Citation: ☼ Fudge v. Owners, Strata Plan NW2636 Date: ☼20120928
2012 BCPC 0409 File No: C13968
Registry: New Westminster

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

BETWEEN:

THERESA FUDGE

CLAIMANT

AND:

THE OWNERS, STRATA PLAN NW 2636

DEFENDANT

REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE T.S. WOODS

Appearing for the Claimant:	J. Kohnke
Appearing for the Defendants:	G. Sinclair and C. Heijke
Place of Hearing:	New Westminster, B.C.
Dates of Hearing:	August 12 and 31, 2010; January 13, April 11, June 13, 2011; January 23, March 9 and April 23, 2012
Date of Claimant's Written Submission:	May 10, 2012
Date of Defendants' Written Submission:	May 22, 2012
Date of Claimant's Written Reply Submission:	June 7, 2012
Date of Oral Submissions by All Parties:	August 13, 2012
Date of Judgment:	September 28, 2012

INTRODUCTION AND IDENTIFICATION OF ISSUES

[1] The claimant, Theresa Fudge ("Ms. Fudge"), is an elderly, seriously hearing impaired and vulnerable pensioner who resides in and owns unit 903 in Quayside Tower 1. That residential structure is part of a condominium complex known as the Quayside Towers (the "QT Complex"), located at 1045 Quayside Drive in New Westminster, British Columbia. A strata council administers the business of the QT Complex on behalf of all QT Complex owners. Those owners constitute, at law, a strata corporation under the ***Strata Property Act***, S.B.C. 1998, c. 43. They are legally styled the "Owners, Strata Plan NW2636" and Ms. Fudge has named them as defendants in her lawsuit. I shall refer in these reasons to the defendant owners, collectively, as the "QT Owners".

[2] This action has its origins in a washing-machine-related flood incident that occurred in Ms. Fudge's unit on August 30, 2007. Her washing machine's discharge hose leads into discharge pipe that was installed in a wall in her unit during original construction (the "Discharge Pipe"). On the day in question the wastewater that flowed out through the discharge hose following the completion of a washing cycle backed up and out of the Discharge Pipe. This occurred at a time when the machine was running but Ms. Fudge was not home. The discharge wastewater—and some wastewater that was already present in the Discharge Pipe and/or the complex's wastewater piping infrastructure of which the Discharge Pipe is a component (collectively, the "WPI")—gushed out of the Discharge pipe, spilled over onto the floor of Ms. Fudge's laundry area and then spread throughout part of her unit, causing damage to carpeting.

[3] Ms. Fudge claims that the flood incident was caused by breaches of duty on the part of the QT Owners to repair and maintain the WPI.

[4] I observe without meaning to be critical in any way that Ms. Fudge's Notice of Claim was quite obviously drawn without the assistance of counsel. Nevertheless, by necessary implication it invokes a cause of action in negligence. Moreover, while the provision is not specifically pleaded in her Notice of Claim, that originating court document also implicitly invokes s. 72 of the ***Strata Property Act***. Section 72 requires owners like the QT Owners to act reasonably in repairing and maintaining common property in stratified ownership structures like the QT Complex.

[5] In their Reply to Ms. Fudge's Notice of Claim—also conspicuously a pleading drafted by a layperson without the benefit of legal advice—the QT Owners in effect deny that Ms. Fudge's losses were caused by any negligence, default or breach of duty of any kind on their part, including (implicitly) duties owed to strata lot holders under s. 72 of the ***Strata Property Act***. (I similarly do not intend any criticism of the QT Owners' Reply.) The QT Owners also dispute Ms. Fudge's factual contention that the flood incident caused wastewater to flow out and reach such a large area that—as she claims—all of the installed carpets in her unit needed (and still need) to be replaced. While they acknowledge in their Reply that they agreed initially to pay for "the affected carpet which was believed to be confined to the hallway and den area," the QT Owners also plead that they later declined to do even that given allegations about the nature of the wastewater in question and Ms. Fudge's persistence in asserting what they considered to be an overreaching claim.

[6] It can be seen from the foregoing that the main issues raised by this case are as follows:

(a) What was the cause in fact of the flood incident?

(b) Did the QT Owners owe a duty of care to Ms. Fudge under s. 72 of the ***Strata Property Act*** or otherwise to act reasonably to prevent such flood incidents?

(c) Did the QT Owners, by their acts and/or omissions, breach any such relevant duty of care they owed to Ms. Fudge? If so,

i. What losses suffered by Ms. Fudge were caused by the breach (or breaches) of the duty (or duties) the QT Owners owed to her? and

ii. What amount of money, by way of damages, would properly compensate Ms. Fudge for the losses she suffered by reason of the breach (or breaches) of the duty (or duties) owed to her by the QT Owners?

THE SCOPE OF COVERAGE OF THE EVIDENCE

[7] The trial of Ms. Fudge's claims against the City in this action took several days to be heard. A number of witnesses gave testimony, some of whom testified for lengthy periods. Many documents were introduced as exhibits.

[8] In managing the trial of Ms. Fudge's claims, and the defences raised by the QT Owners to them, I took a somewhat (though not entirely) relaxed approach to the rules of evidence and the question of relevance. I did so in recognition of the fact that the

claims and defences were being pursued by the parties in Provincial Court without the benefit of counsel. One consequence of that somewhat relaxed approach, however, is that the court is now left with a lengthy record that contains a great deal of evidence, not all of which bears upon the matters that the court must decide at the end of the day.

[9] I acknowledge candidly therefore that I have not made reference to every item of evidence that came before me. I have, rather, referred to evidence that I consider it necessary to mention in connection with my factual findings and the legal conclusions that flow from them. In places I have made mention of evidence that I have been unable to accept, and of the reasons why I have been unable to do so.

[10] If evidence is *not* mentioned in these reasons, Ms. Fudge and the QT Owners can both take comfort that the omission is not the result of my being unaware of it. I have read and re-read my notes of the testimony given at trial in their entirety. I have carefully reviewed all of the documentary exhibits. If witness testimony or documentary evidence do not come up for specific mention in these reasons, that is because:

(a) The evidence was not relevant;

(b) The evidence is to the same effect as other evidence of which mention *has* been made; or

(c) The evidence was tendered in support of alleged facts I have not found and arguments that I have not accepted, having regard to the facts that I *have* found and the arguments that *are* supported by those facts.

[11] That it is an acceptable practice for a trial judge to confine him or herself, in reasons for judgment, to a compressed and somewhat selective canvassing of the evidence heard at trial is well established on the authorities. The law is clear that where there is substantial support in the record for a trial judge's findings and the inferences drawn from them, the trial judge does not make a reversible error by failing to refer to every item of evidence that was adduced: see, for example, ***Buchan v. Ortho Pharmaceutical (Canada) Ltd.*** (1986), 54 O.R. (2d) 92 at 99 (C.A.) and ***Delgamuukw v. R.*** (1993), 104 D.L.R. (4th) 470 at 563-564 (B.C.C.A.).

WHAT WAS THE CAUSE IN FACT OF THE FLOODING INCIDENT?

[12] Ms. Fudge's washing machine is located in a closet-like area within her unit. It is positioned with its back against an interior wall. As is usual with such appliances, the washing machine is equipped with two hoses that feed clean water (hot and cold) into it and a third hose that conducts wastewater out if it. The discharge hose leads in turn into the Discharge Pipe, situated in the wall of the laundry closet. (Indeed, the Discharge Pipe itself cannot be seen. A moulded plastic fitting that is recessed into the wall behind the washing machine has an opening that communicates with the Discharge Pipe embedded in the wall. The washing machine's inverted J-shaped discharge hose hooks into that opening: see Exhibit 1, tab 1, p. 3, top right photo.)

[13] The evidence led at trial satisfies me that the Discharge Pipe serves only the washing machine in Ms. Fudge's unit. However, once it leaves her unit the Discharge Pipe ties into the QT Complex's WPI which, in turn, conducts wastewater from all units, eventually, out of the buildings and into the municipal sewer system. The part of the QT

Complex's WPI which ultimately carries the aggregated wastewater from all individual units out and away from the building is referred to in the QT Owners' strata council minutes as, variously, the "sanitary line" or "sewer line": see Exhibit 1, tab 13, p. 15.

[14] No one was present in Ms. Fudge's unit to observe, in real time, precisely what happened on August 30, 2007 when the flood incident occurred. As I have noted, Ms. Fudge had left her unit with the washer running (a common and unimpugnable practice). She was away for the afternoon and into the evening having dinner with a friend. When she returned she found foul-smelling wastewater pooling in places on the floor of the laundry closet and reaching out into other parts of her unit, soaking or wetting the carpets there. She surmised from these observations that there had been a backup when her washing machine reached the point in its wash cycle where it discharges wastewater into the Discharge Pipe. Ms. Fudge therefore contacted a handyman friend, Keith King ("Mr. King"), to come over to investigate.

[15] Mr. King's evidence, which I accept, was that upon inspecting the area he found no water directly beneath the washing machine. He thereby ruled out a leak from the device's internal components. Believing (as did Ms. Fudge) that the wastewater that flooded the unit must then have come from a backup in the Discharge Pipe, Mr. King activated the pump used to fill and empty the washing machine's tub. When he did so, he testified, wastewater backed up and out of the Discharge Pipe and onto the floor of the laundry closet, confirming his theory (and Ms. Fudge's) that a backup was the cause of the flood incident. (Insofar as Mr. King activated the pump simply as a test I consider it to be a fair inference that the spill caused by the test added a minimal amount of wastewater to what was already present on the floor of the washing machine closet.)

[16] Mr. King retrieved a 10’ snake device from his home and attempted to thread it down into the Discharge Pipe and beyond in order to clear any blockage that might be there. His evidence was that the snake did not deploy fully, due to its thickness, and that he was unable to locate or detect any blockage.

[17] The noise made by Mr. King’s snake device rattling about in the WPI attracted the attention of tenant and sometime strata council member, Paul Parnell (“Mr. Parnell”), who resides in the unit immediately below Ms. Fudge. Mr. Parnell came up to offer his assistance (he said). He brought with him a 30’ snake of a smaller diameter than that used by Mr. King. Mr. Parnell testified that because it was narrower, his snake could be threaded through the Discharge Pipe and beyond it.

[18] Mr. Parnell testified that he believes he cleared a blockage with his longer, narrower snake although he does not know what or where it was. Given that the snake was deployed approximately 30’ during the procedure, I infer that it reached well past the point where the Discharge Pipe serving Ms. Fudge’s unit joins the WPI and, indeed, penetrated some distance into the WPI.

[19] No evidence was placed before me to suggest that a bolus of anything capable of blocking the Discharge Pipe or the WPI into which it is tied was expelled by Ms. Fudge’s washing machine through its visibly narrow discharge hose into the Discharge Pipe. Neither have I been provided with evidence to prove that anything was expelled in a solid form from Ms. Fudge’s washing machine that, through some unexplained process of accretion or accumulation, would or could have contributed to a blockage of the Discharge Pipe or the piping that lies beyond it. Indeed, there is nothing before me

to suggest that on the relevant date there is anything about the way that Ms. Fudge operated her washing machine that was out of the ordinary or that could have caused discharge wastewater to flood her unit instead of leaving the building via the Discharge Pipe and the WPI. Accordingly, I find as a fact that the failure of the Discharge Pipe and/or the portion of the WPI into which it is tied, to permit wastewater from Ms. Fudge's washing machine to pass freely cannot be attributed to Ms. Fudge's machine or the way she operated it.

[20] What evidence is before me, then, that speaks to the possible cause for the failure of the Discharge Pipe and or the WPI into which it is tied, to permit the wastewater from Ms. Fudge's washing machine to pass freely into and through the WPI? The most compelling evidence in that regard is evidence to the effect that the diameter of the pipes that eventually carry wastewater away from the laundry stacks in Ms. Fudge's unit, and others, is insufficient to cope with the volume of that wastewater that is generated by the owners who reside in the QT Complex. In a word, the WPI was under-designed. This design problem, and the effects it has had on various strata lot holders, is acknowledged repeatedly in the QT Complex's strata council minutes (the "Minutes") which were exhibited by Ms. Fudge at trial: see Exhibit 1, tab 13, p. 15*ff.*

[21] Mention is made in the Minutes of "the laundry discharge line backup problem" in certain units at the QT Complex in 2003—years before Ms. Fudge's flood incident—and of a plumbing company that had submitted a proposal to the QT Owners to "alleviate it … by increas [ing] the 4" line to 6". That is an intervention that the Minutes acknowledge would "double the capacity" of pipes in the complex's WPI that ultimately carry laundry discharge wastewater away from the buildings. Interestingly, the Minutes

show that, initially, "[c]ouncil examined the proposal and decided that the work is not required at this moment," because council had concluded that "the water backup problem [had] been looked after". However, further entries for later dates show that the problem recurred, and that the QT Owners through council had directed the strata's agent "to obtain quotes for the *replacement* of the carpet [in a unit] which was contaminated by the *sewer*" (emphasis added).

[22] Other entries in the Minutes similarly show that in other units "water backups" from washing machines were being reported. Incidents of "suds backup" are also referred to in the Minutes. Astonishingly, the Minutes also note that no "as built" drawings exist for the QT Complex. They further acknowledge that this fact proved to be a hindrance to plumbing contractors who had been engaged to assess backup and suds problems and propose solutions for them.

[23] The Minutes—which cover events between 2003 and 2006, that is, a period of years preceding Ms. Fudge's flood incident—also reveal a hesitancy on the part of the QT Complex strata council to undertake the undoubtedly disruptive and expensive task of "re-piping" the WPI. Mention is made of a "Re-piping Fund," yet there seems during those years to have been little will or resolve to gather the necessary funds into it in order to tackle the known design problem to which the fund was meant to be addressed. A meeting of council was held on January 31, 2006—the year preceding Ms. Fudge's flood incident—to consider a levy for the Re-piping Fund and required a three-quarter vote resolution. The minutes of that meeting are telling. They record, *inter alia*, that:

(a) "It was noted that there are less [*sic*] pipe failures recently. The purpose of this [Re-piping Fund] levy is only saving for a 'rainy day'"; and

(b) "An owner commented that it is good to have this saving, which could be used for other purpose [*sic*] if re-piping is not required."

[24] In time the QT Owners *did* finally determine that they had to proceed to have the WPI upgraded as to pipe diameter on a complex-wide basis, but not until 2008, the year after Ms. Fudge experienced the flood incident in her unit: see Exhibit 2.

[25] Another recurring theme in the Minutes is that of complaints being made by strata lot owners periodically regarding "sewage smells" coming from the WPI. One entry for late 2006 refers to an owner "still experienc[ing] an unpleasant smell from the washing machine drainage and it appears that the smell is getting worse". Mention is also made in the Minutes of the need for mould abatement and repair in some locations, although it is not certain that those needs are tied to wastewater backup and suds backup problems in the QT Complex's WPI.

[26] The council's deliberations about problems with the WPI touched on, and sometimes approved, stopgap measures to be performed by plumbing contractors such as "clean[ing] vertical sanitary lines" and, on occasion, the performance of unit-specific (but not complex-wide) enlargement of drainage pipe sizes. As noted, complex-wide enlargement of WPI piping did not come until 2008.

[27] Remarkably, as an alternative to tackling the systemic problems that had been revealed to the QT Owners, and for which pipe enlargement had been proven

successful on an individual unit basis, the Minutes also refer to efforts undertaken, and policy developed, by the strata council *to persuade all unit holders to use one fifth of the detergent contemplated by the manufacturers' specifications*. Interspersed with these types of entries are references to strata lot owners who had suffered carpet and other damage originating with wastewater and suds backup problems and to those owners having had their carpets replaced at the QT Owners' expense.

[28] What inferences, germane to the allegations and defences on foot in the case at bar, can I fairly draw from this evidence? Largely by recourse to the strata council minutes she placed in evidence, Ms. Fudge has persuaded me on a balance of probabilities that the WPI at the QT Complex—with which the Discharge Pipe and other owners' discharge pipes are integrated—was constructed using piping that was too small in diameter to handle the volume of wastewater fed into it from time to time by, *inter alia*, the washing machine discharge pipes situated in the various units within the complex.

[29] The evidence shows that unit owners like Ms. Fudge periodically found that when the volume of wastewater circulating generally within the WPI had reached a level where it could accommodate no more, the wastewater that their washing machines were designed to expel into that infrastructure via their discharge pipes backed up and flooded their units with wastewater from their own washing machines. That wastewater was accompanied by wastewater otherwise circulating within the pipe network that was forced out through the owners' discharge pipes in a gushing action whenever washing machine discharge exceeded the system's capacity, in the moment, to receive further

wastewater. When wastewater entered their units in this way, some of those unit owners, like Ms. Fudge, complained of noxious odours and damaged carpets.

[30] Turning now to the specifics of the case at bar, I find as a fact that on August 30, 2007, when Ms. Fudge's washing machine sought to discharge wastewater upon reaching that stage in its wash cycle, the WPI at the QT Complex was at that time oversubscribed and incapable of accommodating more wastewater. Thus, the wastewater from Ms. Fudge's own washing machine, together with other wastewater already circulating within the piping infrastructure, gushed out of the Discharge Pipe, flooded her unit and soaked or wetted her carpets.

[31] While it stands to reason that a wastewater piping infrastructure that is systemically inadequate by reason of undersized piping may be more prone to blockage by obstructions than an infrastructure with properly sized piping, I do not find that the flooding of Ms. Fudge's unit resulted from blockage by any obstruction.

[32] Mr. King was unable to find any blockage with his 10' snake and, while he believed he cleared an obstruction with his 30' narrower snake, Mr. Parnell was vague in his evidence as to what that obstruction was. He could not give any hint of what made up the obstruction—based, for example, on residue remaining on the end of the snake when it was extracted. Neither could he say where along the 30' or so of its travels his snake encountered an obstruction. All of this makes the evidence regarding an obstruction in the Discharge Pipe or the other piping with which it communicates inconclusive.

[33] I reject the evidence of blockage by an obstruction in favour of the finding I have made above, based on reliable and persuasive evidence furnished mainly by the QT Owners in their strata council minutes, that by entering its discharge cycle at the same time a comparatively high level of wastewater was circulating in the WPI, Ms. Fudge's washing machine's discharge function exceeded and overwhelmed the under-designed infrastructure's capacity to accommodate wastewater and thereby caused the flooding of her unit.

DID THE QT OWNERS OWE A DUTY OF CARE TO MS. FUDGE?

[34] Put very simply, the law of negligence is concerned with taking reasonable steps to ensure that your actions do not cause harms to your neighbour. The notion of "reasonableness" pervades the law of negligence.

[35] Who is your "neighbour" in law? Your neighbour is someone who is in close enough legal proximity to you that he or she (or it) stands to suffer a reasonably foreseeable loss if you do not take reasonable care to ensure that your actions do not cause that loss. Your duty to take reasonable care not to harm your neighbour is, in law, a "duty of care". If you breach it then, subject to some limitations, your neighbour is entitled to be compensated by you for the harm you have caused to him, her (or it).

[36] The policy that informs the law of negligence is obvious. It creates an incentive for those who are neighbours at law to measure their actions and take reasonable precautions so that they do not harm one another. Neighbours who coexist in this careful and peaceable way contribute to the maintenance of a civilised and productive society.

[37] Where actionable breaches of the duty of care occur, the law provides the injured party with a remedy. The law provides what fairness demands, namely, that the wrongdoer make amends for his or her (or it's) breach by compensating the neighbour who has been harmed. Amends are made by the wrongdoer paying compensatory damages to the one who has suffered the loss. The damages are carefully calibrated so as to restore the injured party, as best a money award can do it, to the situation the injured party was in before the breach occurred.

[38] Duties of care are recognised and dissected analytically in a myriad of relationships. The nature of those duties are often explicated in judgments delivered by judges in cases between "neighbours" who have ultimately become aggrieved claimants and defendants and presented their disputes to courts for adjudication. The judges then analyse the effects of the parties' conduct upon each other through the lens of the law of negligence. The decisions that those judges draft then provide guidance to other judges when they are called upon to decide similar cases.

[39] Duties of care are also sometimes imposed by governments through legislation.

[40] As I have noted, Ms. Fudge's claim implicitly invokes s. 72 of the British Columbia ***Strata Property Act***. That provision reads as follows:

> "**72** (1) Subject to subsection (2), the strata corporation must repair and maintain common property and common assets.
> (2) The strata corporation may, by bylaw, make an owner responsible for the repair and maintenance of
> (a) limited common property that the owner has a right to use, or
> (b) common property other than limited common property only if identified in the regulations and subject to prescribed restrictions.

> (3) The strata corporation may, by bylaw, take responsibility for the repair and maintenance of specified portions of a strata lot."

Section 72(1) imposes a general duty upon strata corporations (here, the QT Owners) to repair and maintain, among other things, the common property in a development like the QT Complex. It is plain that the beneficiaries of that duty are the strata lot owners (one of whom, here, is Ms. Fudge).

[41] Other parts of s. 72 contemplate variations of this duty (by casting obligations that otherwise would be borne by the strata corporation upon the owners, for example). No evidence was led to suggest, let alone prove, that the QT Owners have enacted any bylaws that would in any way affect any duties of care they owe to Ms. Fudge. Neither did the QT Owners argue that their obligations under s. 72 had been modified by their bylaws.

[42] Is the WPI in the QT Complex "common property" that the QT Owners were obliged at all material times under s. 72 to maintain for the benefit of, among other owners, Ms. Fudge? I am satisfied that it is.

[43] Section 1 of the ***Strata Property Act*** defines "common property" as follows:

> **"'common property'** means
>
> (a) that part of the land and buildings shown on a strata plan that is not part of a strata lot, and
> (b) pipes, wires, cables, chutes, ducts and other facilities for the passage or provision of water, sewage, drainage, gas, oil, electricity, telephone, radio, television, garbage, heating and cooling systems, or other similar services, if they are located
> (i) within a floor, wall or ceiling that forms a boundary
> (A) between a strata lot and another strata lot,
> (B) between a strata lot and the common property, or

> (C) between a strata lot or common property and another parcel of land, or
>
> (ii) wholly or partially within a strata lot, if they are capable of being and intended to be used in connection with the enjoyment of another strata lot or the common property;"

[44] Recall that the WPI is a network of pipes whose purpose is to conduct wastewater away from individual units within the QT Complex and, ultimately, carry it from the buildings out and into the municipal sewer system. As such it communicates, and is integrated, with the washing discharge pipes in the individual units (including the Discharge Pipe in Ms. Fudge's unit). The WPI is thus properly seen as a network of pipes that connects individual units with one another. It constitutes a piping infrastructure whose components penetrate and pass through walls and structural elements throughout the QT Complex buildings. The WPI accumulates wastewater originating in individual units and carries it out of the building and, ultimately, via a common line, into the municipal sewer system.

[45] That this is so is confirmed by, *inter alia*, a letter from Brighter Mechanical Limited dated November 23, 2009 that was placed in evidence by the QT Owners themselves. While the Brighter Mechanical letter contains inadmissible opinion evidence, it also contains admissible *fact* evidence about the WPI, including the statement that "The clothes washer drainage and the sewer drainage eventually tie into a common line in the lobby floor, and then exit the building": see Exhibit 3, tab 21.

[46] In 2002, Gray J. heard a case involving a claim that pipes supplying fresh water *to* condominium units for the consumption of owners were in some way contaminating the water they carried, discolouring it and possibly making it a health risk: see ***Taychuk***

v. Strata Plan LMS744, [2002] B.C.J. No. 2653 (S.C.). Her Ladyship had no difficulty finding in that case that the network of pipes distributing water throughout the complex at issue there was common property under s. 1 of the ***Strata Property Act***. At para. 28 she stated:

> "… Here, the pipes are connected to the pipes that service all the units, and so they are intended to be used in connection with the enjoyment of another strata lot. Therefore these pipes are subject to the duty [under s. 72] to repair and maintain."

[47] For all of these reasons, for the purposes of the statutory definition of common property, I find that the WPI comprises "pipes … and other facilities for the passage … of … drainage … located … within … wall[s] … that form … boundar[ies] … between … strata lot[s] … [and] between … strata lot[s] and the common property." Similarly, I find that the Discharge Pipe in Ms. Fudge's unit, being integrated with and thus a part of the WPI, is a pipe "…for the passage … of … drainage … located wholly or partially within a strata lot … [which is] … capable of being and intended to be used in connection with the enjoyment of … the common property [that is, the other components of the WPI]".

[48] There is nothing novel or surprising about these findings. The definition of "common property" found in s. 1 of the ***Strata Property Act*** simply recognises the reality that the WPI is an integrated whole. Discharge pipes and other lines that handle wastewater all feed into the network for the purpose of aggregating that wastewater and then feeding it out to the municipal sewer system for final disposal.

[49] Because the WPI is common property, under s. 72, the QT Owners owed a statutory duty of care to, among others, Ms. Fudge, to "repair and maintain" it. Insofar as any failure to repair or maintain the WPI could expose strata lot holders, like Ms.

Fudge, to an unreasonable risk of experiencing flood incidents, the QT Owners' duty of care to repair and maintain the WPI in my judgment included at all material times a duty to act reasonably to prevent flood incidents.

DID THE QT OWNERS BREACH A DUTY OF CARE OWED TO MS. FUDGE?

[50] On the facts as I have found them, the backup in Ms. Fudge's unit was caused by the inability of the WPI to accommodate the wastewater that her washing machine sought to discharge into it on August 30, 2007. It failed in that way because, by incorporating piping of 4" diameter, it was under-designed and incapable of reliably accommodating the volumes of wastewater generated by the various owners within the QT Complex through, *inter alia*, the use of their washing machines.

[51] This deficiency was well known to the QT Owners for a period of years prior to the incident giving rise to Ms. Fudge's claim. Backups of noxious smelling wastewater into other units had occurred on various occasions, necessitating the replacement, at the QT Owners' expense, of carpeting in a number of those units. Indeed, as I have noted earlier in these reasons, the diagnosis of the problem has been in hand since as early as May of 2003: see the entry in the Minutes at Exhibit 1, tab 13, p. 15. By that time the QT Owners had received advice that the 4" WPI piping needed to be replaced with 6" WPI piping in order to enable it to handle the volume of wastewater generated in the ordinary course by strata lot holders at the QT Complex.

[52] The QT Owners acted on that diagnosis in respect of a couple of units thereafter but instead of taking decisive, complex-wide action of a similar kind they dithered. Steps forward, such as the creation of a "Re-piping Fund", were offset by steps back.

The strata council seems, unwisely, to have yielded to the will of some members who took the view—in the face of what I am bound to say was compelling evidence to the contrary—that the problem with backups was diminishing and that the "Re-piping Fund" monies should be saved "for a rainy day". Thus, the QT Owners did not act on the under-design diagnosis, first received in 2003 (if not earlier), until 2008. But that was too late to spare Ms. Fudge her calamity. That remedial action came well after the time in 2007 when Ms. Fudge experienced the washing machine-related backup problem and resulting flood incident that forms the basis for her claim.

[53] The continued occurrence of such backups was a foreseeable consequence of the QT Owners' considered decision to defer, indefinitely, a complex-wide remediation of the ongoing problems that were being caused by their under-designed WPI. The WPI was deficient. The pipes that comprised it were too small. They couldn't handle the load imposed upon the WPI by owners like Ms. Fudge making ordinary use of their washing machines. Making ordinary use of one's washing machine in the QT Complex at the relevant time was, in a sense, like a game of Russian Roulette. Every time one's machine went into discharge mode there was a risk that the wastewater already circulating with in the WPI could be at a high enough level to prevent more from being added. Should that unhappy confluence of events occur, then a backup-related flood incident would occur. On the facts I have found, that is exactly what happened in Ms. Fudge's unit on August 30, 2007.

[54] I have no doubt that a failure to upgrade the WPI piping to a size capable of handling the ordinary wastewater drainage requirements of Ms. Fudge and the other owners within the QT Complex constituted a breach of the QT Owners' statutory duty to

"repair' and "maintain" the WPI as common property within the QT Complex. Both terms contemplate intervention to correct a deficiency. By reason of its having been under-designed, the WPI had a manifest deficiency that was well known to the QT Owners for years before Ms. Fudge suffered her flood incident.

[55] As Gray J. observed in ***Taychuk***, the word "repair" as employed in the ***Strata Property Act*** is a term of somewhat broad and flexible signification. It takes in, *inter alia*, the notion of "making good," whether or not the object requiring repair was ever good or sound before: see paras. 29-30.

[56] The authorities also acknowledge that the word "repair" can incorporate the notion of "improve": see the discussion of the statutory definition for "repair" under the Ontario ***Repair and Storage Liens Act***, R.S.O. 1990, c. R.25 in ***858579 Ontario Ltd. v. QAP Parking Enforcement Ltd.***, [1995] O.J. No. 517 (Ont. Div. Ct.).

[57] I find that by failing to upgrade the WPI to include piping capable of handling the QT Complex's wastewater load, the QT Owners failed to "make good" the WPI or improve it to the point of making it properly functional. It follows that the QT Owners failed to "repair" the under-design deficiency in the WPI as s. 72 required them to do.

[58] Similarly, the cases also show that a duty to "maintain" a thing can embrace the replacement of some of its components where such replacement is necessary to enable the thing to perform its proper function: see, for example, ***He v. Young***, [2010] B.C.J. No. 796 (S.C.) at paras. 41-47, and esp. 46. I find that by failing to replace the 4" piping comprising much of the WPI with 6" piping, the QT Owners failed in their statutory duty to "maintain" the WPI.

[59] The law is clear that a breach of a statutory duty is evidence of common law negligence: see ***R. v. Saskatchewan Wheat Pool***, [1983] 1 S.C.R. 205. In my respectful view, by failing to take any steps (whether one styles them “repairs” or “maintenance”) to remedy the obvious deficiency in the WPI’s ability to carry the wastewater load imposed by owners, like Ms. Fudge, making ordinary use of their units, the QT Owners were clearly negligent.

[60] Ms. Fudge was the QT Owners’ neighbour in law and in fact. They knew that the WPI was under-designed and prone to causing backups of foul-smelling wastewater into the units of strata lot owners like Ms. Fudge when their washing machines cycles entered the discharge phase. The QT Owners knew that because it had happened to a number of owners who suffered carpet damage as a result of the process. Some of those strata lot holders had their carpets replaced at the QT Owners’ expense. The QT Owners even knew what had to be done to prevent the continuation of these problems. But instead of acting they dithered. While they dithered, Ms. Fudge experienced her flood event and consequential losses.

[61] That Ms. Fudge would suffer such losses was an eminently foreseeable consequence of the QT Owners’ inaction. They failed to take reasonable and timely steps to ensure that their neighbour, Ms. Fudge, did not suffer by reason of their inaction in dealing with the foreseeable risk that, one day, the QT Complex’s WPI would cause foul-smelling wastewater to gush into her unit, soak or wet her carpets and otherwise damage her premises. In the result, Ms. Fudge is entitled at law to look to the QT Owners for compensation.

WHAT LOSSES DID THE NEGLIGENCE OF THE QT OWNERS CAUSE MS. FUDGE TO SUFFER?

[62] The flood incident that Ms. Fudge experienced on August 30, 2007 caused wastewater to pool on the floor of the laundry closet in which her washing machine was situated. It also spread out into the unit proper and soaked or wetted her carpets.

The Amount of Carpet Affected by the Wastewater

[63] There is controversy between the parties as to how far the wastewater travelled into Ms. Fudge's unit following the backup and resulting flood incident. She herself testified that the wastewater from the backup soaked or wetted the installed carpets in her hallway, master bedroom, second bedroom/den and living room. Of those carpeted areas she concedes that only the living room was significantly spared. That said, her evidence was that a substantial part of the living room carpet was affected by the flood incident and she does not see how, for reasons of colour and condition matching (for example), only a part of that carpet could now be replaced: see Exhibit 1, tab 1, p. 5.

[64] The QT Owners contend that the spread of the wastewater within Ms. Fudge's unit was much more contained. They rely primarily on the evidence of Mr. Parnell—who attended at the unit soon after the flood was discovered—to argue that only carpets in front of the washing machine and around a corner and into the den were "damp".

[65] However, Mr. Parnell's testimony at trial made it clear that he did not make a point of surveying the extent of the spread of wastewater in Ms. Fudge's unit when he came up, principally to try to diagnose the cause of the flood incident. When he was asked whether the whole apartment was flooded he did not refer to observations to

ground his answer. Rather he invoked a surmise or inference, saying, “Nothing came into my suite [directly below] so I don’t think so.”

[66] I cannot treat this evidence as a reliable measure of the extent to which the carpets in Ms. Fudge’s suite were affected by the wastewater that gushed out of the Discharge Pipe when the backup in her unit occurred. Mr. Parnell reported observations of wet carpets in two locations (in front of the laundry closet and into the den); the remainder of his testimony on point is conjectural. Unquestionably, wastewater could have travelled to the other areas identified by Ms. Fudge without necessarily seeping into Mr. Parnell’s suite below.

[67] There is another reason to be sceptical about the QT Owners’ contention that the spread of wastewater following the backup was markedly more limited than Ms. Fudge claims. Rob Bouchette (“Mr. Bouchette”), a project manager for a restoration contractor called Angel Restoration Inc. (“Angel”), attended at the unit at the QT Owners’ request and made observations consistent with those made by Ms. Fudge herself. In Mr. Bouchette’s own words:

> “From what the owner advised *and from what I observed* the hallway, entry half of living room, den and bedroom where [*sic*] affected so we put in for a complete replacement.” (Exhibit 3, tab 9, p. 9, emphasis added)

[68] The steps taken by the QT Owners’ in the face of this contrary evidence are, if not unsettling, then at the very least profoundly disappointing. Knowing what independent observer Mr. Bouchette had said about *his own observations* regarding the extent to which wastewater had penetrated the rooms of Ms. Fudge’s unit, the QT

Owners' agent, Thomas Young ("Mr. Young"), sent an e-mail to all members of the QT Complex's strata council on September 11, 2007. That e-mail states the following:

> "Dear Council: Apparently it is also Angel Restoration's observation that '*the hallway, entry, half of living room, den and bedroom were affected*'. Perhaps a complete replacement is called for. Please discuss this amongst yourselves and let me know, via Phil [Vechter], on the next course of action – *despite what was decided upon last night. You may wish to leave me out of your discussion*. Thanks." (Exhibit 3, tab 9, p. 9.1, emphasis added)

[69] The clear inference to be taken from this e-mail is that Mr. Young was signalling to the strata council that, given the posture they had already chosen to take regarding Ms. Fudge's claim, they may wish to consider placing him (and his knowledge) in a silo for the purposes of future discussions regarding that claim. It was telling in my view that, when he testified at trial, Mr. Phil Vechter—a council member named personally in the above-quoted e-mail which was addressed explicitly to him and all other council members—denied ever receiving Mr. Young's disturbing e-mail.

[70] Despite having received independent corroboration by Mr. Bouchette of Ms. Fudge's account of the extent of the wastewater damage to carpets in her unit (as acknowledged in his September 11 e-mail quoted above), Mr. Young continued to characterise the extent of that damage as minimal. Only four days later, in an e-mail to a different Angel representative seeking another inspection by Angel regarding possible replacement of the carpet, Mr. Young characterised the backup in Ms. Fudge's unit as being "minor" and opined that the carpeting there was only "somewhat damaged": Exhibit 4, p. 4.

[71] In responding correspondence from Ms. Fudge's then solicitor, sent the same day, Mr. Young was roundly chastised for that dismissive characterisation of Ms. Fudge's carpet damage. The solicitor complained that Mr. Young's instructions to Angel had, to that point, been "very slanted"; he closed his e-mail to Mr. Young by stating "We trust that the results of this inspection have not been predetermined." (see Exhibit 3, tab 5)

[72] The course the litigation that followed in the wake of the various exchanges of correspondence referred to above is clear. The QT Owners have continued to contend that the wastewater that backed up and gushed out of the Discharge Pipe and into Ms. Fudge's unit only reached a short way into her premises, leaving several rooms entirely untouched by it.

[73] I emphatically reject that contention.

[74] I find as a fact that the wastewater that backed up out of the Discharge Pipe in Ms. Fudge's unit spread throughout the unit to soak or wet the carpets in the hallway, master bedroom, second bedroom/den and a significant part of her living room, as Ms. Fudge herself testified. That scope of affected areas accords with the independent *observations* of Mr. Bouchette who attended at the site as an Angel representative at the request of the QT Owners—observations that they and their agent Mr. Young persisted in ignoring (if not outright denying) but which this court nevertheless finds compelling.

The Nature of the Damage Caused by the Wastewater

[75] A great deal of time was spent at trial and in final argument skirmishing over the precise nature of the wastewater that entered Ms. Fudge's unit as a result of the backup and resulting flood incident. I do not propose to descend fully into the *minutiae* of that debate.

[76] Ms. Fudge's evidence was that water was foul-smelling. I accept that evidence. I will explain why.

[77] The Minutes are replete with references to other owners complaining of foul-smelling backups of wastewater from the WPI into their units and to the discharge pipes and other WPI features venting foul odours into their units. Ms. Fudge's evidence fits into the broader context of the experience of others who reside at the QT Complex.

[78] Moreover, I have found as a fact that the wastewater that enters a unit at the QT Complex in the course of a backup includes some wastewater that is generally circulating within the WPI. No evidence was led as to how long that wastewater sits in the pipes and to what extent it contains substances that could produce foul orders. The QT Owners have placed previously mentioned documentary evidence before the court originating with Brighter Mechanical that states that "clothes washer drainage and the sewer drainage eventually tie into a common line in the lobby floor and then exit the building": Exhibit 3, tab 21. That statement certainly seems to contemplate the eventual intermingling of sewer water and clothes washer drainage, and the possibility that foul smelling liquids and gasses could find their way up through the WPI into units (as various owners, including Ms. Fudge, have said they do). The notion that some of the

wastewater that spilled into Ms. Fudge's unit was foul smelling wastewater originating in the WPI itself, and not in her own washing machine, is neither fanciful nor far-fetched. It is consistent with the evidence about the WPI as a whole. Certainly, no evidence was called by the QT Owners to rule such a possibility out.

[79] Beyond all of that there is the expert opinion of Bio-D-Tec Mould Experts, tendered in evidence by Ms. Fudge (see Exhibit 1, tab 18), which speaks to the presence of mould and fungus in her unit and, in particular, in her carpets. The mould and fungal contamination was noted to be secondary to water damage.

[80] I hasten to say that I accept that, given the history of other water-related incidents in Ms. Fudge's unit, not all of that mould and fungal growth detected by Bio-D-Tec can fairly be attributed to the flood incident of August 30, 2007. But I am convinced by the evidence that a substantial part of the mould and fungal growth in the unit can be. No other water-related problem that was described in the evidence led before me was comparable in scope to the incident of August 30th. I am satisfied that that flood incident alone caused sufficient mould and fungal growth, by reason of its sheer size and by reason of the foul-smelling nature of the wastewater that contaminated the suite, to justify the remedial steps that are recommended in the Bio-D-Tec Mould Experts report.

[81] If the QT Owners had identified major weaknesses in the methodology of Ms. Fudge's mould and fungus experts, or in their reasoning or conclusions, they would surely have:

(a) insisted that the report's author attend at trial for cross-examination; or

(b) filed a rebuttal expert report of their own; or

(c) done both.

[82] In fact, they did neither.

[83] Quite apart from the health-related concerns reflected by Ms. Fudge's claim, there are the aesthetic ones. In places her carpets have unsightly stains caused by "cellulosic browning" that is secondary to water damage. Again, not all but some of that staining is attributable to the events of August 30, 2007.

[84] For the foregoing reasons I find as a fact that the wastewater that entered Ms. Fudge's unit during the course of the backup-related flood incident that occurred there was contaminated with something that made it foul smelling. I say again that I find that as a result of being contaminated with that wastewater, Ms. Fudge's unit displays visible staining and mould and fungal contamination—contamination that, in the words of the Bio-D-Tec expert report creates an "elevated risk to health with exposure of sensitive individuals" that calls for the "professional fungal remediation" that is recommended in the report.

WHAT AWARD OF DAMAGES WOULD PROPERLY COMPENSATE MS. FUDGE FOR HER LOSSES?

The Governing Principles

[85] In ***Nan v. Black Pine Manufacturing Ltd***. (1991), 80 D.L.R. (4th) 153 at 157, (B.C.C.A.), Wood, J.A. (as he then was), for the court, summarised the elemental

principles that govern awards of damages in tort cases of this kind. He said the following:

> "I do not find anything in the three judgments in *Bendera*, that would require this court now to resile from the long-established general principles applicable to damages in tort actions. The first of those principles is reflected by the maxim restitutio in integrum, the damages shall be such as will, so far as money can, put the plaintiff in the same position as he would have been had the tort not occurred. The second is that the damages awarded must be reasonable to both the plaintiff and to the defendant.
>
> The result of the application of these principles, in most cases involving the tortious loss of or damage to property, will be that replacement costs will at least be the starting point for the assessment of damages. Whether or not the damages based on such costs should then be adjusted, either for pre-loss depreciation or post-reinstatement betterment, will depend on what is reasonable in the circumstances. No rules can be fashioned by which it can invariably be determined when such allowances should be made. It must, in all cases, turn on the facts peculiar to the case being considered."

[86] It can be seen from that passage that damages awarded in tort claims, including negligence claims, are compensatory in nature. They are intended to compensate, but not overcompensate, successful claimants for the losses caused to them by defendant "neighbours" who the breach their duties of care and thereby cause the claimants harm.

[87] Ms. Fudge's updated damage claim contains two elements.

The Cost of Carpet Replacement

[88] Ms. Fudge first claims the cost of replacement of all of the carpets that were installed in her unit in 1988 at the time of original construction. I have previously found that all of her installed carpets have been sufficiently damaged by the backup-related flood incident of August 30, 2007 to warrant such wholesale replacement.

[89] Mr. Bouchette of Angel has estimated the cost of labour and materials to do the carpet replacement work at $6,164.18: see Exhibit 1, tab 2, pp. 3-6. Ms. Fudge advances that estimate in support of her claim in this regard.

[90] The estimate upon which Ms. Fudge relies was prepared by an apparently reputable restoration professional—one to whom the QT Owners were prepared to turn for advice and guidance from time to time. They have not challenged his methods or his conclusions. I similarly have no reason to question or second guess Mr. Bouchette's methods or conclusions regarding the cost of replacing Ms. Fudge's installed carpets. He said in September 2007 that a total of $6,164.18 was the amount she would need to spend in order to effect the replacement.

[91] Unquestionably, when her carpets are ultimately replaced, Ms. Fudge will have in her unit floor coverings that will have a longer service life than the 19-year-old and somewhat worn carpets that the unit had in place just prior to the flood incident. It will be recalled that a damages award in Ms. Fudge's favour in this case is intended, so far as money can do so, put her in the same position as she would have been had the negligently caused flood incident not occurred. Were I to fail to take account of the benefit of replacing old carpets with new ones—"betterment" as it is known at law—then I would overcompensate Ms. Fudge with an award that would be over-generous to her and over-burdensome to the QT Owners. I must therefore discount the award for carpet replacement to some degree to reflect the phenomenon of betterment.

[92] Wright J. made the observation in the recent case of ***Connolly v. Greater Homes Inc.***, [2011] N.S.J. No. 449 (S.C.) that fixing a discount to offset betterment is a

process that, “by its very nature in these circumstances will be imprecise” (at para. 166). He cautioned himself in that same paragraph against “putting too fine a point on the calculation”. I agree with that approach. There is no clear and easily applied metric to use in fixing an appropriate discount for betterment. Neither was any evidence led by the QT Owners regarding the depreciated value of Ms. Fudge’s carpets at the time they were damaged by the flood incident. Any pretence of making a precise determination of the proper quantum to assign to a betterment discount in these circumstances would be a pretence and nothing more.

[93] I have found some helpful guidance in a very recent Saskatchewan Provincial Court decision called ***Evin v. Harder***, [2012] S.J. No. 249 (Prov. Ct.). In that case a claimant was adjudged to be entitled to have a 25-year old laminate countertop replaced with a new one of comparable quality. The cost of that replacement was to land at the feet of the negligent defendant. D.C. Scott, P.C.J. dealt with the issue of betterment this way:

> “Mr. Ginther testified the original arborite or laminate was replaced with laminate of the same grade or quality. Nonetheless, the plaintiffs received a new countertop to replace one which, according to them, had been in the home for approximately 25 years. The doctrine of betterment precludes the plaintiffs from being fully compensated for a new countertop of greater value than the one which would have depreciated over time as the result of wear and tear. No evidence was presented with respect to the difference in value between the two, the obligation for which was on the defendant. In the circumstances, the Court will assess a nominal discount of 10% of the cost of the new countertop to reflect the depreciation. Approximately $2,800.00 plus 5% GST or $2,940.00 of the Country-West invoice is attributable to the countertop replacement. Accordingly, that portion of the plaintiffs' claim will be reduced by 10% or $294.00.” (at para. 35)

[94] Taking the approach reflected in ***Evin*** and applying it to the case at bar—which bears some similarities to ***Evin***—I discount the Bouchette/Angel estimate of the replacement cost of Ms. Fudge's carpets of $6,164.18 by 10% or $616.42. That leaves a net award in her favour on this head of claim of $5,547.76.

Cost of Mould and Fungal Growth Remediation

[95] Ms. Fudge also claims the $4,650 estimated by Bio-D-Tec Mould Experts as the cost of doing remedial work at her unit to deal with the contamination of her carpets, gyproc walls, baseboards and other components with fungus and mould. To that must be added HST of 11% or $511.50 for a total claim of $5,161.50.

[96] Here I discern some overlap with the carpet replacement claim. This is evident from the fact that both the Bio-D-Tec estimate and the Bouchette/Angel estimate make provision for the cost of removing the existing carpet. No breakdown on the Bio-D-Tec remediation estimate is before me that permits a precise allocation of any particular proportion of the figure to carpet removal.

[97] Unquestionably, carpets figure prominently in Bio-D-Tec's projected remedial work; however, the remediation project also includes numerous tasks other than dealing with carpets (such as work on the walls and baseboards in the den and laundry closet, high level disinfection washing and wiping down of all surfaces in the entire unit, removal and replacement of all personal items and furniture from and in the unit to allow for remediation: see Exhibit 1, tab 18).

[98] Ms. Fudge's recovery with regard to the mould and fungal growth remediation aspect of her claim must be discounted to reflect the duplication that exists between that aspect and the carpet removal estimate provided by Bouchette/Angel, else there will be duplication and double recovery. Using again a calculation that is not capable of precise determination, I discount the mould and fungal growth remediation claim of $5,161.50 by 40% or $2,064.60 for a net award in Ms. Fudge's favour under this head of claim of $3,096.90.

Deductible for the Cleaning of Area Rugs

[99] The evidence at trial establishes that, following the flood incident of August 30, 2007, Ms. Fudge had some of her area rugs cleaned by Canstar Restorations pursuant to her house insurance policy. The need to have those rugs cleaned is tied directly to the breaches of duty by the QT Owners and the wastewater flood that resulted from them that I have discussed in detail above in these reasons for judgment.

[100] Ms. Fudge's insurers covered all but the $200 deductible on her policy when processing Canstar's rug cleaning invoice for payment: see Exhibit 1, tab 2, p. 10. In these circumstances Ms. Fudge is entitled to recover her deductible. I award her $200 under this head of claim.

Other Heads of Claim

[101] Legal fees that Ms. Fudge incurred in pursuance of this action against the QT Owners are not recoverable as damages in a Provincial Court small claims action: see

Machray v. Simpson, [2011] B.C.J. No. 2174 (Prov. Ct.) and the cases cited therein. I deny her claim in this regard.

[102] Ms. Fudge has sought recovery of amounts paid to her mould and fungal growth experts, Bio-D-Tec, in connection with their inspection visit to her unit and the preparation of their expert report. These are litigation expenses. They are not amounts that are recoverable as damages *per se* and, for that reason, I deny her claim for them as damages. I hasten to add, however, that they may be recoverable as "reasonable charges and fees" pursuant to Rule 20(2)(c) of the ***Small Claims Rules***, B.C. Reg. 261/93.

DISPOSITION AND ORDER

[103] I summarise all of the foregoing as follows.

[104] I have found that by failing to "repair and maintain" the wastewater piping infrastructure, or WPI, as common property within the QT Complex, the QT Owners breached their statutory duty to Ms. Fudge, a strata lot owner in the QT Complex and a beneficiary of that duty. The duty to repair and maintain the manifestly under-designed WPI was cast upon the QT Owners by s. 72 of the ***Strata Property Act.*** That duty required them to upgrade the piping forming part of the WPI to 6" diameter from the originally installed 4" piping when they became aware, or ought reasonably to have become aware, that the WPI as originally constructed was incapable of handling the load of wastewater fed into it by the owners in the ordinary course of use of, *inter alia*, the washing machines in their strata lots. The QT Owners were aware of the WPI's inadequate capacity since at least 2003, yet they failed to act on that knowledge. Their

dithering redounded, ultimately, to the detriment of Ms. Fudge. The inaction of the QT Owners constituted a breach by omission of their statutory duty to repair and maintain the WPI.

[105] The QT Owners' breach of their statutory duty to repair and maintain the WPI in those circumstances amounts to negligence at common law. Their negligence was the cause in fact and in law of losses suffered by Ms. Fudge when a backup occurred on August 30, 2007 when her washing machine's wash cycle reached the point where the appliance attempted to discharge wastewater into the WPI via the Discharge Pipe in the wall of the laundry closet of her unit. The WPI, at that time, became overwhelmed with wastewater and so a backup occurred in Ms. Fudge's unit. The backup resulted in wastewater originating in Ms. Fudge's washing machine, combined with wastewater already circulating in the WPI, gushing out of the Discharge Pipe and spreading widely within her unit, soaking or wetting some area rugs, walls and floor boards as well as the installed carpets in her hallway, master bedroom, second bedroom/den and living room. That wastewater gave off a foul odour and it damaged Ms. Fudge's installed carpets sufficiently to require their replacement. That wastewater also damaged some area rugs sufficiently to require that they be cleaned by a professional restoration contractor. The flood event that caused these harms to Ms. Fudge also led to mould and fungal growth in the carpets, walls, baseboards, and so forth within her unit that require remediation on health grounds.

[106] In the circumstances Ms. Fudge is entitled to recover damages against the QT Owners to compensate her for the losses she suffered as a result of their negligent breaches of duty. In particular, Ms. Fudge is entitled to recover:

(a) $5,547.76 on account of the cost of replacement of her installed carpets (inclusive of tax but net of betterment);

(b) $3,096.90 on account of mould and fungal growth remediation (inclusive of tax but discounted to take account of overlap, concerning removal, with the carpet removal claim above); and

(c) $200 on account of the deductible paid in connection with the professional cleaning of her area rugs.

The total of these three heads of claim is $8,844.66.

[107] Beyond the principal amount of her aggregated claims as noted above, Ms. Fudge is also entitled to recover as against the QT Owners:

(a) pre-judgment interest under the ***Court Order Interest Act***, R.S.B.C. 1979, c. 79 on $8,844.66 from August 30, 2007 (the date upon which her cause of action in negligence arose) to the date of judgment to be calculated by the registrar;

(b) filing fees of $156;

(c) service fees of $200; and

(d) reasonable charges and fees incurred in the course of prosecuting this action, pursuant to Rule 20(2)(c) of the ***Small Claims Rules***.

[108] Unless they file and serve upon Ms. Fudge by November 2, 2012, an application and supporting affidavit seeking time to pay the judgment granted herein in Ms. Fudge's

favour, the QT Owners must pay to her the principal amount of her claim ($8,844.66) plus prejudgment interest (to be calculated by the registry) plus filing fees ($156) plus service fees ($200) not later than November 16, 2012. Any application for time to pay that is brought by the QT Owners must be made returnable on the first available small claims motion day at New Westminster and in the event such an application is brought the QT Owners' payment obligation shall be deferred pending the outcome of that application.

[109] In the unlikely event that the parties cannot agree on the charges and fees that are payable by the QT Owners to Ms. Fudge pursuant to Rule 20(2)(c), they may schedule a hearing before a registrar of the Provincial Court at New Westminster pursuant to Rule 20(4). At that time the quantum of Ms. Fudge's recoverable charges and fees will be determined.

[110] Any need that may arise for a hearing before a registrar at a future date to deal with recoverable charges and fees shall not affect the QT Owners' obligation to pay to Ms. Fudge the amounts quantified above, plus pre-judgment interest as determined by the registrar, by the deadline of November 16, 2012 (subject, of course, to any application for time to pay that the QT Owners may file).

[111] Orders accordingly.

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Thomas S. Woods, P.C.J.