineering reports from MVL and CC, confirm that there was active leaking around the balcony enclosures.

49. I place significant weight on the MVL report. The credentials of the authors, a building technologist and an engineer, are noted in the report. I therefore find it meets the criteria for an expert report, as set out in CRT rule 8.3. I find the report is thorough and well-explained, and is based on a physical assessment of the building, owner surveys, and photographs included in the report.

50. The applicants say the MVL report is not reliable evidence, in part because it incorrectly states the number of balconies on the building. The strata says, and I agree, that some of the balconies are listed by MVL as "patios", rather than balconies. While the applicants provided an argument about the meaning of "patio", I find that this distinction does not make the MVL report less persuasive.

51. The applicants also argue that the MVL engineer did not assess the building in person, only the building technologist did. I find that does not make the report less

persuasive. According to the report, the building technologist attended the building several times. He took photographs, which were attached to the report. MVL also reviewed documents, such as the original building plans, strata plan, and depreciation report. I find that this information, combined with the owner surveys, suggests that MVL's overall assessment of the building was thorough and professional.

52. Also, I find that MVL's opinion is confirmed by the CC report, which was written by an engineer independent of MVL. While the applicants suggest that the CC engineer, PK, is a personal friend of the strata's property manager, they have not proven this assertion, and in any event I find it does not establish that PK's opinion is incorrect or biased. The applicants say PK did not physically examine the building, but on page 1 of the report, PK said he did a "walkover review" consisting of reviewing all 4 exterior elevations from the ground, plus the underground parkade. From this description, I accept that PK did not examine the balcony enclosures up close, but from ground level. I find this does not undermine his opinion that the balcony enclosures were nearing the end of their useful life since they were not built for long term leak proof performance, with faulty seals, lack of proper flashings, and attachment to walls and balcony parapets.

53. I find the MVL and CC reports are both expert reports, and both clearly set out the basis for their opinions and recommendations. Both reports said the strata should, on a high priority basis, remove the balcony enclosures, and remove and repair the building's siding layers.

54. I find it was reasonable for the strata to rely on these expert reports, in order to meet its duties under SPA sections 3 and 72, and bylaw 8. There are numerous cases from the BC Supreme Court which discuss the scope and limits of a strata corporation's duty to repair and maintain under SPA section 72. In such cases, the Court has said that a strata corporation's obligation to repair and maintain is measured against a test of what is reasonable in all of the circumstances: *Taychuk v. Owners, Strata Plan LMS 744*, 2002 BCSC 1638, at para. 30. In assessing the

extent of the strata's duty to repair, the standard is not perfection, but what is reasonable: *Weir v. The Owners, Strata Plan NW 17,* 2010 BCSC 784.

55. Also, once the strata obtained the MVL report and was aware of the ongoing leaking, it likely would have been negligent if it had not acted to repair the problems. If a strata is negligent, it may then be liable for resulting damage to the inside of owners' strata lots: see *Kayne v. LMS 2374*, 2013 BCSC 51 and *Basic v. Strata Plan LMS 0304*, 2011 BCCA 231. I therefore find it was reasonable for the strata to implement the recommendations from MVL and CC to remove the balcony enclosures.

56. The applicants particularly rely on 3 documents to say it was not necessary for the strata to remove the enclosures. First, they rely on a 2014 depreciation report from Aqua-Coast Engineering, which discusses the balcony enclosures on page 6.

57. The copy of the depreciation report provided by the applicants is marked "draft", but the strata did not object to it or provide a final version. I therefore accept its contents as evidence of Aqua-Coast's findings and recommendations. The applicants argue that the depreciation report indicates that the balcony enclosures could have a life span of 35 years or more. I find the depreciation report does not support that conclusion. Rather, it discusses balcony deck membranes, which are not at issue in this dispute. It says the balcony enclosures were considered owners' responsibility, and were therefore not part of the contingency reserve estimate contained in the depreciation report. Finally, the depreciation report says that the normal life expectancy of the windows on the main elevations and in the amenities room, and of the sliding doors, was 35 years from the time of installation. I find this 35-year estimate does not apply to the balcony enclosures, since they were specifically excluded from the depreciation report.

58. Second, the applicants rely on a December 20, 2019 letter from NB, the owner of Lundline Glass, who installed the original enclosures at SL24 and SL33. NB wrote to Ms. Vuilleumier, in response to her inquiry about the longevity of the enclosed balcony at SL24. NB described the materials used, and said there was a 10 year

manufacturer's warranty. NB said the actual lifespan of a window depends on how it is maintained, and weather exposure. He said the windows in the enclosure were superior to the windows in the rest of the strata, which were still in working order.

59. I find that NB's opinion is not persuasive. First, it does not address the enclosure at SL33. Also, and more significantly, there is no suggestion in the MVL or CC reports that the source of the leaks was from the enclosure glass, or even the aluminum frames. Rather, the reports say the problems were due to the installation, and the areas between the enclosure and the strata building. This includes missing caulking, inadequate and missing flashings, attachment to the building, inadequate saddle detail at SL33, and dryers venting into the enclosures. NB's opinion is not based on an inspection of the balcony enclosures, but only discusses the type of materials used in 2006. Also, NB does not give any opinion about the condition of the walls, and whether it was necessary to remove the enclosures in order to fix the siding. For these reasons, I place little weight on NB's letter, and instead prefer the evidence contained in the MVL and CC reports.

60. Third, the applicants rely on a January 20, 2016 email from AC, a director of Epic Restoration Services Inc., to the strata's property manager. In the email, AC, said he met with a strata council member the previous week, and was working on an estimate for the strata's "balcony issues". He said the main issue was the angle of the top capping of each balcony wall/rails, which sloped back onto the deck rather than away. He said this was the main reason water was pooling on the decks. He said he would provide an estimate to lay the decks with better slopes, to stop water pooling, and also for larger drains. He said he and the strata should look at the option of changing the angle/slope of the wall/rail cappings. AC asked the property manager to let him know what she thought, and concluded by stating that he did not want the strata to waste money on new decks when they were not needed.

61. I find that AC's email does not establish that it was unnecessary to remove the balcony enclosures, as the applicants submit. AC does not specifically mention the enclosures, or whether the building's siding needed repairs. Also, I find that AC's email is a brief discussion of a potential estimate for work. It is not a thorough

assessment of the exterior condition of the building, as set out in the MVL and CC reports.

62. For these reasons, I find the applicants have not met the burden of proving that the strata's decision to remove the balcony enclosures at SL24 and SL33 was unreasonable, or that the removal was unnecessary to stop the leaks described in the leak surveys the applicants provided to MVL. It was open to the applicants to obtain an opinion from an expert, such as an engineer, in order to support their position about the enclosures. However, they did not do so. I find the reports from MVL and CC are uncontradicted by other expert evidence.

63. In its submissions, the strata relies on several cases, including *The Owners, Strata Plan VR 663 v. Murphy*, 2012 BCSC 1294. In *Murphy,* the BCSC considered whether a strata could require an owner to remove a balcony enclosure on LCP, in order to repair roof leaks. In paragraph 14, the court held that the strata could direct the owner to remove the enclosure at his own expense, unless its conduct was significantly unfair as contemplated in SPA section 164. The court cited *Chan v. Strata Plan VR 151*, 2010 B.C.J. No. 2425, which said that "significantly unfair", for the purposes of SPA section 164, means oppressive, or unfairly prejudicial, burdensome, harsh, wrongful, lacking in probity or unfair dealing, or done in bad faith.

64. In *Murphy,* the court found, on the evidence, that the strata could complete the roof repairs without removing the enclosure. It therefore found that the strata had been significantly unfair, and did not order the respondent to remove the enclosure.

65. I find that the facts before me can be distinguished from *Murphy*. First, in *Murphy,* the strata has had required the respondent owner to bear the full expense of removing the enclosure he installed. That is not the case here, as the removal was paid for by all owners, based on unit entitlement. More importantly, unlike in *Murphy,* I find the applicants have not provided evidence that the leaks described in their leak surveys, and in the MVI and CC reports, could have been fixed without removing the balcony enclosures. The applicants submit that the leaks did not stop

after the enclosures were removed. However, they provided no expert evidence to establish that fact, or about the cause of any ongoing leaks. I therefore place no weight on their non-expert opinions about ongoing leaking.

Significant Unfairness

66. Under CRTA section 123(2), the tribunal may make an order directed at the strata corporation, the council or a person who holds 50% or more of the votes, if the order is necessary to prevent or remedy a significantly unfair action, decision or exercise of voting rights. This is similar to the BCSC's power under SPA section 164.

67. The BC Court of Appeal considered the language of section 164 of the SPA in Dollan v. The Owners, Strata Plan BCS 1589, 2012 BCCA 44. The test established in Dollan was restated by the BCSC in The Owners, Strata Plan LMS 1721 v. Watson, 2018 BCSC 164 at paragraph 28:

    a. What is or was the expectation of the affected owner or tenant?

    b. Was that expectation on the part of the owner or tenant objectively reasonable?

    c. If so, was that expectation violated by an action that was significantly unfair?

68. In other cases, such as *Radcliffe v. The Owners, Strata Plan KAS1436*, 2015 BCCA 448, courts have held that the sole question to be determined is whether the disputed action was significantly unfair, such as defined in *Chan* (oppressive, or unfairly prejudicial, burdensome, harsh, wrongful, lacking in probity or unfair dealing, or done in bad faith.

69. Under either test, I find the applicants have not proven that the strata's actions were significantly unfair. Their expectation was that the strata would not remove the balcony enclosures, but I find that expectation was not objectively reasonable. There was evidence of ongoing leak problems, and 2 engineering reports recommending removal of the enclosures to fix the leaks and resulting building

damage. The CC report said the building was in “dire need of repairs”, and that failure to do the recommended work could lead to ongoing building deterioration and property devaluation.

70. It was open to the applicants to obtain a report from an engineer or other expert about the cause of the leaks, the need to remove the enclosures, or an alternate repair plan. The applicants could have presented such a report to the strata for consideration. I find the applicants had notice of the strata’s intention to remove the enclosures from at least the time of the March 14, 2019 SGM, at which the scope of work set out in the tender documents (including balcony enclosure removal) was discussed.

71. For these reasons, I find the strata reasonably relied on the MVL and CC, and was not significantly unfair to the applicants when it removed the balcony enclosures.

SPA Section 71 – Significant Change to Use or Appearance

72. Under SPA section 71, the strata must not make a significant change in the use or appearance of common property unless the change is approved by a ¾ vote resolution passed at an annual general meeting (AGM) or SGM, or there are reasonable grounds to believe that immediate change is necessary to ensure safety or prevent significant loss or damage.

73. I find that section 71 applies to LCP, which is a form of common property. I also find this is not a situation where immediate change was necessary for safety or damage prevention. While the changes recommended by MVL and CC were of a high priority, the fact that work did not begin for about a year after the strata obtained the CC report establishes that no “immediate change” was necessary.

74. The applicants argue, in part, that the strata was not entitled to remove the balcony enclosures because it did not hold a vote as required under SPA section 71.

75. Criteria for determining what is a significant change in use or appearance as contemplated in section 71 of the SPA were set out in *Foley v. The Owners, Strata Plan VR 387*, 2014 BCSC 1333 at paragraph 19. These criteria include whether the

change was visible to residents or the general public, whether it affects the use or enjoyment of one or more strata lots, whether there is a direct interference or disruption due to the change, and whether the change impacts a strata lot's marketability.

76. Removing the exterior balcony enclosures would be visible to both residents and the general public, and I accept that it affected the applicants' use and enjoyment of their strata lots. There is no evidence before me about whether the enclosure removal impacted the marketability of the strata lots.

77. Regardless of whether the *Foley* criteria are met, one problem with the applicants' argument about the need for approval under SPA section 71 is that it appears from the evidence that there was no vote taken to approve the installation of the SL24 balcony enclosure in 2006, even though SPA section 71 was in force at the time. If a vote was required to remove the enclosure, it was equally required to install it. I find the lack of any prior vote suggests that removing the enclosure was not a significant change in use or appearance.

78. In any event, even if a vote under section 71 was required, I find that this voting requirement was met by the vote taken at the August 13, 2019 SGM. The minutes of that meeting show that the ownership passed a ¾ vote to approve and implement the building envelope remediation project, which explicitly included removing the balcony enclosures. The ownership also passed a ¾ vote about how to fund that work.

79. SPA section 71 does not include any requirements about how a ¾ vote to approve a significant change in use or appearance of common property must occur, other than that it must happen at an AGM or SGM. I find that the voting at the August 13, 2019 SGM fulfilled the requirements of SPA section 71, since the ownership was aware that implementing the building envelope remediation project involved removing the existing balcony enclosures.

80. For all of these reasons, I find the strata was entitled to remove the balcony enclosures adjacent to SL24 and SL33, and did not act unreasonably, significantly unfairly, or contrary to the SPA.

Remedies – Replacement Costs

81. The applicants requested an order that the strata replace the balcony enclosures. I have found the strata was entitled to remove the enclosures, and there is nothing in the SPA, bylaws, or any contract that requires the strata to replace them. Also, the correspondence from the City indicates that building permits would be required, which the applicants have not obtained. I therefore do not order replacement of the balcony enclosures with either original or new materials.

82. The applicants seek reimbursement for replacement costs for the enclosure materials. The strata says the balcony glass is available in the parkade for the applicants to pick up. I order that the applicants may contact the strata to arrange to pick up the glass at their expense as long as it is removed from the strata's common property by August 15, 2020. After that, the strata may dispose of the glass in the manner it choses.

83. The strata provided a statement from MVL's building technologist that it was not possible to save the aluminum framing. The applicants dispute this, and also say the aluminum had significant salvage value. The applicants have not provided evidence that the aluminum could have been saved in the removal process, and have not provided evidence of its salvage value. Also, I note that since they had significant notice, it was open to the applicants to pay someone to remove and store or sell the enclosure materials before the strata removed them. They did not do so.

84. For these reasons, I dismiss the applicants claims for replacement or reimbursement for materials, except for the applicants' entitlement to pick up and remove the glass if they choose, as set out above.

85. It is open to the applicants to seek the necessary permissions from the strata and the City to reinstall balcony enclosures, at their expense. I make no findings about that in this decision.

Original Enclosure Costs

86. The applicants also seek reimbursement for the original amounts they paid to have the enclosures installed in 1995 and 2006. I dismiss this claim. First, I have found the strata was entitled to remove the enclosures, as part of its obligation to maintain and repair common property. Second, I agree with the strata that the applicants had use of the enclosures for many years before they were removed. The applicants argue that the strata's actions in removing the enclosures amount to theft. I do not agree. The owners had significant notice that the strata intended to remove the enclosures, and as I stated above, could have acted to remove the enclosures themselves. Also, the enclosures were installed on LCP, which is owned commonly by the strata ownership, rather than by one individual.

87. For these reasons, I find the owners are not entitled to reimbursement of the original enclosure installation costs.

Balcony Furniture Storage

88. The applicants claim reimbursement for balcony furniture storage. I find there is nothing in the SPA or bylaws that makes the strata responsible for this expense. I therefore dismiss this claim.

General Damages

89. The applicants each claim $20,000 in damages for pain and suffering due to the strata's actions in removing the balcony enclosures.

90. Since I have found the strata was entitled to remove the enclosures, I find the applicants are not entitled to damages.

91. Also, even if I had made a different finding about the strata's actions, I would not have ordered damages in this case. While the applicants each provided evidence

showing that they have health conditions, neither provided expert medical evidence to establish that their condition was caused or exacerbated by the balcony enclosure removal, or the strata's decision to remove the enclosures. The applicants provided their own opinions about that issue, but I place no weight on those opinions because the applicants are not medical experts.

92. I therefore dismiss the applicants' claims for general damages.

Balcony Inspection

93. The applicants claim reimbursement of $475 for a balcony inspection. It is unclear from the evidence who performed this inspection, or when. There was no invoice or receipt provided. I therefore dismiss this claim.

Engineer's Report

94. The applicants claim $1,575 for an engineer's report. The documents in evidence show that Ms. Vuilleumier paid an engineering firm that amount on January 31, 2020 for structural drawings of a balcony enclosure for the purpose of obtaining a City building permit.

95. These drawings were not provided in evidence in this dispute, so I find this is not reimbursable as a dispute-related expense. The evidence before me indicates that neither applicant ever had a City building permit for the enclosures. Because of that, and because I find the strata was entitled to remove the enclosures, I therefore find that the applicants are not entitled to reimbursement of the costs of obtaining a building permit.

CRT FEES AND DISPUTE-RELATED EXPENSES

Legal Expenses

96. Both the applicants and the strata request reimbursement of legal expenses. For the following reasons, I find that no party is entitled to such reimbursement.

97. Tribunal rule 9.4(3) says that except in extraordinary circumstances, the tribunal will not order one party to pay another party's legal fees in a strata property dispute. I find the circumstances of this dispute are not extraordinary. Although the parties both have strongly held positions, and although the applicants provided a significant amount of evidence, I find this dispute is not different in size or complexity from the typical strata property dispute decided by the CRT.

98. The strata says it is entitled to compensation for its legal fees because the applicants made unfounded allegations against the strata's experts and former council president. It says the applicants conduct is deserving of rebuke, as contemplated in *Parfitt et al v. The Owners, Strata Plan VR 416 et al*, 2019 BCCRT 330.

99. In *Parfitt,* I found that the CRT's authority to order reimbursement of legal fees in extraordinary circumstances is similar to an award of special costs under the BC Supreme Court Rules. As discussed in cases such as *Westsea Construction Ltd. v. 0759553 B.C. Ltd*., 2013 BCSC 1352, special costs are an unusual order, only made in exceptional circumstances, intended to chastise a party for reprehensible, scandalous or outrageous conduct. In *Garcia v. Crestbrook Forest Industries Ltd.*, [1994] B.C.J. No. 2486 (BCCA), the BC Court of Appeal said that special costs should be ordered against a party when their conduct in the litigation was reprehensible, meaning deserving of reproof or blame.

100. While the applicants made strong assertions, I find the evidence does not establish that their conduct in the course of this tribunal proceeding was reprehensible. I distinguish this case from *Parfitt,* where a party threatened a witness, with the goal of suppressing further evidence.

101. For these reasons, I do not order reimbursement of legal expenses.

CRT Fees

102. As the applicants were largely unsuccessful in this dispute, in accordance with the CRTA and the CRT's rules I find they are not entitled to reimbursement of CRT

fees. The strata did not pay CRT fees. Neither party claimed dispute-related expenses other than the legal expenses discussed above, so none are ordered.

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

ORDERS

104. I order that the applicants may contact the strata to arrange to pick up the glass at their expense, as long as it is removed from the strata's common property by August 15, 2020. After that, the strata may dispose of the glass in the manner it choses.

105. I dismiss the applicants' remaining claims. I dismiss the strata's claim for reimbursement of legal fees.

106. Under sections 57 and 58 of the CRTA, a validated copy of the CRT's order can be enforced through the Supreme Court of British Columbia. The order can also be enforced by the Provincial Court of British Columbia 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.

Kate Campbell, Vice Chair