

Court of Queen's Bench of Alberta

Citation: Lauder v The Owners: Condominium Plan No. 932 1565, 2021 ABQB 145

Date: 20210224
Docket: 1803 13413
Registry: Edmonton

Between:

Mary Jo Lauder

Applicant

- and -

**The Owners: Condominium Plan No. 932 1565
(o/a Grand Carlisle)**

Respondent

**Memorandum of Decision
of
A.R. Robertson, Q.C., Master in Chambers**

Introduction

[1] This application was brought by originating application. It is a claim by Ms. Lauder, a condominium unit owner, that the board of directors of the condominium corporation engaged in improper conduct, acting in a manner that was oppressive, unfairly prejudicial, or that unfairly disregarded her interests.

[2] Perhaps this is a case of a modern-day Cassandra. Cassandra was a Greek mythological priestess who was cursed to utter true prophecies, but who was never to be believed. That would seem to be how the applicant, Ms. Lauder, must feel. She repeatedly made complaints of leaking windows – not prophecies, but nonetheless cautioning the Board of Directors of a serious issue, and her continued complaints were eventually ignored.

[3] Or perhaps this is a case of a diligent condominium Board of Directors trying to address the many issues it is regularly confronted with, trying to balance the condominium's available funds against unexpected expenses and, when addressing Ms. Lauder's complaints of leaking

windows, reasonably relying on construction contractors and, eventually, a civil engineer. That would seem to be how the members of the Board of Directors must feel. The Board's evidence has been provided by affidavits from its current president, Ms. Wise, plus a brief affidavit from another member attaching a timeline.

[4] I have concluded that in the beginning both sides were acting reasonably and properly. Ms. Lauder's complaints of leaks were valid. The Board tried to address them. However, the resolution of the complaints was stymied by a communications breakdown. There has clearly been frustration on both sides, and some lack of communications, apparently even with an engineer who performed an investigation into the problems.

[5] Eventually the Board of Directors stopped listening to Ms. Lauder.

[6] Claims of this nature are very fact-specific, and here there are two diametrically opposed views of the known facts and many assertions that are in controversy. Proper consideration requires a detailed (and therefore lengthy) review of the known facts and an analysis of the allegations in dispute.

Overview

[7] Ms. Lauder bought an apartment-style corner unit condominium in this St. Albert complex in July 2012. She noticed leaking around the windows. She complained to the Board of Directors of the condominium corporation over a period of years, but she could not get satisfaction from the Board of Directors.

[8] After a period of several years, it turned out that her complaints were valid; there were rot and (non-toxic) mould in the walls. Windows had not been installed correctly. Very significant repairs were required to repair two walls to stop the leaking in her ground-floor unit as well as in other units, and to stop leaking in the parking garage below her unit.

[9] For about 18 months, her unit was what she describes as a "construction zone". Her furniture had to be moved to the centre of the rooms. She mostly lived in her bedroom although she had to sleep on her couch in the living room. Many photographs demonstrate the upheaval to her home.

[10] But it was not a case of the Board ignoring her complaints. The Board responded very quickly, at least at the early stages, but the work that was first done, in hindsight, was significantly inadequate.

[11] After the first major repair effort, the leaking continued during heavy rains, and the water continued to damage her flooring, her drywall, carpets, and her baseboards as well as other interior components. One of the leaking windows, on the east wall of her unit, has not been replaced and it still leaks.

[12] There are a number of interactions that are of concern that have contributed to the communications failure and deteriorating trust.

[13] On one occasion when she complained by email the board member who received the email indicated that there would be a response in an hour, but Ms. Lauder was not sitting by her computer to receive the response and when two Board members arrived she did not respond because she was in the shower. The Board members used a key to enter.

[14] There was a controversy over who was responsible for paying for the damage to the interior of her home that resulted from the significant deterioration of the common property (the wall). The Board initially told her that the interior repairs to her condominium unit were her problem, not the condominium corporation's. She responded clearly and unequivocally that that was not the case. The Board then corrected its view and it eventually very substantially repaired the interior of her home. (There is one outstanding issue about a bedroom window that was not replaced, discussed below.)

[15] There should have been no debate about who was to pay for the interior damages. The Board advises that it initially took that position because its professional property manager told them that was the law. The Board members are, of course, volunteers (although they might be receiving a stipend, as Ms. Lauder asserts). They argue that that is a factor in considering liability for improper conduct.

[16] The repairs required replacement of the stucco exterior of two walls of the building. But the ultimate repairs – as I will discuss, there were interim steps done in an attempt to remedy the problem – were not begun until at least three years after she complained about the leaking. They were not mostly completed until at least November 2017, five years after she moved in (in 2012) and noticed the leaking and three years after there is a clear record that she made complaints to the Board (in 2014).

[17] As one would expect after a significant repair, there was a time following the completion of the wall repair and interior repair when the parties waited to see if the problem had actually been repaired. Certainly, previous experiences here justified a “wait and see” period at this point. The repairs, leaving aside the master bedroom window, appear not to have been thought to be complete and satisfactory until early 2019.

[18] The record shows that there is still one bedroom window that she would like replaced, but the Board now declines to do that until 2024, when all of the building's windows will be replaced, on the recommendation of the engineer retained by the Board. However, the engineer does not appear to have been advised that Ms. Lauder's bedroom window is still leaking, and neither is there any explanation why a recommendation that was made to the Board by both the engineer and Perma Seal Windows and Doors Ltd. that *all* windows be replaced was not followed, even though it was specified to be done.

[19] The communications breakdown is demonstrated, or perhaps it was exacerbated, by allegations by the Board that she refused entry to contractors, or refused to contact them to arrange for entry for repairs, leading to delays. Ms. Lauder adamantly refutes this assertion, and provides some very specific details of when she contacted the repair contractor on some occasions to arrange for work to be done (down to the minute that she called them, and the names of some people she spoke with) while the Board relies on hearsay evidence, often without clear indications of the actual source of the allegations.

[20] Nonetheless, the Board's evidence is that it received this information about Ms. Lauder's alleged refusal to cooperate - whether it is true or not - and that is a factor to consider in determining whether there is a proper claim for oppression.

[21] I have concluded that Ms. Lauder's evidence that she complained throughout is correct. I accept that she complained in 2012 and 2013, although there was apparently nothing in writing. Board members changed, and some died, so it is a fair response that the current members of the

Board have no memory of that, and a by-law provision requires that complaints be in writing is an important factor. Accordingly, although I accept that she complained, By-law section 2.2 is a complete answer to the Board's non-response during that period. It says that if a complaint is not in writing the Board need not respond.

[22] I have concluded that the Board must have been getting misinformation from the repair contractor as to her supposed lack of cooperation. As mentioned, the Board's information is lacking in specifics, when an affidavit from one of the people actually involved would have been possible, or at least a letter from one or more of them after the Board learned of the significant specificity of her evidence.

[23] The Board is looking for final relief – a complete dismissal of the complaint, and accordingly it really should not rely on hearsay. Technically, rule 13.18 prohibits hearsay only when it is evidence of the *applicant*, but if both sides in a summary judgment application are expected to put their best foot forward (*Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49), then on an application brought by originating notice the respondent who is seeking final relief should do the same.

[24] That may involve the respondent providing only hearsay evidence (leaving aside the desire of the respondent to obtain final relief): *Cicalese v SSMPG Integrating Services Inc*, 2020 ABQB 605, at para. 141-160, but sub-rules 13.18(1) and (2) of the *Alberta Rules of Court* require both that the source of the information be shown *and* the person swearing the affidavit must believe it to be true. Here, in some cases there was no detail of the source, and in others there was no name mentioned, and it was sometimes double or triple hearsay.

[25] In the result, the Board may only rely on this information about non-cooperation to argue that it acted reasonably, whether the information from the contractor was true or not. I cannot rely on the evidence about lack of cooperation for the truth of the assertion of Ms. Luader's alleged non-cooperation.

Jurisdiction

[26] This application was brought before the Court of Queen's Bench under section 67(2) of the *Condominium Property Act*, RSA 2000 c. C-22.

[27] The application was brought by originating application, as I have mentioned. Section 66 of the *Condominium Property Act* provides that "petitions" to the Court may be brought by "application", and sub-section 66(4) says that the Court may direct a trial of an issue.

[28] There are conflicting versions of some of the facts here, but no one asked that the application be referred to a trial. My challenge was to determine whether the matter could be resolved without resolving conflicting admissible evidence.

[29] This application was brought in master's chambers, and the condominium corporation did not object on the basis of jurisdiction.

[30] "Court" is defined in paragraph 1(1)(i) of the *Act*, and the Court of Appeal's ruling in *Proprietary Industries Inc v Workum*, 2006 ABCA 225 (which dealt with the jurisdiction of a master in chambers to grant an attachment order under the *Civil Enforcement Act*) would suggest that a master has jurisdiction to address this matter. That is, applications such as this may be brought before the "Court" and the legislation does not specify that the application must be before a justice. The definition of "Court" indicates that any member of the Court, including a

master in chambers, may hear and decide the matter, regardless that the *Act* specifies remedies that may be described as “injunction-like”, and section 9 of the *Court of Queen’s Bench Act*, RSA 2000, c. C-31 states that masters do not have jurisdiction in respect of “applications relating to civil contempt or for an injunction”.

The Facts in Detail

[31] Ms. Lauder has sworn two affidavits. Some affidavits were also sworn on behalf of the condominium corporation. However, there have been no cross-examinations on any of the affidavits.

[32] The building is an apartment-style condominium complex that consists of 48 residential units, with an underground parkade containing 68 titled parking stalls. The applicant's unit, unit #108, is located on the main floor of the building, at the north end.

[33] When she bought the unit in July of 2012, Ms. Lauder noticed water staining on the interior of the window casements and on the window coverings along the north wall. Later, she observed that the windows in the north and walls of the unit leaked significantly during periods of moderate to heavy rainfall.

[34] She deposes that she raised the issue of the leaking windows with the board of directors on several occasions, but she does not detail those first occasions – either details such as the individual or individuals with whom she spoke, or the dates. It appears she did not record them. The first complaints were not in writing.

[35] The By-laws of the condominium corporation require that complaints be made in writing, and if not in writing the Board need not deal with them.

[36] In 2013, Ms. Lauder noticed cracks and leaks in the concrete walls of the underground parkade at the north end of the building, directly beneath her unit. The Board had some work done in the parkade, described as “concrete repair/sealant/drain cleaning and line repair.” At that time, the Board apparently did not consider arranging for an investigation as to the cause of the leaking.

[37] No attempt at repair to her unit, #108, or her windows was done at that time. Ms. Wise deposes that the Board was not yet aware of the leaking in her unit.

[38] In March of 2014 Ms. Lauder “advised the board”, again with no details in the evidence as to how she advised them, that water was streaming into her unit, from almost every window, causing substantial damage to the interior finishings, including the flooring, drywall, baseboards, and window casings.

[39] Although there is no clear detail as to exactly how Ms. Lauder advised the Board in March, the Board of Directors noted in its March 2014 meeting that unit 108 “has a leak around some windows, which needs caulking.” Accordingly, the concern of the complaint not being in writing on that occasion is moot.

[40] There is no indication why the Board thought that caulking was the appropriate remedy. All of her windows were leaking, although the Board advises that it was not aware of that. A handyman was dispatched to caulk the windows on the north wall, including those on Ms. Lauder’s unit.

[41] On April 5, 2014, the Board received a quote from ENS Environmental Services for window repairs on the north wall, including Ms. Lauder's unit.

[42] On April 7, 2014, Academy Mechanical Servicers Inc. inspected Ms. Lauder's unit in respect of "pipes banging".

[43] In its April 28, 2014 meeting, the Board received information that Humphrey Windows attended to the property and completed repairs on 3 units, but that unit #108 would need further work. The entry in the minutes says this:

The windows in unit 108 require considerable work done to them. Al Porter moved that we accept Lindsay of ENS Environmental Services to do the repairs of water leaks in unit 108, for an amount not to exceed \$2,000.00 (two thousand dollars). Anne Korownyk seconded the motion. Carried.

[44] Of significance is the fact that although the Board was advised that the windows required "considerable work", the board of directors was not prepared to direct an investigation as to the cause, or to spend more than \$2,000 at that time. ENS submitted a quote for a little less than \$2,000.

[45] In its May 26, 2014 meeting, the issue of Ms. Lauder's windows was dealt with again. By that time workmen from ENS Environmental Services had reported that extensive work was required. The minutes record that, "When the lintels above the leaking windows were removed, a large expanse of the wood behind the stucco was rotten, and will have to be replaced. This work must be done. We are waiting from Lindsay [of ENS] for a report regarding the cost."

[46] On June 23, 2014, the Board authorized ENS Environmental Services to perform work in the amount of \$7,500, being its quoted figure for the scope of work ENS had proposed. The minutes also record that the ENS crew had started May 24 and was supposed to have shown up June 21, but had not.

[47] Around that time, water recommenced leaking into the underground parkade.

[48] On July 25, 2014, Ms. Lauder reported (by email) water streaming through her master bedroom window. Her master bedroom is in the north and east corner of the building. She said, "The windows are leaking in the master bedroom, which were not leaking before *and I believe are not being repaired.*" (My emphasis.)

[49] She reported that, "In addition to the existing water damage to the flooring in the dining room, the carpeting in the master bedroom, den and partial living room are wet."

[50] The Board responded by email that two Board members would attend within an hour, but Ms. Lauder says in her letter of July 25, 2014 (not sent for a year, as discussed below) that she was not sitting by the computer waiting for a response. Within an hour of Ms. Lauder's email, two Board members came to her unit and, receiving no response at the door, entered using a key that was to be used for emergencies.

[51] Ms. Lauder was in the shower at the time, and came out, wearing a housecoat and a towel on her head, to find them in her home. Her observation was that the Board members appeared to be "completely unconcerned that the floor was soaking wet from the leaks".

[52] She apparently did not make a fuss at the time about the surprise intrusion. She did write a letter to the Board, but thought better about sending it for almost exactly one more year when

she wrote another letter (and this time sent it) to the Board expressing her strong views of being told that interior repairs were her problem, and about other topics.

[53] Of significant importance is that at that time of the shower entry – July 25, 2014 – the Board members knew that there was a significant leaking problem in Ms. Lauder’s master bedroom window on the east wall.

[54] (A later Fenestration Review, done by Perma Seal in 2017 when it submitted a report to the Board, shows that the master bedroom has three windows, one in the east wall. All three were leaking.)

[55] In its July 28, 2014 meeting, the Board addressed a report that it had received from ENS. That minutes record this:

When ENS Environmental Services removed the stucco around the windows, they found there was a large area of rotten wood, covered by mold, on the north wall. This area was under repair, when the heavy rains between July 22 and July 24 caused windows in units 208 and 308 to leak. The area around these windows was checked and more rotten wood and mold was found. The repairs are being done. The roof over the north emergency door also leaked, and is being repaired. Lindsay of ENS Environmental Services recommended that the mold be tested, for health reasons. Lindsay made the necessary arrangements, with a company he uses, and units 108 and 208 were tested, as well as the mold on the exterior wall. This was done before the leak occurred in unit 308. Lindsay reported back that the mold was not toxic.

On July 14th, by E mail, Georgina Smith moved that we pay a company approximately \$1,200 to test and identify the mold on the north exterior wall, before more work is done, so that the mold can be treated, before the wall is enclosed. Al Porter seconded the motion. *ENS Environmental Services advised us to have this work done* and will make the necessary arrangements.

(My emphasis.)

[56] The minutes further noted, “A leak in the north wall of the parkade will be monitored.”

[57] The repair work was then done by ENS in 2014.

[58] On September 29, 2014 the Board received confirmation from ENS that the “Windows and *North Wall*” job had been completed. (Emphasis added.) The minutes state this:

This job has been completed. The total cost for the mould inspection, replacing all damaged wood, treating to prevent mould, new R20 insulation, blue skin all around windows repaired, and stuccoing was \$33,775 plus \$1688.75 GST. The total bill was \$35,463.75.

Phoenix Insurance has not yet notified the Board about their decision re the claim for water damage on the north wall.

[59] There does not appear to be a reference at this time to any insurance claim for the water damage to Ms. Lauder's unit. This is relevant to a point discussed below.

[60] The details on the ENS invoice make it clear that the repairs were to the common property part of the building. The invoice describes the “North Wall rebuild” as follows:

Mold inspection test
Inspect all areas suspect to water damage
Tear down of exterior wall plywood and insulation
Air dry existing wall, clean by scraping dampened areas and spray with soap and water
Spray with bleach solution for mold prevention
Rebuild all water damaged areas with new plywood and R-20 insulation
Blue skin around all windows repaired
Re stucco entire north wall

[61] Once again, there appears to have been no inquiry as to what was actually the cause of the moisture penetration causing the rot, mould, and the need for significant repairs. However, the Board had hired a contractor, the contractor proposed a scope of work, and the Board did not challenge either the scope of work or the amount quoted. The work was done as promised (as far as is known) and paid for.

[62] But the repair was to the north wall only. But one of her leaking master bedroom windows is on the *east* wall.

[63] The Board's perspective was that it had addressed the leaking windows of unit #108 as well as other leaking problems, although it was continuing to monitor the leaks in the parkade below.

[64] Ms. Wise asserts that interior repairs to unit #108 were not completed then because Ms. Lauder requested that the interior repairs be delayed until spring 2015. She had written to the board on September 11, 2014 saying, "I would suggest that inside repairs wait until spring 2015, after the winter thaw, to make sure that there is not another issue to deal with and inside repairs are done once."

[65] Counsel for the Board submits that to the extent there are complaints relating to the delay in having her unit repaired, Ms. Lauder cannot complain about the period from September 2014 to spring 2015 because the delay was suggested by her. He asserts that other affected units were repaired at the time.

[66] However, Ms. Lauder's evidence contradicts that. She deposed that it was another five months before the Board even resolved to obtain quotes for the interior repairs of both her unit *and* others affected. The minutes of the February 10, 2015 Board meeting reflect this:

Moved by Ken Moore, seconded by Lori Jennings that we get quotes from renovation companies for inspections of Unit #108, Unit #208 and Unit #308 to determine if there are damages from the north wall leaks and the cost to repair said damages.

[67] Those minutes also record that Diverse Claims had advised that the corporation's insurance coverage does not include the cost of repairing the north wall. "Therefore *the cost of repairs* to the north wall *and involved units* are the responsibility of the condominium." (My emphasis.)

[68] However, at the next Board meeting, on March 10, 2015, the minutes record a contrary approach to the liability for the cost of interior repairs. They record that the property manager was directed to send letters to Units #108, #208, and #308 "to inform them to contact their

insurance companies if they feel they have damage to their units from the north wall leaks last summer.”

[69] The property manager, Vinay Vashisht of Estate Properties Incorporated, wrote Ms. Lauder on March 20, 2015, telling her that she should contact her own insurer in relation to the interior damage to her unit from the leaking.

[70] That advice was wrong, and frankly makes no sense because the water was originating in the common property, entering and damaging Ms. Lauder's premises. The common property is, of course, the responsibility of the condominium corporation, not the individual unit owner: section 37 of the *Condominium Property Act*. The Board has the responsibility of maintaining the common property as manager of the condominium's assets: s. 37 and s. 28.2 of the *Act*.

[71] A letter, mentioned below, indicates that the Board was relying entirely on the property manager for the advice that interior repairs of damage resulting from inadequate maintenance of common property is a unit owner's problem.

[72] In July 2015 Ms. Lauder responded to the March 20 letter quite forcefully. She stated that she would not make a claim against her own insurer because the interior damage was the result of the north wall exterior damage. In that letter, she stated that “In the three years I have lived here, I tried to handle concerns in a verbal and informal fashion but clearly this is [sic] not been beneficial to me.” She then set out five concerns.

[73] Later in the letter, she referred to the letter dated July 25, 2014 (that is, a year earlier) that she had drafted but not sent, although she included that letter as an attachment in 2015. She said this in her 2015 letter:

After the chaotic 2014 summer repairs and yet another upsetting incident, I penned the attached letter but did not send it. I gave it a second thought wanting to offer [the Board] another chance. I feel that [the Board] might benefit from reading this now to fully understand my frustration, disappointment, but more importantly that I do not feel safe and comfortable in my own home. A feeling that no one should have to endure! Aside from the verbal and physical altercations, to have my home entered 2 times (that I know of) without my permission is not a good feeling. Had these incidents happened to someone else the outcome might not have been as understanding as I tried to be.

I appreciate the long hours and challenges that accompany board member positions. There is no way for any board to fully satisfy its residents, but I will no longer allow the treatment towards me by [the Board] to continue.

[74] In her draft letter from the year before she said that within the first few months of living in the condominium she had been yelled at, bullied, harassed, received physical and verbal abuse, and her suite was entered without her permission by a Board member.

[75] She went on to say, a little later in that letter, “Some board members make me feel that I am not welcome, which no one has the right to do, nor will I tolerate!”

[76] There is an important contrast between the evidence given by Ms. Wise, on behalf of the Board and Ms. Lauder over the communications between the fall of 2014 and into the summer of 2015. Ms. Wise asserts that Ms. Lauder made no complaints during that period. Ms. Lauder deposes, in the context of discussing the March 20 letter and her reply, “In the meantime, water

continued to penetrate the windows of my Unit for the next year through July 25 of 2015. I reported the leaks to the Board each and every time.”

[77] However, her July 20, 2015 letter says, “The rainfall on July 16 and 17, 2015 confirmed my suspicions that the leaking windows were not fixed. The window (west side of the parking garage entrance) had a steady stream of rain dripping on the inside.”

[78] With no detail of other leaks or complaints from the fall of 2014 to July 16, 2015, the Court is drawn to the conclusion that her statement that leaks penetrated over that entire period is not supported. Had there been continued leaking she would not merely have had “suspicions” that the repair was unsuccessful in July of the previous year; she would have known that much sooner. The leaking appears to have re-occurred on July 16 and 17.

[79] In that letter she advanced another concern. I mentioned above that there had been an inspection into “pipe banging” in 2014. She said,

For the 3rd winter, the water pipe heating system in the bedroom clunks and bangs throughout the night. [The Board] had a repairman investigate and concluded it was only pipe expansion. I realize I am in no way an expert but I believe this rattling goes beyond the concept of pipe expansion. The situation remains unchanged, when can I expect it to be fixed?

[80] There appears not to have been any further discussion or consideration of the banging, unless it was something repaired when the wall was later opened up and significant repairs done.

Known Facts

[81] Although there is now some conflict as to what happened over the several years to which this dispute relates, there are certain things that are known to have occurred.

[82] For example, as mentioned on July 25, 2014, some members of the board of directors of the condominium corporation entered Ms. Lauder's unit while she was in the shower, using a key that they had obtained. There is some debate as to her response to someone entering her unit while she was in the shower, as she greeting them in a housecoat and a towel, but that seems to be based on the fact that she was not making a significant fuss over it. I think it is fair to conclude that virtually anyone would be very surprised to get out of the shower and find uninvited persons standing in their home. In her letter sent a year later she spoke in strong terms about that experience, but perhaps not at the time.

[83] One of the three leaking master bedroom windows is on the east wall.

[84] The Board of Directors, through Ms. Wise' evidence, says it inquired of its insurer in September 2014 about whether insurance would cover the interior damage, and no response was received for five months. We have not been provided with a record of any such request. We see the response reflected in the minute, quoted above, in February 2015: that the cost of repairs to the units fell to the condominium corporation. The Board then had its property manager write a letter saying the cost fell to her (or at least, her insurer).

[85] The minutes of the Board meeting on July 30, 2015 has entries that were not followed up on.

[86] Those minutes record the July 20 letter from Ms. Lauder was noted. First, it records, “Unit #108 has reported a leaking window. This window is on the *north* wall that was replaced last year. *The Board will investigate this matter.*” (My emphasis.)

[87] Later in the minutes the letter is specifically referenced as follows:

Letter from unit #108 listing grievances against the Board. The Board will draft a response dealing with these issues. *Also a meeting will be arranged with the owner to discuss said issues.*

(My emphasis.)

[88] The now former president of the Board, Don Beer, wrote to Ms. Lauder on July 30, 2015 in reply to her July 25, 2014 and July 20, 2015 letters, point by point. As to the unauthorized entry, he said that the Board must make a judgment call as to whether they should enter an owners unit or not, that it “takes every step it can to check and see if the owner is home and then asking for permission to enter the unit”, but if the board cannot contact the owner, “*and the board is convinced that it must enter an owners unit in order to prevent possible damage to the owners suite or to the common property they will then enter the unit.*” (My emphasis.)

[89] However, there is no evidence that there was an immediate need to enter her unit without permission on July 25, 2014. The concern was that the windows were leaking when it rained, not that the plumbing had burst.

[90] The Board also said, in response to her refusal to claim against her own insurance company,

The board was informed by the management company that these repairs were the responsibility of the owner. A letter was sent to you by the management company. This was an error as the board did commit to cover the cost of repairs for damage caused by the leaking windows.”

(My emphasis.)

[91] Mr. Beers expressed regret for the disclosure of her private telephone number.

[92] As to the on-going problems, he said,

The board will be pleased to have the heating and leaking windows looked at when it is convenient both for you and the board members. *One of the board members will contact you.* The Board would be pleased to receive you at one of their regular meetings should you wish to attend.

(My emphasis.)

[93] Accordingly, the Board minutes of July 30, 2015 stated that that a meeting with her would be set up to address the issues. The letter says that one of the Board members would contact her to have the leaking windows looked at.

[94] The July 25 minutes also state that the Board will investigate the report of the leaking window.

[95] But no meeting with Ms. Lauder was set up. No investigation was done at that time at all, or to try to understand why the windows had continued leaking either for over a year (as Ms. Lauder’s affidavit says) or at least in the July 22-23 rain (as her letter states).

[96] A month later the Board met again. In the Board's October 22, 2015 minutes it states, "There has been no reply to the Board letter to Unit #108 addressing the owners concerns about the Board. Until a response is received this matter is closed."

[97] But the July 30 letter to Ms. Lauder had not asked for a reply. It said that if she had questions she could contact one of the Board members. One of the Board members was to contact her, but no one did.

[98] Three months later, there was another reference in the Board minutes. The October 22 minutes recorded, "Michael Jordan caulked the windows in Unit #108. There had been some leaking earlier in the year. We will wait to see if this is effective." Michael Jordan was a member of the Board.

[99] There is no evidence before the Court why the Board thought that Mr. Jordan's caulking the leaking window, where the siding is finished with stucco, would be effective. Previous caulking apparently had not worked. There was now a reasonable ground for questioning whether the significant work done by ENS had been effective to fully stop the leaking. The Board had stated that it would investigate. But it did not, for about a year-and-a-half. It only investigated after legal counsel became involved in 2017.

[100] Of significance is that one of the bedroom windows that was leaking in 2014, which the Board rushed to investigate, is on the east side of the building. No work, other than possibly the caulking done by Mr. Jordan, appears to have been done on that window until (perhaps) 2017, as I will discuss below.

[101] The March 24, 2016 minutes of the Board meeting simply say, in respect of unit #108, "Mold report for Unit #108. Tabled." No further explanation is given.

[102] Another leak upstairs, perhaps unrelated, exacerbated both the problem and the frustrations of everyone, in April 2016. When members of the Board were doing a spring walkabout, stains on the stucco in the newly-reinstalled stucco on the north wall indicated a leak.

[103] On April 28, 2016 the Board considered the mould issue again, recorded as follows:

Mold/Repairs Unit 108: There has been no communication from the owner in this regard as there has not been a rainstorm which could reveal whether the repairs that have been done to this point have been entirely successful and satisfactory. As previously requested by the owner, other required repairs have also been put on hold. Matter is set aside pending further information from the owner. Tabled

[104] I have not seen any evidence to the effect that Ms. Lauder requested putting the repairs inside her unit "on hold", other than the communication in 2014 suggesting that they wait until 2015.

[105] On May 6, 2016 Ms. Lauder spoke to three members of the Board about moisture in her wall.

[106] By email dated May 12, 2016, the construction contractor, Lydale, recommended repairs to Ms. Lauder's unit. That involved removing the drywall on the exterior wall, to check the insulation and the travel of water, and noting that a hole might have to be cut in the ceiling if there was a problem with plumbing. This was in relation to the interior plumbing leak that caused the staining on the stucco on the north wall.

[107] In May, the engineers retained by the Board identified the cause of the stucco stain mentioned above: a small leak in a radiant heater and a drain line. It was repaired.

[108] On May 26, 2016, the Board of Directors decided that the mould issue was “closed”.

[109] The minutes for that meeting go on to record a revealing discussion about possible significant problems and a need for a thorough investigation.

Vinay Vashist raised several issues that will need to be addressed in the preparation of the Budget for the coming year. The moisture on the north wall and the resulting damages cannot be covered by insurance but the costs may be recovered from the Reserve Fund. The problem is that this is an unbudgeted expense and at present the cost of repairs is an unknown and could put a strain on the Reserve Fund. *Further investigation into the problems revealed that the wall is not drying as expected even though fans have been in place, indicating that the source of the moisture does not appear to have been found.* It is a possibility that during the replacing of the roof, the problem was already there and the new membrane was simply placed over the existing problem the wall in the kitchen area of unit XX is also affected by moisture we are now faced with the dilemma of applying a special assessment of \$72,000 (this could be \$1,500 per unit) or raising the condo fees 5-10%. If there is a surplus of funds after the repairs are done the surplus would be deposited into the reserve fund.

(My emphasis.)

[110] The minutes disclose further discussion and a recommendation by the property manager that the Board arrange for an “exhaustive investigation”:

Vinay Vashisht recommended that we hire a Structural Engineering firm to do an exhaustive investigation on the roof to check for structural damage and the possible source of this moisture problem. Until such time as the investigation is completed, the needed repairs are on hold. Vinay will proceed to get quotes. The board extends their sincerest apologies to the owners, affected by the delays to complete the needed repairs, over which we have no control. Tabled

(My emphasis.)

[111] If only that investigation had been done.

[112] Immediately below that entry, there was a discussion of the boiler problem and the glycol tank, and a resulting stain on the ceiling of unit XXX. The minutes state, “It is believed this problem could be related to the appearance of moisture on the north wall.”

[113] There are, surprisingly, two different versions of the Board’s minutes for that meeting. Ms. Lauder says she took the minutes, got them photocopied, and then returned them, but the Board now produces a different version. Ms. Wise says she has “reviewed the matter with the secretary for the Corporation [but she does not identify who that is closed bracket who advised that she did not author the minutes contained in Ms. Lauder's affidavit.” Ms. Wise goes on to say, “Nor were the minutes contained in Ms. Lauder's affidavit ever reviewed or approved by the board.”

[114] There is clearly a credibility issue here, and it is a serious one. Someone is simply not telling the truth, or at least not telling all of the truth. We are not told the details of how or when

the Board of Directors' minutes are prepared, when they are routinely placed in the minute book, and whether it is routine to put draft minutes in the minute book before they are formally approved, which presumably takes place at the next meeting.

[115] In any event, I am unable to resolve that credibility dispute in a chambers application.

[116] But the critical point, for this application, is that the passages that I have quoted appear in the *Board's* version of the minutes.

[117] Therefore, by May 26, 2016, we can conclude that the Board had been advised that the cause of the moisture had apparently not been found. That was consistent with Ms. Lauder's report from almost a year earlier when she said there was water penetration in July, 2015. The Board had been advised by its property manager to hire an engineer to investigate the leaking and a possibly much bigger problem.

[118] But what was done once the Board realized that Ms. Lauder's complaints, by then two years old, were valid? Why did the Board not retain the services of an engineer to investigate?

[119] Counsel for the condominium submits that the answer lies in the June 23, 2016 minutes – from a month later. They record this:

It was determined by Derek of Lydale Construction that the stains on the North Wall were a result of leaky zone valve in Unit XXX which drained the glycol tank attached to the boiler. This resulted in the stain on the ceiling of Unit XXX and damages in Unit XXX, as well as staining on the outside of the North wall. Vinay Vashisht submitted a recorded conversation with Lydale regarding the ongoing situation in Unit xxx. *He stated that the problem in the unit is not related to the previous problem and repairs on the North Wall. The owner continues to insist that the windows be replaced even though the professional advice, based on a report issued by Lydale Construction, dated June 21, 2016, indicates that this is not relevant to the problem.*

The Board recognizes the delays and expresses our apologies to the owners involved as the process of exploring all possibilities in locating and properly assessing the problem prior to proceeding with repairs, became time consuming.

Discussion followed us to the feasibility of having the repair costs covered by insurance or the Reserve Fund. As we have recently signed on with a new insurance provider a claim this soon would immediately raise our premium. Robert MacDonald moved and Michael Jordan seconded the motion that, "The Board will provide the scope of work approved, to the owners of XXX, XXX, and XXX, based on the professional assessment by Lydale Construction with the instructions to proceed and complete the repairs as soon as possible with the cost to be covered by the Reserve Fund." Tabled

(My emphasis.)

[120] Reading these minutes requires a little bit of guesswork because unit numbers are covered up. But it seems clear that the reference to the third owner, regarding her "ongoing situation" was to Ms. Lauder.

[121] Accordingly, the condominium corporation argues that it was led to believe, by a qualified contractor, that the problems in her unit were in relation to an exterior stain on the north wall that had been noticed by the board, and a leaky zone valve in another unit.

[122] There was no investigation done to conclude that that was the case. Rather, it appears that this was the opinion of Lydale Construction, and the matter was not pursued further.

[123] We do not have a written report from Lydale on the point. The property manager apparently played a recording, perhaps a telephone message, that satisfied the Board.

[124] But the stucco stain, and repair, was on the *north* wall. The Board members knew in 2014, and from subsequent complaints from Ms. Lauder, that her bedroom window on the *east* wall was one of the windows that was leaking. In particular, they knew on June 23, 2016, that she was still complaining of leaking windows.

[125] Nothing was done about her complaint.

“Non-Cooperation”

[126] As to the assertions that Ms. Lauder did not cooperate with Lydale, Ms. Lauder is clear that she allowed Lydale access to her unit on a number of occasions to effect repairs but only when she could be present. She states that on numerous occasions she rearranged her schedule, cancelled appointments last minute, or simply stayed home to accommodate Lydale, even though sometimes they failed to show up. She has produced, as an example, a copy of an “Access Authorization” from Lydale dated July 21/16 that she received under her door. It asked that she contact Derek Kryjak. She wrote on the note indicating that she tried. He would be back from holidays on August 15. “Trent to set appt.”

[127] She then noted that she spoke to Derek July 26, 2016 asking about whether the proposed work would include repair and restoration to the whole suite, and he had responded “No.” She recorded further calls to Derek and to Trent.

[128] But nonetheless, the property manager informed the Board that she was being difficult and refusing Lydale access. At paragraph 37 of Ms. Wise's affidavit she makes the bald statement, “Ms. Lauder was generally uncooperative with contractors in arranging times for repairs. This has contributed significantly to the delay in repairs to unit 108.”

[129] I note that Ms. Lauder had suggested delaying the interior repairs to the spring of 2015. It was now the summer of 2016 and the repair contractor was apparently telling her that the interior repairs would still not be done, although she was trying to set up appointments with the contractor.

[130] There is no evidence that any more repairs to leaking windows were planned in July.

Attempt at Meeting in 2016

[131] The minutes of the Board meeting on August 25, 2016 again have all unit numbers covered up. However, item 7.3 would appear to refer, based on the context, to unit 108. There seems to have been an intent to fully resolve the issues about unit #108. It says this:

Estate Management (Carlene Beek) Advised by email that the repairs in Unit XXX are completed, repairs in Unit XXX are near completion *and Unit XXX has “not been responding to Lydale (Repair Contractor)she advised that she will call them to schedule.”* In view of the lack of communication with the Owner

a motion was made by Robert McDonald and seconded by Ann Wise“that the Board directs Estate Management to send a Registered letter to the owner of XXX requesting an emergency meeting with Estate Management, the Board and the Owner of Unit XXX to resolve this outstanding issue, during the week of Sept 10, if possible. Time is of the essence.” Carried

(My emphasis.)

[132] No source for this triple hearsay information about Ms. Lauder not responding to Lydale is provided, so this evidence is not in compliance with rule 13.18. We do not know what person at Lydale said this, we do not know when it was said, or when the attendance was scheduled, or any other details of the supposed lack of cooperation. And there is no statement of belief, required by Rule 13.18, except the broad statement mentioned above.

[133] Vinay Vashisht of Estate Properties Incorporated wrote to Ms. Lauder by letter dated September 13.

[134] Mr. Vashisht said that the Board had asked that she please attend the next Board meeting scheduled for September 22 at 9:00 am in the amenities room.

[135] Ms. Lauder explains that she did not attend because the contractor (Lydale) had scheduled work at the exact same time. She contacted the Board by letter of September 21, 2016 saying that Lydale had just informed her that they will be working in her suite then. She explained that “living in the turmoil and mess for the past 4 months *I must keep Lydale Construction on track.*” (Emphasis added.)

[136] She wrote that there should be a change in venue for the Board meeting and that she expected the Board and property manager to meet in her suite at 9 a.m. the date and time of the board meeting that had been scheduled for the amenities room.

[137] However, the Board of Directors merely recorded in the minutes that, “The owner did not attend.” This seems disingenuous. They knew that she had not simply ignored the invitation, and the reason for not coming was to “keep Lydale on track” in making repairs.

[138] A couple of days after the meeting, on September 26, 2016, the property manager wrote Ms. Lauder, noted that she had not attended, and said, “Please note that the Board does not meet in individual units, owners are invited to special meetings, which in this case was during our regular Board Meeting to discuss your concerns.”

[139] It is not clear to me that it would have inconvenienced the Board members to go from the amenities room to Unit #108 to visit her place. No explanation is given other than what appears in Mr. Vishasht’s letter. Ms. Lauder asserts that the Board members had previously met in her suite and she had observed them meeting in other unit owners’ suites.

[140] In hindsight, perhaps another viewing of her home would have allowed the Board to be reminded that Ms. Lauder’s condominium unit is a corner unit, and to realize that the window that was still leaking was on the east wall, not the north wall, and the explanation given by the contractor about the stucco stain, plumbing leak, and repair was limited to the problem on the north wall.

[141] On November 9, 2016, the property manager received an email from Lydale Construction, saying that Ms. Lauder refused to permit contractors to have access to her unit to

work on the flooring. There seems to have been a misunderstanding as to whether Lydale was going to re-do the flooring in the kitchen.

[142] This is, I believe, the only instance of detail about this topic. But this is directly contrary to Ms. Lauder's evidence throughout, and no detail is given as to who it was who said that she was not cooperating. The email was possibly reporting on communication with Ms. Lauder that had occurred 6 days earlier with Trent, but that is not clear.

Continued Non-Repair

[143] Given the two years of attempted repairs, refusal by Ms. Lauder to provide access to contractors to perform repairs would make no sense. Her letter of September 21, 2016 makes it clear that at least by then she was expecting Lydale to do work in her unit on September 22.

[144] But the interior repairs had not been done, and no window replacement was scheduled.

[145] Ms. Lauder asserts that she was confined to living, eating, and sleeping in her bedroom, because all of her other furniture and personal property had to be moved away from the exterior walls of the unit due to the ongoing water issues and unfinished repairs. She asserts that on several occasions she was simply informed that a contractor would arrive in a few hours, she arranged her schedule accordingly, and then the contractors did not show up. Most of the time, neither the board nor anyone else bothered to inform her when the contractors cancelled or rescheduled.

The 2016 AGM

[146] At the 2016 annual general meeting, or AGM, of the condominium corporation, it appears that Ms. Lauder tried to raise her concerns about the leaks, but she was told that the AGM was “not the time to address the concerns of a unit owner relating to a single unit.” She was told that “she could address the Board at another time.”

[147] Of course, her concern was leaking coming from the common property. Furthermore, as the Board knew, the damage was not limited to her unit. The Board had known both of these things for years.

[148] And by May of that year the Board of Directors knew that the cause of the moisture had not been identified. It had later accepted the report of Lydale that the previous problems were not related to the plumbing leak identified much more recently, and counsel submits that that is why it did not follow up on the property manager’s recommendation to hire an engineer to do a thorough investigation into the cause of the leaking.

[149] But the Lydale advice was limited to the north wall – the wall that had been repaired in 2014 by ENS, the wall that Lydale had repaired again after the stucco stains were noticed.

[150] Accordingly, the issue she was trying to raise at the AGM was a serious one, and it was not related to a single unit. In hindsight, it seems clear that this should have been a broad discussion amongst the members of the condominium corporation, raised by the Board. It later resulted in a very significant cost to the condominium corporation as a whole.

[151] As it turned out, the complaints of leaking windows that Ms. Lauder had been advancing since 2014, at least, were a major problem. The cause had not been identified. From her perspective, complaints of leaks and mould were put aside by the Board whenever there was a

basis for doing so. The initial response was to try just to caulk, and when the first wall repair did not solve the problem, to caulk again.

[152] In hindsight, if the Board had retained an engineer to do a proper investigation as to why her windows (and apparently the windows on the two units above hers) were leaking, and had done repairs to the *east* wall as well as the *north* wall, much money would have been saved, and her unit would have been returned to normal far sooner.

Investigations Are Done

[153] Ms. Lauder retained legal counsel in early 2017. By letter of March 5, 2017, Ms. Lauder's legal counsel wrote to the condominium corporation and demand that it comply with its legal obligations. He asserted that it had failed to do so by, among other things, not maintaining the common property, and he threatened legal proceedings if a response were not received by March 17.

[154] The Board of Directors then retained legal counsel.

[155] Finally, in June of 2017 the Board of Directors retained Delyte Engineering Ltd., Perma Seal Windows and Doors Ltd., and RML General Contracting to perform destruction inspection by removing a portion of the interior drywall on the north wall in Ms. Lauder's master bedroom. Their findings were significant.

[156] Delyte and Perma Seal both submitted reports to the Board that stated that there were major problems. The work the engineers found to be necessary included these items:

- (a) All of the recommendations mentioned in Mr. Gord Gauvin's report (that is, Perma Seal's report) should be implemented;
- (b) Excavate the foundation starting at the north *and east wall* at the unit;
- (c) Patch and wrap the foundation with new dimpled membrane;
- (d) *Replace all the windows on the entire north and east walls;*
- (e) The north side *and east side* stucco of unit #108 and the floor immediately above it need to be stripped off; and
- (f) New wall framing for the affected north and east wall needs to be done for the main floor of unit #108 and the floor above it. Thereafter new stucco would be applied to both levels.

(My emphasis.)

[157] When the excavation was done, it was discovered that the weeping tile around the entire north wall and corners would need to be completely replaced.

[158] Perma Seal found that the windows were bowed, and apparently had not been installed properly, resulting in water penetration around them. Their report specifically said,

All window heads maintain a bow in the center - signs no reinforcing was used within the PVC frames. As water/condensate gets around/through/by the nailing fin, and into the rough opening, the bowed frame will channel water to the window center, down into the structure, to enter the condo in between the frame and after-market jamb extensions that are installed in two stepped reveal.

(My emphasis.)

[159] The recommendation to replace *all* windows was not a passing suggestion. It was specifically recommended or stipulated in these reports and repair specifications:

- (a) the Delyte Engineering report of 9th June, 2017, on page 2;
- (b) the Perma Seal report of June 12, 2017, on page 3 (which attaches a Fenestration Review of unit #108 that specifically shows the “east facing window in master bedroom”); and
- (c) the Delyte Engineering’s Specifications for Renovation of Walls and Windows, dated 15th June, 2017, on page 2.

[160] Eventually, the Board levied a substantial special assessment on the unit owners to cover the cost of the significant repairs that were required to the foundation, the window and the walls.

[161] Ms. Lauder paid her portion of the assessment in full before the due date for doing so.

Repairs Are Done

[162] The excavation commenced about July 17, 2017, and after the weeping tile work was added, construction was expected to be completed by September 13, 2017, including the interior repairs to Ms. Lauder’s unit.

[163] However, the work was not completed on that schedule. A report from Delyte Engineering on September 27, 2017 stated that the repairs to unit #108 had been started by then. The author forecast that the work in her unit was “expected to be totally completed and site vacated on or before October 13, 2017, weather permitting.”

[164] When these proceedings were started in June 27, 2018, the work had still not been completed.

Recommended Window Replacement Not Done

[165] Of significance is that both Perma Seal and Delyte Engineering specifically recommended replacing *all* of the windows in her unit. When the work was done, the window in her bedroom was not replaced. That has become the subject of further debate.

[166] I have not found evidence explaining why that window was not replaced in the course of repairs although its replacement was part of the repair specifications.

[167] That is, Perma Seal’s report was that *all* windows had been installed wrong (presumably in 1993 when the structure was built) and the deficiencies were funnelling water into the structure. This would explain the rot and mould.

[168] The master bedroom window is on the east wall. While significant work was done relating to the wood and the stucco on the east wall, the bedroom window was not replaced.

[169] Delyte’s report made a revealing comment. It says, “[T]he *perennial* effect of moisture finding its way into the unit has discolored the plywood and the stud causing patches of rot, with traces of dried water on the concrete floor.” (My emphasis.)

[170] So, if it were not already clear, this was a years-old problem. Perma Seal’s report seems to make it clear that the installation done in 1993 was wrong.

[171] It was not surprising that the caulking had not done the trick. The work done by ENS had not done the trick. And the repairs done by Lydale regarding the exterior stucco stain and the plumbing leak had nothing to do with the underlying problem, despite their advice to the Board that the continuing leaks were merely resulting from the new problem that they had fixed.

[172] When the work was otherwise done, Ms. Lauder complained that the east bedroom window had not been replaced and was still leaking. Delyte Engineering's report dated November 8, 2017 begins as follows:

We bring to the attention of the board to the present condition of the first east window of unit #108 which the occupier, Mary Jo, wants replaced.

[173] The report went on to say that its engineer had "passed the work" on the window, after learning that Ms. Lauder had complained to the contractor of water ingress while the work was being done.

[174] But the engineer was unable to see any water ingress because furniture was obstructing the view, and the contractor had told him that it was "fixed". This is apparently why the work was "passed."

[175] It was supposed to have been replaced, the Board had instructed the work to be done based on that specification, and the engineer knew that it had not been replaced.

[176] But that window was, for some reason, not replaced. The Delyte engineer had made that clear both in the November 8, 2017 report and also in subsequent reports when he recommended that it *not* be replaced until 2019, and then he extended that to 2024, as discussed below.

[177] By at least June 2018 (when these proceedings were commenced) Ms. Lauder was again complaining that it leaked. She had been complaining since 2017, as the engineer's report mentions.

[178] Nothing has been done since.

[179] Delyte admitted that it did not test the east window in the fall of 2017 (when this issue was addressed) because the weather did not allow it. Delyte also reported that the contractor, RML, was giving a two-year warranty on the bedroom window. (It is not clear to me why a contractor would give a two-year warranty on a window that it had not installed. Presumably, the warranty was to the repair that it says it did.)

[180] Ms. Lauder did not trust the contractor RML. Her comments in this regard are these: "The guarantee is not worth much if the contractor does not show up!" and,

I am not interested in the offer RML made regarding the East window. I do not want them back in my home after all the damage they did. This is supported by the problems the Board had getting RML to finish the outside work and the Board having to hire other contractors to fix the damage RML did.

[181] Delyte expressed the opinion in the fall of 2017 that RML had properly sealed the window and given the warranty, and therefore that the window could withstand the winter conditions of 2017 and 2018 (although Delyte had not tested it to see if it was secure), and that it should be replaced along with the others on the east side of the building in the spring or summer of 2019.

[182] No one has done an interior inspection of the window in her master bedroom since 2017. Perhaps there was the exterior inspection that the engineer reports it did in 2018. Ms. Lauder questions that.

[183] In summary on this important evidence,

- (a) the window had not been replaced as specified;
- (b) Ms. Lauder had told the contractor while he was repairing the unit that the window leaked, in 2017;
- (c) the engineer did not get a proper interior view;
- (d) he did not test it for leaks;
- (e) he knew that the window had not been replaced as specified, but he passed the work anyway on the contractor's advice that it had been "fixed";
- (f) he later reported that Ms. Lauder was complaining that the window had not been replaced (ignoring that it was supposed to have been replaced);
- (g) the window has not had an interior inspection since 2017; and
- (h) the Board knew that it was still leaking seven months later in June 2018.

[184] A later opinion from the engineer delayed the timeline for replacement. On June 16, 2019, Delyte Engineering stated that it had inspected the windows visually *from the exterior*, and that the windows all appeared serviceable. They recommended replacement in the spring of 2024, when they will be about 31 years old. In the meantime, Delyte recommended caulking.

[185] There was no interior inspection (even in 2017 the engineer simply relied upon the contractor's assertion that the window had been "fixed"), and there is no indication that Delyte was made aware that Ms. Lauder said in 2018 that the bedroom window was still leaking.

[186] As mentioned, I have seen no comment from Delyte that explains why the Perma Seal recommendation of replacing all of the windows, which Delyte had adopted and made part of the renovation specifications, was not followed, in light of the known bowing and water ingress.

[187] In reliance on the reports from Delyte, the Board has declined to replace (or repair) the master bedroom window. The Board has simply ignored Ms. Lauder's complaints about the fact that the window still leaks and that it was not replaced as it should have been - even after these proceedings were commenced.

[188] In her June 2018 affidavit Ms. Lauder said this:

Unfortunately, the work is not yet complete, and my unit is in worse shape now than before the repairs began. While the majority of my leaking windows have been replaced, and I am assured that the foundation issues have been corrected, the board refuses to replace the leaking window on the east wall in my master bedroom. Attached and marked as Exhibit "31" to my affidavit are true copies of photographs of the window, and the half inch gap between the frame and the casement.

The window still leaks, fogs up, and I can feel cold air coming in through the gaps. The experts' reports indicated that all the windows in my unit need to be replaced, and yet the board insists on waiting until spring of 2019. Meanwhile,

the Board wants me to allow the contractors to complete interior restoration work around the shoddy window, even though it will continue to leak and freeze up over winter.

(My emphasis.)

[189] The east window, in her bedroom, has still not been replaced, as of February 2021.

Summary of Recent Evidence

[190] Looking at this from the Board's perspective:

- (a) they had received a report from Perma Seal stating that all windows had to be replaced;
- (b) they had a report from the engineer Delyte saying the bedroom window, although not replaced, had been repaired properly, and had been inspected;
- (c) they had evidence in 2018 from Ms. Lauder under oath that it still leaked, and that there was 1/2-inch gap apparent, supported by photographs; and
- (d) rather than taking Ms. Lauder's complaint of continued leaking back to the engineer for proper inspection and recommendation, or having the contractor come back to repair it, or (better) replace the window, the leaking window has simply been left while the legal proceedings have carried on.

General Damages Claim

[191] Ms. Lauder's counsel asserts that the water damages to her unit, and the stress associated with the conflict, and the delays in getting the work done, have seriously impacted her health. He also asserts that she had had four surgeries in a nine-month period, while still making time for contractors stand for the unit. But she has not provided any detail or supporting documentation regarding those surgeries, or indicated that she has received any treatment for the stress.

[192] Her counsel urges the Court to take judicial notice of the fact that an older, retired, person forced to live in her bedroom, except for sleeping which she had to do on the living room couch, for about a year-and-a-half, would suffer significant stress-related consequences. She describes some in her affidavits.

Conflicts in the Evidence

[193] As I have mentioned, there is some debate over other details in the evidence, such as whether RML General Contracting repainted Ms. Lauder's unit 3 times, or whether they only barely painted it once.

[194] As mentioned, there is a conflict about whether Ms. Lauder was cooperating with the contractors. She adamantly denies this, and Ms. Wise' evidence to the effect that Ms. Lauder did not cooperate largely does not comply with Rule 13.18. If this were a trial, it is obvious that Ms. Wise could not give evidence that Ms. Lauder had not cooperated with contractors. At best, she could say that the Board's information was that she was not cooperating.

[195] In contrast, in Ms. Lauder's materials, she provides specific details of dates when she received demands for entry without notice (May 13, 2016, in addition to the 2014 in-the-shower experience); combined with threats by a Board member of charging her for expenses for water damage; specific dates of contacting Lydale, including names of an individual she spoke with

(Derek); a telephone call from Estate Properties Incorporated on August 24, 2016 at about 3:34 PM, demanding why she had denied Lydale entry to the unit and why she had not even contacted them yet, both of which were inaccurate, because she had spoken to Derek on July 26, 2016 at about 11:00 AM, her conversation on August 25th at about 8:00 AM with Lydale, leaving a message for Derek; and other communications.

[196] As to the conflicts in the affidavits, as I have mentioned, undocumented and largely non-detailed assertions of Ms. Lauder's alleged failure to cooperate are barely an answer to known facts.

Reliance on Reports

[197] Ms. Wise asserts that the Board relies on contractors and engineers to advise the Board so it can make decisions, and that the Board members have acted in good faith.

[198] Despite repeated complaints over the years, in writing, and her July 2015 letter setting out how unpleasant the whole experience was for her, the Board did not investigate the cause of the leaks until 2017. In 2014 it authorized the contractor EMS Environmental Services to do certain repair work. I accept that in 2014 there was some basis for not investigating further at that time. EMS had not recommended an investigation, and had not recommended any repair to the east wall.

[199] But the Board was aware early on that there was leaking in the master bedroom, which is against the east wall. She had told them the window was leaking on the wall on which work was not being done.

[200] It was only after legal counsel became involved three years later, in 2017, that an engineering and window suppliers' reports were done that demonstrated that some very significant work was required to both the north *and east* walls, structural in nature, and that the leak problem had existed for several years in the common property.

[201] As the ground floor occupant, it seems that Ms. Lauder was the primary victim of the leaky condo building, being effectively at the bottom of the waterfall, but she was not the only one affected.

[202] Members of a condominium board are substantially volunteers. In many cases they are truly volunteers, although here Ms. Lauder says that for this condominium they receive a per diem, meaning they get paid a modest amount for sitting on the Board.

Non-Communication

[203] In the meantime, the Board's response at each stage seems to have been to do the minimum. Sometimes it tried to reflect blame back to Ms. Lauder. It is said that she did not complain often enough given her evidence about continued leaking, or that she did not document every interaction, or that she did not allow entry by contractors.

[204] By March of 2014, the Board was clearly aware of leaking windows in unit 108, and after some early attempts at repairing it, it was told that the problem was more serious.

[205] In 2015 the Board said it would investigate, that a member would contact her, and told her to contact the Board if she had any questions. But no one contacted her and it did not investigate. When she did not have any questions in the meantime, the Board considered the matter closed. The matter sat, ignored, again, requiring further complaints from Ms. Lauder.

[206] No one suggested having an inspection done by an *engineer* to find out the cause of the moisture getting into the building causing rot and mould until the property manager encouraged it in 2016. But then the work on the north wall relating to a plumbing leak was thought to have corrected the problem.

[207] No proper investigation was done until after Ms. Lauder retained legal counsel and threatened to sue, in 2017.

[208] There are some other unfortunate interactions between Ms. Lauder and the Board that seem clearly to have affected trust. There was no apology (at least none shown in the evidence) about the shower incident, only an explanation that sometimes the Board has to enter in an emergency. On another occasion, in 2016, a Board member attended without notice and demanded entry, threatening that she would have to pay for repairs if she did not comply.

[209] Furthermore, when the repairs were finally begun, and Ms. Lauder had been complaining about the fact that she was unable to live properly in her unit because everything was wet all the time, and she had to move her furniture to the middle of the rooms as the photographs show, the Board deferred repairing her east window because they thought the window could withstand yet another year or two before being repaired.

[210] She has continued to complain about the leaking east window in her master bedroom since 2017. Despite new complaints being made in 2018, under oath, in legal proceedings, the Board has done nothing to address it. There is no indication that that important fact has been reported to the engineer, and there is no explanation why the engineer passed work that did not meet the stated specifications, despite the fact that Ms. Lauder specifically pointed out that failure in her affidavit.

[211] It has now been almost seven years since Ms. Lauder first complained of the leaking windows. One still leaks. There is no plan to replace it for another three years.

[212] And no one from the Board has ever actually apologized to Ms. Lauder (other than the expression of regret for disclosing her telephone number) – although as it turns out, she was right all along. There have been apologies to unit owners generally set out in the Board minutes for the delay in getting repairs done, but none specifically to her.

[213] Her complaints about leaking were valid, but her further complaints about continued leaking were not taken seriously after the Board made an initial effort at doing repairs.

[214] Nevertheless, she persisted. It seems obvious that had she not persisted, the leaking would have continued for much longer, no doubt causing more rot, mould and damage to the structure.

The Law

[215] The condominium corporation has statutory obligations set out in the *Condominium Property Act*. One central to the continued safe use of the property is the duty to keep the common property in a state of good and serviceable repair: section 37.

[216] In *Hnatiuk v Condominium Corporation No. 032 2411*, 2014 ABQ 22, Master Schlosser stated this at paragraph 9:

The statute and the by-law impose a specific obligation to maintain and keep the common property in a state of good and serviceable repair. In my view, section 37

and the corresponding by-law cannot be read to require the corporation only to preserve a state that may prove to be deficient, or to maintain the status quo, particularly if this might create a danger to the health and safety of the occupants. The statute and the by-law impose not only a duty to maintain, but *an obligation to correct deficiencies or, at the very least, to investigate and bring the conclusions to a meeting of the owners.*

(My emphasis.)

[217] The powers and duties of the corporation are to be exercised and performed by the Board of Directors of the corporation: section 28.2. Every member of the Board is required to exercise the powers and discharge the duties of the office of a member of the Board honestly and in good faith with a view to the best interests of the corporation: sub-section 28(2).

[218] In this case, the condominium corporation has not filed a Notice of Change of Directors in many years. Ms. Wise deposes that she is a member and is the current president. The minutes from the various meetings disclose who was thought to be a valid member of the Board at different times. Regardless of whether elections were properly held and minuted, subsection 28(9) provides that

All acts done in good faith by a board are, notwithstanding that it is afterwards discovered that there was some defect in the election or appointment or continuance in office of any member of the board, as valid as if the member had been properly elected or appointed or had properly continued in office.

[219] There is no evidence that anything that was done by the Board, as it was variously constituted from time to time, was done in bad faith. I accept the submissions by counsel for the condominium corporation that the Board members retained contractors, it acted quickly in response, at least in the first instance, and it had a basis for thinking that it had actually arranged for the correction of the leaking problem. The steps taken by those people who believe that they were or are directors are valid steps of the Board. (Although the Board should immediately bring its corporate annual filings up to date.)

[220] However, in my view the fact that the members acted in good faith is not a complete answer to the assertion that the Board acted oppressively or otherwise contrary to legislation. It is possible to misunderstand legal obligations or the facts in issue, or simply overlook an important factor without acting in bad faith, without acting dishonestly, and while trying to act in the best interests of the condominium corporation.

[221] Nonetheless, a Board decision may have the effect of being oppressive, or being unfairly prejudicial, or it may unfairly disregard the interests of one or more of the owners.

[222] Accordingly, while the word “oppression” in the section in the *Act* seems to suggest deliberate malfeasance and malice aforethought, that is not what the section requires, or what this application is about.

[223] The Courts are properly reluctant to interfere with a proper decision of a board of directors of a condominium corporation, but where improper conduct has taken place, the Court may grant any of the remedies set out in the legislation: **934859 Alberta Inc v Condominium Corporation No 0312180**, 2007 ABQB 640, at paragraph 55.

[224] At paragraphs 92 to 97 of that case, after considering earlier case law, Chrumka, J. discussed the meaning of “improper conduct”:

[92] In section 67 (1)(a) of the *Condominium Property Act* “improper conduct” means the conduct of the business affairs of the corporation or the exercise of powers of the board in a manner that is oppressive or unfairly prejudicial or that unfairly disregards the interests of an interested party. ...

[93] Oppression or oppressive conduct has been defined and discussed in a number of the cases cited above. It has been defined to be conduct that is burdensome, harsh or wrongful *or which lacks probity* or fair dealing.

[94] The term “unfairly prejudicial” has been defined to mean acts that are unjustly or inequitably detrimental.

[95] The term “unfairly disregards” may be defined as unjust and inequitable. Unfairly itself has been defined as “in an unfair manner, inequitably, unjustly”. Fair has been defined as “just, equitable, free of bias or prejudice, impartial”. Prejudice means “injury, detriment or damage caused to a person by judgment or action in which the person’s rights are disregarded: hence injury, detriment or damage to a person or a thing likely to be the consequence of some action”. Prejudicial means “*causing* prejudice; detrimental damaging “to rights, interests, etc.”

[96]

[97] The term ‘significantly unfair’ encompasses conduct that is oppressive, unfairly prejudicial or which unfairly disregards the interests of an interested party.

(My emphasis.)

[225] In *Owners Condominium Plan 7722911 v. Marnel*, 2008 ABQB 195 the Court was dealing with a decision of a board of directors that was inherently discretionary in nature, as to the alteration of the outside appearance of a unit. Shelley, J.’s decision, upholding the board’s decision, was an example of the Court deferring to a board decision.

[226] But the issues here are about safety and structure. This case is not about the outside appearance of the building or some other exercise of discretion. It is about an owner being unable to enjoy the use of her home due to the rotting of wood, leaking, and consequential damage to the interior resulting from a failure to maintain the structure over many years.

[227] The Board argues that repairs were started promptly and done within a reasonable time. That is the expectation: *Leeson v Condominium Plan No 992 5923*, at paragraph 25. Furthermore, the Board sought and received professional advice and followed a course of action, which has been said to be the proper approach: *Dykun v Cravenbrook Condominium Corporation 032 1893*, 2009 ABQB 104 (in that case rectifying problems created by a previous manager). However, there is no explanation for the failure to replace one of the windows and no indication that the engineer was told that that window continues to leak. That significantly erodes the explanation that the Board relied on the professional advice.

“*Improper Conduct*”

[228] The definition in sub-paragraph 67(1)(a) of the *Act* of “improper conduct” is disjunctive: its meaning is disjunctively listed in 6 sub-paragraphs. The first, sub-paragraph (i), is “non-compliance with this Act ... by a member of a board”.

[229] The second sub-paragraph (ii) defines “improper conduct as including “the exercise of the powers of the board in a manner that is oppressive *or* unfairly prejudicial to *or* that unfairly disregards the interests of an interested party”.

[230] The remedy for “improper conduct” in the condominium context is broader than an oppression remedy in corporate law: *Leeson v. Condominium Plan No. 9925923*, 2014 ABQB 20 at para. 15 and 16. I note that the definition of “improper conduct” includes both “oppression” and other alternative circumstances.

[231] “Either the cumulative results of the conduct complained of or a specific egregious act ultimately determines whether there is an actionable wrong” *per* Schlosser, M.C., in *Leeson* quoting *Condominium Law and Administration*, Carswell, vol. 2, (Loose leaf) Ch. 23 (T. Rotenberg).

[232] Master Schlosser has described section 67(1)(a)(i) as being a kind of “all terrain vehicle”: *Leeson*, at paragraph 20. By that expression I believe he meant that the definition allows the Court to get wherever it wants to go when the obligations under the Act have not been complied with. In my view, the entire section might properly be described as an “all terrain vehicle”. Subsection (2) lists a wide variety of potential remedies that the Court may order, and it then leaves the terrain open with the words “any other directions or make any other order that the Court considers appropriate in the circumstances.”

Analysis

[233] Each case stands on its own facts. Here, although the Board responded reasonably promptly, and had work done promptly after the first recorded complaints in 2014, the facts demonstrate a later shutting down of communications. No doubt the Board members became frustrated. They had, with some basis for doing so, believed that they had done what was necessary.

[234] They had, over time, received reports from a contractor that Ms. Lauder was not facilitating entry to effect repairs.

[235] However, alarms should have, in my view, caused them to re-consider matters on several occasions.

[236] After the 2014 ENS repair, when Ms. Lauder complained of more leaking, there should have been more of a response than simply a self-help caulking of some windows. It now seems clear that not only was the repair to the north wall ineffective because there had been no proper investigation done as to the cause of the leaking, the repair was *only* done to the north wall.

[237] Her email to the Board on July 25, 2014 specifically said:

The windows are leaking in the master bedroom, which were not leaking before
and I believe are not being repaired.

(My emphasis.)

[238] The members of the Board who found Ms. Lauder getting out of the shower may have been distracted by the awkwardness of the encounter, but they should have realized that a master

bedroom window that was leaking is on the east wall. That seems to have been forgotten in all future dealings with Ms. Lauder, the engineer, and the contractors.

[239] The window company, Perma Seal, realized that the windows were not only leaking on the north wall, but also the east wall, and Delyte initially adopted that recommendation, but the recommendation of replacing all the windows was not followed.

[240] In fact, it seems to have been ignored. Ms. Lauder specifically spoke of the east wall window, and the Perma Seal recommendation, in her evidence in this application, almost three years ago. The condominium board has simply ignored that evidence, pointing to the engineer's recommendation not to replace until 2019, and then his further recommendation not to replace until 2024.

[241] The Board has not responded to her evidence that the east wall window was to have been replaced and it was not.

[242] It is incomprehensible that the engineer would have made either of the recommendations about not replacing the window until 2019, or until 2024, had he been told in 2018 that her east wall window was still leaking. He did not do an interior inspection in 2017, or later when the deadline for replacement was recommended to be delayed. How could he tell, from the outside, if the window was leaking? The Board knew the window was leaking. Ms. Lauder had told them. But that's where the communication stopped.

[243] In 2016 the property manager had recommended hiring an engineer to look into what was looking like a long-standing problem, but when the contractor told them that the relatively minor plumbing leak repair on the *north* wall had solved everything, the Board did not consider the matter further. There is no record of having considered the fact that the east window was leaking.

[244] Real communications seem to have stopped long ago. The relationship had taken a serious downwards spiral in March of 2015 when the Board decided to tell her that the interior repairs were going to be at her expense.

[245] She did not respond to that letter in haste. The letter to her was dated March 20. She did not respond until July 15, 2015 and when she did she enclosed her draft letter written a year earlier. That letter spoke of a lack of respect by the Board and its contractors and the time she had wasted waiting for the contractors to show up, when they did not. It re-counted the surprise entrance when she was in the shower.

[246] Her July 20, 2015 letter said she thought that the Board members might benefit from reading her 2014 letter "to fully understand my frustration, disappointment, but more importantly That [she did] not feel safe and comfortable in [her] own home."

[247] There appears to have been no meaningful consideration of her perspective. The letter was described in the minutes as "listing grievances against the Board".

[248] The letter sent by the Board in reply did not apologize for telling her that she had to pay for her interior repairs, although it corrected the information. It did not apologize for wasted time waiting for contractors. It did not apologize for the surprise entry in 2014 – it purported to explain why it was done.

[249] The Board had said it would do an investigation. It did not.

[250] The Board said it would invite her to a meeting in 2015. It did not.

[251] When she did not take the initiative to contact them, the Board considered the matter closed.

[252] When the former president suddenly showed up unannounced as she was leaving for errands in 2016, he treated her disrespectfully, although she then allowed him access.

[253] In 2016, when the Board finally invited her to a meeting, she responded that she could not attend because (ironically, given the assertions of refusal to allow the contractor access) the contractor was going to be working in her unit at the same time. She invited the Board to come to her unit. They simply recorded in the minutes that she had failed to attend.

[254] It would not let her talk at the 2016 AGM. Her question was shut down on an improper basis – that it was a complaint that related to only one unit. The Board, it is clear, wanted to think that it had dealt with the problem. But the leaking did not relate to only one unit, it did not relate only to the north wall, and if the work that had been done had been effective, it only related to the north wall.

[255] The Board actually had a direct obligation to investigate and bring the concerns to the attention of the owners: *Hnatiuk*, above.

[256] The only conclusion that I can reach, based on a review of the minutes, correspondence and the narratives in the affidavits, is that from about 2015 onwards, the Board had simply stopped listening to what Ms. Lauder was saying. As Paul Simon wrote in *The Sound of Silence*, they had become “people hearing without listening.”

[257] Even when her affidavits filed in this application made it clear that although other windows had been replaced, the bedroom/east wall window had not, when Perma Seal had specifically said it should be, and that it was still leaking, no effort by the Board or its engineer (who I conclude was not told of the continued leaking) to inspect and see if what she was saying was correct.

[258] They should have. As we now know, she had been correct all along.

[259] Clearly, the common property has not been maintained as it should have been. The current Board members may not have been involved in earlier failings, but it is clear that the north and east walls had been deteriorating for many years, probably since construction in 1993. Ms. Lauder’s complaints in 2014 should have led to a proper investigation, although I accept that the Board was initially trying to deal with the problems based on the limited information that it had at the time.

Conclusion

[260] As to sub-paragraph (ii), I do not find that the Board was deliberately prejudicial in their dealings with Ms. Lauder. However, their actions had the effect of being oppressive. Furthermore, the failure to take her concerns as seriously as it ought to have done shut down the Board’s consideration of her information. That unfairly disregarded her interests. The fact that the various members were acting in good faith throughout is not a complete answer to the application.

[261] Nonetheless, the cumulative effect of the Board’s actions and inaction amount to a proper claim of improper conduct.

[262] Accordingly, I find that improper conduct has taken place, Ms. Lauder is an “interested party” entitled to advance a claim resulting from improper conduct, that the condominium corporation is in violation of the *Condominium Property Act*, and the Court has authority under section 67(2) to direct remedies to try to compensate Ms. Lauder and to try to minimize further harm.

Remedies

[263] The remedies are as follows:

- (a) the condominium corporation is directed to retain the services of a qualified building repair contractor to replace the east window in unit #108, and perform such repairs as may be necessary on any other windows in unit #108 that continue to leak, including performing all related removal and repair work as in necessary to remove the existing window (or windows as may be necessary) and effect proper installation of the replacement window or windows;
- (b) the condominium corporation is directed to retain the services of a qualified building repair contractor to repair any damages to the master bedroom interior finishings in unit #108 that appear to have resulted from continued window leaking in the master bedroom, including drywall repair, window casing repair, flooring repair or replacement, painting, and associated electrical wiring and outlet repairs, if any;
- (c) all such work shall be completed as soon as reasonably practicable but, in any event, no later than August 31, 2021 (and all such work shall involve the repair to any further damage that may occur as a result of leaking up to the time of repair);
- (d) the window replacement and repairs shall be at the expense of the condominium corporation; and
- (e) Ms. Lauder is awarded the sum of \$5,000 in general damages payable by the condominium corporation for the inconvenience and stress that Ms. Lauder has had to suffer as a result of the delays in resolution.

[264] Ms. Lauder is entitled to an award of costs for this application. She has asked for solicitor client costs. I make no ruling at this time on costs. If the parties are not able to agree on the award of costs, they may make representations in writing briefly summarizing their positions and send them to the Court of Queen’s Bench in Edmonton, Masters Chambers, to my attention for a ruling.

Heard on the 4th day of February, 2021.

Dated at the City of Edmonton, Alberta this 24th day of February, 2021.

A.R. Robertson, Q.C.
M.C.C.Q.B.A.

Appearances:

Roberto Noce, Q.C. and Michael Gibson (no appearance by Mr. Gibson)
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