IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Radcliffe v. The Owners, Strata Plan KAS1436,* 2014 BCSC 2241

Date: 20141201
Docket: 100677
Registry: Kelowna

Between:

Robert John Radcliffe and Holly Ann Radcliffe

Petitioners

And

The Owners, Strata Plan KAS1436

Respondent

Before: The Honourable Mr. Justice G.P. Weatherill

Reasons for Judgment

Counsel for Petitioners:	B.R. Coyne
Counsel for Respondent:	G.A. Purdy, Q.C.
Place and Date of Hearing:	Kelowna, B.C. November 5, 2014
Place and Date of Judgment:	Kelowna, B.C. December 1, 2014

[1] A strata property development located in Kelowna, B.C., locally known as the "Lagoons" and comprising 74 tower units and 30 low-rise townhomes, had some water ingress issues. This dispute involves the interplay between the duties imposed on the respondent by the *Strata Property Act,* S.B.C. 1998 c. 43 ("*Act*"), the respondent's bylaws, s. 164 of the *Act*, and how the respondent's strata council ("Strata Council") responded to the petitioners' claim for restoration and remediation costs from water damage that occurred between 2009 and 2012.

[2] Water ingress was caused by the failure of the Lagoons' building envelope. The problem was ultimately resolved in 2013 at a cost of $1,900,000.

[3] The petitioners are owners of unit 1101 ("1101"). It suffered from periodic flooding and water ingress since October 2009 and the petitioners say the Strata Council wrongfully refused to pay their out-of-pocket expenses of $21,614.78 related to floor replacement and other repairs necessitated by the water. They say that the Strata Council's treatment of them is "significantly unfair" and seek relief under the oppression remedies of s. 164 of the *Act.*

[4] The respondents say that it acted reasonably in repairing the building envelope and resolved the water ingress issue in a timely manner, acted reasonably in discharging its duty to repair and maintain the Lagoons' common property, followed its bylaws in denying the petitioners' request for reimbursement and is therefore not liable for the petitioners' repair costs.

The Petitioners' Claim

[5] On September 13, 2013 the petitioners brought this application by way of petition and supporting affidavits. In the petition they claimed the following relief:

1. A Declaration that the Strata Council is in breach of its duty under the *Strata Property Act*.
2. A Declaration that the respondent Strata Corporation is in breach of its duty under its bylaws.
3. A Declaration that the respondent Strata Corporation has breached its duty to properly repair and maintain the common property and the

repair and maintenance of the building envelope and balconies falls squarely within the scope of that duty.

4. A Declaration that the Strata Council's failure to properly repair and maintain the Lagoons is significantly unfair to the Petitioners.
5. An Order that the Strata Corporation reimburse the Petitioners in the amount of $21,614.19.
6. An Order that the Petitioners be exempt from payment of their respective share of any special assessment levied by the Strata Corporation to pay the Petitioners' costs of this proceeding;
7. An Order that the Strata Corporation jointly and severally pay the Petitioners' costs of this proceeding.
8. Interest pursuant to the *Court Order Interest Act*, RSBC 1996 c. 79.

Background

[6] The petitioners purchased and took possession of 1101 in June 2009. They carried out renovations to 1101 until they were completed in October 2009.

[7] On October 23, 2009, 1101 suffered water damage (the "First Event"). The petitioners described it as a flood. It was determined that the water ingress was from outside the suite. On Side Restoration ("On Side") was retained by the petitioners' insurer to remediate the damage. The Lagoons' building management company, Baywest Management Corporation ("Baywest") investigated and the culprit was determined to be improper slopping of and an opening in the concrete deck of the balcony of suite 1201 ("1201") located immediately above 1101.

[8] Insurance coverage for the water damage to 1101 was denied as being an uninsured peril.

[9] In its amended response to petition, the respondent admits that some water leakage occurred into 1101 from the common property, but denies that all of the water damage to 1101 from the First Event was from that source. Rather, it says that some of the damage was from the overflow or leakage from a toilet within 1101 and/or from modifications the petitioners made to one of 1101's balconies above where the water damage occurred. These allegations are denied by the petitioners who describe the toilet leakage as a "one-off event" that was remediated immediately before causing further damage.

[10] Temporary repairs to 1201's balcony were attempted by On Side. On Side's repair bill was paid by the respondent.

[11] The restoration and repair costs to 1101 following the First Event totalled $7,016.11 and included repairing walls and replacing hardwood floors. The petitioners sought reimbursement from the respondent.

[12] Water ingress into 1101 occurred again in January and February 2010 and again the matter was brought to the attention of both Baywest and the Strata Council. Baywest confirmed that the temporary repairs undertaken by On Side did not last.

[13] At a March 8, 2010 Strata Council meeting the petitioners again raised the matter of reimbursement of 1101's repair costs. The Strata Council denied the request, relying upon its then Bylaw 10 ("Bylaw 10") that was passed in October 2008. It provided:

> Lagoons By Law 10 - Damage to Property
>
> a. No owner shall be entitled to claim any compensation from the Strata Corporation for a loss or damage to the property or person of the owner arising from any defect, want of repair of the common property or any part thereof.

[14] The minutes of the March 8, 2010 Strata Council meeting state:

> 4.2 suite damage and owner requested the strata corporation cover the cost of drying out the suite after it was damaged by water penetration through the building envelope. The request was denied.

[15] I infer that the "owner" mentioned in the minutes was the petitioners although they were not named specifically.

[16] The petitioners argue that Bylaw 10 offends the *Act*, which provides that the strata corporation is responsible for managing and maintaining common property and common assets for the benefit of its owner (s. 3) and that the strata corporation has a duty to repair and maintain common property and common assets (s. 72).

[17] Baywest's manager at the time was Ms. Czinger. Her recommendation to the Strata Council was that the cost of remediating 1101 be paid by the Strata Council. This recommendation was as a result of her understanding that the water ingress into 1101 resulted from failure of the seal on 1201's balcony. Notwithstanding her recommendation, the Strata Council rejected the petitioners' claim.

[18] Baywest retained RDH Engineering Ltd. to undertake a review of the condition of the Lagoons' building envelope and provide an opinion on the reason for flooding. The report is dated June 2010 and is entitled "Building Enclosure Maintenance Review Report" ("2010 Maintenance Report").

[19] The 2010 Maintenance Report confirmed that the water ingress issue in 1101 was due to the failure of the seal around 1201's balcony and a design or structural defect in the balcony itself, specifically, the absence of balcony vinyl membranes and improperly installed temporary fascia. The report acknowledged that water ingress would likely become "a persistent problem."

[20] The 2010 Maintenance Report provides:

> The balcony vinyl membrane at Suite 1201 does not appear to return up behind the wall cladding and has led to water ingress at Suite 1101 below. A temporary flashing return was installed at the base of wall perimeter to reduce the amount of water ingress. This stripping has now de-bonded from the balcony surface and is no longer adequately functioning to prevent water ingress. This is the first instance of water ingress at what will likely become a persistent problem.

Their recommendation was:

> Remove flashing and reseal joint between EIFS cladding and concrete balcony slab. Should the balcony membrane remain, terminate membrane within this sealant joint.

[21] No immediate steps were taken by the respondent to follow the recommendations made in the 2010 Maintenance Report.

[22] In September 2010, 1101 suffered further water damage (the "Second Event"). The petitioners replaced the flooring for a second time at a cost of $4,627.30.

[23] At a meeting on October 5, 2010 ("October Meeting") the Strata Council acknowledged its responsibility to repair and maintain the Lagoons' common property and invited owners of units with water damage to submit invoices for repairs. The minutes of the October Meeting provide:

> Strata Council discussed water ingress which has been due to the outside or common elements of the building and not in-suite related. It is the responsibility of the Strata Corporation to repair and maintain the common property. Owners who have had damage excluding personal property, and have had it minuted by council may present their invoices as well as a copy of relevant minutes to council for consideration.

[24] In December 2010 the petitioners submitted invoices for the cost of remediating the flooding in 1101. At that point the petitioners' total repair costs were $11,224.21. The petitioners repeated requests for reimbursement of these costs were ignored. The petitioners wrote to Ms. Czinger on December 16, 2010:

> I am once again submitting my expenses incurred due to water ingress on Unit 1101. As you are aware we have had standing water in our unit twice, once in October 2009 and once in February this year… The Strata paid for a temporary fix to the balcony. As per the minutes of the last council meeting I have once again enclosed a copy of the expenses we have paid as well as minutes of the March council meeting where I requested payment. I have also enclosed the agenda of the June council meeting which shows I once again requested to speak to council on this matter. As the council decided to have this discussion 'in camera' I do not have minutes of that discussion.

[25] Throughout 2001 and 2012, the petitioners' requests for reimbursement continued. They also made repeated requests for repairs to 1201's balcony to curb the water ingress problem.

[26] In August 2011 there was a major rainstorm. 1101 flooded again (the "Third Event"). The Strata Council's then president viewed the damage to 1101 and promised the petitioners that the unit would be repaired. In December 2011, Okanagan Dura Deck Ltd. was retained to attempt another temporary repair to 1201's balcony. As a result of winter conditions, testing of the repairs could not be performed. Water continued to flood into 1101.

[27] On February 11, 2012 the Strata Council held a special general meeting and a special levy was approved allocating $60,000 to pay the cost of repairs to various

units that had suffered water damage. One of the attendees at the special meeting, Ms. St. Hilaire, stated that it was her understanding that the $60,000 special levy was to include repair costs to 1101. The special resolution reads:

> $60,000 to address repairs required in the sole discretion of the council to any strata lots suffering damages due to water penetration, mold or otherwise and pay repair costs, contractors, professionals, investigations, legal costs, permits, taxes, and any other related costs.

[28] Meanwhile, the Strata Council had taken steps to seek a global solution to the water ingress problem. They consulted with three engineering firms:

a. RDH Engineering Building Engineering Ltd. ("RDH") who prepared a "Building Enclosure Maintenance Review Report" dated September 15, 2010, a "Water Testing Report" dated September 15, 2010, a draft "Localized Leak Investigation Report" and a draft "Building Enclosure Condition Assessment Report" dated May 5, 2011;

b. Morrison-Hershfield who prepared a "Preliminary Review and Conceptual Design" report dated June 10, 2011;

c. Spratt Emanuel Engineering Ltd. who prepared an observation report dated May 7, 2013.

[29] The cost estimate associated with the Morrison-Hershfield repair recommendations were in excess of $16,000,000.

[30] At an August 2012 annual general meeting, new bylaws were approved which included the removal of Bylaw 10.

[31] By this time the petitioners had commenced a Small Claims Court action against the respondent claiming relief similar to the relief claimed in this petition. That action was dismissed in January 2013 on the basis that Bylaw 10 prevented the petitioners from claiming damages against the respondent. Even though they were passed in August 2012, the new bylaws were not registered until May 2013. I infer that the Small Claims Court judge was not aware that Bylaw 10 had been repealed.

[32] Repairs to the building's envelope were finalized in November 2013 at a cost of $1,900,000.

Preliminary Objection

[33] This proceeding was initiated by way of petition under Rule 2-1(2) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 ("*Rules*"). The respondent objects to this matter proceeding by way of petition rather than by way of a notice of civil claim because Rule 2-1(2) does not apply to a claim for damages.

[34] Rule 2-1(2) reads:

> (2) To start a proceeding in the following circumstances, a person must file a petition or, if Rule 17-1 applies, a requisition:
>
> > (b) the proceeding is brought in respect of an application that is authorized by an enactment to be made to the court;

[35] The petitioners seek redress under ss. 164 and 165 of the *Act* which provide:

> 164 (1) On application of an owner or tenant, the Supreme Court may make any interim or final order it considers necessary to prevent or remedy a significantly unfair
>
> > (a) action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner or tenant
>
> …
>
> (2) For the purposes of subsection (1), the court may
>
> > (a) direct or prohibit an act of the strata corporation, the council, or the person who holds 50% or more of the votes,
> >
> > (b) vary a transaction or resolution, and
> >
> > (c) regulate the conduct of the strata corporation's future affairs.
>
> 165. On application of an owner… of a strata lot … the Supreme Court may do one or more of the following:
>
> > (a) order the strata corporation to perform a duty it is required to perform under this Act, the bylaws or the rules;
> >
> > (b) order the strata corporation to stop contravening this Act, the regulations, the bylaws or the rules;
> >
> > (c) make any other orders it considers necessary to give effect to an order under paragraph (a) or (b).

[36] The respondent argues that of all the relief sought by the petitioners, the only relief that falls within Rule 2-1(2) is their claim under para. 5 of the petition seeking "a declaration that Strata Council's failure to properly repair and maintain the Lagoons is significantly unfair to the Petitioners."

[37] In order to obtain that relief the respondents say the court first must find that the respondent has breached its duty to properly repair and maintain common property of the strata. The respondent argues that the *Act* does not authorize the court to make such a declaration.

[38] Relying on *East Kootenay Realty Ltd. v. Gestas Inc.*, [1986] B.C.J. No. 1569 the respondent also argues that there is no authority in the *Rules* to grant the relief sought by way of petition given the narrow circumstances in which petitions are the appropriate form of proceeding.

[39] Further, the respondent argues that s. 164 does not allow the court to order damages as a remedy. The respondent argues it is not broad enough, relying on the words of Smith J. in *Chan v. Owners, Strata Plan VR-151*, 2010 BCSC 1725 at para. 18.

[40] The respondent argues as an alternative that this court should order that the matter be referred to the trial list under Rule 21-1(7)(d) with pleadings being filed.

[41] Neither counsel was able to provide any authority for s. 164 being used as the basis for granting damages to an applicant.

[42] Despite the lack of jurisprudence, the petitioners argue the language of s. 164 permits the court to make such an order. It allows a court to make "*any* interim or final order it considers necessary to prevent or *remedy* a significantly unfair decision of the strata corporation" [emphasis added].

[43] The petitioners argue that had the legislature intended the damages resulting from the conduct of an oppressive strata council would not be one of the remedies contemplated, the legislature would have said so.

[44] *Dollan v. The Owners, Strata Plan BCS1589*, 2012 BCCA 44 appears to be the leading case in the province on s. 164. It states that s. 164 is "remedial" and provides a remedy to a strata owner who has been treated significantly unfairly by a strata council. The petitioners argue that the court has the ability to "right a wrong" in

those circumstances. Righting a wrong in this case means compensating the petitioners for the cost they incurred from flooding for which the Strata Council is responsible.

Discussion

[45] For the reasons that follow, the respondent's preliminary objection is dismissed.

[46] There are a range of lawsuits a strata owner can launch against a strata corporation. Owners may sue in tort and contract in addition to availing themselves of the statutory remedies in ss. 164-165 of the *Act.* Each of these remedies has different procedural requirements, including requirements pertaining to jurisdiction and the proper form of proceeding. For example, if a claim is in essence a negligence claim, it must be brought by notice of civil claim.

[47] It appears possible to bring a claim under s. 164 by petition. Petitions are generally characterized as a supplication to the court for relief, and are generally appropriate when there are no seriously contested issues of fact or serious questions of law (*East Kootenay Realty*). The structure of s. 164 provides for a supplication to the court to remedy or prevent significant unfairness on the part of a strata corporation. In addition it uses the language "on application", which suggests a petition. Taken together, it appears that a petition is an appropriate form of proceeding. Indeed, a majority of cases brought pursuant to s. 164 are petitions (see for example: *Liverant v. Strata Plan VIS-5996,* 2010 BCSC 286; *Azura Management (Kelowna) Corp. v. Strata Plan KAS 2428*)).

[48] On the other hand, other cases under s. 164, such as *Grantham v. Strata Plan VIS 4116*, 2013 BCPC 146 and *Menzies v. Strata Plan NW2924,* 2014 BCPC 216*,* were started as actions. In those cases, like this one, there were hybrid elements of negligence and s. 164 oppression claims. In *Grantham,* the Provincial Court had to determine what exactly the scope of s. 164 was and whether the claim fell within it in order to determine whether the court could take jurisdiction.

[49] I am persuaded that the proper approach is to determine what the pith and substance of the claim is, and then determine what procedural requirements and remedies flow from it. I keep in mind the proportionality objectives of the *Rules* and the importance of resolving cases on their merits as efficiently and cost effectively as possible.

[50] Section 164 is in essence an equitable oppression remedy. Its scope is discussed at length in *Grantham*. In that case, the claimant brought an action to recover expenses from the strata corporation for the cleanup and treatment of mould growing in her crawlspace. She claimed that the strata corporation breached its statutory duty of care to repair and maintain the structure of the strata lot. They did not deal with the issue in a timely fashion and ultimately declined to repair it. In evaluating the scope of s. 164, the court found that issues involving corporate governance and the decision-making of strata corporations fell squarely within s. 164, whereas something that was essentially a claim in negligence would not fall within the scope of s. 164. The court held:

> [87] Although the Claimant purports to seek to recover a debt, in essence she seeks a remedy for what she likely considers to be an unfair decision. That remedy is, in fact, a judgment to recover the monies that she has expended for mould remediation, in accordance with the plan that she has adopted. In my view that brings the dispute within the scope of section 164 of the Strata Property Act.

[51] The court in *Menzies* endorsed the approach in *Grantham* but distinguished the claim for reimbursement for damages and loss under s. 164 on the facts, characterizing it as ultimately a case in negligence with secondary corporate governance issues.

[52] It appears from these cases that if a claim under s. 164 is properly made out, any appropriate remedy will follow. Although the court declined to take jurisdiction in *Grantham* on the basis that the claim fell squarely within s. 164, it appears the court would have entertained the idea of awarding damages under s. 164 to address the debt portion of the claim. The language of s. 164 supports this. It provides that the court may make <u>any</u> interim or final order it considers necessary to prevent or

remedy significantly unfair decisions made by a strata corporation. Generally courts have broad discretion in crafting equitable remedies because they seek to ensure fairness.

[53] Here, although there are elements of a negligence action, the petitioners' claim is in pith and substance a claim under s. 164 and thus may proceed by way of petition with the possibility of a damage award as a remedy.

[54] As in *Grantham,* there is an element of debt because the petitioners want reimbursement for the expenses they incurred in repairing 1101 and they allege a breach of a statutory duty of care. However, their primary complaint lies with the corporate governance and decision-making of the respondent. The petitioners argue that the respondent took no immediate steps to follow the recommendations made in the 2010 Maintenance Report, their repeated requests for reimbursement for damages and current repair to the flooding issue were ignored, and temporary repairs were insufficient and ineffective. The respondent refused to follow Ms. Czinger's recommendation for payment. The respondent relied on Bylaw 10 to refuse payment when they knew or ought to have known it was contrary to s. 3 of the *Act* and they discriminated against them by refusing to pay 1101's restoration costs when other property owners' expenses were paid in similar circumstances. These instances are all part of a pattern of oppressive conduct that the petitioners allege was "significantly unfair".

[55] Furthermore, the petitioners frame their pleadings entirely in the context of s. 164. Aside from the alleged breach of the statutory duty of care, there is no language or law relied on to suggest the petitioners are bringing a negligence claim. I note that in *Grantham* the court still found the claim fell within s. 164 even though the claimant alleged a breach of the strata corporation's duty to repair and maintain.

[56] Section 164 remedies significantly unfair actions of a strata corporation. In my view, it is inappropriate to suggest that the essence of the claim will change on the basis of the specific wording of the relief sought, especially due to the breadth of remedies that can flow from s. 164.

[57] On the above grounds, the petitioners' claim falls squarely within s. 164.

[58] Consequently, the court has discretion to make any order it considers appropriate to remedy the actions of the respondent. The principles of equity, the wording of s. 164, and the relevant case law support this conclusion. Reimbursement of remediation costs incurred by the petitioners would help to right the wrong of the respondent and restore fairness. It is therefore an appropriate remedy under s. 164.

[59] I allow this claim to proceed by way of petition.

Elements of a s. 164 Claim

[60] Section 164 is a remedial provision aimed at addressing the fairness of the decision-making process of a strata corporation. Proving a s. 164 claim turns on whether the actions or decisions of a strata corporation were "significantly unfair".

[61] The outcome of a strata decision is one factor to consider in determining if an impugned action is unfair (*Gentis, Dollan*). Though considerable deference will generally be granted to democratic decisions reached by strata corporations, even a democratic and fair process may yield results that are significantly unfair to the interests of minority owners. The view that these decisions are insulated from judicial intervention would rob the section of any meaningful purpose (*Dollan* at para. 24).

[62] "Significantly unfair" has been described in the jurisprudence as follows:

a) At the very least, it must encompass oppressive conduct and unfairly prejudicial conduct or resolutions: *Reid v. The Owners*, *Strata Plan LMS 2503,* 2001 BCSC 1578 at para. 11.

b) It must be conduct that is burdensome, harsh, wrongful, lacking in probity or fair dealing, or has been done in bad faith: *Blue-Red Holdings Ltd. v. Strata Plan VR 857* (1994), 42 R.P.R. (2nd) 49 (B.C.S.C.) at para. 52.

c) The actions must result in something more than mere prejudice or trifling unfairness: *Gentis v. The Owners, Strata Plan VR368*, 2003 BCSC 120 at para. 28.

[63] *Dollan* proposes a two-part test (at para 30):

1. Examined objectively, does the evidence support the asserted reasonable expectations of the petitioner?
2. Does the evidence establish that the reasonable expectation of the petitioner was violated by action that was significantly unfair?

Submissions of the Parties

[64] The petitioners argue that the Strata Council acted in a "significantly unfair manner" within the meaning of s. 164 of the *Act* in three distinct ways:

1. by relying on Bylaw 10 to refuse payment of the petitioners' restoration costs when they knew or ought to have known that the Bylaw 10 was in contravention of s. 3 of the *Act*;
2. by breaching its duty to maintain and repair the common property in failing to permanently solve the water ingress problem in a reasonable and timely manner; and,
3. by historically paying the repair costs of other unit owners in similar circumstances while refusing to pay the petitioners' remediation costs.

[65] The petitioners say that the respondent's conduct is inconsistent, unjust and inequitable, is significantly unfair and has resulted in the petitioners being financially prejudiced.

[66] The petitioners argue that "significant unfairness" has been proven because:

i. the respondent was aware of water ingress issues since October 2009 and was aware from its own investigations and experts that the problem's source was 1201's balcony;

ii. instead of accepting the responsibility they had under the *Act,* they chose to avoid it by relying on Bylaw 10 to deny the petitioners' claim which had never been used before to deny claims by other owners;

iii. the respondent provided the petitioners with verbal and written assurances that the petitioners' restoration expenses would be paid, but subsequently revoked the assurances without explanation; and,

iv. despite passing a resolution for a special levy to create a $60,000 fund to pay for repair/remediation costs related to water ingress caused by the failure of the building envelope, and despite inviting affected owners to submit their repair invoices for approval, the respondent continues to refuse to pay the petitioners' invoices.

[67] Damages claimed by the petitioners relate to restoration and repairs to 1101 they say were required following the First Event ($7,016.11), following the Second Event ($4,627.30), and following the Third Event ($9,970.78). In total, the petitioners claim $21,614.19.

[68] The respondent's submissions on the merits of the case are framed in terms of a negligence claim and not a s. 164 oppression claim; counsel refers me to *Basic v. Strata Plan LMS 0304,* 2011 BCCA 231 and *Kanye v. Strata Plan LMS 2374,* [2013] B.C.J. No. 56 which deal exclusively with a strata corporation's duty and standard of care. The respondent points out that a strata corporation has a duty to act reasonably in the circumstances and is not an insurer of all damages suffered or losses incurred by the individual unit owners (*Basic*).

[69] The respondent also takes issue with the reasonableness of the damages being claimed. It argues that each time the petitioners remediated 1101, the updates to the flooring were a betterment to the property.

Discussion

[70] I am satisfied on the evidence that the damage caused to 1101 in all three events was from water ingress from outside 1101. On a balance of probabilities, I find that the water came from the balcony of 1201, a problem that first came to the attention of the respondent shortly after the First Event.

[71] While I am satisfied that the remediation costs of $7,016.11 related to the First Event were reasonable, for the reasons that follow I am not satisfied that the respondent is liable for the costs of the First Event. The evidence is that the respondent was unaware of water ingress issues associated with 1201's balcony until after the First Event. Within a reasonable period of time, the respondent agreed to pay On Side to repair the source of the problem in 1201.

[72] Had this been the end of the water ingress issue, the respondent would have been correct to deny the petitioners' claim. I agree with the respondent that that a strata corporation is not an insurer against all damages suffered or losses incurred

by the individual unit owners (*Basic*). In this case, the respondent is not an insurer against all risks of flooding or water ingress into 1101.

[73] The balance of the petitioners' claim thus stands or falls on whether they have proven that the respondent acted in a manner that was significantly unfair to them by breaching a duty to maintain and repair the common property and refusing to pay for the remediation costs associated with the Second Event and the Third Event.

[74] I am satisfied that they have. Applying the two part *Dollan* test and viewing the evidence objectively, the petitioners did have a reasonable expectation that flooding damage caused to 1101 as a result of water ingress from the failure of the building envelope/balcony of Unit 1201 would be redressed expeditiously, and if not, any reasonable cost incurred by the petitioners associated with the Strata Council's inaction would be paid by them.

[75] With respect to the second branch of the test the evidence establishes that the reasonable expectation of the petitioner was violated by significantly unfair actions by the Strata Council respecting the flooding and water damage that occurred to 1101 subsequent to the First Event. The preponderance of the evidence is that the petitioners have been singled out by the respondent and for reasons that are not clear, the respondent has refused to pay the petitioners' restoration/repair invoices notwithstanding clear evidence that the water source was from portions of the building within the respondent's mandate to maintain and repair.

[76] I find that the respondent's actions towards the petitioner amounted to a pattern of oppressive conduct and decision-making that commenced after the First Event.

[77] Given the damage to 1101 has already been remediated and costs incurred, I find that reimbursing the petitioners for their repair costs for the Second Event and Third Event is the appropriate remedy. I am satisfied that $4,627.30 for the Second Event and $9,970.78 for the Third Event is reasonable and they will be entitled to judgment for $14,598.08.

[78] The petitioners will also be entitled to a declaration that the Strata Council's failure to properly repair and maintain the Lagoons following the First Event was significantly unfair to the petitioners; they are not entitled to the other declarations enumerated in the relief sought as they fall outside the scope of s. 164.

Disposition

[79] The petitioners are entitled to:

a. A declaration that the Strata Council's failure to properly repair and maintain the Lagoons following the First Event was significantly unfair to the petitioners.

b. Judgment against the respondent Strata Corporation in the amount of $14,598.08.

c. Court order interest on the sum of $14,598.08 from and after February 11, 2012, the date the respondent approved the allocation of $60,000 for water remediation costs.

[80] Even though the respondent was successful in respect of the claim for the First Event's damages, the petitioners will be entitled to costs.

"G.P. Weatherill J."