IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kayne v. The Owners, Strata Plan LMS 2374,*
2013 BCSC 51

Date: 20130114
Docket: S097312
Registry: Vancouver

Between:

Peter Kayne and Linda Kayne

Plaintiffs

And

The Owners, Strata Plan LMS 2374,
Paragon Realty Corporation, Milano Construction Ltd.,
Morrison Hershfield Limited, Kepland Homes Ltd.,
Ankenman Associates Architects Inc.

Defendants

Before: The Honourable Mr. Justice Weatherill

Reasons for Judgment

Counsel for the Plaintiffs:	J. Bilawich
Counsel for the Defendant The Owners, Strata Plan LMS 2374:	A. Sekunova J. Watson
Counsel for the Defendant Morrison Hershfield Limited:	C. Hirst E. Stock
Counsel for the Defendant Kepland Homes Ltd.	S. May
Place and Date of Trial/Hearing:	Vancouver, B.C. October 9 - 12, 15 - 19, 29 - 31, November 1, 5 - 9, 19 - 23, 2012
Place and Date of Judgment:	Vancouver, B.C. January 14, 2013

Introduction

[1] "Wildwood Glen" is a 38 unit townhouse development located in Surrey, British Columbia. It comprises eight buildings with wood frame construction on concrete foundations. The exterior walls are clad in vinyl siding with wood trim accents, PVC-framed windows and sliding doors. Many of the units have wooden stairs and landings attached to the rear walls. The roofs are pitched and covered with asphalt shingles.

[2] Wildwood Glen was built in three phases between 1995 and 1997:

- Phase I comprising Buildings 1 to 4;
- Phase II comprising Buildings 5 and 6; and
- Phase III comprising Buildings 7 and 8.

[3] Building 4 (Phase I) was the first to be completed. It received an occupancy permit from the City of Surrey in the spring of 1996. Unit 405 is at the south end of Building 4, and was the "show home" for the complex. Immediately to the south of Unit 405 and attached to it is the complex's community centre building.

[4] The architect and coordinating professional for the initial design and construction of Wildwood Glen was Mark Ankenman of Ankenman & Associates ("Ankenman"). He and others from his firm conducted regular site visits for the purpose of ensuring that his design was being properly adhered to during construction. Site reports were issued from time to time detailing those inspections and the progress of construction.

[5] On March 25, 1996, Ankenman issued an Assurance of Professional Field Review and Compliance which provided, *inter alia*, that the construction of Building 4 substantially complied in all material respects with the applicable requirements of the B.C. Building Code ("Building Code") and Ankenman's plans with the exception that the "bldg envelope (vinyl siding) was to be caulked according to Ankenman's Site Report #8 and as discussed with contractor". Ankenman's Site Report #8 was

issued on March 26, 1996. One of the identified deficiencies related to the fact that the concrete patios for Building 4 had been poured right up to and against the barge boards. The relevant Building Code required an eight inch clearance between the barge board and the ground. The accepted standard practice was that, where concrete had been poured, the clearance needed to be at least two inches. The occupancy permit for Building 4 was issued despite this deficiency not having been corrected.

[6] Commencing in approximately 2005, there were water ingress problems reported in various units in the Wildwood Glen complex, including Unit 405. By 2010, these problems had become more widespread and the owners decided to spend considerable money repairing the building envelopes.

[7] This action arose from the frustrations and delays the plaintiffs experienced while the problems with their unit, Unit 405, were investigated, diagnosed and repaired.

The Parties and the Claim

[8] Wildwood Glen was built by the defendant, Kepland Homes Ltd. ("Kepland")

[9] The defendant The Owners Strata Plan LMS2374 (the "Strata Corp.") is the strata corporation for Wildwood Glen.

[10] The defendant Morrison Hershfield Limited ("MH") is a consulting engineering firm. Its involvement with Wildwood Glenn began in 2006 when it was retained to investigate the building envelope problems. It continues to be involved to this day.

[11] The plaintiff Peter Kayne ("Peter") purchased strata lot 9, Unit 405, in July 2000 from a previous owner who had purchased it from Kepland. On July 22, 2003, Peter transferred an undivided half interest in Unit 405 to his wife, the plaintiff Linda Kayne ("Linda").

[12] Commencing in 2004, the plaintiffs began to notice water damage in and around the front and rear stair landings of Unit 405. In the fall of 2005, their

concerns were confirmed by Milano Construction Ltd. ("Milano"), a building envelope contractor. Milano was authorized by the Strata Corp. to and did perform repairs to Unit 405. Unbeknownst to the plaintiff, Milano did not remediate other water damaged areas within the building envelope of Unit 405 that it had discovered.

[13] In September 2006, the owners authorized the funding necessary to retain MH to perform a comprehensive building assessment of the buildings within the Wildwood Glen complex. MH's building envelope condition assessment report ("BECA") was delivered to the Strata Corp. in January 2007 (the "MH 2007 Report"). It identified a variety of building envelope deficiencies but described them as localized in nature requiring relatively minor remedial work. MH estimated that the total cost to repair the damage plus an amount for annual maintenance and contingency, was approximately $70,000. MH also recommended that a more comprehensive inventory assessment survey be conducted of the rear landings and stairs within the complex. The Strata Corp. did not undertake any of the repairs or other recommendations identified in the MH 2007 Report. Instead, it commissioned a report by Inter-Provincial Roof Consultants Limited ("Inter-Provincial") regarding the condition of the Wildwood Glen building roofs and proceeded with the replacement of some of the roofs, which were seen as a more pressing issue.

[14] By November 2008, the plaintiffs had noticed the smell of mould in the ground level bedroom of Unit 405. They removed the drywall from one of the inner walls and discovered the presence of significant deterioration of the wood framing materials. The Strata Corp. arranged for Milano to assess the situation and provide a repair estimate. Ultimately, after further investigatory work by MH, the Strata Corp. concluded that the entire complex was in need of building envelope remediation.

[15] In late July 2009, the plaintiffs moved into temporary rental accommodation pending the completion of repairs to Unit 405. That repair work did not commence until September 2010 and was not completed until April 2011. The plaintiffs sold Unit 405 at the end of April 2011.

[16] In the meantime, the plaintiffs commenced this action on October 6, 2009. In addition to the named defendants, the action was also initially brought against Milano, Ankenman and Paragon Realty Corporation ("Paragon"), the latter being Wildwood Glen's property manager at the material times. The claims against those parties were settled prior to trial.

[17] In this action, the plaintiffs claim:

(a) damages against Kepland for the negligent design and construction of Wildwood Glen;

(b) damages against the Strata Corp. for:

(i) breach of statutory and common law duties owed to the plaintiffs;

(ii) nuisance arising out of the Strata Corp.'s failure to properly and in a timely way repair and manage ongoing water ingress in and around the common property abutting Unit 405; and

(iii) aggravated, and punitive damages.

(c) damages against MH for:

(i) negligence;

(ii) negligent misrepresentation; and

(iii) nuisance;

Factual Evidence at Trial

[18] Peter is a retired businessman. Linda is a teacher. They are both 65 years of age. They have three adult children and at least one grandchild that, from time to time, lived with them when they still resided at Unit 405.

[19] Peter was involved in various activities over the course of his working career, including a stint in the Canadian Army (from which he received an honourable discharge), installing urethane foam installation in and removing urea formaldehyde

foam insulation from residential homes. As the result of this latter occupation, Peter fancied himself as knowledgeable and experienced regarding building envelopes. Thereafter, he was involved in the development, production and marketing of eurofoam panelized building systems. By 1992, Peter had developed significant health issues and he was no longer able to work. In 2003, he was diagnosed with a brain tumour that was subsequently removed. The tumour resulted in his pituitary gland being crushed. The pituitary gland affects, among other things, his immune system. He has never fully recovered from the effect the brain tumour had on his pituitary gland.

[20] Peter was an elected member of Wildwood Glen's strata council for one year (2001-2002). His involvement on the strata council ceased because of a disagreement over the use of a handicapped parking space near Unit 405. The space was being used by another member of the strata council (who was paying a small stipend for the right to do so). Peter wanted to use the parking space as a handicapped parking space for his own use because of his physical condition. This disagreement culminated in Peter being accused, wrongly, of aggressive and inappropriate conduct towards another strata council member's wife and daughter. A letter to that effect was sent by the strata council to all owners on July 30, 2003. The Strata Corp. conducted two hearings into the matter without giving Peter an opportunity to be heard.

[21] In August 2003, Peter responded by filing a Human Rights complaint against the strata council. The complaint proceeded to a hearing in July 2004. After three hearing days, the Strata Corp. and Peter reached a settlement, the terms of the which included the following:

> Systemic Remedy
>
> 9. The Strata Corporation will amend its bylaws to provide the following:
>
> ...
>
> (a) The Strata Corporation will forthwith convert the revenue parking space situated beside the Common Room in the complex into a designated accessible parking ("DAS") space for persons with disabilities. The DAS will be marked in accordance with the requirements of the Social Planning and Research Council of BC ("SPARC BC").

...

(e) The Strata Corporation will install and maintain a small "STRATA NOTICE BOARD" in the Strata Mail Room in Unit No. 406.

(f) The Strata Corporation will post notices of the dates of Strata Council Meetings on the Strata Notice Board from the date when each meeting is scheduled but not less than 7 days before any Council Meeting may be held. No Strata Corporation business will be conducted without such notice except in an emergency.

(g) The Strata Corporation will post the Minutes of all Strata Council Meetings on the STRATA NOTICE BOARD from the date from which they are published until replaced by the minutes of the next Council Meetings' Minutes. Minutes from a General Meeting shall be concurrently posted from 30 days. No Strata business will be enacted or is valid if it does not appear in such a posting.

(h) The Strata Corporation will attach a notice in each Council Minutes mailed to the residents of the Strata Complex that they are welcome to attend meetings, respectful decorum required, or portions of the Strata Council Meetings unless otherwise advised.

(i) Neither the Strata Corporation nor its agents will charge any Strata Resident an amount exceeding 25 cents per physical page including delivery, for any document they are entitled to receive nor may they be charged any amount until after any such documents have been delivered nor may any person be used or any reason be used to impede, delay or deny the prompt delivery of any such requested document. [previously the Strata Corporation had charged Peter $2.50 per page]

(j) The Strata Corporation will repudiate the letter sent to the Owner of Unit 405 dated the 30th of July 2003 and recants its contents entirely and absolutely. Furthermore, the Strata Corporation will apologize for any pain or harms their wrongful conduct and remarks may have caused the Owner and his family throughout this matter.

...

Those terms were incorporated into the bylaws of the Strata Corp. in September 2004.

[22] In September, 2004, as a result of a series of water ingress problems experienced in various units, the Strata Corp. requested that each owner complete a "Unit Deficiency Report" setting out both interior and exterior deficiencies that the owner thought required attention. The plaintiffs indicated in their report that there were various exterior deficiencies including those relating to water dripping from the eaves at the front and back doors. They gave their report to Dick Byzitter ("Byzitter"), the president of the strata council, who was responsible for collecting all

such reports and providing them to the Property Manager. However, Rebecca Heinrich ("Heinrich"), a long time owner and resident of Wildwood Glen and a member and treasurer of the strata council from 2003 to present (except for a period in 2005), testified that the plaintiffs' report was not seen by the strata council until it was received as part of the discovery of documents by the plaintiffs in this action. This was confirmed by Brent Russell ("Russell"), owner of Unit 302 and a member of the strata council from November 2004 to January 2006 and president of the strata council from January 2009 to present. No explanation was given for why the plaintiffs' deficiency report did not find its way from Byzitter to other members of the strata council.

[23] Heinrich testified that, because of Peter's human rights complaint, the relationship between Peter and the strata council was contentious and, as a result, the strata council was cautious in its dealings with Peter. She described Peter as having his own views on how things should be done, a sentiment that was echoed by several witnesses. On March 31, 2005, Peter attempted (via a Petition for a Special General Meeting) to oust several members of the strata council, including Heinrich, for allegedly failing to implement the terms of the Settlement Agreement and for continually targeting Peter and his family in retaliation for the human rights complaint. A Special General Meeting was held on April 24, 2005. Peter's resolution was defeated. The owners voted to keep the existing strata council in place.

[24] Peter testified that, in 2005, he became concerned that the repairs he had requested for his unit had not yet been undertaken but repairs to units owned by council members had been. He testified that this issue led the strata council's president, Byzitter, to tender his resignation but that the resignation was not accepted. Byzitter continued to act as chairperson for a period of time thereafter. There was no documentary evidence supporting any of this. In particular, there was no indication in any of the strata council meeting minutes, all of which were detailed and comprehensive with respect to water problem complaints that had been received, that problems with Unit 405 had been communicated to the strata council.

This is despite the fact that the strata council held an "owners' forum" at the commencement of every strata council meeting after April 7, 2005, which allocated time for owners to attend and communicate any issues they had.

[25] In June 2005, Wildwood Glen's property manager, Park Place, was replaced with a new property manager, Paragon. Paragon's principal representative in respect of Wildwood Glen was Alfred Marchi ("Marchi").

[26] In September 2005, Milano was retained by the Strata Corp. to investigate and repair damage due to water ingress in Units 602 and 603. The back stairs and landings of those units had rotted. These issues as well as earlier ones involving water ingress into Unit 603 were fully disclosed to the owners by the strata council, as documented in various meeting minutes.

[27] Also, by September 2005, the back landing of Unit 405 was beginning to give way due to rot. At about the same time, the plaintiffs' clothes dryer motor burned out as a result of the dryer vent to the outside of the unit being completely clogged. It was the Strata Corp.'s responsibility to clean and maintain the dryer vents, which it had not done.

[28] By letter dated October 13, 2005, the plaintiffs wrote to the Strata Corp. enclosing the dryer motor repair bill as well as other miscellaneous maintenance invoices associated with repairs and maintenance that the plaintiffs deemed were the responsibility of the Strata Corp. It put the Strata Corp. on "Final Notice About a Dangerous Condition" regarding the porch, landing and back door rot caused by "a constant drip from the eaves trough onto our porch by our back door". It referenced the Unit Deficiency Report that the plaintiffs had completed one year earlier. The plaintiffs advised the Strata Corp. that, if the condition was not repaired by November 1, 2005, they would repair it themselves and send the bill to the Strata Corp. The plaintiffs also notified the Strata Corp. of concerns regarding rotting wood on the lower front stairs, the back landing and back door caused by water dripping from the eaves. Despite the letter's contents, which stated that the dripping of water from the eaves had been pointed out to the strata council in the plaintiffs' Strata

Deficiency List of October 2004 and on "numerous times previously", both Heinrich and Russell testified that this was the first indication received by the strata council of any problems with Unit 405. Curiously, neither Heinrich nor Russell was asked to explain why the strata council was apparently unaware of the 2004 deficiency list.

[29] On October 20, 2005, Milano determined that the back stairs on Unit 103 were also in poor shape due to water damage.

[30] Also on October 20, 2005, Peter attended a strata council meeting during which repairs for water damage to Units 603, 504 and 103 were discussed. When advised by the strata council that the matters set out in his October 13, 2005 letter were not going to be dealt with at the meeting, Peter persisted and a heated discussion ensued. Peter was told by the strata council that if he proceeded with repairs to Unit 405 as was threatened in his letter, he would be on his own regarding the costs. Peter then left the meeting.

[31] Despite what had been said to Peter at the meeting, the strata council nevertheless instructed Paragon to direct Milano to investigate Peter's complaints. In the course of doing so, Paragon advised Milano in an email that:

> The owner claims the stairs are rotten and present a 'dire' safety hazard. Just as a heads up, this owner in #405 (Peter Kayne) is a trouble maker, and wouldn't think twice about trying to cause trouble for Council and me. He appears to be at odds with virtually the entire complex. He is also an expert on everything, including construction. So it is only a matter of time before you reveal that you don't [know] anywhere near as much about construction as he does.

[32] On October 24, 2005, Milano attended at and inspected Units 404 and 405. Unit 404 is immediately adjacent and to the north of Unit 405. Milano reported to Paragon that the stairs of Unit 405 were suffering from the same issues that were found at Unit 603, but that the rotting at Unit 405 was significantly more advanced. Milano's investigation also found some structural damage within the outer wall and damage to, among other things, wall studs. After assessing the situation, Milano planned to use the repairs to Units 404 and 405 as a "sample wall" to show the strata council how it proposed that the repairs to the rest of the complex would be

completed and what the end result would look like if the Strata Corp. chose to proceed. Milano estimated a cost of $15,000 to $17,000 for the work on Units 404 and 405.

[33] The proposed scope of work included "[n]ew drywall, insulation, interior repairs, as required". The scope of work was approved by the strata council and commenced shortly thereafter, on or about November 1, 2005.

[34] The Unit 404 work performed by Milano included repairs to its interior walls. No such work was performed on Unit 405.

[35] As the work progressed, Milano discovered that the problem was much worse than it had anticipated. It took photographs of the additional damage and sent them to Paragon. By email dated November 4, 2005, Paragon advised the strata council that:

> ...It appears we have some serious envelope issues to address. Especially in light of what was discovered over in the 400 block. My suggestion to you is that we should schedule a meeting with Michael from Milano Construction in order to assess the severity of these envelope issues. This way we can than [sic] develop a well planned systematic approach to fixing the problems rather than this reactive approach.

[36] During a meeting on November 8, 2005, Milano informed the strata council that the problems it was encountering at Units 404 and 405 as well as at the units it had previously worked on were not isolated to those units but rather were systemic to the entire complex. Milano recommended that a proposal for a full scale building envelope investigation and restoration be prepared for the entire complex, similar to what had been done at Units 404/405. The strata council accepted this advice and retained Milano to do so.

[37] Russell denied that Milano used the term "sample wall" to describe the work it was performing at Units 404 and405. In his mind, there were problems with those units and Milano had been engaged to fix them.

[38] On November 9, 2005, Milano sent an email to the strata council and Paragon reporting on the situation at Units 404 and 405 and updating its original

scope of work to include the newly discovered water damage, increasing the cost from $17,000 to $30,700. Several strata council members responded by indicating that they agreed the work needed to be done. The work was approved but Milano was not authorized to spend any more than $30,700. Russell understood that Milano had been engaged to repair all of the damage at Units 404/405 and that it was not restricted in any way, to the concept of a "sample wall" or otherwise.

[39] Milano's work included the installation of a new rim joist under the kitchen door as well as new vinyl siding and trim around the kitchen window and door. A new membrane was installed on the upper landing but, because Milano was instructed by Paragon not to incur the cost of removing the kitchen door, Milano simply had to do the best it could to tuck the membrane underneath. Again, according to Russell, Milano did not request authority to do any additional work.

[40] Michael Incantalupo, the president of Milano, testified that a complete repair of the water damage and related issues at Unit 405 was not done and that, when the walls were closed up by Milano, there were visibly damaged areas adjacent to those repaired by Milano that had not been repaired. Patrick Rowland, the Milano employee who did the repair work, testified that there was water damage to areas outside of the "sample wall area" that were not addressed by Milano at the time it did the work. For example, he found that an originally installed barge board was "spongy" when he was affixing a newly installed barge board to it, which to him was a good indication of water damage both within the barge board and behind it. Mr. Rowland also testified that all of the work intended to be done as part of the original scope of work was not completed, such as replacement of the stairs and proper installation of the upper landing membrane. The installation of the new membrane was done in a temporary fashion as Mr. Rowland was told to "wrap it up".

[41] Mr. Incantalupo testified that all of this was made known to Paragon but that Milano was told that the additional repairs would be completed at a later date once the Strata Corp. had decided upon an overall plan for the building envelope remedial work in the complex. Both Mr. Incantalupo and Mr. Rowland anticipated that Milano would be returning to deal with these issues at some time in the near future.

Mr. Incantalupo told Paragon that "the longer you wait, the more it will rot and the bigger the problem will be". Mr. Russell testified that he understood Milano had performed all of the required repairs and that the strata council was never apprised of this apparent discussion between Milano and Paragon. There was no evidence proffered as to this apparent communication gap between Paragon and the strata council (Mr. Marchi, the person at Paragon with whom Milano was dealing was on the plaintiffs' witness list but was not called as a witness).

[42] The plaintiffs were not apprised of any of this either. There was no disclosure to them of any details concerning the repairs that had been made to Units 404 and 405 and, in particular, no information regarding the nature and extent of the damage that had been found or the cost of repair or the fact that Milano had been asked by the strata council to prepare a proposal regarding what it viewed as the systemic building envelope problems facing the complex. All of the decisions regarding the investigation and repair of the damage at Units 404 and 405 took place informally between formal meetings of the strata council and no meeting minutes were prepared.

[43] Peter was not satisfied with the extent of the repairs that had been done by Milano. He requested that the strata council provide him with all written communications relating to Unit 405 among strata council members, Paragon and Milano. By letter dated November 10, 2005, the president of the strata council, Byzitter, directed Milano to :

> ...immediately release all communications past and future, including pictures, texts, and diagrams that concern in any way, the repairs currently under way by your firm on Strata Unit numbered 405 at the Wildwood Glen complex.

[44] Despite this direction, the plaintiffs received nothing. Russell assumed that it had been complied with. He left the strata council shortly thereafter and was not involved again until January 2009.

[45] Peter requested a hearing before the strata council regarding this lack of information and made it clear that he did not want certain members of the strata

council participating in the meeting as he perceived them to be prejudiced against him. The hearing was scheduled for January 26, 2006.

[46] In the meantime, an annual general meeting of the Strata Corp. took place on January 12, 2006. Peter initiated a discussion regarding the need for a professional BECA, a general overview of all building envelope assemblies in the complex based upon visual inspection as well as moisture probing and exploratory opening data. The discussion culminated in a motion to instruct the strata council to obtain proposals from three engineering firms for the provision of a BECA. The motion was carried unanimously.

[47] At the January 26, 2006 meeting of the strata council, Peter made it clear that he wanted to know the instructions that had been provided to Milano in respect of Units 404 and 405, the terms of reference given to Milano, how much had been paid to Milano, and why. He was told that he was not entitled to that information. Peter was not satisfied and continued to press for production of this information.

[48] In February, 2006, the strata council learned of serious water leaks in the roof of Unit 302. A tarp was installed as a temporary measure pending a decision on repairs. That tarp ended up remaining in place for almost 2 ½ years. The many attempts by the strata council to raise the necessary funding for roof repairs were continuously defeated by the owners.

[49] Meanwhile, the strata council obtained proposals from three engineering firms. At a special general meeting of the Strata Corp. held on May 18, 2006, a resolution was put forward to accept a proposal from MH to conduct a BECA for a cost of $8,346. The resolution was defeated by the owners because the majority of them considered that it would be more cost effective to retain a contractor to undertake targeted repairs as necessary. At a special general meeting of the Strata Corp. on June 15, 2006, the owners approved a resolution to retain a building envelope repair contractor to provide a BECA. The plaintiffs were the only owners present who opposed the resolution as they felt strongly that a qualified engineer should be retained to do the work.

[50] At its meeting on August 2, 2006, the strata council reconsidered the decision made by the owners during the special general meeting held on June 15, 2006 and decided to once again put forward to the owners a resolution to retain a certified engineering firm to provide a BECA rather than a contractor. Finally, at a special general meeting of the Strata Corp. held on September 7, 2006, the owners approved a resolution to retain MH to provide a BECA. This was the same resolution that they had rejected on May 18.

[51] MH commenced work shortly thereafter. As part of its assessment, MH requested that each owner complete a building envelope condition survey. The plaintiffs completed their survey form on October 11, 2006. In it, they advised that there were several ongoing water-related problems related to Unit 405, including that the rear stairway landing had not been properly repaired in 2005 and that ongoing gutter overflow and leak problems had caused the backdoor and frame to rot. At the end of the questionnaire, the plaintiffs wrote:

> Extensive repairs in the Fall of 05 ($33,000) due to leaks around upper east wall windows rotting studs down to and including sill plate. Also outside stairs support members attached to wall studs permitting water to enter and damage structure. Problems with incomplete repairs?

The plaintiffs identified all of the problems that they were aware of.

[52] The plaintiffs' completed survey, along with all others that had been received, was reviewed by Jay Jirka ("Jirka"), MH's project manager for the Wildwood Glen BECA. Jirka realized from reviewing these surveys that there was a potential issue with all of the back stairs and landings.

[53] One of the tasks set out in the MH BECA proposal that was accepted by the Strata Corp. was a review by MH of documents and photographs from previous repairs within the complex. Inexplicably, none of this information was either requested by MH or provided by the Strata Corp. In particular, MH was not provided with any of the documents, photos or invoices regarding the Milano repairs to Unit 405 that had been completed one year earlier.

[54] MH commenced its inspection and testing of the Wildwood Glen building envelopes on November 9, 2006. The testing included moisture probing and exploratory openings of various areas that exhibited potential water ingress. The exploratory opening work was performed by Al Martin ("Martin"), an experienced building envelope consultant employed by MH. He selected the locations of the exploratory openings based upon his experience and observations. He did not review the owners' surveys prior to making his selections, although he did discuss them briefly with Jirka. There was no moisture probing or exploratory opening work performed on the rear of Unit 405 because it was obvious to both Jirka and Martin that that area had been previously remediated with a rain screen cladding. MH made 17 exploratory openings that revealed some localized building envelope issues. The issues that did exist were primarily related to the rear stair landings and barge boards, the former due to the membranes and manner in which the landings and stairs were fastened to the wall, the latter due to the barge boards being too close to grade and J-trim having been used instead of a vinyl starter strip at the bottom of the walls.

[55] Jirka inspected the interiors of seven units which were selected based on the surveys. Unit 405 was not one of them because the issue that the plaintiffs had identified in their survey related to the back door and landing, which were visible from the outside.

[56] MH was not aware of any acrimony between the plaintiffs and the strata council or that Unit 405 was a particularly problematic unit. Martin testified that MH was not restricted in any way by the strata council regarding its inspections and, in particular, was not told by the strata council to refrain from inspecting Unit 405.

[57] As mentioned above, Peter continued to press for production of documents from the strata council related to the 2005 repairs. In April 2006, he filed a second human rights complaint against the strata council, Paragon and five individual members of the strata council alleging retaliation against him and non-compliance with the Settlement Agreement. He also complained that the Strata Corp. had

retained someone other than himself to clean the vinyl siding in the complex. The hearing of the complaint was set for nine days in August 2007. In December 2006, the plaintiffs were invited to review documents at the offices of the Strata Corp.'s solicitors. Peter did so and concluded that document production continued to be inadequate. He demanded further production and was advised by Mr. Marchi that "that's all there is". The plaintiffs then retained counsel.

[58] MH presented its BECA report on January 10, 2007 ("MH 2007 Report"). It concluded that, although there was evidence of water penetration and decay in the envelope of the complex, the problems were associated with local details rather than a systemic problem with the wall system. The MH 2007 Report stated that localized repairs were needed to address the damage caused by past water ingress. In MH's opinion, the probable costs of further investigation and repair in respect of these localized areas was $70,000, including $5,000 for ongoing annual maintenance and a contingency allowance of $9,000. Included in the repair estimate was an allowance of $12,000 for "localized repair of exterior wall sheathing and framing" at four locations ($3000 each), $9,000 to repair "isolated deteriorated trim boards...and adjacent sheathing" at six locations ($1500 each), $12,000 to remove and install rear stairs and mid-landings at 4 locations ($12,000 each) and $6,000 to replace deteriorated roof shingles at four locations ($1500 each). In each case, the number of locations coincided with the localized problems that MH had found, as detailed in the report. Martin testified that MH's opinion of probable costs was based upon areas of known damage that had been found at specific areas, either from the exploratory openings or by way of other observations.

[59] Martin noted that the horizontal J-trim used at the bottom of the vinyl siding acted as a mechanism for the collection of water, a detail that required attention. He also noted that, in 1996 when the complex was constructed, the drilling of holes in the J-trim to allow water to drain was not generally done.

[60] With respect to the roofs, the four locations noted were all on Building 3, the only building where the upper roofs were draining onto the lower roofs without

proper drain spouts. According to Martin, the rest of the building roofs were typical of 10 year old shingle roofs and were not particularly problematic.

[61] The MH 2007 Report expressly provided that the targeted repair option was worth considering, but only upon the following conditions:

- The Strata recognizes that retaining the existing cladding system implies risk of future repair requirements.
- Immediate action is taken to address the significant water entry paths identified to date and in the future.
- Maintenance plans include a detailed review of water protection elements such as gutters and sealant on an annual basis and immediate correction of deficiencies.
- A plan of periodic inspection and moisture probing be undertaken to reduce the probability of undetected deterioration.

[62] Peter agreed on cross-examination that these conditions were practical. He also agreed with the manner in which the issues in the report were described, including that the landings and decks in the complex posed the "most significant potential for water ingress to all the exterior wall system". Finally, he agreed with the MH 2007 Report's conclusion that the following remedial actions were necessary:

- Conduct an inventory condition assessment of all front entrance decks and back landings and stairs. Identify all units that require immediate repairs, and those that can wait until membrane replacement.
- Remove existing damaged back stairs and landings and repair framing/sheathing as required and reinstall stairs and mid-landings away from buildings with improved waterproofing details.

  [emphasis added]

[63] Jirka testified that, while a BECA provides a general overview of the complex's building envelope, an inventory condition assessment is a detailed and focused investigation of a specific element within the building envelope. MH made this recommendation because the detailing was consistent throughout the complex and he was concerned that, if it was problematic at some locations, it was likely systemic to all locations.

[64] Regarding the Opinion of Probable Costs within the MH 2007 Report, Jirka testified that the estimated costs were based upon what MH considered needed repair for certain. He was not prepared to recommend or estimate the costs of repair for the entire complex until an inventory condition assessment had been completed.

[65] The MH 2007 Report contained the following limitations:

> 1.3 Limitations
>
> This assessment is based on a review of available documents and visual inspection, selective moisture content measurements and test openings taken at a sample of building envelope elements.
>
> It is a basic assumption that any correspondence, material, data, evaluations and reports furnished by others are free of latent deficiencies or inaccuracies except for apparent variances discovered during the completion of this report.
>
> The sheathing moisture content measurements and test openings were done at typical building details believed to be possible locations of water penetration. They do not represent a total listing of all locations with deficiencies nor do they imply all similar locations or items to be deficient.
>
> ...
>
> Any comments or conclusions within this report represent our opinion, which is based upon the documents provided to us, our field review of physical conditions, specifically identified testing and our past experience.
>
> ...

[66] When asked on cross examination whether a review of the photographs and documents relating to the repair to Unit 405 in November 2005 would have been helpful to MH, both Jirka and Martin responded that, while any additional information is always potentially helpful, in reality this information would not have given MH any relevant information they did not already have. The repair work to Units 404 and 405 was readily apparent to anyone looking at those units. MH knew that the work had been done, that it was an upgrade to what had been there previously and that it had caught their attention. Both Jirka and Martin testified that the documents and photographs relating to the 2005 Milano repairs would not have changed the recommendations set out in the BECA. They emphasized that the purpose of the BECA was to provide a "general" overview of the entire complex and not a detailed review of a particular unit. Martin also pointed out that MH knew the rear landings

and stairs were a major problem and that the situation at Unit 405 was simply another example of that same issue. To Jirka, it was more important to focus on the areas of the building envelope that MH didn't understand rather than those that it did.

[67] The plaintiffs' reaction to the MH 2007 Report was one of relief and reassurance. They concluded that things were not as bad as they had thought and that, although there were some issues, they were localized and none were urgent or required immediate attention.

[68] Heinrich's reaction to the MH 2007 Report was also generally one of relief but she did not believe that MH had properly addressed the roof problems. She telephoned Martin to request an amendment of the report in this regard. Martin responded with words to the effect that the findings in the report were as had been seen by MH and that the report would not be changed. Heinrich concluded that MH was the expert and they knew better than she.

[69] The next annual general meeting of the Strata Corp. took place on February 12, 2007. Jirka attended to explain and answer questions related to the MH 2007 Report. He knew that the Strata Corp. and the individual owners were relying upon the MH 2007 Report as an accurate assessment of Wildwood Glen building envelopes. He was asked directly by one of the owners whether Wildwood Glen was a "leaky condo" development. Jirka responded: "no". He testified that he did not believe that Wildwood Glen was a "leaky condo" development since there was no evidence of a systemic failure of the building envelope. There were issues but, other than the inventory condition assessment that was recommended for the rear landings, they were either localized or were indicative of normal, required maintenance. The owners were also advised that the Strata Corp. had incurred a deficit of over $41,000 against its maintenance and repair budget for the previous year.

[70] Despite MH's advice that the only roof repairs required were targeted repairs to Building 3, after MH's inspection, the strata council received complaints of roof

leaks at other buildings. In an effort to be proactive, the strata council decided to resolve the roof issue before it became even more problematic. The owners passed a motion to obtain an assessment of the Wildwood Glen buildings roofs, which at the time were considered the most problematic of the building envelope components. The strata council retained Inter-Provincial to perform a full roof inspection and report on the remaining service life expectation.

[71] At this time, the Strata Corp. was low on funds with which to perform maintenance and repairs. It was doing the best it could with "band-aid" solutions pending implementation of a game plan. It instructed Paragon to proceed with the targeted repairs that had been recommended by MH. As will be seen by what follows, neither the Inventory Condition Assessment nor the repair work recommended by MH in the MH 2007 Report was carried out in 2007 or in 2008. Indeed, the recommended localized repair work wasn't carried out at all.

[72] MH was not involved again with the Wildwood Glen complex until late 2008/early 2009.

[73] On March 28, 2007, at a special general meeting, the owners considered a settlement proposal from the plaintiffs regarding the second human rights complaint. They decided not to settle and to proceed to the hearing scheduled for August 2007. Ultimately, that complaint was settled with no admission of liability on the part of the Strata Corp. or the individual council members.

[74] On April 17, 2007, Inter-Provincial provided its assessment that the roof system was "very near the end of its life cycle". It estimated repair costs of $325,000. The plaintiffs were perplexed by this assessment because the MH 2007 Report, received just three months earlier, had indicated that there was no significant problem with the roofs and that only $6,000 was needed for repair. No evidence was proffered explaining this obvious inconsistency. Jirka testified that he believed that the 2007 MH Report was correct. There was no viva voce evidence from Inter-Provincial to explain the basis upon which it concluded that the roof system needed replacement.

[75] On April 18, 2007, Peter filed a petition in the Supreme Court of British Columbia against the Strata Corp. seeking production of documents in respect of the Milano repairs in 2005, pursuant to the provisions of the *Strata Property Act* S.B.C. 1998, c. 43 ("*SPA*"). Within ten days of the filing of the petition, counsel for the Strata Corp. provided the plaintiffs with access to an additional 4½ banker's boxes of documents. Upon review, Peter remained convinced that full production had not been forthcoming and pressed ahead with his petition.

[76] Between February and May 2007, the strata council, through Paragon, requested that MH provide a proposal for the cost of preparing the specifications necessary for the repair/replacement of the rear landings and stairs. MH's proposal was not received until May 16, 2007. In it, MH advised that it believed an inventory condition assessment was necessary before the specifications could be properly prepared. In Jirka's words, the strata council was asking MH to provide specifications for a repair before the problem was fully understood.

[77] On July 5, 2007, the Strata Corp. convened a special general meeting to seek the owners' approval to spend $590,000 for roof replacement and stair repair and replacement, plus other miscellaneous repairs. According to Peter, the owners were extremely upset that they had not been given an explanation for why the roofs and stairways in the entire complex had to be replaced when only six months earlier MH had reported that repairs were required to the roof and stairs at only four units. The resolution was defeated. The general consensus of the owners was that the costs needed to be broken down and a better explanation given as to why these repairs were necessary. The strata council was frustrated and discouraged by the motion's defeat. Russell wondered if the roof of Unit 302 (his unit) would ever be repaired.

[78] In July 2007, two days before the hearing of the plaintiffs' petition, approximately 350 pages of additional documents were provided, many of which were marked as exhibits in this action. The Petition itself was dismissed by the court on the basis that the remaining documents being sought were not those to which the plaintiffs were entitled under the *SPA*. However, the documents that had been

produced disclosed that the Strata Corp. had knowledge of the following on the dates indicated:

March 29, 2002	"severe" decay in Unit 301;
August 19, 2002	mould and gutter problems in Unit 603;
November 6, 2004	mould situations in Unit 301;
January 23, 2005	kitchen mould in Unit 304;
January 25, 2005	the investigation of mould problems in building 3;
March 5, 2005	the need to repair water ingress problems in Unit 603;
March 9, 2005	mould problems in Unit 304;
March 14, 2005	a recommendation by the insurance adjuster for one member of the strata council that a building envelope report from an engineer be obtained;
August 15, 2005	water ingress problems at Units 602 and 603;
August 27, 2005	rotten rear landing beams at Unit 103;
October 20, 2005	that water ingress and the rotting at Unit 103 were similar to that at Unit 405;
October 31, 2005	Milano advised the strata council that the water damage in Units 404 and 405 were "beyond the walls we are working on"; and
November 3, 2005	Unit 302 had an "emergency leak"

[79] Peter assumed that, as these documents predated the MH 2007 Report, they had been provided to MH or at least that MH had been made aware of the issues identified in them and had taken them into account in the preparation of its report. The plaintiffs continued to believe that there were no serious or systemic building envelope problems within the Wildwood Glen complex.

[80] On July 12, 2007, the strata council concluded that it would approach the problem of funding approval by having Inter-Provincial provide a report in which the roof repairs were prioritized.

[81] In August 2007, Peter filed a second petition in the Supreme Court seeking further production of documents in respect of the fees the Strata Corp. had incurred for legal services defending the plaintiffs' human rights complaint. Peter was suspicious that the Strata Corp.'s defence of the complaint was being conducted

without the approval of the owners. He sought an order that a special general meeting be held to approve the levies being made against the owners for the expenditure of legal fees. The Strata Corp. responded to the effect that Peter had no standing because he was not contributing to the legal fees. As a result, Peter discontinued his petition and another owner, a Mr. Gimmell, who was paying a portion of the legal fees, filed an identical one. Mr. Gimmell lacked funds to bring the petition so the plaintiffs made funds available to him. The Gimmell petition was heard by the court and dismissed on the basis that the Strata Corp. had acted within its rights.

[82] In September 2007, the hot water tank in the lower level of Unit 405 burst and flooded portions of the carpeting in the lower level bedroom. The plaintiffs' insurer retained a restoration company to effect the clean up and repairs at no cost to the plaintiffs other than a $500 deductible. The plaintiffs' 26 year-old son Paul had been living in the lower level bedroom at the time. He moved to a bedroom on the third floor of Unit 405 for approximately one month while the restoration work took place. He had previously noticed a "musty" smell in the bedroom but attributed it to stale air due to a lack of air flow in the room.

[83] Prior to the hot water tank event, Paul had developed what he described as a series of unusual cold-like symptoms that would last for several weeks. The symptoms would recede only to return again. At the time, he didn't think much of it.

[84] On October 12, 2007 the plaintiffs commenced an action against the Strata Corp. and various strata council members. That proceeding mirrored the second human rights complaint and was filed as a precaution in the event the Human Rights Tribunal found the complaint ought to have been brought in the Supreme Court. That action was never served.

[85] On November 15, 2007, the Strata Corp. convened another special general meeting for the purpose of passing one of four resolutions regarding extensive roof repairs within the complex. The proposed expenditures ranged from a high of $580,000 (Resolution A - replacement of all roofs) to a low of $165,000 (Resolution D - replacement of the roofs of Buildings 1, 2 and 3 only). Resolution D was passed.

The others were defeated. The owners agreed to raise the necessary funds by way of a special levy, the plaintiffs' portion of which was $4,347.29. The levies were collected and the roof replacement work began in the spring of 2008 and was completed by September 2008. During this period of time, the strata council became increasingly aware of more water ingress-related issues within the complex. It continued as best it could to identify and deal with these problems with the budgeted maintenance funds that were available.

[86] In the spring and summer of 2008, Paul suffered a herniated disc and was on bed rest, which resulted in him spending more time than usual in the basement bedroom. His cold-like symptoms worsened. He was continually fatigued and he had a deep and persistent cough. His chest was inflamed and he had developed what he described as bronchial "flam" and mucus.

[87] In October 2008, approximately one year after the plaintiffs' hot water tank burst, the plaintiffs' daughter from Boise Idaho was staying with them in Unit 405 as she was expecting the imminent birth of a baby. One day she was in Paul's downstairs bedroom and said to Linda: "I know why Paul is so sick - it's the mould". The plaintiffs determined that there was a strong smell of mould in the room. The carpeting was pulled back and the plaintiffs observed what they described as a thick layer of mould in the corners of each side of the patio door. The plaintiffs' initial reaction was that this was the result of improper clean up and repairs by the insurer's restoration company the previous year. The insurer and the restoration company re-attended and accepted some responsibility but, upon removing the lower three-feet of drywall, discovered considerable rot and other damage to the wall system. This indicated a significant water ingress problem unrelated to the failed hot water tank.

[88] On October 28, 2008, Iain Mcdonald ("Mcdonald"), a member of the strata council received a telephone message from Peter requesting that Mcdonald look at what had been found in the basement of Unit 405. Mcdonald notified Paragon and requested that someone be sent to inspect Unit 405.

[89] By letter dated November 1, 2008, the plaintiffs formally notified the strata council of what they had discovered. The plaintiffs made it clear in the letter that they were concerned the mould and rot presented a significant and serious health problem for them and that they wanted the strata council to immediately evaluate and correct the problem on an urgent basis. The plaintiffs also stated in the letter that:

> This problem is a serious repair and maintenance that requires an immediate external evaluation and correction. To assist the strata in evaluating this situation I will leave the inside wall open until 5:00 pm on Sunday the 9th of November for examination before closing it and reconstructing the internal walls.

Other than the phone message two days earlier, this letter was the first indication of any concerns regarding Unit 405 that had been received by the strata council since the repair work that was performed by Milano in November 2005, three years earlier.

[90] On November 4, 2008, Milano dispatched Rowland to investigate. He inspected Unit 405 on November 12, 2008 and confirmed many of the plaintiffs' complaints. When asked by Peter why rotten and mould infected wood had been left in placed in 2005, Mr. Rowland responded to the effect that the strata council had told Milano to go no further, stop the work, and close up the walls.

[91] On November 5, 2008, prior to Milano's inspection and unbeknownst to the plaintiffs, Milano sent an email to Paragon that stated:

> The repairs done on this unit were to a specific wall and not all wall surfaces to the unit, as was requested by the council. The pictures below are 2 of dozens we have. One shows leakage into the unit from years ago that we were expecting to obtain a work order for completing until Mr. Kayne decided to sue Paragon, unjustly, then all communication with the Wildwood Glen complete [sic] stopped.
>
> The second picture shows the full lower strip of OSB sheathing that was removed and replaced with Plywood, the only product we've ever used as sheathing. And since the current rot pictures show OSB that is water damaged, we can assume that the pictures are of the above mentioned old leaks that we had documented years ago. Plus considering the fact that [sic] almost never see any of our work fail, and that the mold looks about 8 + years old, I expect that this has nothing to do with failed work.

It should be noted that there was no active litigation involving either of the plaintiffs against Paragon or the Strata Corp. in November 2005. Milano was incorrect in this regard.

[92] Emails from Milano to Paragon dated November 13 and 24, 2008 disclose that Milano had made it clear three years earlier that there were problems with Unit 405 that remained unaddressed.

[93] The plaintiffs decided to conduct their own investigation in order to provide the strata council with independent verification of their concerns. They retained Spratt Emanuel Engineering, a building science consulting firm, who investigated and, in a report dated November 24, 2008, advised the plaintiffs that the rot damage was severe and that extensive repair was required. For some unexplained reason, the plaintiffs were not entirely satisfied with this report. No one from Spratt Emanuel Engineering testified at the trial.

[94] The plaintiffs also retained Pacific Environmental Consulting and Occupational Hygiene Services ("Pacific Environmental"), who had previously been used by their insurer to provide consulting services in respect of the damage caused by the water tank leak, to perform a fungal investigation and provide recommendations. In reports dated December 3, 2008 and February 24, 2009, Pacific Environmental advised of the existence of significant fungal staining and of rotting at certain exposed structures within Unit 405. They made recommendations regarding remediation. No one from Pacific Environmental testified at the trial.

[95] On December 10, 2008, the plaintiffs received a portion of an email that Milano had previously sent to Paragon regarding Unit 405. It read, in part:

> The damage to the adjoining wall was suspected at the time we did the sample wall quote, and as Alf and council will recall we had meetings on site even had an audio video presentation stating clearly that the entire buildings [sic] would need to have an updated envelope since all the windows, barge boards and flashing on the entire complex had substandard waterproofing.
>
> Added work to complete the complex and Milano Started the Water proofing Assessment report that was requested by council and we were half way

> through the report which would have been followed by work commencing when we were asked to stop.
>
> ...
>
> The OSB is old original sheathing. It has water damage from years of known leaks, that we pointed out to the council years ago. The water heater cold have had some effect on adding water damage to the wall, but the main issue with water damage to the wall is poor siding, & flashing details
>
> ...All barge board flashing is leaking on the entire complex. Again our work is 100%, but of coarse [sic] the adjoining wall surfaces, which we did not work on yet have not gotten any better since we diagnosed the issues a few years ago.

[96] Milano had made it clear to the strata council that the repair to Unit 405 was not going to be easy or inexpensive. It provided an estimate of $50,000. Milano recommended that a building envelope engineer be retained to properly assess the situation.

[97] During its regularly scheduled meeting on December 13, 2008, the strata council, resolved to retain MH to prepare the necessary specifications for the scope of work in respect of the repairs necessary for Unit 405. The plaintiffs were in attendance during that meeting. As there was no indication from the plaintiffs or Milano that there was any particular urgency, the strata council held off taking any steps to remediate Unit 405 until it had a better idea of what it was facing and what was required to remedy the water leak problem at Unit 405.

[98] On January 13 and 30, 2009, Martin, on behalf of MH, inspected Unit 405 as well as Units 501 and 304 which were also experiencing water ingress problems. Martin testified that he observed what he described as "bio-deterioration" of wood items within the outer walls of the unit but he did not come away from the inspection with any concern that the deterioration he observed posed any safety or health dangers. However, the inspection did result in MH renewing the recommendation in the MH 2007 Report that the Strata Corp. undertake an inventory condition assessment of all rear landings in the complex. It did not make any specific recommendations for temporary repair measures to be undertaken at Unit 405.

[99] Peter testified that he asked Martin why the MH 2007 Report had not disclosed any of the water damage to Unit 405. He said Martin responded that MH had not been engaged to either look at or report on the repairs conducted by Milano in November 2005. Martin testified that he could not recall any such discussion but he was certain that the strata council had not instructed MH to not inspect Unit 405.

[100] The plaintiffs next retained Peter Link and Associates ("Peter Link") to inspect their unit and report on its current condition. Peter Link's report is dated February 26, 2009. The Peter Link report concluded that the work performed by Milano in November 2005 had not been performed in accordance with the provisions of the *Homeowner Protection Act*, S.B.C. 1998 c. 31. It also indicated that the Home Protection Act Office had no record of Milano being licensed with this legislation.

[101] The plaintiffs were unsatisfied with the Peter Link report because Peter Link was not sufficiently qualified. Peter Link did not testify at the trial.

[102] In February 2009, Paul moved to Boise Idaho to live with his sister. He testified that, within two weeks, his cold-like and respiratory symptoms began to clear up and, within one month, they had disappeared completely.

[103] MH completed its Site Visit Report regarding Units 405 and 501 on March 10, 2009 ("MH 2009 Report"). It was sent to the Strata Corp. but it was not sent to the plaintiffs until April 1, 2009. The report confirmed active ingress of water into Unit 405, similar problems at Unit 501 and suggested that there were two potential sources:

> 1. Due to the poor detailing and proximity to grade, water is entering into the wall framing at the base of the wall and causing localized deterioration of the sill plate, studs and wall sheathing. This is occurring on both sides of the PD [patio door].
> 2. At the left of the PD, water is entering into the wall assembly from the second floor level as a result of poor detailing at the landing and door.

These, of course, were the same issues that had been raised in the MH 2007 Report over two years earlier. Again, MH recommended repairs although it did not suggest any particular urgency. When asked on cross examination to explain why the strata

council had considered that a mould problem found in the attics of Building 3 required urgent attention but that a mould problem found in Unit 405 in 2008 did not, Russell testified that, in 2008 unlike 2005, the strata council had retained and was relying upon the advice of MH, their consulting engineer.

[104] The MH 2009 Report also recommended that a landing condition survey be performed for the entire complex, as it had done over two years earlier in the MH 2007 Report. This time, the strata council accepted MH's advice and instructed Paragon to obtain a proposal and quotation from MH for this assessment.

[105] In March 2009, prior to their receipt of the MH 2009 Report, the plaintiffs retained a fourth consultant, JRS Engineering Building Envelope Consultants ("JRS"), to conduct an independent condition assessment of their unit. The JRS assessment was conducted by Charlie Gould ("Gould") who testified on behalf of the plaintiffs as both a lay and expert witness.

[106] On April 15, 2009, Gould reported on several specific elements of the wall system and construction detailing that was allowing water to ingress into the unit, none of which had previously been disclosed to the plaintiffs. The report indicated that the rot evident in the walls of Unit 405 had likely been occurring for several years, that the water ingress had likely been occurring since construction, that changes must be made to the building envelope system to protect the walls from further damage, that sources of the water ingress had not been corrected during the Milano repair work in 2005, and that a complete work investigation of the entire complex was required in order to determine whether the problems at Unit 405 were isolated or systemic. Gould also identified the back stairs of the unit as dangerous. He recommended discontinuing their use until they were replaced.

[107] The plaintiffs concluded that the issues identified by Gould were the result of deficient original construction and that it was reasonable to assume the entire complex was similarly affected. On April 23, 2009, the plaintiffs' counsel provided both the Strata Corp. and Paragon with copies of the independent assessment

reports that had been commissioned by the plaintiffs. In the letter, he advised the Strata Corp. that the repairs were urgently needed and that:

> Our clients are, understandably, upset that given the extensive and intrusive nature of the required repairs they are facing the prospect of having to move out of the Kayne Unit and relocate for a period of time during which the repair work is done. They would prefer to coordinate scheduling that so as to minimize that upset. Mrs. Kayne is a teacher and would find a work program from the beginning of July 2009 the least upsetting.

[108] Both of the plaintiffs testified that, as a result of mould and rot discovered in their unit, their living conditions were extremely frustrating and destructive to their everyday life. They had to completely empty the lower bedroom and bathroom of all furniture. The dining room furniture had to be relocated into the kitchen and living room and the use of the dining room had to be discontinued. There was mould in the kitchen wall which had been opened up. Fans had to be brought in and windows opened to deal with the health concerns over mould. They had to continually spray bleach in order to treat the mould. Bricks were used to patch holes in the walls in order to keep rodents out. The cost of operating the home increased due to higher heating cost. They were no longer able to host family functions as had been their habit previously.

[109] Moreover, the mould was creating health concerns for the plaintiffs. Peter was suffering flu-like symptoms almost constantly. He testified that he had not had these symptoms prior the mould being discovered in his parents' unit. Linda was used to seasonal allergies but was finding that she was suffering allergies year round and generally felt "lousy".

[110] The plaintiffs say they were assured by the strata council that repairs to Unit 405 were imminent. For example, on April 1, 2009, Paragon sent an email to Peter enclosing the MH 2009 Report and stating:

> I've asked MH to prepare specs for the necessary repairs to your unit as soon as possible. Once I receive the specs I'll have the work tendered.

[111] Another example occurred during a meeting of the strata council on April 25, 2009, attended by the plaintiffs, in which the stair replacement and envelope problem at Unit 405 was discussed as a separate item. The meeting minutes state:

> *Stair Replacement and Envelope Problem at Unit #405* - The assessment report currently being undertaken by Morrison Hershfield will being [sic] addressing the cause of these problems and will be providing Council with the appropriate repair solution.

[112] Still another example is found in a letter dated May 13, 2009 from counsel for the Strata Corp. to counsel for the plaintiffs that stated, in part:

> ...the Strata Corporation has retained Morrison Hershfield Ltd. ("MHL") to assist the Strata Corporation prioritizing the work to be undertaken by the Strata Corporation at Wildwood Glen, including the Kaynes' strata lot, as part of its duty to repair and maintain. The Strata Corporation has stressed to MHL the importance of a timely response regarding the specifications for the repair of the exterior wall of the Kaynes' strata lot and expects to receive MHL's advice in this regard by June 1, 2009.
>
> [Emphasis added]

[113] There was nothing in any of these communications to suggest that the repairs to Unit 405 were to be part of a broader, overall building assessment or repair in the complex. Yet that was exactly what the strata council was considering. In Mcdonald's words, the strata council didn't take immediate steps to deal with the problems in Unit 405 because "it had reason to believe that the problems were systemic and we needed to understand the extent of them."

[114] Martin testified that MH was never asked by the strata council to provide specifications for the repair of Unit 405 in isolation.

[115] In reliance upon those assurances, the adjustments the plaintiffs made to their living arrangements within Unit 405 were considered by them to be temporary. They did not make any long term arrangements for storage, etc. In Linda's words, they decided to "put up with it".

[116] Despite what was stated in the April 1, 2009 email from Paragon to the plaintiffs, both Heinrich and Mcdonald testified that the strata council did not instruct

Paragon to advise the plaintiffs that the repairs to Unit 405 were imminent. Rather, its plan was to spray and contain any mould in Unit 405 and integrate the necessary repairs into the overall assessment of the building envelopes. However, the strata council did authorize MH and a contractor to proceed with repairs to the back landings and stairs to Unit 405. That work was completed by early June 2009.

[117] Heinrich agreed on cross examination that the five month delay between the plaintiffs' complaints regarding Unit 405 being confirmed by Milano and the advice to the plaintiffs in April 2009 that a repair solution was in the offing was "a bit long".

[118] On May 4, 2009, MH submitted to the strata council a proposal for an overall stair and landing condition survey for the complex. That proposal was accepted by the strata council during its meeting on the following day.

[119] In mid-May 2009, the plaintiffs experienced a family tragedy with the death of their son-in-law. The plaintiffs travelled to Idaho to support their daughter and grandson and to attend the funeral. It was ultimately decided that, because they required the support of parents, their daughter and grandson would return to British Columbia and live with the plaintiffs at the end of July.

[120] However, the plaintiffs felt that Unit 405 was not a safe environment for them. They considered the basement accommodation to be uninhabitable, the dining room unusable and the rest of the unit unliveable because it was filled with the furniture from the other rooms. The plaintiffs were concerned about possible harm to their children and grandchildren and were distressed over their inability to provide a safe living space for them. Their grandson was eight months old and was beginning to crawl and explore. Linda couldn't imagine having to confine her grandchild to an upper bedroom. It was unthinkable to the plaintiffs that they would expose their daughter and grandson to those conditions. The plaintiffs concluded that they had no other alternative but to move to rental accommodation until the repairs on Unit 405 were completed. Given their understanding that the repairs were imminent, they thought their stay in rental accommodation would be of short duration. However, they were unable to find suitable accommodation unless they signed an eight-month

lease, which they did. They moved into the rental home at the end of July, 2009. It never entered Linda's mind that they would not be moving back to Unit 405.

[121] The plaintiffs were the only owners within the Wildwood Glen complex to move out of their unit pending repairs.

[122] The plaintiffs testified that their health issues disappeared after they moved into the rental home. Their health went "back to normal".

[123] Meanwhile, on June 2, 2009, MH forwarded its landing condition survey to the strata council. The survey indicated that Unit 405 was one of seven units that should be given the highest priority for repairs and should be done as soon as possible. Martin testified that the condition of the landings and stairs at Unit 405 was far worse than what he had observed six months earlier in January 2009. That was because during the interim, Peter had taken a hammer to portions of the stairs in order to expose the rot.

[124] On June 12, 2009, MH submitted its proposal to the strata council for the provision of design and field review services for the repairs that the landing condition survey had recommended. On June 30, 2009 the strata council authorized MH to proceed. By late August 2009, MH had completed final drafts of the design drawings, specifications and budget for the work. It included an expanded scope of work for Unit 405 because of additional damage that had not been found elsewhere. No one had yet apprised the plaintiffs that the repair of Unit 405 was not imminent but rather was to be done as part of the overall repairs within the complex.

[125] In its construction budget document dated August 28, 2009, MH listed Unit 405 as second in priority. This document estimated total repair costs of $661,625, including a 25% contingency allowance.

[126] The strata council scheduled a special general meeting for November 1, 2009 to inform the owners of the investigation and recommendations of MH and to obtain approval of a special levy to fund the repair work.

[127] On October 26, 2009 the plaintiffs sent an email to Paragon raising several questions and concerns regarding the scope of repairs being proposed for the complex and complained about the strata council's failure to deliver MH's specification and scope of work documents to them in a timely way. They also complained about the lack of "information and discussion meetings" on the building envelope issues and progress. They attempted to have the November 1, 2009 special general meeting adjourned until more information was provided by the strata council. The plaintiffs were the only owners to raise such concerns.

[128] The special general meeting proceeded as scheduled on November 1, 2009. Again the plaintiffs moved to have the meeting adjourned. No one was prepared to second the motion and the meeting proceeded to consider a motion by the strata council that the owners approve a special levy of $677,625 to undertake building envelope repairs. At the meeting, Mcdonald explained the background to the motion, the reason for the retainer of MH, the investigation and recommendations that MH had made and that delaying the repairs any further was "not an option". Several of the owners expressed concern that the scope of work in the motion did not include replacement of the remainder of the roofs. They wanted a more comprehensive repair proposal put together that included a repair of the remaining roofs. Ultimately, the motion was defeated. The strata council re-grouped, put together a revised motion which included the repair of the remaining roofs and scheduled another special general meeting for December 6, 2009.

[129] At the December 6, 2009 special general meeting, the owners approved a resolution authorizing the Strata Corp. to spend an aggregate of $917,625 to repair/replace the roofs and exterior staircases of the units within Wildwood Glen, the money for which would come from a special levy approved by the owners.

[130] The plaintiffs claim that they were assured by the strata council that, even though the roof and staircase project did not appear to include the remedial work that was required to repair the rot and other problems caused by water ingress within the walls of the units, everything that needed to be repaired would be

repaired. It was on that basis that the plaintiffs voted in favour of the resolution. Again, the owners agreed that the money would be raised by way of a special levy. The plaintiffs' portion of that levy was $24,176.84. MH made it clear that it was not prepared to proceed with tendering the work for Phase I until sufficient funds had been raised from the special levy to pay for it.

[131] In the meantime the strata council proceeded with a contract for the repair of the remaining roofs within the complex because the roofing consultant was prepared to proceed without the money first having been collected.

[132] Throughout the period 2008 through to early 2010, the plaintiffs were concerned that the owners were being asked to approve resolutions that would not resolve the complex's building envelope problems. The plaintiffs felt that, in some respects, the money was being spent for repairs in areas that did not need it (some roofs) at the expense of other areas (the front building envelopes). They feared that the funding sought by the various resolutions that had been put forward by the strata council was more than what was required for the work specified and that the work was inadequate in scope. Given the MH 2007 Report and what had transpired since, the plaintiffs had lost confidence in the advice being received from MH. The issue in the plaintiff's mind was whether the strata council was engaged in the prudent deployment of the limited repair resources available to it.

[133] By letter dated December 23, 2009, counsel for MH strongly encouraged the plaintiffs (through their counsel) to obtain a second opinion regarding the adequacy of remedial design prepared by MH. The plaintiffs accepted that invitation and once again retained JRS to review and comment on the remediation work proposed by MH.

[134] In March 2010, the plaintiffs commenced a program of extensive renovations to Unit 405, in part to repair the damage to the interior when the walls had been opened up to reveal the water ingress problems and in part to improve the unit in order to enhance its value on resale. This work was completed by the fall of 2010. It is noteworthy that the repair work done by the plaintiffs was not dependent in any

way on the exterior building envelope work that was being contemplated at that time by the Strata Corp. and could have been undertaken in November 2008 as the plaintiffs indicated it would be in their November 1, 2008 letter.

[135] By mid-April, 2010, sufficient monies had been raised from the levy to allow the strata council to proceed with Phase I of the repairs. MH was instructed to finalize the tender documents.

[136] On June 3, 2010, Scott Croasdale ("Croasdale") of JRS inspected Unit 405 as well as other units within the Wildwood Glen complex. He is an expert in building science and building envelope assessment and repair. He was qualified as such at the trial. He became involved in the plaintiffs' retainer of JRS because Gould had become sidelined as a result of a heart attack he suffered in January 2009. On June 4, 2009, Croasdale sent a letter to plaintiffs' counsel expressing concerns about the building envelope repair work that had been proposed by MH which, in his view, failed to address several issues that had previously been identified by MH as problem areas. He made it clear that, in his opinion, a significant increase in both the scope of remedial work and the cost was required in or to address the building envelope deficiencies and damage, particularly to the front of the buildings. That letter was provided to counsel for both the Strata Corp. and MH on that same day together with an invitation that MH and JRS meet and discuss JRS's concerns before the Strata Corp. signed a remediation contract.

[137] A response was received from counsel for the Strata Corp. that criticized the plaintiffs for undertaking "destructive testing" of common property walls without the permission of the strata council. It is apparent that the extent of the "destructive testing" conducted by JRS was simply the insertion of a knife or pry bar some six to nine inches into rotting wood at various units, including Unit 405. Russell testified that the strata council had retained MH, who were expert building envelope engineers, and were following the professional advice they were receiving.

[138] MH's response was that the scope of work proposed by MH would deal with what required immediate attention and that the additional matters raised by

Croasdale would be addressed during construction if necessary. Indeed, the scope of work set out in the MH tender documents provided for unit price allowances for additional work determined to be required during the course of construction.

[139] By the end of June 2010, MH had completed the tender documents and had initiated the tendering process. Bids from five contractors were received. The lowest bid, that of New City Contracting Ltd. ("New City"), was selected by the strata council on August 31, 2010. New City commenced work on the following day.

[140] The building envelope repair work on Unit 405 was the last of the Phase I repairs to be completed. Work on Unit 405 did not commence until September 2010 (when the siding was removed). The work began in earnest in November 2010, and was substantially completed in January 2011, and finally completed in April 2011. On July 28, 2011, a Certificate of Substantial Completion for the Phase I work, which included more units than had been initially contemplated due to the strata council having received payment of some of the levies earlier than scheduled.

[141] Martin testified that the actual problems revealed during construction of the Phase I repairs were generally as had been predicted by MH.

[142] Peter agreed on cross-examination that no representative of MH was ever hostile towards him, ridiculed him, or vilified him. He agreed that MH at all times dealt with him in a respectful manner.

[143] The plaintiffs believed that several members of the strata council were using the repair process to enhance the value of their own units for sale purposes, and by doing so were acting in their own self interest. There was no evidence to suggest that this was in fact the case. Indeed, the suggestion was flatly denied by Russell.

[144] Heinrich testified that Peter was a difficult person to deal with. Russell testified that the strata council's relationship with Peter was "strained". Mcdonald testified that, although the strata council was "cautious" of Peter, it was not dismissive of him. All three strata council members confirmed that the strata council

did not treat Peter any differently than any other owner and attended as best they could to the concerns raised by him.

[145] In late 2010, the plaintiffs decided to sell Unit 405 once the repairs were completed. Their decision was based in large part on what they perceived was continued ill-will between them and the strata council. Heinrich testified that, when the strata council learned the plaintiffs had sold Unit 405, they were relieved.

[146] The plaintiffs sold Unit 405 for $325,000 to Jessica Lengyell. Ms. Lengyell testified that there was at least one other Wildwood Glen unit that was for sale at the time at a slightly lower price but that she was attracted to Unit 405 because of the renovations that had been made to it, which had been done or overseen by Peter who was quite passionate about the quality of them. Ms. Lengyell was aware that, prior to purchasing Unit 405, extensive repairs had been done to the building envelopes within Wildwood Glen and she was aware of this lawsuit the plaintiffs had commenced. Indeed, she insisted upon terms in the Contract of Purchase and Sale to the effect that the plaintiffs would be responsible for any increase in the strata fees arising out of or consequent upon the lawsuit. She did not consider that she was purchasing the unit at a discount for any reason, let alone that she was buying a "leaky condo". Since purchasing, she has not experienced any water ingress issues with Unit 405.

[147] Subsequent to the plaintiffs' sale of Unit 405, MH discovered deterioration in some of the building envelope components at the front of the 600 block units that JRS had warned of in its reports of June 2010. However, that deterioration was primarily limited to the Building 6 units and, with one small exception, did not damage the structural elements of the units as had been feared by Croasdale. The repair work was undertaken and completed as part of Phase II of the remediation.

Analysis

Admissibility of Mould Evidence

[148] A slide presentation by Peter during the course of his evidence-in-chief demonstrated that, in several instances, the repair work conducted by Milano in November 2005 butted up against studs and other structural members that were also likely damaged by water ingress at that time. It appears clear, and I so find, that this additional damage would have been obvious to Milano when it stopped its repair work in November 2005. In 2008, when the plaintiffs removed drywall in the basement bedroom, rot in various wooden elements was present in the ceiling, walls, and along the concrete floor. That this damage must have been visible in November 2005 is apparent from the fact that none of the plywood sheathing installed by Milano in 2005 had deteriorated whereas the wood around that plywood had. Were it not present in 2005, the damage discovered in 2008 would have affected the originally installed wood components and the newly installed plywood equally.

[149] The slides and other photographs presented at trial depict a black colouration on some of these wooden elements. The plaintiffs claim this black colouration was mould. However, there was no evidence proffered by the plaintiffs that the black colouration was in fact mould or any other form of harmful fungi. Moreover, there was no medical evidence proffered by the plaintiffs connecting the health problems they or their son Peter say they experienced to the black colouration, whatever it may have been. The plaintiffs ask me to infer that it was mould and that their symptoms were caused by it.

[150] This very issue was the subject of the decision of the B.C. Court of Appeal in *Seiler v. Mutual Fire Ins. Co. et al*, 2003 BCCA 696 (CanLii), application for leave to appeal dismissed [2004] S.C.C.A. No. 60 (S.C.C.). There, the plaintiff submitted that observations of a stain and black spots were evidence of mould and that the causal relationship between the alleged negligence and the alleged damage could be inferred. The court disagreed and stated, at para. 16:

> The learned trial judge found at [paragraph] 25 of his reasons that there was no expert evidence pointing to the existence of mould, and that the relationship between mould and disease was not a matter of common knowledge. In my respectful view he was correct in reaching these findings. I also agree that the absence of expert evidence on those issues supports the conclusion that there was no evidence upon which a jury acting reasonably could find that the defendants breached the standard of care or caused harm to the plaintiffs.
>
> [Emphasis added]

[151] The plaintiffs' decision not to call expert evidence regarding the presence of mould was not an oversight. An expert, J. Blair of Pacific Environmental was on the plaintiffs' witness list. However, inexplicably, counsel for the plaintiffs elected not to call that evidence.

[152] Counsel for the plaintiffs argues that, while *Seiler* makes it clear that expert evidence is necessary in order to prove the effect of mould, expert evidence is not required to prove the existence of mould. He argues that evidence from a lay witness, even though untrained in what does or does not constitute mould, that mould was present is sufficient. I disagree. The question is whether or not mould was present, not whether or not the plaintiffs thought mould was present. As was made clear in *Seiler*, the answer requires the evidence of a properly trained expert. The black colouration that was plainly visible in the photographs could well have been mould. Equally, it could have been rot, tar excretion, mere staining or some other phenomenon. Without the benefit of expert testimony, the Court is left to speculate. There is no place for speculation on the existence of facts that are fundamental to a plaintiff's case.

[153] In the result, there is no admissible evidence as to whether or not there was mould in Unit 405.

Claim against Kepland

[154] The claim against Kepland is in negligence. The plaintiffs allege that Kepland breached the standard of care expected of it as a real estate developer. They seek recovery of non-pecuniary damages for the pain and suffering they claim to have

endured from prolonged exposure to mould caused by water ingress into Unit 405 brought about by construction deficiencies. They also claim damages for pure economic loss associated with the investigations, repairs, alternative accommodation, moving and related expenses they incurred.

[155] The thrust of the plaintiffs' claim against Kepland is that various deficiencies during construction allowed water ingress to occur, which resulted in damage to Unit 405 that was discovered over 10 years later. Those deficiencies were:

a) the J-trim affixed to the bottom edge of the exterior vinyl siding and around the windows and doors did not allow rain water to drain and instead channeled it towards the building envelope;

b) deficient exterior finishing work on exterior vinyl siding, window trim, door trim, roofing, eaves and drainage system;

c) improper installation of waterproof membrane on and around the rear landing and stairway;

d) wooden sill plates affixed to the concrete slab on grade;'

e) wooden framework for the concrete slab and perimeter walls left in place; and

f) inadequate and defective installation, finishing and maintenance of roof shingles, roofing trim, roof vents, eaves trough and drainage systems.

[156] A breach of a duty of care (negligence) is made out where a plaintiff proves on the balance of probabilities that a defendant did not meet the standard of care expected in the circumstances. The relevant standard is that of a reasonable real estate developer in the lower mainland of British Columbia in the mid-1990s when Wildwood Glen was built.

[157] The plaintiffs did not call any expert evidence regarding the standard of care that Kepland was required to meet. Plaintiffs' counsel contends (without providing any authority) that no such opinion evidence is required because the court can derive all of the guidance it needs by reference to the applicable provisions of the Building Code. He submits that the Building Code provides sufficient proof of the required standard of care. In other words, proof that the Building Code was not followed, without more, is proof of negligence. I disagree. Statutory breach may be

evidence of negligence but it is not proof of negligence: *R. v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 at 225 - 226; 143 D.L.R. (3d) 9 at p. 24 (S.C.C.).

[158] No evidence was led as to whether the City of Surrey required adherence to the Building Code or to some other building standard or whether it issued occupancy permits based on some other criteria. No evidence was led regarding what occurred between the time when Ankenman's conditional Assurance of Professional Field Review and Compliance was issued on March 25, 1996 and the issuance of an occupancy permit by the City of Surrey. At the very least, it was incumbent upon the plaintiffs to provide the Court with some evidence that the Building Code, and not some other possibly relaxed code to which the City of Surrey adhered, was the appropriate standard to be applied.

[159] Although no witness was called to provide opinion evidence regarding the standard of care that Kepland was required to meet, the evidence of Gould, Croasdale, Ankenman and Martin did touch upon the subject.

[160] Gould testified that building envelope science and related engineering was evolving in the late 1990s when the Wildwood Glen complex was built. He said that, at that time, there was no real sophistication in how building materials should be put together to ensure that wall systems were protected from water ingress. He confirmed that building science has evolved and the knowledge of waterproofing and the design of wall systems has improved dramatically since then. However, he was of the opinion that there were some aspects of the design, detailing and construction of Wildwood Glen that, even by 1996 standards, were lacking. For example, he observed that the J-trim allowed water to collect and funnel into the building envelope. He also noted that 2 x 4 studs had been left in the concrete by the developer contrary to the then existing Building Code which he thought may have caused some of the rot in the wall systems.

[161] Croasdale commented that the problematic detailing observed within the Wildwood Glen complex in the late 2000s, including J-trim, were typical of the standard of construction of condominium developments built during the mid-1990s.

He was neither asked to nor did he provide any opinion evidence regarding whether there was anything inherently negligent about that standard.

[162] Ankenman, who was called as a fact witness, testified that the City of Surrey required an eight inch clearance between the barge boards and the ground and that the accepted standard practice was that the clearance between concrete and barge boards should be at least two inches. Kepland did not construct Unit 405 with the required two inch clearance. No explanation was provided for why the City of Surrey issued its occupancy permit in the face of this apparent deficiency. Ankenman also testified that use of non-draining J-trim was a common method of installing vinyl siding at the time.

[163] Martin testified that Wildwood Glen was typical of vinyl clad buildings constructed in the mid-1990s and that the installation of undrilled J-trim was common practice in the mid-1990s.

[164] Having considered all of the evidence, I find that the plaintiffs have not demonstrated on the balance of probabilities that Kepland breached the standard of care expected of it in the circumstances.

[165] Having found that the plaintiffs have failed to prove that Kepland was negligent in the construction of Wildwood Glen, it is unnecessary to go further. However, even if I had found negligence on the part of Kepland, there are other reasons why the plaintiffs' claims against it must fail.

[166] First, with respect to the plaintiffs' claim for non-pecuniary damages, there is a complete absence of any medical evidence that the plaintiffs' health was affected by anything Kepland did or failed to do. Putting the evidence at its best for the plaintiffs, there was a black substance present on some of the building components that could have been mould caused by shoddy construction on the part of Kepland. However, there is no medical evidence linking the presence of this black substance to the flu-like, allergy or other symptoms that Peter and Linda perceived they were experienced. As expressed by the Supreme Court of Canada in *Mustapha v.*

Culligan of Canada Ltd., [2008] 2 S.C.R. 114 at para. 9, there must be proof of serious and prolonged injury that rises above "the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept. A mere concern or perception of physical injury is not proof of actual physical injury: *M. Hasewaga & Co. v. Pepsi Bottling Group (Canada), Co.,* [2002] B.C.J. No. 1125 (BCCA) at para. 56. There is no evidentiary basis upon which a claim for non-pecuniary damages can be founded.

[167] Second, with respect to the plaintiffs' claim for pure economic loss, in cases such as this involving allegedly defective construction of a residence (i.e. no damage to anything other than the thing itself), the Supreme Court of Canada has made it clear that the builder does not owe a duty of care to a subsequent purchaser unless the alleged defect is more than just shoddy construction. Rather, it must pose a "real and substantial danger" to persons or property: *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85 at paras. 36 - 38.

[168] During his closing submissions, counsel for the plaintiffs argued that the following provides sufficient evidence of Kepland's shoddy construction posing a real and substantial danger:

a) Peter's and Gould's evidence that the rear landings and stairs were rotten;

b) Paul's sickness and the common sense notion that "mould is bad"; and

c) Peter's evidence that water was seen running down electrical wiring in the exposed exterior walls.

[169] Plaintiffs' counsel argues that "if these issues had not been repaired, rot would affect the structural integrity of the buildings, water running along electrical wires was clearly a shock and fire hazard, and ongoing mould growth was clearly a significant health concern."

[170] There was evidence that the rear landings and stairs were rotten in 2009. However, Martin testified that the stairs were in a safe condition in January 2009 when he inspected them. Subsequently Peter performed destructive testing on them

and rendered them unsafe by removing a substantial amount of deteriorated material from them. In any event, the Unit 405 stairs and landings were completely replaced by the Strata Corp. by early June 2009 and the plaintiffs have not shown that they suffered any damages as a result.

[171] There is no evidence that the structural integrity of the buildings was potentially compromised. There is no evidence beyond Peter's opinion, to which I accord little weight, that water running down the insulated electrical wires was a shock or fire hazard. Finally, there is no evidence that mould was growing or that mould was, in the circumstances, a health concern. The plaintiffs ask that all of the foregoing be inferred which, as noted above, I am not permitted to do.

[172] Moreover, the deficiencies complained of by the plaintiffs consisted of "detailing" on the exterior of the building envelope and were readily observable upon a reasonable inspection. There is an obligation on any purchaser of a residential building to inspect and discover patent defects: *Cardwell v. Perthen,* 2006 BCSC 333 at para. 122 (affirmed 2007 BCCA 313). Liability arises under *Winnipeg Condominium* only for latent defects.

[173] Finally, recovery for pure economic loss under the *Winnipeg Condominium* doctrine is limited to the reasonable costs of restoring a dangerous defect to a non-dangerous state (see paras. 43 and 54). No attempt was made by the plaintiffs to identify the portion of the costs being claimed that were incurred to restore Unit 405 to a non-dangerous state. That analysis was provided instead by counsel for Kepland, who demonstrated and I accept, that if the Court finds that Kepland was negligent, and if the plaintiffs demonstrated that they were entitled to recovery under the *Winnipeg Condominium* doctrine, only $3,869.28 could properly be attributable to restoring the building to a non-dangerous state.

[174] In summary, there is no basis in the evidence or the law upon which I can conclude that Kepland is liable to the plaintiffs.

Claim against the Strata Corp.

[175] As owners at the relevant time, the plaintiffs had an undivided interest as tenants-in-common in the Strata Corp.'s common property proportional to their unit entitlement.

[176] The plaintiffs' claim against the Strata Corp. is for:

a. breach of statutory duties under the *SPA;*
b. negligence;
c. breach of contract; and
d. nuisance

[177] In addition, the plaintiffs seek "aggravated, exemplary and punitive damages" against the Strata Corp.

a) Breach of Statutory Duties

[178] The power and duties of the Strata Corp. must be exercised and performed by a strata council: *SPA,* ss. 4 and 26. The strata council consists of elected owner members, who act as its directing mind.

[179] Strata council members have a statutory duty when exercising the powers and performing the duties of the Strata Corp. to act honestly and in good faith with a view to the best interests of the Strata Corp. The strata council must exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances: *SPA* s. 31.

[180] The Strata Corp. is responsible for managing and maintaining common property and common assets for the benefit of owners: *SPA* s. 3.

[181] The Strata Corp. has a statutory duty to repair and maintain common property and common assets: *SPA* s. 72(1).

[182] The documents that the Strata Corp. is required to keep and make available to its members are set out in ss. 35 and 36 of the *SPA*. Examples include minutes of annual and special general meetings, minutes of meetings of the strata council,

including the results of any votes, books of account showing money received and spent and the reason for the receipt or expenditure, contracts to which the strata corporation is a party, budgets and financial statements and correspondence sent or received by the strata corporation and council. Section 36 requires that these documents be made available to a member of the strata corporation within 14 days of a request. Bylaws and rules must be provided within seven days.

[183] The most recent case of this court on the strata corporation's duty to repair and maintain common property is *Leclerc v. The Owners, Strata Plan LMS 614,* 2012 BCSC 74. There, the owners of a unit sued the strata corporation for failure to repair and maintain the common property drainage system. The facts in the case are remarkably similar to those in the case at bar. Owners of a strata unit complained of water ingress. The strata corporation inspected the problem and brought in professionals to carry out repairs to the drainage system. A few years later the water ingress problem returned. The strata corporation responded again with a request for proposals from professionals to inspect and determine the cause. The plaintiffs, concerned that insufficient steps were being taken, retained independent experts who put forward a theory that hydrostatic pressure was contributing to the problem. The strata council retained a geotechnical consulting firm who dismissed the hydrostatic pressure theory and opined that the problem was due to capillary water. The plaintiffs complained that the strata council was delaying the repairs. Acrimony developed between the plaintiffs and the strata council regarding what should be done to remedy the problem. The plaintiffs moved out of their unit due to concerns about mould.

[184] The applicable law and principles were neatly summarized by Brown J.:

> [54] The Strata Council submits, rightly, that the plaintiffs' urging of the Court to disregard the budgetary restraints within which it operates is contrary to the principles laid out in *Oldaker v. The Owners, Strata Plan VR 1008,* 2007 BCSC 669, wherein the Court stated at para. 72:
>
> > [72] ... It is to be expected that one of the considerations in any case where expensive repairs to a building envelope are required will be the ability of the owners to finance those repairs…

[55] In *Weir v. Owners, Strata Plan NW 17,* 2010 BCSC 784*,* Josephson J. neatly summarized the relevant legal principles regarding the duty of a strata corporation to repair and maintain common property:

> [23] There is little issue regarding the law. The respondent has a fundamental duty to repair and maintain its common property: s. *72* of the *Act; Royal Bank of Canada v. Holden,* 7 R.P.R. (3d) 80, [1996] B.C.J. No. 2360 (S.C.). In performing that duty, the respondent must act reasonably in the circumstances: *Wright v. Strata Plan No. 205,* 20 B.C.L.R. (3d) 343, [1996] B.C.J. No. 381 (S.C.), aff'd (1998), 103 B.C.A.C. 249, 43 B.C.L.R. (3d) 1032. Furthermore, the starting point for the analysis should be deference to the decision made by the strata council as approved by the owners*: Browne v. Strata Plan 582,* 2007 BCSC 206*.*
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> …
>
> [28] In resolving problems of this nature, there can be "good, better or best" solutions available. Choosing an approach to resolution involves consideration of the cost of each approach and its impact on the owners, of which there is no evidence before the court. Choosing a "good" solution rather than the "best" solution does not render that approach unreasonable such that judicial intervention is warranted.
>
> [29] In carrying out its duty, the respondent must act in the best interests of all the owners and endeavour to achieve the greatest good for the greatest number. That involves implementing necessary repairs within a budget that the owners as a whole can afford and balancing competing needs and priorities: Sterloff v. Strata Corp. of Strata Plan No. VR 2613, 38 R.P.R. (3d) 102, [1994] B.C.J. No. 445 and Browne.
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> [30] The course of action chosen by the respondent may or may not resolve the problems. If it does not, further remedial work, including separation of the two drainage systems, may be required. The respondent acknowledges that it will undertake that remedial work if it proves reasonably necessary.
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> [31] It may even prove to be the case that the approach of the petitioner is the wiser and preferable course of action. Again, that does not render the approach of the respondent unreasonable.
>
> [32] Disagreements between strata councils and some owners are not infrequent. However, courts should be cautious before inserting itself into the process, particularly where, as here, the issue is the manner in which necessary repairs are to be effected.

[56] The Owners are entitled to rely upon and be guided by professional advice from professionals: s*ee Oldaker.* And, "[s]hould it turn out that those they hire to carry out work fail to do so effectively, the defendants cannot be held responsible for such as long as they acted reasonably in the circumstances": *Wright v. The Owners, Strata Plan #205,* (1996), 20 B.C.L.R. (3d) 343 (S.C.), at para. 30*.*

[185] The court in *Leclerc* considered the steps taken by the strata corporation to deal with the drainage problem and found that, in the circumstances, the strata corporation had acted reasonably:

> [61] The defendants have sought suitable professional advice, and, based on the recommendations received, they have elected courses of action that they thought would be reasonable and effective in solving the problem of moisture ingressions into the unit. For the various options the experts have tendered to them, they may consider the financial cost of each one. But I also do not see, anyway, that when the Strata Council has selected from the options available to them, they have let cost become a too weighty a consideration, as opposed to their perceived effectiveness. I note the cost of repairs to date has consumed a large portion indeed of the defendants' reserves for repairs and maintenance. I find they have acted reasonably and fairly and did their best. They have called for investigations and quotes. They have received recommendations from qualified sources, and to ensure they had the best possible advice, they sought advice from a geotechnical engineer, which seems to me a sensible choice. They have responded to the advice they have received in what I view as a reasonable fashion, though at times they perhaps could have tried to hasten investigations in 2007-2008 somewhat. That might not have been possible, however, and I see no evidence of deliberate foot-dragging. After all, it was in the interests of all the Owners to find a solution as soon as possible. But perfection is not required of the Strata Council; only reasonable action and fair regard for the interests of all concerned.

[186] In support of its reasoning the court in *Leclerc* referred to two other decisions of this court, the facts in each of which are also strikingly similar to those in the case at bar.

[187] The first, *Wright v. Strata Plan No. 205* (1996), 20 B.C.L.R. (3d) 343, aff'd [1998] B.C.J. No. 105 (BCCA), involved a former owner of a strata unit who sold her unit and then sued her strata corporation in negligence. She claimed that water had seeped into her unit from the time she purchased it in 1988 to the time she sold it in 1992. She lodged formal complaints with the strata corporation, which then retained a contractor who repaired the damage to the building envelope within a week. Those repairs were ultimately unsuccessful, and the strata corporation conducted further repairs on several occasions. The strata corporation eventually obtained a number of estimates from the contractors to proceed with extensive waterproofing repairs, and chose the least expensive of them. The plaintiff argued that the strata corporation was negligent in not accepting a more expensive bid which would have

resulted in more comprehensive repairs. The plaintiff alleged that, as a result, she developed asthma-like symptoms allegedly caused by mould. The trial court held that the strata corporation had acted reasonably in taking the steps that it did:

> 25 Meanwhile, in May the plaintiff had begun to feel unwell. This she attributes to the presence of fungi and bacteria in her apartment. Her doctor could find nothing to which he could attribute a specific cause: but did find that she had developed an asthma-like respiratory condition. It is not unreasonable to suppose that this condition had its origin in the bacteria and fungi among which she was living, for it cleared up after she moved out in June of 1991.
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> …
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> 28 It was evident that, as time passed in the years 1989, 1990 and 1991, and the plaintiff continued to complain to the Council about the entry of water into her strata lot, that she came to be regarded by some, at least, of its members from time to time as something of a nuisance: she disturbed the peace and repose of the condominium community. But I cannot find that the defendants' conception of their duty to repair under the Condominium Act was affected by this state of affairs, unfortunate and understandable as it was.
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> 29 As appears from the record of its proceedings the Council was at all times alive to its repair and maintenance responsibilities; and throughout the period of the plaintiff's ownership of her strata lot took steps to remedy the defects which she drew to its attention. The Council even went so far as to interview and take advice from the plaintiff's friend Mr. Rose as to what should be done. In the end, the work of Van-Isle Waterproofing & Restoration Services Ltd. evidently having been found wanting, the Council sought estimates and had more extensive work done by Caporale Construction Ltd. As I have indicated, much expense was incurred.
>
> 30 The defendants are not insurers. Their business, through the Strata Council, is to do all that can reasonably be done in the way of carrying out their statutory duty: and therein lies the test to be applied to their actions. Should it turn out that those they hire to carry out work fail to do so effectively, the defendants cannot be held responsible for such as long as they acted reasonably in the circumstances: and in this instance I have to say that the defendants did just that. They cannot be found to have been negligent.

[188] The appeal was dismissed. In doing so, the court pointed out the necessity, in cases like this, of evidence demonstrating that the outcome would likely have been different had the allegedly wrongful conduct not occurred:

> 8 In my view, there are two major difficulties with this submission. First, it requires us to accept that had Mr. Rose's recommendations been followed, the leakage problem would in fact have been resolved. There was no expert evidence on this point and the trial judge did not make a finding on it and I am

> not persuaded this court can or necessarily should do so. In fact, as Mr. Hutchison acknowledged, the second owner of the strata lot after Mrs. Wright, says that she has not had a problem with water or humidity in the unit - thus the problem may well have been resolved permanently or indefinitely by the work carried out by Caporale Construction. Conversely, Mr. Rose's double flashing may also have achieved the desired result or it may not have. We simply do not know.
>
> 9 Second, I am not persuaded that the trial judge has been shown to have erred in finding that the Strata Council did all that could reasonably be done to respond to Mrs. Wright's complaints. (Again I emphasize that Mr. Hutchison advised us he was not seeking to enforce a standard of strict liability or absolute perfection, but only one of reasonableness.) Whilst it might have been better for the Strata Council to have prepared a written specification or to have retained a consultant or other expert adviser concerning what should be done, I cannot say it was wrong for the trial judge to conclude that the Strata Corporation acted reasonably in obtaining the bids it did and in trying to resolve the leakage problem by retaining Caporale to carry out the "waterproofing" work. The evidence reasonably supports the conclusions both that Caporale's work has solved the problem and that the course of action followed by the Strata Council was reasonable in the circumstances..

[189] The second remarkably similar case on its facts referred to in *Leclerc* is the more recent decision in *Weir v. Owners, Strata Plan NW 17,* 2010 BCSC 784. There, an owner of a strata unit sought to compel the strata corporation to repair its drainage system. The strata corporation commissioned a BECA, which recommended the retainer of a geotechnical engineer. The strata corporation did not act on this recommendation until after flooding had occurred in one of the units. The strata corporation then retained a firm to investigate, which led to the discovery of mould in the flooded unit. The firm concluded that water had been entering the unit over a substantial period of time. The petitioners argued that the firm retained by the strata corporation was not qualified to deal with the investigation, and hired their own engineers to advise on the situation. One of these engineers commented that the scope of work proposed by the strata corporation's firm was incomplete. The court held that, even though the planned repairs may not have resolved all of the drainage issues, the strata corporation had acted reasonably.

[190] Dissension among owners regarding the appropriate approach to repairs does not absolve the strata corporation from its duty to repair and maintain common property. In ***Browne v. Strata Plan 582*****,** 2007 BCSC 206 at para 28:

> **28** Irrespective of whether there has been dissension among owners with respect to proceeding with the repair, the corporation's obligation to maintain the common property continues. As Macdonald J. observed in ***Tadeson v. Strata Plan NW 2644*** (1999), 30 R.P.R. (3d) 253, 94 A.C.W.S. (3d) 1017 (B.C.S.C.) at para. 15:
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> > The failure of the respondent strata corporation here is not due to any neglect on its part. That failure results from the refusal of the respondent owners to authorize the work, and the special assessment necessary to carry it out. But it remains, so far as the petitioners are concerned, a failure to fulfill a clear statutory obligation.

[191] The evidence in this action reveals that the strata council regularly received repair requests from owners and dealt with them as best it could within budgetary constraints. When it became apparent that a significant building envelope problem existed, the strata council scheduled meeting after meeting in an attempt to have the owners pass resolutions to raise the necessary funds, all of which failed, until December 2009.

[192] The plaintiffs argue that the Strata Corp. nevertheless breached its statutory duty owed to the plaintiffs in several respects:

a) it failed to disclose to the plaintiffs details of the Milano investigation and repairs that took place in November 2005, including Milano's opinion that there were widespread, systemic building envelope deficiencies in the complex, despite requests by the plaintiffs that it do so;

b) it failed to provide MH with the repair documents and photographs previously performed by Milano at other units around the complex;

c) it failed to follow MH's recommendation in January 2007 that an inventory condition survey of the rear stairs and landings be performed (this survey was not performed until May 2009);

d) it failed to provide the plaintiffs with timely temporary repairs to Unit 405 after it became aware of the water ingress problems in November 2008 and despite the problems having been confirmed by the Strata Corp.'s own experts;

e) it generally failed throughout the period 2007 to 2010 to consider a more thorough and full assessment and repair program regarding the water ingress problems at the complex; and

f) it led the plaintiffs to believe that repairs to Unit 405 were imminent when, in fact, the Strata Corp.'s plan was to hold off making any repairs until the full extent of the building envelope problems within the complex were better understood.

[193] The plaintiffs argue that the strata council ignored them and dismissed their complaints and requests because of animosity and ill will dating back to August 2003 when the plaintiffs filed a human rights complaint against the Strata Corp. regarding the use of a parking stall.

[194] It is obvious that the plaintiffs, particularly Mr. Kayne, became thorns in the side of the strata council and were not particularly liked by its members. The situation deteriorated when, in March 2005, the plaintiffs initiated a petition to have the strata council members dismissed for cause (that petition was defeated by the majority of owners). The relationship deteriorated further in September 2005 when the plaintiffs, apparently with the approval of Mr. Byzitter, undertook landscaping in the common area behind the 400 block units without proper authorization from the strata council and then demanded that the expenses be paid by the Strata Corp. This appears to have been a unilateral decision by Mr. Byzitter to undertake landscaping in the area behind his and the plaintiffs' units in priority over other common areas. Then, in January 2006, the plaintiffs began to second guess the decision of the strata council to retain Milano to perform the November 2005 repairs without first obtaining a quote. The plaintiffs went so far as to suggest that Milano and Paragon, the property manager, had a "relationship". This was all in the context of the plaintiffs having demanded that the strata council perform repairs to his unit within three weeks. Next, in January 2006, the plaintiffs began pushing for an audit of the Strata Corp.'s financial records. Then, in April 2006, Peter filed a second human rights complaint against the Strata Corp. In April 2007, he filed a petition in the Supreme Court seeking production of documents. In August 2007 he filed a second petition seeking the production of further documents.

[195] Needless to say, none of the foregoing served to improve the relationship between the strata council and the plaintiffs. However, mere personality conflicts do not amount to a breach of the duty owed by a strata council to owners. The evidence falls short of establishing that the plaintiffs were singled out by the strata council or were treated unfairly or differently than other owners were. Understandably, the strata council was cautious when dealing with Peter. Any

unfriendliness or animosity that existed between the plaintiffs and the strata council was primarily of Peter's own making. As was aptly stated by counsel for MH, the plaintiffs "are clearly not suited for the compromises required for strata living".

[196] I will deal with each ground of alleged breach of statutory duty.

A. failure to disclose details of the 2005 Milano investigation and repairs and that Milano;

[197] Plaintiffs' counsel argued that, had this information been provided to Peter in 2005 when he demanded it, Peter would have been even more of a thorn in the side of the strata council and would have done what he did in 2008, namely be instrumental in pushing the strata council to launch in 2006 the investigation and building envelope repair program that was ultimately followed in 2009. He submits that, had this happened, Unit 405 would have been properly repaired in 2006, the plaintiffs would not have had to move and would not have sold their unit.

[198] The Strata Corp. was well aware of what Milano had found at Unit 405 and acted on it. It obtained a proposal from MH for a BECA. Despite its recommendation to retain MH, the owners instructed the strata council to retain a contractor instead. They subsequently changed their mind and adopted the strata council's original recommendation. In the result, MH was retained in September 2006 rather than in May 2006. It is pure speculation to suggest that, if Peter had the 2005 Milano repair documents or had MH been retained four months earlier, there would have been any difference in the timing of the eventual outcome, particularly given that the difficulty faced by the strata council is obtaining the approval of owners for the repairs. I find that the plaintiffs have failed to prove on the balance of probabilities that disclosure of the Milano investigation and repair information would have materially changed the outcome.

B. failure to provide MH with previous repair documents and photographs

[199] It is true that MH completed the MH 2007 Report without being privy to these documents. However, the evidence of both Martin and Jirka, which I accept, is that

they were fully aware that previous repair work had been done and that, while it is always helpful to have as much information as possible, in this case the receipt of this additional documentation would not have changed the recommendations in the MH 2007 Report.

C. failure to follow MH's recommendation in January 2007 that an inventory condition survey of the rear stairs and landings be performed

[200] Shortly after receipt of MH's recommendation that an inventory condition survey be conducted, the strata council began to receive more complaints about roof leaks. They retained a roofing consultant who advised that the Wildwood Glen roofs were nearing the end of their life cycle. Based upon that advice and on the MH 2007 Report that targeted repairs to the building envelope were the only repairs requiring immediate attention, the strata council concluded, in my view reasonably, that the roofs were the first priority. It proceeded expeditiously to put forward a roof repair plan and to obtain the necessary owner approvals and assessments. It did not become aware that the vinyl siding portion of the building envelopes was a bigger issue until November 2008. Thereafter, it proceeded expeditiously to bring in MH again and obtain the inventory condition survey.

[201] Although in hindsight it is easy to criticize the strata council for failing to commission the inventory condition survey in 2007, I cannot fault them for not recognizing that it would be as important as it turned out to be. In my view, the Strata Corp. did all that could reasonably have been expected of it in the circumstances.

D. failure to perform timely temporary repairs to Unit 405

[202] The plaintiffs argue that the Strata Corp. should have taken immediate steps to stop ongoing water ingress into Unit 405 pending permanent repairs. They point to the fact that, to the strata council's knowledge, there were "open walls, water actively entering the living space ... through the Strata Corp.'s building envelope on an ongoing basis, rotting OSB facing inside the living space, rotting framing and rotting trim (outside)." They say that the strata council was "wilfully blind" to the

urgency of the problems at Unit 405 and led the plaintiffs to believe that repairs were imminent when, in fact, the strata council's intention was to obtain a building envelope assessment of the entire complex before spending money on any repairs. The plaintiffs submit that the failure by the Strata Corp. to treat the situation at Unit 405 as an emergency and to effect temporary repairs was a breach of its statutory duty.

[203] I find that the strata council did investigate the plaintiffs' complaints regarding water ingress. It took immediate steps to deal with the problems discovered in November 2005. It promptly sent Milano to inspect Unit 405 when it received Peter's November 1, 2008 letter demanding action. It then retained MH to provide an opinion of an expert building envelope consultant that led to an inspection of Unit 405 in early January 2009 and to the MH 2009 Report issued in March 2009. On April 1, 2009, it retained a company to spray for and encapsulate any mould.

[204] Throughout the relevant time period, the strata council was facing and doing its best to react to increasing issues related to the complex's building envelopes. It relied and acted upon the advice it received from MH. While it may have lost sight of the situation at Unit 405 as it focused on the completion of a full analysis and remediation plan for the entire complex, by doing so, it was not in breach of its statutory duty to repair.

[205] It is important to note that the open walls within Unit 405 were Peter's own doing. He stated in his November 1, 2008 letter to the strata council that he intended to close these openings and reconstruct the internal walls after November 9, 2008. He could easily have done so. He chose instead to leave the inside walls open and Unit 405 exposed to the elements until 2010 when he hired a contractor to renovate his unit. It is noteworthy that the contractor closed up these very walls before the repairs to the building envelope were even commenced. Plainly, this work was not dependent on the Strata Corp. first taking action on the outside of the building and could have been done any time after November 9, 2008 when Peter said it would be. He was certainly resourceful enough to have done so. In my view,

the plaintiffs left the inside walls open for one reason: to emphasize their woes in an attempt to obtain priority for repairs to Unit 405 over those to the complex generally. The strata council, rightly in my view, focused its attention on the interests of all owners.

[206] Finally, it is noteworthy that none of the plaintiffs' own experts indicated in the various reports prepared prior to April 2009 that there was urgent need to perform the repairs, temporary or otherwise.

E. failing throughout the period 2007 to 2010 to consider a more thorough and full assessment and repair program

[207] I have dealt with this allegation above. When the Strata Corp. received the Inventory Assessment Survey from MH in May 2009, it responded to it. It is speculation whether the strata council would have obtained approval of the necessary owners' resolutions regarding the recommended repairs faster than it did by providing more information or analysis to the owners. There is no evidence of deliberate delay on their part. On balance, I find that the Strata Corp. acted reasonably and prudently and in the best interests of all the owners to find a solution as quickly as possible. Again, perfection is not required, only reasonable action and fair regard for the interests of all concerned is necessary: *Leclerc* at para. 61.

F. leading the plaintiffs to believe that repairs to Unit 405 were imminent

[208] The evidence is clear that, from December 2008 to approximately June 2009, the strata council led the plaintiffs to believe that specifications for the repairs to Unit 405 were being prepared. The plaintiffs requested that repairs to their unit commence in July 2009 when it would be least disruptive to Linda. Instead of proceeding with repairs to Unit 405, the strata council held off and undertook a comprehensive building envelope review of the entire complex to ensure a full understanding of the situation. It must have been (or at least should have been) clear to the plaintiffs by at least the June 13, 2009 meeting of the strata council (which Linda attended) that repairs to Unit 405 were going to await on overall

assessment of the complex. Indeed, on April 23, 2009, counsel for the plaintiffs wrote to the strata council stating:

> It is obvious that doing the repairs and remedying the problems here will be a substantial matter. It may well be that doing so will involve work not just in relation to the Kayne Unit and to the common property in and around it, but also to other units that have not been fully investigated as of yet. The obligations of a prudent owner of property in circumstances such as this, which is the standard that the Strata Corporation must adhere to in relation to the Strata Complex, are such that it must make such a full investigation and move promptly to address whatever problems are detected.

[209] Thereafter, the plaintiffs attended various strata council meetings at which this approach was discussed in detail. Their complaints were not about being misled about the timing of the repairs to their unit but rather about inadequate information regarding the scope of repair for the complex as a whole.

[210] In my view, the approach taken by the strata council was entirely reasonable. Moreover, the plaintiffs have not demonstrated that they suffered any damages as a result of being misled from December 2008 to July 2009. No breach of statutory duty has been made out.

b) Negligence

[211] In his closing submissions, counsel for the plaintiffs did not identify any conduct on the part of the Strata Corp. amounting to negligence other than that which he argued amounted to breach of the Strata Corp.'s statutory duty. There was no suggestion that the standard of care in respect of the statutory duties is any different than the standard of care in respect of the common law duty. I have found that the Strata Corp. did not breach its statutory duty. Accordingly, I find that the plaintiffs have failed to show that the Strata Corp. is liable in negligence.

c) Breach of Contract

[212] The plaintiffs claim damages for breach of the Settlement Agreement by the Strata Corp.

[213] Counsel for the plaintiffs submits that the Settlement Agreement required that the strata council conduct itself in "an open and transparent manner" and disclose to the owners all key information in its possession. He argues that the failure by the strata council to provide information and records to Peter "forced him to engage [in] long, expensive and stressful processes, including a second Human Rights Complaint and a Supreme Court Petition to force production of relevant repair documents."

[214] However, a review of the terms of the Settlement Agreement suggests no such thing. There was no term mandating a higher level of openness and transparency. The evidence presented in this case, particularly that of Heinrich, demonstrates that each term of the Settlement Agreement was implemented. There was no requirement under the Settlement Agreement that the plaintiffs be provided with the minutia of every communication taking place among members of the strata council. The plaintiffs were invited to and did attend virtually every formal meeting of the strata council. Furthermore, they were given an opportunity at the beginning of the meeting to speak, and they were able to observe, listen and takes notes of the entire meeting.

[215] Even if I were to accept the plaintiffs' interpretation of the Settlement Agreement no consequential damages have been proved. Given Peter's well established propensity to demand action, it is possible that receipt by him of the documentation and photographs regarding the 2005 repairs would have resulted in the 2006 MH BECA proposal being approved at the special general meeting on May 18, 2006 rather than on September 7, 2006. However, based upon the evidence before me, I am unable to find that, had MH commenced its BECA work four months earlier, the 2007 MH Report would have changed. Indeed, the evidence is overwhelming that MH identified the very building envelope issues that Milano had uncovered.

[216] This claim is dismissed.

d) Nuisance

[217] The plaintiffs also claim damages against the Strata Corp. for the tort of nuisance. The claim is founded upon the allegation that, by not repairing the building envelope around Unit 405 in a timely way, the Strata Corp. caused and intentionally allowed ongoing water ingress through the defects in the building envelope, thereby interfering with the plaintiffs' use and enjoyment of and causing damage to Unit 405.

[218] A person commits the tort of nuisance when he or she is responsible for an act indirectly causing physical injury to land or substantially interfering with the use or enjoyment of land and where, in light of all surrounding circumstances, that interference is unreasonable: *Suzuki v. Munroe,* 2009 BCSC 1403 at para. 34 (quoting from *Royal Anne Hotel Co. Ltd. v. Village of Ashcroft* (1979), 95 D.L.R. (3d) 756 (B.C.C.A.)).

[219] Nuisance gives rise to strict liability. The court will look to the harm suffered, without regard for whether it results from intentional, negligent or non-faulty conduct. The interference must be intolerable on an objective standard. It must also be substantial, which means that compensation will not be awarded for a trivial annoyance: see *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64 at para. 77.

[220] The factors to be considered for finding nuisance are the nature, severity and duration of the interference, the character of the neighbourhood, the sensitivity of the plaintiff's use and the utility of the impugned activity, which is helpfully elaborated upon in *340909 Ontario Ltd. v. Huron Steel Products (Windsor) Ltd.* (1990), 73 O.R. (2d) 641 (H.C.J.) (*Huron Steel*), affirmed (1992), 10 O.R. (3d) 95 (C.A.).

[221] The plaintiffs argue rain water emanating from the sky landed on the building envelope and was channelled into Unit 405 by the defective detailing installed during construction. They say that, having become aware of the water ingress problems at Unit 405, the Strata Corp. had an obligation to repair the building envelope which it owned and its failure to do so makes it is liable in nuisance.

[222] The plaintiffs were unable to provide any precedent for such a proposition.

[223] The Strata Corp. was not responsible either for the rain falling from the sky or for the detailing that had been installed the way it was. Where no fault can be imputed to the defendant, the court will take into account whether the defendant had knowledge of the nuisance and, if so, whether the defendant took reasonable steps to abate the nuisance: *Nikka Overseas Agency v. Canada Trust Co*., [1961] B.C.J. No. 172 (S.C.) at paras. 19 - 21; *Kraps v. Paradise Canyon Holdings Ltd*., [1998] B.C.J. No. 709 at paras. 14 - 23; *Wayen Diners Ltd. v. Hong Yick Tong Ltd*. (1987), 35 D.L.R. (4th) 722 at 726 (S.C.).

[224] As set out above, when problems with the building envelope were identified, the Strata Corp. took reasonable steps to respond.

[225] The Strata Corp. was not responsible for the any interference with the use and enjoyment by the plaintiffs of Unit 405. Rather, the walls and building envelope that the plaintiffs complain about were the very things that kept the plaintiffs' unit from being fully exposed to the elements. As stated earlier, the plaintiffs could have, at any time, re-built the interior walls that they opened.

[226] The plaintiffs' claim in nuisance is dismissed.

Claims against MH

[227] The plaintiffs claim against MH for negligence, negligent misrepresentation and nuisance.

a) negligence/negligent misrepresentation

[228] The plaintiffs submit that the MH 2007 Report was inaccurate and led them to believe that the only a few localized repairs were needed within the complex when in fact the building envelope was failing throughout and required significant repair. They say that, had the MH 2007 Report been accurate and reliable, they would not have had to retain their own independent experts, the repairs to the building

envelope ultimately undertaken in 2010 would have been done 2 ½ years earlier and they would not have been forced to move out of Unit 405.

[229] The plaintiffs rely for their claims in negligence and negligent misrepresentation on the expert opinion of Croasdale.

[230] Croasdale was critical of the MH 2007 Report, which stated that the vinyl clad wall assemblies were "performing acceptably" and that the problems were localized. In his opinion, the investigation performed by MH in 2006 revealed moisture-related and performance problems and other "red flags" of systemic water ingress problems. In his words:

> ...problematic details, landings, windows, vents and band board corners repeat throughout the complex.

He testified that it should have been obvious to MH that the water damage extended into the walls throughout the complex and that this fact should have been included in the report.

[231] Croasdale also criticized MH for conducting moisture probes for the purpose of the MH 2007 Report after prolonged dry weather conditions. He opined that the $70,000 repair cost estimated by MH was not even close to being accurate and should have been ten times that amount. He was of the opinion that MH should have extrapolated from what was plainly apparent and provided a more realistic estimate.

[232] During cross-examination, Croasdale conceded that different building envelope specialists could reasonably form different opinions on repair strategies based upon their respective assessments of the performance of the building envelope. He also conceded that the targeted repair strategy recommended by MH was common in the lower mainland of British Columbia and that this strategy can be successful depending upon the detailing within a given complex. He also conceded that he may have exaggerated the volume of "red flags" that were reported to MH prior to the MH 2007 Report.

[233] Croasdale agreed that, by June 2010 when he performed his inspection, the rot and decay he observed was likely worse than it had been in the fall of 2006 when the complex was inspected by MH. However, he testified that, given the complex was constructed in 1996, in his opinion the rot would have been apparent in 2006 at the time of MH's inspection.

[234] Although Croasdale had various criticisms of the work performed by MH, he did not provide any opinion on the standard of care expected of a building envelope consultant in the circumstances. Indeed he did not provide any other industry baseline against which MH's conduct could be judged. It is possible that Croasdale is the type of individual who expects exacting standards from his fellow professionals and judges them accordingly. However, perfection is not the basis upon which negligence is measured. Rather, negligence is conduct that falls below the standard of care expected in the circumstances. The task of the Court is to determine that standard. Croasdale did not provide any assistance in that regard.

[235] The answer was instead provided by MH. It called Derek Neale as an expert on building envelope assessments and the industry standard required of MH in the circumstances. As a past president of the Architectural Institute of British Columbia, past chairman of the AIBC Building Envelope Committee, member of the Building Envelope Research Consortium, contributor to various publications on the acceptable standards for architects and engineers when assessing building envelopes and a building envelope specialist with a wealth of experience in the restoration of buildings subject to building envelope issues, he was eminently qualified to assist the Court in its determination of the appropriate standard of care. He reviewed the MH 2007 Report, the January 2009 Site Visit Report, the 2009 Landing Condition Survey as well as the various other designs and specifications prepared by MH in respect of the Wildwood Glen complex.

[236] In Mr. Neale's opinion, the best reference for good practice in the building envelope consulting industry is the CMHC Building Envelope Rehabilitation Consultant's Guide ("Guide"). In his opinion, all of MH's investigations, reports and

bid packages were appropriate for the project, followed the recommendations contained in the Guide and were typical and met the standards of good building envelope practice.

[237] On cross examination, Mr. Neale conceded that, given MH became aware that extensive repairs had been performed on the building envelopes of Units 404 and 405, it would have been good practice for MH to have requested all relevant documents and photographs related to that work. However, despite having not received that information, MH identified these very areas as problematic and made appropriate recommendations. In Mr. Neale's opinion, the receipt of that additional information, while useful, would not have changed MH's findings as set out in the MH 2007 Report.

[238] Mr. Neale also agreed that the plaintiffs' questionnaire (October 2006) raised concerns that were worthy of inquiry at Unit 405. However, Jirka testified that he did take these concerns into consideration when preparing the MH 2007 Report.

[239] The MH investigation in 2006 did not reveal a full building envelope failure or warrant an immediate and full remediation. It did identify and raise sufficient concerns with respect to the rear stair and landing details that MH recommended a full inventory condition survey of those areas throughout the complex. These were the areas that were discovered 2 ½ years later as being the primary source of water ingress. The fact that the Strata Corp. delayed for 2 1/2 years to commission such a survey can hardly be visited upon MH.

[240] Mr. Neale also opined that the content of the MH bid package put out to tender in 2010 was also consistent with industry standards for such packages.

[241] While is it easy to criticize the work of any professional in hindsight when more information is known, the professional is not negligent unless his or her work failed to meet the standard of care expected of the professional in all of the circumstances at the time it was performed. In this case, I have no hesitation finding

that the work performed by MH in respect of the Wildwood Glen complex met the required standard of care at the time it was performed.

[242] The plaintiffs have failed to prove that MH acted negligently. Moreover, they have not shown that the MH 2007 Report was untrue, inaccurate or misleading at the time it was prepared and presented to the plaintiffs.

[243] Moreover, on the issue of causation, the plaintiffs did not lead any evidence to support the proposition that, but for the failure of the MH 2007 Report to state or emphasize what they say should have been stated and emphasized, the events that transpired would have been different. Again, the plaintiffs asked me to infer that the events of 2009 and 2010 would have taken place 2 ½ years earlier, which would be pure speculation. Speculation is not a sufficient basis upon which to prove causation. As was made clear by the Supreme Court of Canada in *Resurfice Corp. v. Hanke,* 2007 SCC 7 in order to prove causation there must be a "substantial connection" between the alleged injury and the defendant's conduct:

> **21** First, the basic test for determining causation remains the "but for" test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred. Having done this, contributory negligence may be apportioned, as permitted by statute.
>
> **22** This fundamental rule has never been displaced and remains the primary test for causation in negligence actions. As stated in Athey v. Leonati, at para. 14, per Major J., "[t]he general, but not conclusive, test for causation is the 'but for' test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant." Similarly, as I noted in Blackwater v. Plint, at para. 78, "[t]he rules of causation consider generally whether 'but for' the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities."
>
> **23** The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and defendant's conduct" *is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone…*[citations omitted]

[244] The plaintiffs' failure to prove causation is also fatal to their claim in negligence against MH.

b) Nuisance

[245] The plaintiffs' claim against MH in nuisance is also flawed. Nuisance requires that a defendant "used" or owned land from which the nuisance emanated: *Lefebrve v, Maple Ridge (District)*, 2006 BCSC 326 at para. 88.

[246] MH is a building envelope consultant. It was retained to advise the Strata Corp. It did not have any interest in any of the land or common property at Wildwood Glen. It did not use any of the land or common property in the sense required by the tort of nuisance.

[247] The claim in nuisance against MH is dismissed.

The Plaintiffs' Damages Claim

[248] Given my decisions on liability, it is unnecessary for me to consider the plaintiffs' various damages claims. However, in the event that I am wrong, I will do so.

a) payments made to investigation consultants (all defendants)

[249] The plaintiffs claim the sum of $52,403.50 in respect of the fees charged by the independent consultants they retained to advise and assist them in understanding the nature and extent of the building envelope problems. These fees include those of at least two consultants that the plaintiffs themselves were not satisfied with. One need only contrast the total amount of all assessments paid by the plaintiffs for the repairs to the building envelopes in the complex ($28,524.13) to see that the consulting fees paid were out of all proportion to the issues that were facing the plaintiffs and are therefore unreasonable. In my view, there was no need for independent consultants. The matter was being properly handled by the strata council.

[250] In any event, the consultant fees incurred for the purpose of providing expert evidence at trial are disbursements and should not have been claimed as damages.

b) repairs and maintenance of Unit 405 (all defendants)

[251] The plaintiffs claim $15,490.97 in respect of the repairs and upgrades to Unit 405. This amount is net of the settlement received by the plaintiffs from their insurer in 2009 as a settlement for the damages caused by the hot water heater failure in 2007.

[252] Of the $15,490.97 being claimed, $9,111.50 was incurred in respect of improvements and upgrades to Unit 405 and for maintenance and landscaping costs at the rental unit which, in contrast to Wildwood Glen (where those expenses were the responsibility of the Strata Corp.) were the plaintiffs' responsibility. No explanation was provided by the plaintiffs as to why they moved to a detached house rather than to another townhouse. There is no basis in law for this portion of the claim.

[253] With respect to balance, namely the "repairs" portion of the claim, $1,545.60 was spent repairing water damage in the third floor from roof leaks. No evidence was presented that there was any negligence in the construction of the roof. This portion of the repair claim is unrecoverable.

[254] Many of the other amounts claimed related to normal maintenance costs (i.e. a new kitchen faucet, new rollers and lubricants for the garage door, rental of a grinder to repair a crack in front of the garage door, a cover for an electrical box in the garage, an epoxy coating for the garage door and a new shower curtain). Others were not shown to have been the result of actionable conduct on the part of the defendants. Accordingly, they are not properly included in the damages claim.

[255] The plaintiffs also claim $2,500 as compensation for their labour performed in attempting to make Unit 405 inhabitable. No factual basis was provided for this amount. It was simply a number pulled out of the air by counsel for the plaintiffs.

c) rental of replacement accommodation (all defendants)

[256] The plaintiffs claim the sum of $55,597.79 in respect of their rental accommodation for the period August 1 2009 to April 30 2011, including moving expenses and utilities.

[257] The plaintiffs were the only residents of Wildwood Glen that moved during the repairs. Their reason for doing so was that the various rooms in Unit 405 were cluttered with furniture from the basement rooms, that some of the walls and floors had been opened up and that they had concerns regarding their health and that of their family.

[258] The walls and floors were opened up by Peter in order to expose the water ingress problem. They could have been closed at any time. If they had been, and if water ingress continued and damaged the new walls and flooring due to any unreasonable delay on the part of the Strata Corp. in effecting repairs, the repair costs would have been recoverable. They did not provide any expert evidence that Unit 405 was objectively uninhabitable. In my view, the extreme action that the plaintiffs took by moving to rental accommodation was unnecessary and unreasonable.

d) loss of value on and costs incurred for the sale of Unit 405 (Strata Corp. and MH)

[259] On April 27, 2011, the plaintiffs sold Unit 405 for $325,000, which they say was $25,000 less than it would have been had there been no building envelope stigma associated with the unit. The plaintiffs incurred real estate commissions totalling $12,104.40, legal fees for conveyancing of $478, as well as mortgage pre-payment penalties and discharge fees totaling $13,695.20. They claim these amounts against the Strata Corp. and MH as damages which they say they would not have been incurred but for the issues associated with the building envelope problems. These claims total $51,277.60.

[260] In support of this claim, the plaintiffs called Mr. Neufeld, an expert real estate appraiser, who opined that, as of April 27, 2011, assuming that there was no stigma

associated with it having had building envelope issues, Unit 405 would have had a value of $350,000. Mr. Neufeld did not opine, nor was he asked to opine, on any reason why Unit 405 sold for $325,000 at a time when its value, in his opinion, was $350,000. Mr. Neufeld's opinion was based upon the Direct Comparison Approach. He compared what he considered were appropriately comparable units in comparable developments to Unit 405. Mr. Neufeld was well qualified and I accept his opinions in their entirety.

[261] However that does not end the matter. There was no evidence regarding how or why the selling price of $325,000 was established. In particular, there was no evidence that the price was in fact less than would have been the case had Unit 405 never experienced a building envelope issue.

[262] The plaintiffs sold Unit 405 because of the ill will that they perceived existed between them and others living within the Wildwood Glen complex, particularly the strata council. To the extent that ill will existed, it was largely of Peter's own making. There is no basis in law for visiting any costs or other losses on the sale upon the Strata Corp. or MH.

e) recovery of special assessments (strata levies) (Kepland)

[263] The plaintiffs say that the special assessments they paid totalling $28,524.13 would not have been incurred had the building been properly constructed by Kepland and/or had the repair work conducted by Milano in November 2005 been done properly. They say that all of the repair work would have been covered by the Strata Corp.'s normal maintenance budgets had it been done properly and in a timely way and that there would have been no need for a special assessment.

[264] There were two assessments paid by the plaintiffs. The first, in 2007, was $4,347.29 in respect of the replacement of roofs and gutters on blocks 100, 200 and 300. No evidence was adduced that the roofs or gutters were built or designed negligently. Rather, the evidence is that the roofs were at the end of their service life and were replaced as a matter of routine maintenance.

[265] The second assessment paid by the plaintiffs in 2009 was $24,176.84 for replacement of exterior staircases and other building envelope work, including replacement of the roofs on the remaining buildings. The roof replacement portion of the plaintiffs' 2009 assessment was $6,744.88. It is clear from the evidence that a good deal of the remaining work was renewal rather than replacement. No evidence was led by the plaintiffs regarding what portion of the balance was required in order to return the building envelope to a non-dangerous state.

f) Other

[266] The plaintiffs also claim the following:

a) non-pecuniary damages in the amount of $20,000 against all defendants arising from what the plaintiffs allege was prolonged exposure to mould that resulted in "mild but persistent" reactions;

b) damages for nuisance and loss of quiet enjoyment in the amount of $80,000 against the Strata Corp. and MH;

c) aggravated damages in the amount of $50,000 against the Strata Corp.; and

d) punitive damages in the amount of $100,000 against the Strata Corp.

[267] Given my findings on liability, there is no need to deal with these claims.

Disposition

[268] The plaintiffs have failed to prove a cause of action against any of the defendants. Their action is dismissed.

[269] If the parties are unable to agree on costs, they are at liberty to apply.

"The Honourable Mr. Justice Weatherill"