IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Hirji v. Owners Strata Corporation VR44,* 2016 BCSC 548

Date: 20160330
Docket: S070817
Registry: Vancouver

Between:

Mohd Ali Hirji, also known as Mohamedali Hirji Mohamed Lalani,
and
Parin Mohd Ali Hirji, also known as Parin Mohamedali Hirji Lalani

Plaintiffs

And

The Owners Strata Corporation Plan VR 44

Defendant

Before: The Honourable Madam Justice Sharma

Reasons for Judgment

Plaintiffs, Mohd Hirji and Parin Hirji:	In person
Counsel for the Defendant:	R. Shaw
Place and Date of Hearing:	February 22, 2016
Place and Date of Judgment:	Vancouver, B.C. March 30, 2016

[1] The decision in this action was rendered on November 6, 2015: *Hirji v. The Owners Strata Corporation Plan VR 44*, 2015 BCSC 2043. All of the plaintiffs' claims were dismissed and the parties were given liberty to ask within 30 days of the judgment for a hearing on costs which took place on February 22, 2016.

[2] The defendant seeks the following orders:

> 1. Special costs to be awarded to the defendant, The Owners Strata Corporation Plan VR 44 ("VR 44") and to Brenda Mayert, Barbara MacLellan, Diane Wykes, Dennis Watt, Jane MaKernan, Maureen Cerny, Robert Nuedorf and Bryce Sommerville (the "personal defendants");
>
> 2. In the alternative, VR 44 be awarded costs at scale B and double costs from the date of its offer to settle made on January 3, 2014;
>
> 3. In the further alternative, VR 44 be awarded costs at scale B and double costs from the date of its offer to settle made on November 7, 2014; and
>
> 4. In the further alternative, VR 44 and the personal defendants be awarded costs at scale B throughout these proceedings.

[3] In relation to the personal defendants, the action against them was discontinued, without consent, well before the trial. Supreme Court Civil Rule 9-8(4) provides that a party that wholly discontinues an action against another party must pay costs from the date of service to the notice of discontinuance.

[4] There is no dispute about the law that applies to orders for special costs. In *Garcia v. Crestbrook Forest Industries Ltd.*, [1994] B.C.J. No. 2486 (C.A.), Justice Lambert confirmed that there is a single standard for awarding special costs which is that the court must find that the conduct in question is reprehensible. He continued at para. 17:

> As Chief Justice Esson said in *Leung v. Leung*, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible,

> taken in that sense, must represent a general and all-encompassing expression of the applicable standard for the award of special costs.

[5] It is also recognized that an award of special costs should only be made in exceptional circumstances where the court concludes that an element of deterrence or punishment is necessary because of the reprehensible conduct. In *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352, Madam Justice Gropper summarized the jurisprudence discussing the test for special costs as follows:

> [73] I have undertaken a thorough review of the cases involving special costs. Having examined the authorities provided by both sides, it is apparent to me that the courts have been somewhat inconsistent in their determination of what amounts to reprehensible conduct and that those authorities must be reconciled. Based upon my review of the authorities, I have derived the following principles for awarding special costs:
>
> a) the court must exercise restraint in awarding specials costs;
>
> b) the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order;
>
> c) simply because the legal concept of "reprehensibility" captures different kinds of misconduct does not mean that all forms of misconduct are encompassed by this term;
>
> d) reprehensibility will likely be found in circumstances where there is evidence of improper motive, abuse of the court's process, misleading the court and persistent breaches of the rules of professional conduct and the rules of court that prejudice the applicant;
>
> e) special costs can be ordered against parties and non-parties alike; and
>
> f) the successful litigant is entitled to costs in accordance with the general rule that costs follow the event. Special costs are not awarded to a successful party as a "bonus" or further compensation for that success.

[6] Justice Walker also articulated a number of circumstances where special costs could be awarded in *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at para. 11:

> (a) where a party pursues a meritless claim and is reckless with regard to the truth;
>
> (b) where a party makes improper allegations of fraud, conspiracy, fraudulent misrepresentation, or breach of fiduciary duty;
>
> (c) where a party has displayed "reckless indifference" by not recognizing early on that its claim was manifestly deficient;

> (d) where a party made the resolution of an issue far more difficult than it should have been;
>
> (e) where a party who is in a financially superior position to the other brings proceedings, not with the reasonable expectation of a favourable outcome, but in the absence of merit in order to impose a financial burden on the opposing party;
>
> (d) where a party presents a case so weak that it is bound to fail, and continues to pursue its meritless claim after it is drawn to its attention that the claim is without merit;
>
> (e) where a party brings a proceeding for an improper motive;
>
> (f) where a party maintains unfounded allegations of fraud or dishonesty; and
>
> (g) where a party pursues claims frivolously or without foundation.

[7] It is not enough to show that a party's allegations of bad faith or malice were not proven. The party seeking special costs must demonstrate that the opposing party acted improperly in bringing forward claims that were obviously unfounded: *Hung v. Gardiner*, 2003 BCSC 285 at para. 16. It should also be noted that the court is not limited to considering only the evidence that was adduced at trial: *Chutti v. Bisla*, 2012 BCSC 1456 at para. 9.

[8] I conclude this is one of those rare cases where an award of special costs is justified on more than one of the grounds mentioned in the case law referenced above. One of the strongest grounds is that during cross-examination of the personal defendants and final submissions, the plaintiffs made unfounded allegations of bad faith, malice and dishonesty against the personal defendants despite discontinuing the action against them before trial. There was no evidence to support a claim of bad faith or dishonesty against any of the personal defendants. The plaintiffs' allegations rested on pure speculation and Mr. Hirji's persistent paranoia.

[9] The plaintiffs levelled the same type of allegations of bad faith against VR 44. Those were equally unfounded.

[10] What I find particularly reprehensible, is the fact that the plaintiffs continued to level serious allegations of misconduct against counsel that appeared in front of me (Mr. Eged), and VR 44's former counsel (Mr. Bleay). Mr. Hirji has filed affidavits and

sent correspondence in which he makes numerous spurious allegations which call into question both counsel's ethics, honour and professional integrity. Mr. Hirji went so far as to copy an email full of these groundless allegations to all the other lawyers at Mr. Eged's law firm as well as distributing the email to people outside the firm. At the costs hearing, Mr. Hirji attempted to bring forward allegations that VR 44 fabricated evidence and that Mr. Eged misled the court during the trial.

[11] There was absolutely no evidence upon which a reasonable person could maintain these allegations, and I find that Mr. Hirji's conduct in doing so is reprehensible. He had the opportunity during his closing submissions to distance himself from these allegations, but when asked to clarify whether he wished to maintain allegations against counsel, he confirmed that he did. In my view this behaviour, on its own, justifies an award of special costs. I add not only were the accusations baseless, I find they were motivated by improper motives. I find Mr. Hirji's strategy was to attempt to bully and intimidate the defendant into settling.

[12] There are other circumstances that also support an award of special costs. A great deal of time was spent at the trial by Mr. Hirji pursuing claims relating to an alleged collapsed sale of his condo unit and business losses. With regard to the claim about the sale of the condo, at para. 174 of my previous decision, I concluded that claim was frivolous because it represented an irrational stance based only on Mr. Hirji's evidence, which I found to be unreliable and not believable. I came to the same conclusion with regard to his claim about business loss (see paras. 177-183).

[13] VR 44 brought forward evidence about Mr. Hirji's conduct outside of the trial which I also find deserving of rebuke. That conduct concerns Mr. Hirji's possession and threats to use one of the defendant's confidential and privileged documents.

[14] On January 31, 2014, the plaintiffs were successful in getting an order adjourning the trial based on the fact that their counsel at the time (Mr. Morrison) was medically incapable of practising law and his practice was in the process of coming under a power of attorney (Ms. Voss). On March 10, 2014, Mr. Eged deposed that he received an email from Mr. Hirji, copied to Mr. Morrison that

attached a 57 page document dated November 7, 2013 (the "Chronology"). As Mr. Eged swears in his affidavit, the Chronology was a privileged and confidential document prepared by defendant's counsel over several months, and it contained information that formed part of the solicitor's brief, subject to both litigation and solicitor-client privilege. Mr. Eged confirmed that he never received any instructions to waive privilege or disclose it, and that he never took any action consistent with waiver or disclosure. Upon receiving the email, Mr. Eged immediately wrote to both Mr. Morrison and Ms. Voss confirming the confidential and privileged nature of the Chronology, and the lack of intent in disclosing it. Mr. Eged asked both counsel for confirmation of the steps taken to have Mr. Hirji destroy all copies of the Chronology. In response, Ms. Voss informed Mr. Eged that Mr. Morrison had returned to practice. Mr. Eged left voicemail messages for Mr. Morrison which were not returned.

[15] On March 20, 2014, however, Mr. Morrison sent a notice of intention to withdraw as counsel, which had been filed March 17, 2014. Mr. Eged filed an objection to the notice of withdrawal. In a telephone conversation with Mr. Morrison, the latter advised that it would be inappropriate for him to discuss the Chronology or how Mr. Hirji came into possession of it. I assume Mr. Morrison would have fulfilled his duty as a lawyer to instruct Mr. Hirji to dispossess himself of a privileged document. Thus, I infer Mr. Hirji was aware that it was improper for him to use, copy or distribute the Chronology in any fashion. I find the tenor of Mr. Hirji's communications about the Chronology are consistent with that inference.

[16] Shortly thereafter Mr. Hirji filed a notice of intention to act in person. This was followed the next day by a long email from Mr. Hirji full of allegations against Mr. Eged. The email was copied to every lawyer in Mr. Eged's law firm. A few days later, Mr. Hirji sent another email to all lawyers at the firm as well as an individual unknown to counsel. The same thing happened the following day except that an additional person, unknown to counsel, was also sent the email. The email sent by Mr. Hirji included baseless claims of unethical behaviour. Mr. Hirji also accused counsel of misleading the court at a settlement conference. He indicated he would

send a copy of his email to the Law Society as well as to the Chief Justice. He then goes on to reference the Chronology in relation to his view of his claim.

[17] After sending the email and the confidential memo to numerous people, Mr. Hirji sent another email, also copied to people outside of the law firm, stating that he intends to use the Chronology during the lawsuit. Mr. Eged replied to Mr. Hirji strongly suggesting that he get further legal advice regarding his possession and use of the Chronology and that he refrain from disseminating it. Mr. Hirji refused to offer any assurance that he would do so. Mr. Hirji stated the Chronology "accidentally came into my possession" and that it "probably got mixed up with my documents in one of the hearings". He even goes so far as to make the outlandish suggestion that counsel working with Mr. Eged should take responsibility for Mr. Hirji's improper possession of the document because they were careless. Mr. Eged was forced to bring an application for an injunction on April 14, 2014 to compel Mr. Hirji to return the Chronology and enjoin him from using the document during the trial.

[18] Mr. Hirji's response to the application for special costs is that it would be a financial burden that the plaintiffs cannot afford. Although that statement is plausible, I have no evidence before me about the plaintiffs' current financial situation. He also claimed that he never "intentionally" took action to harm or disrespect anyone. I reject that statement based on the discussion earlier in these reasons with regard to his insistence on maintaining allegations of bad faith. With regard to the Chronology, Mr. Hirji claimed that his explanation for his conduct in relation to it is contained in the emails attached to counsel's affidavit Chronology.

[19] Mr. Eged's affidavit notes that there were only three people at the law firm that possessed a copy of the Chronology in Mr. Hirji's presence, all of whom were counsel working on the file. Mr. Eged describes where the document would have been each time any of those lawyers were in the presence of Mr. Hirji. Mr. Eged does not accuse Mr. Hirji of taking the document because he does not have personal knowledge of such conduct. It is true, however, that a reasonable inference

that can be drawn from the facts stated in his affidavit is that Mr. Hirji picked up the Chronology when it was unattended either during an examination for discovery or a settlement conference. What Mr. Hirji did not explain was why, after (as I have inferred) he knew it was improper to have or use the Chronology, he would not refrain from doing so and the defendant was forced to seek an injunction. He relies on his email communications to explain his position. There is no explanation in those emails about his refusal to return the Chronology. In fact, those communications constitute behaviour deserving of reproof. Regardless of how he came into possession of the Chronology, I find Mr. Hirji knew it was improper for him to keep or use it but he persisted in doing so for improper motives.

[20] I have only described in this decision the most egregious circumstances that support an award of special costs. Having reviewed all material before me and heard the submissions, I am satisfied that the circumstances in this case meet the legal tests described above at paras. 5 [para. 73(d) of *Westsea*] and 6 [paras. 11(a), (b), (d), (f) and (g) of *Mayer*].

[21] I have no hesitation in concluding that the actions and behaviour of Mr. Hirji leading up to, during and even after the trial are deserving of rebuke and are reprehensible. I make an award of special costs in favour of the defendant and the personal defendants.

[22] It is unnecessary for me to consider the alternative claims of the defendant. The defendant is entitled to the costs of this application.

"Sharma J."

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Hirji v. The Owners Strata Corporation Plan VR 44,* 2015 BCSC 2043

Date: 20151106
Docket: S070817
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Between:

Mohd Ali Hirji, also known as Mohamedali Hirji Mohamed Lalani,
and
Parin Mohd Ali Hirji, also known as Parin Mohamedali Hirji Lalani

Plaintiffs

And

The Owners Strata Corporation Plan VR 44

Defendant

Before: The Honourable Madam Justice Sharma

Reasons for Judgment

Plaintiffs, Mohd Hirji and Parin Hirji:	In person
Counsel for the Defendant:	A. Eged R. Shaw
Place and Date of Trial:	Vancouver, B.C. April 7 - 10, 13-17, April 20-24, 27-30, May 4 - 5, 7 - 8, 2015
Place and Date of Judgment:	Vancouver, B.C. November 6, 2015

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I. OVERVIEW

[1] For over a decade, the plaintiff, Mr. Hirji, has waged a campaign of complaints against the strata council for the complex in which he lives, Lillooet Place, about deck repairs he says were required or promised but never done, or done poorly. Not being satisfied with the response he received, he launched this litigation over eight years ago.

[2] In the course of this litigation, Mr. Hirji has sued the strata management company which oversees the strata complex, strata council members in their personal capacity, and engineering and contracting firms, and the principals of those firms, in their personal capacity. All defendants except the Owners Strata Corporation Plan VR 44 have settled with the plaintiffs.

[3] Mr. Hirji also complained to the Association of Professional Engineers and Geoscientists ("APEG") about two of the engineers hired by the defendant. He complained to the governing body of real estate agents about one of the strata managers for the complex. He even tried to enlist the assistance of the Better Business Bureau by sending a complaint about a consultant who had not yet started working on Mr. Hirji's unit. He threatened a human rights complaint against various defendants for what he perceived to be the "discriminatory treatment" he was receiving.

[4] During the trial he attempted to repeat accusations of dishonesty, bad faith, and exploitation of a position on strata council for personal gain and benefit against individuals who served on council despite the fact that those allegations, originally included in his law suit, were discontinued about three years ago.

[5] The evidence establishes that the defendant has spent over $100,000 in engineering and contractors' fees to address repairs in the plaintiffs' unit. This is about four times more than what was spent on any of the other 64 units in the strata complex, most of which had more serious repair issues. Despite this, Mr. Hirji maintains he is the victim in this saga.

[6] Far from being a victim, I find that the evidence shows that Mr. Hirji has threatened, harassed, and taken any action he thought necessary to get what he wanted, with little regard for the impact he has had on reasonable people, most especially the 64 other owners in the complex. Rather than being unfair, I find that the defendant responded promptly, fairly, and diligently to all of Mr. Hirji's complaints.

[7] Mr. Hirji's wife, Parin Mohd Ali Hirji, is also a plaintiff but she did not testify. This is surprising since most of the evidence at trial pertained to the condition of the unit in which she lived and continues to live. Presumably she was in a good position to corroborate Mr. Hirji's evidence, and she attended the trial almost every day. No evidence was presented to substantiate the submission that Mrs. Hirji suffered any of the losses identified in the Amended Claim.

[8] Mr. Hirji represented himself and his wife at trial and did so adeptly. He had an encyclopedic knowledge of events and documents relating to his complaints, and many times demonstrated that without aid, he could recall the date and often the content, or at least his version of the content, of many documents he felt were crucial to his case. He questioned witnesses with vigour. He has had the benefit of legal advice, although he did not have legal representation consistently. He had sufficient familiarity with court procedures. Like any in-person litigant, he needed guidance and direction about the admission of evidence, proper questioning of witnesses and the *Rules of Court*, but I am satisfied that Mr. Hirji was able to launch an effective prosecution of his claim notwithstanding his lack of legal representation at trial.

[9] Despite that, and as I explain in this decision, I find that the plaintiffs have failed to prove any of their claims.

[10] Throughout the decision, I refer to the Owners Strata Corporation Plan VR 44 as the defendant. The defendant can only "act" through its strata council, so for convenience, I also refer to the strata council as "the defendant".

A. The Plaintiffs' Claims

[11] The plaintiffs claim damages for negligence and breach of contract. The original statement of claim was filed on February 7, 2007. It was amended for the ninth time during the trial (the "Amended Claim"). At its heart, the Amended Claim alleges a failure to repair and maintain common property adjacent to the plaintiffs' unit -- the building envelope beside the front and rear decks of the plaintiffs' unit.

[12] In his closing submissions, Mr. Hirji identified and quantified the heads of damages to which he believes he is entitled. The plaintiffs' claims for damages come to a total of over $1 billion as follows:

a. lost profits and loss of business opportunity - $932,773,410.38;

b. loss of rental income - $204,678.00;

c. loss for collapsed sale of his unit - $267,250.00;

d. non-pecuniary "loss for substandard housing" - $45,000.00;

e. moving costs - $5,948.59;

f. cost to repair unit - $41,198.00;

g. cost of appraisal - $866.25;

h. interest on line of credit from 2004 to 2010 - $50,435.59;

i. engineers' fees - $31,020.58;

j. damage to furniture - $2,459.00;

k. water damage to electronic equipment - $7,165.76;

l. water damage to drapes - $650.00.

[13] As I explain in this decision, the plaintiffs have failed to prove any of their claims because of an insufficiency of reliable and credible evidence.

B. Mr. Hirji's Credibility

[14] Mr. Hirji's credibility is a key factor in this case. The defendant submits that Mr. Hirji was neither a reliable nor credible witness. Its position is that his testimony should not be accepted unless it was corroborated by the testimony of another witness or documents that were admitted for the truth of their content.

[15] I agree with the defendant for a number of reasons.

[16] Mr. Hirji's testimony was impeached several times by evidence he gave at his examination for discovery. He would claim he had "misunderstood" the question asked at discovery, or he "misspoke" and that the court should accept his trial testimony as accurate. At one point, he testified that he believed his memory of events was better at trial than it was during the discovery. He claimed he was suffering the effects of a concussion during his discovery. Mr. Hirji was represented by counsel at the discovery. Counsel for the defendant informs me there was no mention at any time before trial that Mr. Hirji's discovery evidence may have been impacted by any medical condition, nor was there any mention at any time of Mr. Hirji having had a concussion.

[17] Many times during cross-examination, Mr. Hirji changed his evidence from his testimony in chief. One telling example is his evidence about when he moved out of his unit for the purpose of allowing repairs to be done. Mr. Hirji insisted he had not moved out in August 2009, and he relied on a letter written by his then counsel that on its face supported him. It turned out, however, that the letter had a typographical error about that date, and in fact, the letter was consistent with the defendant's position about when Mr. Hirji moved out. Other documentary evidence supported the defendant's position.

[18] The defendant submits Mr. Hirji seized upon the mistaken date in the letter because it suited his evidence at a particular point in time, notwithstanding it was contradicted by other evidence. According to the defendant, Mr. Hirji's tendency to "say anything" if he believed it supported his case at the time was characteristic of Mr. Hirji's demeanour throughout the trial.

[19] In other instances too numerous to mention, Mr. Hirji would not accept a proposition, often innocuous, put to him in cross-examination until confronted with a document that tended to prove the proposition was true. In response, sometimes Mr. Hirji insisted his testimony remained accurate, other times he agreed his testimony was wrong, and other times he tried to excuse the differences in his evidence based on his misunderstanding the question. The result is that large portions of Mr. Hirji's evidence in chief were impaired by his evidence during cross-examination. The amount of these differences negatively impacts his reliability as a witness.

[20] The evolution of the pleadings in this case also support the concerns the defendant has raised about Mr. Hirji's credibility. In the original Statement of Claim Mr. Hirji alleges that the problems with water leaks and faulty repairs subjected him and his family to "suffer mentally and emotionally". In the First Amended Statement of Claim filed on July 9, 2008, the plaintiffs alleged that having to "cope up with the daily hassle, inconvenience and [unsanitary] conditions created by the leakage, for a period of almost ten years…has contributed to a significant health problems for the Plaintiffs, in that (a) [Mr. Hirji] suffered a heart attack in August of 2007;". During cross-examination, Mr. Hirji admitted he never suffered a heart attack and that the allegation that he had was false, and this was known to him in July 2008. He explains its inclusion in the claim filed on July 9, 2008 by saying he did not realize that inaccuracy was in the pleading when he signed it.

[21] Despite this, the Second Amended Statement of Claim filed June 11, 2009, contained a wholly re-worded paragraph which stated, in part, that as a result of the problems with the repairs, the plaintiffs have "suffered physical and emotional distress, as a result of stress and mould, with the result that Mr. Hirji suffered a heart attack in August 2007". Mr. Hirji stated the continued inclusion of this false fact was because he got his facts "mixed up". I find that very difficult to accept given his otherwise strong command of "facts" relating to this law suit.

[22] Another example of Mr. Hirji's impaired credibility is his claim relating to the loss of rental income. Mr. Hirji advances a claim that the defendant's failure to repair his unit in a timely fashion caused him to lose rental income. The defendant alleges that not only is there no evidence to substantiate a loss of rental income, it is possible the claim was fabricated.

[23] The original Statement of Claim filed on February 7, 2007 does not include any facts or allegations related to rental income. Yet Mr. Hirji claims he was suffering a loss of about $1,600 per month each month from May 2001 onwards. Mr. Hirji also alleged that he obtained a bank loan on the strength of that rental income, although he admitted during cross-examination that this assertion was not true.

[24] I find it very difficult to accept that Mr. Hirji would not have pursued a claim worth that much money if it was extant when he started the litigation. The claim relating to lost rental income was first included in the Second Amended Statement of Claim filed June 11, 2009. This was also the first time any claim for business loss was included in the pleadings.

[25] The defendant points to the timing of these amendments and says "[i]t is inconceivable that a highly litigious person such as Mr. Hirji would not plead facts supportive of a business loss or loss of sale of the unit if he had believed these losses had been incurred". The defendant further states in its written submissions:

> It is submitted that the above evidence suggests that Mr. Hirji was making new claims and new facts upon which to base those claims as this action progressed. It is further submitted that Mr. Hirji did so for the purpose of increasing the value of his lawsuit thus putting maximum pressure on [the defendant] and the other named defendants to bend to his demands to repair the Unit exactly in the manner he himself thought it should be repaired and pay him significant amounts of damages in a settlement he routinely testified throughout the proceedings that he wanted.

[26] These are serious allegations. Based on my review, however, these allegations are not exaggerated and have a sound basis in the evidence.

[27] The above examples are illustrative; there were numerous instances where, through cross-examination of Mr. Hirji and/or the testimony of other witnesses, the

defendant was able to prove on a balance of probabilities that Mr. Hirji's evidence was at best dubious, and often inaccurate.

[28] Another concern about Mr. Hirji's credibility and reliability was Mr. Hirji's habit of misstating evidence while he was cross-examining witnesses. He was continually reminded to rephrase his question to accurately reflect evidence that had been given. Given my remarks earlier in this decision about Mr. Hirji's familiarity with the court process and his competence at running his litigation, I reject Mr. Hirji's excuse that he did not intend to misstate evidence. On more than one occasion, upon being reminded of the importance of accurately stating evidence to a witness, Mr. Hirji would apologize, but then, in the next question, misstate the evidence in the same manner.

[29] Having heard all the evidence and observed Mr. Hirji's demeanour both as a witness and a litigant, I find it highly unlikely that Mr. Hirji was confused about the directions he was given. Instead, I find this behaviour demonstrated an obstinacy that prevented Mr. Hirji from accepting documents or testimony that contradicted his version of the facts.

[30] For all those reasons, I find Mr. Hirji was not a reliable or credible witness. Accordingly, I am not prepared to rely on his testimony unless it is corroborated by other testimony or documents entered into evidence for the truth of their content.

C. The Defendant's Evidence

[31] Given my conclusion about the quality of Mr. Hirji's testimony, I find it appropriate to make some general comments about the defendant's evidence.

[32] Eight witnesses testified on behalf of the defendant: its former legal counsel (Jamie Bleay), two former strata managers with Vancouver Condominium Services Ltd. (VCS), the company that managed Lillooet Place (Lyn Campbell and George Alexandru), four former strata council members (Jennifer Thornton, Peter Brown, Diane Wykes, and Barbara MacLellan) and a contractor hired by the defendant for general maintenance who had experience with many events at issue in this case

(Rudy Sedlak). All witnesses were subjected to effective cross-examination by Mr. Hirji.

[33] Without exception, I found these witnesses to be credible and reliable. They were honest about the limited extent of their memories about events that happened in the past, and in my view did not attempt to exaggerate or re-create evidence that they did not specifically recall. They reasonably relied upon documents to assist their memories, where appropriate. They testified in a forthright manner and with courtesy. This speaks well of their reliability as witnesses. Most of the witnesses had been subjected during this law suit to serious allegations of misconduct by Mr. Hirji. Despite this, I detected no malice towards Mr. Hirji as these witnesses testified.

[34] Almost 200 exhibits were entered into evidence, all of them documents. Many documents were authored by Mr. Hirji. He attempted to rely on his own documents to provide supportive evidence of his claims, but, quite rightly, the defendant objected to the admissibility of such documents on that basis. The documents were accepted into evidence on the basis that they were not being relied upon for the truth of their content but to establish that the content of the document had been communicated as indicated on it. This qualification was explained to Mr. Hirji and I am satisfied that he did understand it.

[35] An exception was made, however, for the minutes of strata council meetings. Those minutes were tendered and accepted into evidence for the truth of their contents. The distinction of how these documents were treated was explained to Mr. Hirji and I am satisfied that he understood it.

[36] Although little reference is made in this decision to those minutes, they represent important evidence. The minutes provide corroboration of the testimony of the defendant's witnesses about events and interactions with Mr. Hirji. I found the defendant's witnesses' evidence to be very consistent among them, and consistent with the minutes. This consistency of the defendant's evidence and the credibility of its witnesses provide support to dismiss this action.

[37] Lastly, I note that a number of photographs were entered into evidence. Mr. Sedlak testified regarding photographs (about 100) that showed conditions in the plaintiffs' unit before repairs were done, as repairs were being done, and showing the finished product. Mr. Hirji also testified about photographs that he took depicting conditions in his unit.

[38] Having viewed those photographs and listened to the testimony of all the witnesses, I find that the defendant's witnesses' descriptions more accurately reflect what the photographs depict than Mr. Hirji's testimony. I also find that Mr. Hirji's perception of what the photographs contain is not as reliable as the comments in the various reports done by engineers, and I specifically prefer that evidence to Mr. Hirji's about the condition of his unit.

II. ISSUES

[39] There are three legal issues in this case:

a. Was the defendant negligent in the manner in which it responded to the plaintiffs' complaints about water leaks and structural deficiencies in their unit?

b. Did the parties have a contract as alleged by the plaintiffs, and if so, was it breached by the defendant?

c. If the defendant is liable under either issue above, are the plaintiffs entitled to damages as a result?

[40] At a minimum, the success of these claims requires the plaintiffs to prove on a balance of probabilities the following propositions which they put forward:

a. The defendant promised in 2001 to replace the east balcony of the plaintiffs' property and it did not do so in a timely manner.

b. Between 2002 and 2006, the defendant failed to adequately respond and address numerous complaints of water ingress of the plaintiffs' unit.

c. The defendant entered into a "contract" with Mr. Hirji to carry out any and all repairs identified in a report prepared on the basis of a joint investigation of his unit by an engineer hired by the defendant and one hired by Mr. Hirji. The defendant breached that agreement by failing to authorize all the repairs.

[41] Before analyzing whether the facts underlying these propositions have been proven, I describe some background facts.

III. BACKGROUND FACTS

A. The Strata Complex

[42] Lillooet Place has 65 units that are in the style of townhouses. It was built in the 1970s and the buildings are wood framed. The complex has a pool and many trees on the property.

[43] The plaintiffs bought their unit in 1988 and have lived there continuously since. The decks in issue are both on the second level of the plaintiffs' unit. The east deck is above the carport and the west deck is mostly above the living room. There is also a ground level patio.

[44] The demographic of the population of Lillooet Place has always been a mix of retired or older professionals and young families. This demographic has generally remained, but the balance has shifted and there is now a larger number of young families. During the period of time relevant to this litigation, the people who lived at the strata complex were mostly middle-class with many living on a fixed income. In other words, this was a comfortable complex, but not luxurious, and the owners were of modest means.

B. The Defendant's Reaction to Leaky Condo Issues

[45] In the late 1980s and early 1990s, the "leaky condo" crisis was in its early stages in British Columbia. The defendant sought advice about the condition of all balconies and decks, and commissioned a report that was entered into evidence. The purpose of the report was to get a general assessment of the building envelope problems in the strata complex. The plaintiffs' unit was identified as requiring repair, as were most others.

[46] Another report was completed in 1999. Mr. Hirji maintained throughout the law suit and trial that his unit was deliberately excluded from this initial investigation for what he assumed was a nefarious reason. Yet the evidence demonstrated that

as many as 10 units were left off this initial survey, and their omission was innocuous. Units were most likely omitted because the owners of those units failed to complete and return a survey. In any event, the omitted units, including Mr. Hirji's, were later inspected and included on a survey.

[47] At the November 9, 2000 Annual General Meeting ("AGM") the owners ratified by a ¾ vote a resolution to raise $60,000 by way of levy charged upon owners in proportion to the unit entitlement of their respective lots. That money was earmarked for deck repairs.

[48] During this time, deck repairs were addressed by a protocol which stipulated that any complaint of water ingress, or a dangerous or unsafe condition, would be considered an emergency repair and addressed immediately. The defendant's witnesses testified that the protocol was consistent with the common approach used by strata corporations at that time. Such a protocol was necessary to handle extensive building envelope repairs, which could be very expensive and required special levies on all owners in order to pay for them. Moreover, deck repairs were not the only items owners wanted to address. It is important to note that at the 2000 AGM, the owners approved $198,000 to be spent from the defendant's contingency reserve fund for a painting project.

[49] At the next AGM held November 29, 2001, the owners again approved a levy to raise another $60,000 to conduct deck repairs on a priority basis. Up to that point, repairs had been done by a general contractor in accordance with the protocol.

[50] By 2003, the owners became concerned about the cost of the deck repairs. At the 2003 AGM, the owners again approved a levy to raise $60,000 but the resolution stipulated that no funds could be expended by council, and an "appropriate process, plan and tendering process be established giving the owners the opportunity to vote on it" at a Special General Meeting ("SGM").

[51] There were two SGMs in early 2004. At the first held on February 2, 2004, two options for proceeding with deck repairs were presented to the owners: one

proposed repairs be done by a general contractor without the support or supervision of an engineer, and the other option was to have an engineering company provide consultancy services to supervise repairs. Neither resolution received the necessary ¾ vote. Accordingly, all deck repairs were halted except for emergency repairs, but a further SGM was scheduled to address the issue. That SGM was held in March 2004, and this time, the owners did approve moving forward with a balcony remediation program under the supervision and oversight of an engineer. Marsh Touwslager Engineering Ltd. ("Touwslager Engineering") was hired for that task.

[52] Touwslager Engineering conducted limited "field reviews" and relied on questionnaires the defendant had circulated to the owners in 2003 to prepare an initial report completed in July 2004. The defendant instructed Touwslager Engineering to inspect all balconies and to prioritize the repairs in order of need and update the report. That was done and Touwslager Engineering delivered a report dated September 24, 2004 in which each deck was given a rating based on its "life safety concerns" looking at both floor structure and guardrail conditions.

[53] The ratings ranged between P1 (most severe damage) and P9 (no known problems). The report explained the rating system:

> In order to compare the overall condition of the balconies, we prepared the rating system so that the condition of a floor structure could be compared to the condition of a guardrail. For example, we consider a decayed guardrail connection (P2) more critical than a partially decayed joist (P3). The reasoning in this case is that an occupant could fall or be pushed through the guard. Failure of the joist, on the other hand, is less likely to occur at this time and there is also a higher likelihood that the occupant would not fall to the ground below even if the joist were to fail completely. Further, there would likely be a warning if the joist were failing as the deck would start to deflect excessively. The adjacent joists may also pick up some of the load.

[54] Mr. Touwslager, who authored the report, recommended that decks rated P1, P2 or P3 should not be used until they were repaired. Fifty seven of the 100 decks examined were so rated. Both the plaintiffs' decks were rated P4.

[55] This report was reviewed at the next AGM held November 18, 2004. A resolution to raise $200,000 for the first of a proposed three-year project based

Touwslager Engineering's estimated total cost of $700,000 to repair the 57 high priority decks failed to pass. Owners with decks having a priority rating of P1 were advised not to use the deck because of safety concerns.

[56] The issue was revisited and at a Special General Meeting held February 2005, the owners agreed to impose a levy to raise $100,000 for deck repairs to be done on an ongoing basis. The recital to the resolution stated, among other things: "whereas the engineering company has recommended repairs be performed on fifty seven (57) balconies, and whereas the Strata Council is proposing that repairs be performed on an ongoing basis". In other words, it was always contemplated that the funds were intended to address the decks with a rating of P1, P2 or P3 first.

C. The Defendant's Expenditures

[57] From the beginning of 2007 to the end of 2009, the defendant spent $104,554 repairing the plaintiffs' unit. The defendant submits the following facts (that were substantiated by the documentary evidence) put the scale of the plaintiffs' repairs into an appropriate context. At paragraph 184 of its written submissions, the defendant states:

> For the fiscal years of 2007 to 2009, $104,554 amounts to:
>
> (a) 193% of the average annual contingency reserve fund of $57,000;
>
> (b) 44% of the average annual operating budget of $250,000;
>
> (c) 120% of the average annual repair and maintenance budget of $92,000, and
>
> (d) 37% of the entire $300,000 special levy for the balcony repair fund.

[58] In addition, Mr. Alexandru testified that all the other units in Lillooet Place were repaired pursuant to the balcony remediation project at an average unit cost of between $10,000 and $15,000. The evidence also established that no other owner had alternate accommodation and moving costs paid for while repairs were done to their unit.

IV. ANALYSIS OF THE NEGLIGENCE CLAIM

[59] The plaintiffs' complaints fall into two categories: complaints about water ingress and complaints about structural deficiencies. To be successful in their negligence claim, they have the initial evidentiary burden of proving that their complaints about water ingress and structural deficiencies were truthful and were reported to the defendant. These are factual issues.

[60] They also have the burden of proving on a balance of probabilities that the issues identified in their complaints were either not remedied or not adequately remedied according to the applicable standard of care. I turn first to the factual issues.

A. Factual Issues

1. Complaints about Water Ingress before 2001

[61] The Amended Claim alleges that the plaintiffs reported problems with water ingress as early as 1998. The defendant's position is that some of those complaints are beyond the applicable limitation period. The action was not commenced until February 7, 2007. The defendant says there is a six-year limitation period and therefore any damage sustained prior to February 2001 would not be recoverable.

[62] This issue does not arise because I find there is no credible or reliable evidence that the plaintiffs made any complaints about water leaks before February 2001.

[63] Apart from my concerns about Mr. Hirji's credibility, there is no reference in any document entered into evidence to a complaint by the plaintiffs about water ingress prior to 2001. Mr. Hirji explained the lack of documents to support his testimony of water leaks prior to 2001 by saying he was being patient, waiting his turn and not being "one to complain". All of the evidence points to the opposite being true; I find Mr. Hirji was easily aggrieved and quick to pursue his complaints. In my view, it is inconceivable that Mr. Hirji simply accepted the lack of action by the

defendant prior to 2001. Because of this, I conclude it is highly unlikely Mr. Hirji did complain about water leaks prior to 2001.

[64] But I also find there is reliable and credible evidence that supports the defendant's position that the plaintiffs made no complaints about water ingress prior to 2001. Lyn Campbell and two former council members who served between 1998 and 2001 (Diane Wykes and Peter Brown) testified that they have no memory of any complaint about water ingress made by the plaintiffs prior to 2001.

[65] Furthermore, I am satisfied that complaints about water ingress would not have been ignored. Ms. Campbell and Mr. Alexandru testified about the procedures for handling complaints at VCS over the relevant time period. Both testified that their office had a strict policy of date stamping documents relating to any complaints received from owners. Those witnesses also testified that an extremely high priority was given to water ingress complaints; both were clear and firm in their testimony that it was "impossible" that any complaint about water ingress would have been ignored or not acted upon. I find these witnesses were credible and reliable and I accept their testimony on these points.

[66] Additionally, no strata minutes entered into evidence mentions a complaint being made by the plaintiffs prior to 2001 about water leaks. Based on the testimony of Mr. Alexandru, Ms. Campbell and the four former council members, and the consistency of their testimony with the strata minutes that were entered into evidence, I am satisfied that the minutes accurately recorded any complaints received and considered by the defendant.

[67] I conclude the plaintiffs did not complain about water ingress before 2001.

2. June 2001 Complaint of Water Ingress

[68] On June 30, 2001 Mr. Hirji called VCS to complain about water ingress at the west deck of his unit. This phone call is recorded on a document entered into evidence. Immediately upon receipt of the telephone complaint, the manager at the time dispatched a contractor to investigate. The contractor (JCB Management, or

"JCB") received instructions to repair the leak without further consultation so long as it was a simple repair. If the repair was not straightforward or simple, JCB was instructed to investigate the repair and provide a quotation so that the strata council could discuss it at the next meeting.

[69] The quotation was $14,749 plus GST. That quotation was not an authorization for work to be done, but rather an estimate of what work was recommended and its cost. The defendant determined that some of the quotation items were not its responsibility to repair, but it approved all others. The repairs done to the plaintiffs' unit cost $12,233. The plaintiffs admitted that the repairs relating to that complaint were completed by the end of November 2001.

3. 2002 to 2006 - Ongoing Complaints about Water Ingress

[70] A central part of this case is the plaintiffs' claim that they complained about water leaks consistently and regularly between 2002 and 2006, but that their complaints were either ignored or minimized. This is the primary basis upon which the plaintiffs claim the defendant is negligent.

[71] Mr. Hirji says that at the same time he called on June 30, 2001 to complain about the west deck, he also complained about the condition of the east deck. He testified that in about November 2001, he spoke with the property manager at the time, Ms. Campbell, and that they came to an "agreement" that his east deck would get replaced the following spring.

[72] Ms. Campbell testified that she had no recollection of that conversation. She also testified that she would never have agreed to the east deck being replaced, or even repaired, without receiving express instructions from the defendant, and she denied she received those instructions. There was no other evidence indicating the strata council gave that instruction. As noted above, I found Ms. Campbell to be a credible and reliable witness and I accept her testimony in preference to Mr. Hirji's.

[73] I find that Mr. Hirji was not promised the east deck would be repaired or replaced. I also find it more likely than not that Mr. Hirji did not make a verbal complaint about the condition of the east deck to Ms. Campbell at any time.

[74] The plaintiffs say within six months of the repairs on the west deck being completed, they again experienced water leaks and notified the defendant seeking repairs. Mr. Hirji described a leak after a heavy rainfall in June 2002, where water leaked into the living room, running down the walls under the drapes and valance. With regard to this particular leak, he claims the "strata" sent someone who quickly tarred a patch on the deck. He could not recall the person with whom he spoke about that leak, or whether it was someone at VCS or a council member. He does not know who did the repair. He complains this patch work was done poorly.

[75] Mr. Hirji says the leaks continued every couple of months for the entire four year period from 2002 to 2006. He also says the leaks worsened to the point that they had to place up to 10 buckets throughout the living room to catch leaking water. He also testified that the flow of water of one of the leaks resembled a tap being turned on. Despite this, Mr. Hirji says he did not complain about every leak.

[76] He testified, however, that he did provide to the defendant a written complaint about serious water ingress at his unit four times. Mr. Hirji relied on an email he wrote on April 19, 2007 (after this litigation was started) to a strata council member in which he wrote, among other things:

> From June 2004 I have informed the council four times in writing and I have pointed out some of the letters to you in strata files, of water leaks from the back upper deck in the living room. Each time we have requested the council and their agents to take care of these leaks, and for an engineer to come and investigate the creaks [sic] each time the council and their agents completely failed and ignored our requests to take action.

[77] Mr. Hirji was clear and firm in his evidence during cross-examination that the four documents referenced in that email constitute all of the plaintiffs' "proof" that he had complained about water leaks between 2002 and 2006, and that those complaints were ignored. This email was entered into evidence, as were the four documents to which Mr. Hirji refers.

[78] None of these documents support Mr. Hirji's position.

[79] The first document is a form delivered to all owners in April 2003 asking them to identify any general repairs, painting deficiencies, balcony repairs, stucco repairs or ground issues in their units that needed to be addressed. The questionnaire was sent to all owners by the defendant as a first step in addressing building envelope problems.

[80] The form the plaintiffs completed is dated April 14, 2003. In relation to balcony repairs, Mr. Hirji wrote that repairs had been approved for his balcony about two years ago (which would have been 2001), but that nothing had been done. He also wrote on the form that both decks are "extremely rotten". No mention is made on that form of any instances of water ingress of the plaintiffs' unit.

[81] The second document Mr. Hirji relies upon is his hand-written letter dated June 10, 2004 addressed to VCS. In that letter Mr. Hirji complains again that he believes he had been promised over two years ago that both (not just the east deck) of their upper decks would be replaced (not just repaired), and he says the "partial" repair work done in 2001 needed to be inspected because there were cracks in the walls. He goes on to mention other complaints about a painted door, people not cleaning up after their dogs, cars backing up into his lawn, and landscaping deficiencies. No mention is made in that document of any kind of water ingress of the plaintiffs' unit.

[82] The third document is dated June 12, 2004, and titled "Balcony Remediation Questionnaire". It is a form that was sent out by Touwslager Engineering to provide it with information upon which it could give initial advice about deck repairs. The form has a series of questions about the decks. Again, no mention is made on the form completed by the plaintiffs of any kind of water ingress of their unit.

[83] The last document is a typed letter to VCS dated October 27, 2004 from Mr. Hirji. It has "delivered by hand" printed at the top right corner. In the letter, Mr. Hirji claims to have spoken a number of times on the phone to the property manager

(Mr. Alexandru) and written to him in order to report “minor water leaks in our unit since 2003 and the centre post which was not installed properly in 2001". Mr. Hirji suggests in the letter that problems with the centre post have created cracks causing damage to the unit. Mr. Hirji testified that he has a distinct memory of delivering the letter by hand and said that he kept a copy for his records.

[84] I note that this letter only refers to “minor water leaks” from 2003 on, which is at odds with Mr. Hirji’s testimony about the nature and timing of the water leaks he experienced in this time period. In any event, I am not satisfied that this letter was received by VCS.

[85] Mr. Alexandru testified that VCS had a strict procedure for recording complaints by owners whether by phone or in writing. He said anything in writing was immediately date-stamped and phone messages would also have a date. This evidence about VCS’s standard practice for receiving and responding to owner complaints was completely consistent with Lyn Campbell’s testimony.

[86] There is no date-stamp on the letter and Mr. Alexandru had no recollection of receiving a written complaint from Mr. Hirji at that time. He had no recollection of speaking with Mr. Hirji several times about water leaks. He was firm in his testimony that it would not be the case that he would have spoken to an owner “several times” and not followed up on complaints. This accords with other evidence adduced at trial where a complaint was recorded and responded to promptly. In particular, unlike the June 10, 2004 letter, no responsive document from VCS was produced, and no strata minutes were produced that references this complaint.

[87] I find Mr. Alexandru’s evidence is credible and reliable and I prefer it to Mr. Hirji’s. I find Mr. Hirji’s October 27, 2004 letter was never received by VCS.

[88] In my view, there is no credible or reliable evidence that Mr. Hirji complained to the defendant about water leaks left unaddressed between 2002 and 2006.

[89] This conclusion is consistent with a January 10, 2007 letter Mr. Hirji wrote to VCS. Mr. Hirji wrote that the letter was “final notice before the Writ of Summons”

would be filed suing VCS and the strata council for "breach of contract, gross negligence, mismanagement of funds and acting irresponsibly and recklessly in dealing with the problems in Unit 1084", and that he would be seeking "Special Costs and Punitive Damages from Strata Council and their agents unless I have written assurance from the Strata Council and their agents by January 23rd, that the work which was approved in 2001 and the present work in hand will be completed by a competent builder … by the end of March at the very latest".

[90] That letter purports to set out events "for the record" leading up to the threatened litigation. The following are the only references in that letter to water leaks after July 2001:

> - In or around 2002/3, fairly large cracks appeared at the edge of the central beam, and water started to leak heavily from the upper deck flat roof in to the living room and basement, which was replaced by [the contractor] approximately a year before.
>
> - In or around 2002/3, [VCS] was informed by telephone and in writing of the water leak, the large cracks next to the central beam and the very poor workmanship carried out by [the contractor]. Neither [VCS] nor the Strata council took any action to investigate this matter… Instead Strata council or [VCS] went and spent more money and patched the leak. Again, this was extremely poorly done …

[91] This letter refers to one water leak, and according to Mr. Hirji's own account in this letter, it was repaired with a patch, although he says it was repaired poorly. This letter was sent just prior to the Statement of Claim being filed and yet its reference to water ingress is markedly different from Mr. Hirji's testimony.

[92] On the basis of all of the evidence, I find the plaintiffs have failed to prove on a balance of probabilities that they experienced water leaks as they described between 2002 and 2006. They have also failed to prove that they complained about any leaks to either VCS or the strata council, and that those complaints were ignored or minimized.

4. November 6, 2006 Complaint about Water Ingress

[93] On or about November 6, 2006, Mr. Hirji reported a water leak at the west deck. The deck was tarped the same day or next. In addition, a member of the strata council and Mr. Touwslager attended at the plaintiffs' property the next day to investigate.

[94] The plaintiffs were told at that time that the repair would not be fixed immediately because it did not fall within the emergency repair protocol. However, the defendant did instruct Touwslager Engineering to investigate the leak and recommend repairs. Mr. Touwslager provided two reports to the defendant in January 2007, and, on the basis of those, the defendant hired a contractor (JLK Projects Ltd.) to do the repairs, supervised by Touwslager Engineering. By the end of February 2007, the plaintiffs agree that the repairs were about 80% complete.

[95] In early March 2007, Mr. Hirji instructed the contractors repairing the west deck to stop all the work until the "structural issues" (discussed later in this decision) were addressed. Accordingly, the deck repairs were on hold for a time at the insistence of the plaintiffs. Eventually, however, all of the exterior repair work was completed. Mr. Touwslager provided his final report on the plaintiffs' unit in May 2008 certifying that all repairs were completed.

5. Initial Structural Complaints

[96] By the time the west deck repairs were about 80% complete (February 2007), Mr. Hirji began complaining about "structural concerns" in his unit. The plaintiffs' position on the nature and relevance of these "structural" issues was inconsistent during the trial. However, it is clear that Mr. Hirji believes the structural deficiencies were caused by water ingress and flawed repairs. That connection is important to his claim because the defendant's legal obligation for maintenance and repair does not apply to internal structural issues.

[97] The plaintiffs sent an email to the strata council in February 2007 complaining about certain structural issues. They referred to the same issue in their January 10, 2007 letter to VCS (see para. 89).

[98] Mr. Hirji claims this was not the first mention of "structural" complaints. He says that the same time that he made a complaint about the west deck in July 2001, he also complained about the condition of a centre post or beam in his unit. As noted above, I conclude that Mr. Hirji never made the verbal complaint to Ms. Campbell that he claims.

[99] Based on my assessment of all the evidence on this point, I find Mr. Hirji made no complaints about "structural" issues prior to 2007.

[100] Upon receipt of this new complaint about structural issues, the defendant asked Mr. Touwslager to provide an opinion. At that time, Mr. Touwslager was already working at the plaintiffs' unit addressing the west deck repairs.

[101] It appears Mr. Touwslager may have commented on some interior issues initially. In his January 11, 2007 report to the defendant, he wrote that "[i]t appears the beam was not shored properly during the repair in 2001 and the beam was permanently seated slightly lower". He clarified later, however, that he did not intend the plaintiffs to accept these comments as his engineering opinion. In a June 12, 2007 letter to the defendant he wrote:

> We have been receiving emails and other correspondence from various parties relating to the repairs at 1084 Lillooet Place. In particular, [the plaintiff] has vaguely referred to our reports and opinions with respect to the beam, fireplace, interior cracking, sloped floors, etc. We want to clearly outline our scope of work so that we can limit our involvement and reduce the strata's costs.
>
> We provided some preliminary opinions in a transmittal dated January 22, 2007. Many comments stated "as required" and "if possible". Further review was requested and Sunderland Consulting was retained for this purpose. Therefore, we are not providing any opinions with respect to the interior framing, structural details, or interior decorating issues.
>
> . . .
>
> With respect to 1084 Lillooet Place, Touwslager Engineering Ltd. is currently involved only in the building envelope aspects of the roof deck on the upper floor, immediately outside the master bedroom.
>
> . . .
>
> Throughout our involvement, we have informed Mr. Hirji of our scope of work. While [he] has explained the various interior issues to us on several occasions, we have always indicated that others are providing opinions.

[102] Based on Mr. Touwslager's recommendation, the defendant hired Sunderland Consultants to investigate the structural issues in the plaintiffs' unit. Mr. Sunderland inspected the unit and provided an initial report dated May 15, 2007. Included in that report were the following comments:

> I understand that it is Mr. [Hirji's] contention that what appears to be settlement of, and therefore deflection in the structure above that post is the result of some shortcomings in either the post, or its support.
>
> …
>
> I could see no clear reason for the occurrence of settlement at the post location over the time period since the earlier repair. However, there seems to be two possibilities:
>
> (a) the post may have been installed short in the first place, and therefore the apparent deflection has been present since that work was done, or
>
> (b) the assembly of framing between the top of the foundation wall, and the underside of the upper floor structure supported by the post has been shortening for some reason not apparent without further investigation.

[103] Mr. Sunderland then recommended certain corrective measures that could be taken before commenting on other complaints made by Mr. Hirji. He concluded however that it is "extremely unlikely that there are any framing issues in" the plaintiffs' unit. He said that the "cracking observed, except for that in the valance, is in my opinion the result of seasonal moisture variations over time". In other words, Mr. Sunderland did not agree with Mr. Hirji's contention that flawed repairs in 2001 caused the cracks.

[104] The defendant requested an updated opinion from Mr. Sunderland to identify remedial options, and that was provided June 1, 2007. The recommended repairs were: removal of the finishes on the central post, careful examination and/or probing of the framing elements to ensure there is no decay, replacement of any decayed material, and replacing all finishes. I note this recommendation amounted to nothing more than investigating the situation further, and if decay was found, to fix it. On June 26, 2007 the strata council approved this work to be done.

[105] Despite this, after receiving both reports from Mr. Sunderland, Mr. Hirji refused access to the contractor to get those repairs done. Mr. Hirji had decided

Mr. Sunderland was somehow "biased". Because of that, the recommended repairs were not started.

[106] Rather than insisting that Mr. Sunderland's report was adequate and sufficient, the defendant gave Mr. Hirji the opportunity to hire his own engineer in order to get a different opinion. Mr. Hirji hired Jerry Lum who provided a report dated August 20, 2007 which was reviewed by the defendant the next day.

[107] In an attempt to create a joint scope of work, the defendant asked Mr. Lum to cooperate with Mr. Sunderland. In my view, this was a reasonable suggestion. However, Mr. Hirji refused to pay Mr. Lum's fees to collaborate with Mr. Sunderland; Mr. Hirji expected the defendant to pay for both engineers.

[108] Again, rather than relying on Mr. Sunderland's opinion, the defendant instructed Mr. Sunderland to prepare yet another report based on his review of Mr. Lum's August 20, 2007 report. In my view, this step was completely unnecessary, but it demonstrates the defendant's patience and good faith efforts to resolve the matter amicably, and to the plaintiffs' satisfaction.

[109] Mr. Sunderland prepared a report dated September 13, 2007 which was given to Mr. Hirji. I note that even after taking into account Mr. Lum's report, the additional repairs recommended by Mr. Sunderland were not consistent with Mr. Hirji's testimony that his unit had serious structural flaws. The additional recommendations were: reinforcing a split joist with glue, and screwing on a plywood strip along the length of the split; enlarging a hole in the subfloor to allow more room for a gas pipe; levelling the living room by either inserting a 0.6 inch shim under the support beam, or using a floor levelling topping; and filling gyproc cracks with filler and if needed, embedded fiberglass mesh.

[110] By October 16, 2007, having received no response from Mr. Hirji about the latest report, the defendant assumed that repairs could go ahead, and it instructed the contractor and Mr. Sunderland to proceed. Those repairs started in mid-November 2007.

[111] Not all repairs identified in Mr. Sunderland's report were approved by the defendant because it concluded, based on legal advice, that some issues were not its legal responsibility to repair. The contractor was instructed to do the work that the defendant believed was its responsibility.

[112] The contractor reported on January 15, 2008 that the work was done. Due to some personal health concerns, Mr. Sunderland's final report and certificate of completion was not provided until April 2008. Relying on the professional certification of Mr. Sunderland and the legal advice it received, the defendant considered that it had completed all structural repairs to the plaintiffs' unit that were its responsibility.

6. January 2008 Complaint about Water Ingress

[113] Mr. Hirji made another complaint of water ingress in January 2008. Based on the evidence, including an invoice from the contractor, I find that the complaint was completely remediated within three days at a cost of $115. I find it was a very minor leak and the defendant responded to it promptly.

7. June 2008 Complaint about the East Deck and Previous Repairs

[114] Mr. Hirji complained on June 3, 2008, about the east deck. He complained the wood on the deck was completely rotten and he demanded that the situation be addressed immediately. Immediately upon receiving the complaint from Mr. Hirji, the defendant approved the contractor to erect tarps on the east deck.

[115] Pictures of the east deck were entered into evidence and based on those and the testimony of Rudy Sedlak, I find that the potential for water ingress at the east deck was caused by someone lifting the boards from the deck, and then most likely stepping on the membrane creating a hole. This hole looked to be about three feet in diameter.

[116] Out of an abundance of caution, the defendant decided to hire yet another engineer instead of instructing the contractor to repair the east deck. The engineer was instructed to investigate the east deck, and also investigate the repair work that

had been done with regard to the west deck and the structural complaints. These additional instructions (beyond the east deck) were necessary because Mr. Hirji continued to complain about the repairs that had already been done, claiming they were done improperly. Mr. Touwslager and Mr. Sunderland refused to do any further work at the plaintiffs' unit. By this time Mr. Hirji had lodged a complaint against both with APEG.

[117] The content of Mr. Hirji's complaint is telling. During the trial, Mr. Hirji stated he had no intention of "ruining" the professional reputation of either man and he attempted to downplay the significance of his complaint. This provides another instructive illustration of the dissonance between what really happened and Mr. Hirji's testimony about what happened. In an email to APEG (which was forwarded to Mr. Bleay), Mr. Hirji writes the following, among other things, about Mr. Sunderland and Mr. Touwsleger:

> In my view both members have breached tenet of code of ethics. As I understand from the email you sent me, and the information I obtained from other members of APEGBC, confirms that Mr. Sunderland had no business providing reports on the structure of the unit in question, as is clearly stated by the Association, that this is not Mr. Sunderland's field of experience. This [does] not end here. The events of issues in this case very strongly suggests, that there was a conspiracy between Mr. Sunderland, and Mr. Touwslager of a fraudulent act of depriving the repairs being carried out to my unit properly, which I am entitled to, by their inaccurate reports in spite of all the information provided to them. Mr. Sunderland being a good friend of Mr. Touwslager came to Mr. Touwslager's rescue who had made some very serious mistakes. Mr. Sunderland provided inaccurate reports to get Mr. Touwslager off the hook, thus leaving a permanent defect in the unit and depriving me of proper repairs being carried out and eliminating the problem of water ingress occurring approximately every six months in our unit for the last seven years. We have been subjected to live in appalling conditions and suffering for last seven years by strata council.
>
> . . .
>
> [Inviting the Association to view his unit] this will also provide the evidence of an inaccurate opinion submitted by Mr. Sunderland and Mr. Touwslager where the work was agreed to be carried out but was never carried out and the certificate of completion of work issued by Mr. Sunderland. The sort of inaccuracy from a person of Mr. Sunderland's stature and his position of being a chairman of the ethics committee, who is in charge of judging other members, and passing judgment on the other members, is unbelievable, shocking, unethical, unprofessional, dishonest and disgraceful.

[118] The defendant had to hire a new engineering firm, JRS Engineering Ltd. ("JRS") to investigate the east deck and the continuing complaints by the plaintiffs about the quality of repairs that had already been done. JRS completed a comprehensive report on October 7, 2008 and, after obtaining legal advice, the defendant made a decision about which repairs to approve given its understanding of its legal obligation towards common property. Mr. Bleay confirmed the defendant followed the legal advice he gave. The defendant instructed JRS to prepare a second report that only addressed those items that the defendant identified were its responsibility.

[119] In the meantime, Mr. Hirji filed an application in court on October 8, 2008 seeking, among other things, that the defendant: provide a further and better list of documents; repair and remedy all defects and deficiencies in the common property; repair all damage on the plaintiffs' property by December 15, 2008; pay for alternate accommodation and moving expenses until repairs are complete. Mr. Hirji also sought the appointment of an administrator to manage the affairs of the defendant.

[120] The application was heard on October 24, 2008. Except for the relief relating to moving expenses and alternate accommodation, the application was dismissed. With regard to the remaining relief not dismissed, the Chambers Judge adjourned the applications giving Mr. Hirji liberty to revive them within three months. In a way, this created a timeline for the defendant to get repairs it believed were its responsibility done.

[121] JRS completed the second report which was dated November 26, 2008 (the "November Report"). The November Report stipulated that JRS was hired "to inspect and determine the scope of repairs to the unit and not to assess or allocate responsibility for carrying out any recommended repairs".

[122] The relevant comments in the November Report about repairs included:

a. With regard to two water leaks in the house, JRS concluded "[t]he source of the water leakage is not due to a failure of the building envelope" but was "due to lack of maintenance of the sealant around the bathtub".

b. JRS looked at the deck membrane because Mr. Hirji suspected it was a possible point of water ingress. During this investigation, it was noted there was "a smell coming out of the south divider wall on the west deck" and "[i]t was reported that this wall sat open at the top for one winter". Other testimony in the trial confirmed that observation.

c. Regarding the "structural" complaints, the living room floor was noted to have a drop of approximately 1 ¼ inches at the south side.

d. The carpet had been removed and JRS noted that the plywood sheets appeared to have been removed and replaced at some point. The evidence was unclear as to who originally removed the carpet from the plaintiffs' living room. However it was clear that Mr. Hirji placed the rolled up carpet outside for a long period of time. This ruined the carpet. Mr. Hirji claims damages to replace that carpet.

e. JRS did note a "hump" in the kitchen floor measuring about 2/16 of an inch. There were at least two and possibly three layers of linoleum on the kitchen floor and some type of underlay chip board or particle board that sat on top of the plywood. The plywood appeared to be flat when observed from below.

f. There was a difference in the heights of the floor joists, with a range of between 7 ¼ and 7 $\frac{1}{16}$ inches. In JRS' opinion, "[t]his differential is very likely related to the quality of the original construction and not due to any structural problems associated with water ingress into the basement area".

g. With regard to the floor joists, JRS noted that there was a sill plate of cedar wood that was driven into the joists and this did not sit properly causing the bottoms of the floor joists to be compressed up to ¼ inch, but that the "rim joist appears to be in good shape and is supported by the new piece of treated wood section that was installed as well as the original sill plate at both ends where this repair was completed".

[123] JRS ended the report with a number of recommendations, not all of which was accepted by the defendant to be its responsibility. Nevertheless, a scope of work that addressed repairs the defendant accepted were its responsibility was approved quickly. The defendant received no response from Mr. Hirji and assumed it could proceed. The contractor was instructed to start work on December 8, 2008. However, when the contractor arrived Mr. Hirji refused access to his unit because he remained dissatisfied with the scope of work that the defendant had approved.

[124] By letter dated December 15, 2008, Mr. Bleay informed Mr. Hirji's then counsel that the defendant wished to proceed with the repairs quickly. The scope of work that the defendant had approved was attached to that letter. Because Mr. Hirji refused access on December 8, 2008, and given the schedule of the contractor, the repairs were then slated for January 5, 2009. Mr. Bleay noted that the defendant had now lost valuable time to commence the repairs and any further interference may result in Mr. Hirji being responsible for the expense of another work stoppage. Notwithstanding this letter, Mr. Hirji again refused access to his unit in early January 2009.

[125] This refusal by Mr. Hirji put the defendant in an almost impossible position. Mr. Hirji had gone to court seeking repairs be completed by December 15, 2008 and although that application was dismissed, the Chambers Judge had effectively set a deadline of three months for some repairs to get done. The defendant was proceeding with haste but was prevented from acting quickly by Mr. Hirji's refusal.

[126] It is clear the parties disagreed on what repairs were the legal responsibility of the defendant; but there was no suggestion that the defendant would rely on Mr. Hirji permitting repairs to be done as any kind of admission by him that the defendant had no further obligation. There appeared to be a stalemate. The defendant instructed counsel to seek a court order granting it access to Mr. Hirji's unit to commence the repairs.

[127] Notwithstanding those instructions, and while the parties waited for an available court date, the defendant instructed JRS to meet with Mr. Lum and prepare another report which took Mr. Lum's opinions into account. In my view, this is another demonstration of the defendant's good faith effect to resolve the matter with Mr. Hirji.

[128] JRS met with Mr. Lum on March 10, 2009 and prepared a report dated March 20, 2009. The defendant considered this report at strata council's meeting on March 31, 2009 but sought clarity about its legal obligations with respect to the repairs identified. JRS prepared a final report dated May 12, 2009 (the "May Report"). It is

this report that Mr. Hirji alleges constitutes a "contract" between the plaintiffs and the defendant. His position is that the May Report is a joint report, and because of that the defendant is legally bound to pay for all the repairs identified in it.

[129] Mr. Hirji testified that the parties had "agreed" all repairs identified in the May Report would be undertaken at the defendant's expense. There was no other evidence consistent with Mr. Hirji's version. All of the defendant's witnesses who had knowledge of events during this time period denied that it had ever been agreed that the defendant would pay for any and all repairs JRS identified in the May Report. This is further confirmed in the documentary evidence including a May 13, 2009 email from the president of the strata council to Mr. Bleay, Mr. Alexandru, Mr. Brown, and Ms. Thornton and others. In that email, the president reports that the "joint scope of work is still being considered but no agreement has been made and no document has been signed by council". Even Mr. Lum agreed in his testimony that in no sense can the May Report be considered a "joint" report; he did not sign it.

[130] The May Report did emanate from a joint site visit in March 2009. In attendance during that joint site visit were Mr. Hirji, Peter Brown, and Tim Scott, the president of the strata council, as well as Rudy Sedlak, Mr. Lum, and Mr. Gould, an engineer with JRS.

[131] The May Report addresses the condition of the east deck and the "structural" issues. With regard to the east deck, JRS noted it was not vented and therefore, it was prone to rot.

[132] The May Report notes a considerable amount of time was spent investigating the beam referred to as B-1. The top of that beam appeared to be about 3/8 of an inch lower than the wall next to it. At the west end, the beam sits on top of a concrete wall and it appears to be lower than the other end of the beam. It was noted that there had not been proper blocking of the floor joists and the floor was not properly attached to the top of the joists.

[133] Twenty recommendations were made in the May Report. Many of them were not considered by the defendant to be its responsibility because they did not relate

to common property. The defendant relied on legal advice and the opinions of engineers in coming to that conclusion. This included repair to the faucets and tub liner in the upper bathroom, inspection of the condition of a central post in the living room, repairing cracks and blemishes in the drywall, elongating a hole for the gas line that runs from the basement to the fireplace, painting and priming of walls, new carpet installation, and repairs to the sliding door and window assembly in the master bedroom.

[134] Significant repairs were recommended with regard to leveling beam B-1 and leveling the kitchen floor, but the defendant also took the view that neither of those were its responsibility because they related to structural issues within the unit and not common property; nor were the conditions caused by water ingress from common property.

[135] The defendant approved the engineering firm to proceed with the recommendations in the May Report that it decided, based on legal advice, were its responsibility. The defendant received a quote for that work from Rudy Sedlak for $73,296, which was approved. The plaintiffs were given the ability to choose accommodation, to be paid for by the defendant, to allow them to leave the unit while it was being repaired. Originally, the defendant agreed to pay for one month's accommodation.

[136] The repairs started in mid-August but witnesses testified that workers reported Mr. Hirji was continually on-site, interfering with contractors by filming their work, getting in the way, and giving them instructions. This was contrary to the WCB regulations regarding the work site, and contrary to the defendant's understanding that the plaintiffs would be living in alternate accommodation during repairs.

[137] I find that Mr. Hirji's actions were directly responsible for causing the repairs to take longer than anticipated. Despite that, the defendant paid for the plaintiffs' alternate accommodation for another month.

[138] On October 27, 2009, the defendant met with Mr. Bleay, Mr. Sedlak, and JRS. Together they reviewed the May Report carefully. Both JRS and Mr. Sedlak informed the defendant that all repairs they had been instructed to do were completed. Relying on that and legal advice, the defendant believed its legal obligations towards the plaintiffs had been fully met.

[139] On December 4, 2009 JRS provided its final report confirming all work was completed. The defendant again received legal advice that its responsibility towards the plaintiffs for repair and maintenance had come to an end.

8. Complaints about the Quality of Work

[140] Mr. Hirji continued to complain from November 2009 onward about the method by which repairs were undertaken. None of these complaints are against the defendant; they were directed at the contractors hired by the defendant to do the work, and the engineers supervising that work. Those parties have settled with the plaintiffs.

[141] In any event, I am satisfied based on all the evidence I heard and the pictures adduced into evidence that Mr. Hirji's complaints were of a minor nature and there is no basis to his allegation that the work was substandard. This view was not contradicted by Mr. Lum, who agreed that the unit's structural support was sound.

B. Conclusion on Facts

[142] Based on the evidence discussed above and all the evidence presented at trial, I make the following findings:

a. The plaintiffs did not complain about water ingress at their unit prior to June 2001.

b. Mr. Hirji did not make a verbal complaint to Ms. Campbell about the east deck or centre post in November 2001, or at any other time.

c. Neither the defendant nor Ms. Campbell, nor anyone else, promised to repair or replace the plaintiffs' east deck in 2001.

d. I do not accept Mr. Hirji's testimony that he endured frequent water leaks of increasing severity between 2002 and 2006 in his strata unit or that any leak was so serious that it resembled a tap running.

e. I find Mr. Hirji made no complaint to VCS or the defendant about water ingress at his unit during this time period.

f. VCS had a strict policy of date-stamping and recording owner complaints. Complaints about water ingress were given a high priority. I find on a balance of probabilities that no complaint from an owner received by VCS about water ingress was ignored or dismissed.

g. Mr. Hirji's October 27, 2004 letter was not received by VCS.

h. There were only four instances of water ingress at the plaintiffs' unit and they occurred in June 2001, November 2006, January 2008, and June 2008. All four of these instances were reported to the defendant either directly or via VCS, or both.

i. The defendant and VCS responded promptly and diligently to all four instances of water ingress.

j. It is improbable that the condition of the east deck was caused by any building envelope failure. Instead, it was the structure of the deck itself (not being vented) that more likely than not caused the rot. Its condition was exacerbated by someone removing the boards and stepping through the membrane.

k. Mr. Hirji did not make any complaints about structural issues prior to January 2007. At that time, his only complaint was cracking around or above a centre post in his living room.

l. Based on the opinion of Mr. Sunderland, it is more likely than not that this cracking was caused by seasonal differences in atmospheric moisture and was unrelated to water ingress, or the 2001 repairs.

m. When repairs were being done to Mr. Hirji's unit, he interfered and interrupted the work in an unreasonable manner by asking the workers to stop, refusing access to workers and generally getting in the way by taking pictures, video, and purporting to instruct the workers.

n. This interference caused a delay in the work being done. None of that delay is attributable to the defendant.

o. All deck and "structural repairs" that the defendant agreed to pay for as of the end of 2007 were completed by January 2008.

p. The defendant received and followed legal advice about the extent of its responsibility to the plaintiffs' complaints. The defendant instructed the engineers and contractors to undertake those repairs that the defendant decided, based on legal advice, were its responsibility because of its duty to maintain and repair common property.

q. The legal advice received by the defendant was sound.

r. I find that the main structural complaints of the plaintiffs (problems with the centre beam in the living room, and the alleged instability of beam B-1) had no relationship to water ingress issues. Those structural issues were internal to the plaintiffs' unit and therefore not the responsibility of the defendant because they were unrelated to common property.

s. The repairs identified in the May Report that the defendant decided were its responsibility were completed by October 2009, and an engineer's certificate confirming that was received in December 2009.

t. The amount of money spent on the plaintiffs' unit was disproportionate to the nature of the repairs that were truly needed. This disproportionality was largely due to the defendant's cautious and reasonable response to Mr. Hirji's exaggeration, and what I have found to be misinformation about the water leaks and structural problems of his unit.

u. All of the repairs done to the plaintiffs' unit were adequate and of sufficient quality.

C. Legal Principles

[143] The defendant admits it owes a duty of care to the plaintiffs, but submits that duty is limited to the repair and maintenance of common property because of s. 72 of the *Strata Property Act*, S.B.C. 1998, c. 43. Although this point was not pressed, the defendant pointed out the legislation provides for a court application if an owner feels the strata corporation is not fulfilling its duties under s. 72 (s. 165(a)). It says this case falls into that category. However, the plaintiffs' claim is also for breach of contract which would not seem to be captured by s. 165.

[144] The defendant's position is that there is no difference between the standard of care it must meet to comply with s. 72 of the *Act* and the standard at common-law.

[145] The defendant pointed to four reported decisions involving a claim of negligence against a strata corporation because of its failure to comply with the duty to maintain common property: *Wright v. Strata Plan No. 205* (1996), 20 B.C.L.R. (3d) 343, aff'd [1998] B.C.J. No. 105 (CA); *John Campbell Law Corp. v. Strata Plan 1350*, 2001 BCSC 1342; *Leclerc v. Strata Plan LMS 614*, 2012 BCSC 74; and *Kayne v. Strata Plan LMS 2374*, 2013 BCSC 51. Also helpful are: *Oldaker v. The Owners, Strata Plan* VR 1008, 2007 BCSC 669 and *Weir v. Strata Plan NW* 17, 2010 BCSC 784. All these cases set out the relevant factors to consider when deciding if a strata corporation has been negligent in its repair or maintenance of common property.

[146] Regardless of the source of the defendant's duty, I agree with the following points contained in the defendant's summary of legal principles about strata corporations' duty and standard of care applicable in this case as set out in its written submissions:

(a) the overarching test is reasonableness in the circumstances;

(b) reasonableness involves balancing interests to achieve the greatest good for the greatest number given budget constraints;

(c) strata corporations are entitled to rely on advice from their professionals;

(d) there was no requirement that repairs be performed immediately or perfectly;

(e) a strata corporation cannot be held responsible for the failed work of others so long as it acted reasonably.

D. Did the Defendant meet the Requisite Standard of Care?

[147] The plaintiffs have failed to prove that the defendant did not meet the applicable standard of care. I find the evidence demonstrates that the defendant responded promptly, diligently, and fairly to Mr. Hirji's every complaint. I make this conclusion on a bare assessment of what happened with Mr. Hirji's unit.

[148] This conclusion is only strengthened when it is considered in the context of what was happening in the whole strata complex, and in particular, in light of the difficult financial circumstances the deck repair project created for all owners. In my view, the court must take this contextual approach because the defendant owes duties to every owner in the complex, not just the plaintiffs. It is therefore mandatory that the defendant assess the repairs it approved against the other repairs needed and the available funds.

[149] With regard to the water leaks, I find that the defendant's actions and its instructions to VCS were reasonable. This was not a case of a strata corporation dragging its feet or ignoring complaints or advice from qualified professionals about repairing building envelope failure.

[150] The survey by Touwslager Engineering that rated every deck in the strata complex was a responsible and reasonable approach to identifying the order in which repairs should proceed. This incremental approach was important given the cost of the repairs and the modest means of the owners.

[151] All the evidence supports the defendant's position that the strata council acted in a fiscally prudent and cautious manner in respect of the deck repairs. Such an approach was mandatory in order for the defendant to fulfill its duty to all owners; it had to consider the overall cost and not just the nature and extent of individual owner's problems. This is why the creation of and adherence to the emergency

repair protocol was a reasonable response to building envelope issues in the complex.

[152] There was no reliable or credible evidence that the defendant was irresponsible, careless, or unreasonable in its choice of professionals. Nor is there any evidence that the defendant declined to follow professional advice that it received. It was not obliged to carry out every single repair identified by the engineers. The engineers and their reports made it clear that the issue of who bore the responsibility of the repairs was beyond the scope of their opinion.

[153] The defendant appropriately sought and followed legal advice to determine which of the repairs identified by the engineers it was responsible for. I am also satisfied that Mr. Bleay's legal advice was sound. The defendant had a duty to repair problems with common property which included, in the plaintiffs' case, repairs arising because of building envelope failure. The defendant was not responsible for issues relating to the repair, maintenance, or structural integrity of the interior of the plaintiffs' unit. To the extent there was uncertainty about the source and therefore responsibility for repairs of "structural issues", I find the defendant's response and reaction to the engineering reports it received was consistent with the sound legal advice it received.

[154] It is important to note that even Mr. Lum could not say that any of the "structural issues" were of such a nature so as to negatively impact the structural integrity or habitability of the plaintiffs' unit. I am also satisfied based on the evidence presented at trial that none of the structural issues were caused by or linked to water ingress at the plaintiffs' property.

[155] With regard to the east deck repairs, the defendant hired an engineer to investigate and provide a report for what the evidence revealed to be a relatively straight-forward repair. I also find that it was a repair most likely necessitated by the careless action of someone the plaintiffs had allowed onto the east deck. It is possible that the defendant may still have met its legal obligations had it instructed a contractor to undertake the repairs without the benefit of an engineer's opinion

(although I do not make that finding). The fact that the defendant agreed to take the extra step and spend more money to obtain an engineer's report is conclusive evidence of its good faith conduct towards the plaintiffs.

[156] Having heard all of the evidence and reviewed the reports of the various engineers, as well as looking at the pictures provided by Mr. Sedlak and Mr. Hirji, I reject Mr. Hirji's position that work done on his unit was done poorly or remains unfinished. Even if the evidence had established that claim, inadequate workmanship would not have been the defendant's responsibility so long as it was reasonable in its choice of and reliance on professionals, which I have found it was.

[157] Taking everything into account, I conclude the plaintiffs have failed to prove the defendant was negligent. I find the defendant met the standard of care with regard to all of the plaintiffs' complaints.

VII. ANALYSIS OF THE CLAIM FOR BREACH OF CONTRACT

[158] The plaintiffs have failed to adduce any credible or reliable evidence that there was any agreement, much less a contract, between them and the defendant with regard to any repairs. Mr. Hirji claims the May Report amounted to an agreement between the parties that any and all repairs identified in it would be carried out at the defendant's expense. The underlying premise of this position is flawed. The May Report is not a joint report and does not purport to be one. Instead it is JRS's report, having taken into account Mr. Lum's opinion. Mr. Lum did not sign the report and in no other sense can it be said to have been a joint report.

[159] Not only is there no evidence that the defendant or any of its representatives agreed to carry out all of the repairs, all the documentary evidence is consistent with the opposite conclusion. Those facts have been discussed earlier in this decision relating to the defendant's response to the plaintiffs' complaints.

[160] Although not stated explicitly either in submissions or the pleadings, Mr. Hirji also believed there had been an "agreement" between Ms. Campbell and him in

2001 that the east deck would be repaired. As noted above, I have rejected Mr. Hirji's evidence on this point and therefore no such claim could succeed.

A. Other Semi-contractual Claims

[161] At other points during the trial Mr. Hirji implied that on behalf of the defendant, Mr. Bleay had agreed that certain costs or expenses associated with the plaintiffs' moving out of their unit would be paid for by the defendant. In support of this position, Mr. Hirji relied on a number of invoices that he produced at the trial which related to cleaning, accommodation until all repairs were done, duct cleaning, drape cleaning, packing and transportation of household items, an electrical inspection, and repair to a broken fireplace.

[162] Mr. Bleay denied he made any such offers. I found him to be a credible and reliable witness, who testified in a forthright fashion. His evidence was clear on this point. I am satisfied that there is no reliable or credible evidence to establish that the defendant ever agreed to pay any of those costs.

B. Conclusion on the Contract Claim

[163] Not only have the plaintiffs failed to prove the basic elements of any contract between them and the defendant, I conclude even the most generous view of the reliable and credible evidence does not come close to establishing a claim for breach of contract.

[164] The defendant's position is that this claim is a "recent fabrication" by Mr. Hirji. It points out that the first time any details were given about the claim was in the eighth further Amended Notice of Claim filed August 25, 2014. At that time the only reference to the contract was in relation to the May Report. Yet at the examination for discovery in September 2013, Mr. Hirji was asked for details about the breach of contract claim as it existed at that time; his evidence was he did not know the date of any contract, the terms of any contract, whether the contract was written or verbal, or what was exchanged in the contract. In the ninth amendment to the Statement of

Claim filed during trial, there is an additional paragraph alleging a new contract, but absolutely no particulars are provided.

[165] In my view there is no reasonable basis upon which one could advance a claim for breach of contract. I find this claim frivolous.

VIII. DAMAGES

[166] The preceding discussion is sufficient to dispose of all of the plaintiffs' claims at trial, and it is unnecessary for me to consider the last issue.

[167] I address two heads of damages claimed by Mr. Hirji because of the emphasis he placed upon them, and the fact they constitute the bulk of his damages claim. Nothing in this analysis, however, detracts from my conclusion that none of the plaintiffs' claims have been proven.

[168] Mr. Hirji claims damages for a proposed sale of his home that did not complete. His position is that the defendant delayed the completion of repairs which impacted the proposed sale.

[169] The evidence about the collapsed sale of the plaintiffs' unit was vague, contradictory, and inconsistent. Even the selling price was unclear. During his testimony in chief, Mr. Hirji said the unit was originally listed at sale for $650,000. His evidence on this point was impeached by his discovery evidence where he said the list price was $550,000. The copy of the contract for purchase and sale entered as an exhibit at trial clearly shows "Five Hundred and Fifty Thousand" typed in as the purchase price with the word "Five" crossed out and "Six" hand-written above it. It also shows "$550,000" typed with hand-written alteration of the beginning "5" to a "6" and then "$650,000 hand-written beside it. Also odd is the fact that the contract is dated March 27, 2008, but includes the term that the property will be in substantially the same conditions as viewed by the buyer on March 31, 2008. Interestingly, the "27" on the front page appears to be a hand-written correction to some other typed number which is unclear.

[170] Mr. Hirji said his discovery evidence was an "honest mistake". It is difficult to accept that Mr. Hirji honestly was mistaken about the selling price. He claims the sale of the house was necessary to generate equity that he was going to use to launch his currency trading business. He testified that the business, based on software he said he developed over 14 years, represented his "life's work".

[171] The defendant suggested that Mr. Hirji's testimony in chief was concocted to respond to the anticipated argument that it was highly unlikely any buyer would offer $100,000 over the list price without there being any competing bids. This suggestion is not unreasonable.

[172] Similar problems plague Mr. Hirji's evidence about the reasons for the sale not going through. When testifying in chief, Mr. Hirji claimed that he was required to provide two engineer certificates to the buyer prior to the subject removal deadline, and that the defendant's delays in having the repair work completed resulted in him not being able to meet that deadline. However he admitted in cross-examination that there is no such subject written on the contract. At that point Mr. Hirji said he relied on the professional advice of his realtor, Mr. Jamal, about what conditions were necessary to close the sale. Mr. Jamal testified and did not confirm Mr. Hirji's evidence.

[173] Mr. Hirji also acknowledged that he had no idea if the other subject conditions on the contract for purchase of sale were ever satisfied, or if they contributed to the collapsed sale. Despite this he maintained that the defendant was liable. The defendant's position about this evidence is encapsulated in the following paragraph:

> This insistence on the collapse of the sale being caused by [the defendant], despite clear evidence that the sale could have collapsed just as easily because of any of the three other subject clauses, indicates a complete and irrational bias on the part of Mr. Hirji against [the defendant]. It is submitted that this bias permeates all of Mr. Hirji's evidence rendering it extremely suspect and largely, if not entirely, unbelievable.

[174] I find Mr. Hirji's evidence about the list price of his unit and the collapse of its sale to be completely unreliable and not believable. I agree with the defendant that Mr. Hirji's position represents an irrational stance, and I find the claim frivolous.

[175] Even if Mr. Hirji's evidence about the collapsed sale was reliable or credible (it was neither), I have concluded that Mr. Hirji and not the defendant was responsible for all the delays of repair work at his unit and therefore the claim would have failed in any event.

[176] The failure of Mr. Hirji to establish that the defendant was responsible in any way for the collapsed sale of his unit also defeats his claim for lost profits, but there is other evidence that calls into question the veracity of this claim. The defendant's position is that this claim too was potentially a recent fabrication and irrationally pursued by Mr. Hirji.

[177] The first time any claim related to business loss appears is in the Second Amended Statement of Claim filed June 11, 2009. In it, Mr. Hirji alleged that the defendant's delay and improper repair of his unit caused him to take "time away from his work as a self-employed computer programmer, resulting in a loss of business opportunities and revenues". In the Third Amended Statement of Claim filed December 9, 2010, Mr. Hirji claims the rental income of $1700 per month was vital to his business. Its loss (which he blames on the delay and improper repairs) resulted in him having to abandon his currency trading business which he conducted from his home. At that time he quantified his loss "based on the actual profits made in 2001" to be about $3.8 million for the time period 2007-2010. The defendant requested copies of Mr. Hirji's income tax returns which Mr. Hirji promised during the trial he would produce. They were never brought to court.

[178] The defendant also adduced evidence that in other lawsuits filed against his own family members, Mr. Hirji sought damages for business losses, but in those pleadings he claimed the business losses were caused by his own poor health and the failure of his family members to give him a share of the family's estate.

[179] In the third Amended Statement of Claim, Mr. Hirji claims the delays and improper repairs caused him to lose the sale of his unit at the peak of the market resulting in a loss of $135,000. He does not allege that is linked in any way to his business.

[180] In the Ninth Amended Statement of Claim filed during the trial, the plaintiffs allege that as a result of the defendant's negligence and/or breach of contract, they were "unable to raise sufficient capital or sell [their] unit and inject the required capital in [their] currency trading business".

[181] I find there is no reliable evidence that Mr. Hirji suffered any business loss, or that if he had, it was related to the defendant's actions.

[182] The claim itself defies logic and common sense. Mr. Hirji makes the outrageous claim that with seed money of $500,000 (from the sale of his unit) he could have generated $2 million in one month and that the continual reinvestment of that money would result in approximately $5 million of profit monthly. Mr. Hirji extrapolates that he could have turned that original $500,000 into $932,773,410.38 over a three-year period. Mr. Hirji gave some evidence that at one time he had a prospective partner in his business, but some complication prevented that investment from going through.

[183] I make the obvious comment that if there was any possibility that Mr. Hirji had created a viable business plan that could generate such huge profits, it is inconceivable that the market would not have responded with numerous offers of investment. Mr. Hirji's claims about how he could have made such huge profits are simply not believable. I find that Mr. Hirji's claim of business loss is frivolous.

[184] Further, even if there had been any reliable or credible evidence upon which to found these two heads of damage, I would have found no causative link between any action of the defendant and those losses because they are too remote.

IX. CONCLUSIONS

[185] For the reasons expressed herein, the plaintiffs' claims are dismissed. The parties are at liberty to arrange a hearing relating to costs so long as notice is provided to the Registry no later than 30 days from the date of judgment.

"Sharma J."