IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata EPS401 v. Findlay,* 2023 BCSC 500

Date: 20230330
Docket: 162338
Registry: Victoria

Between:

The Owners, Strata EPS401

Plaintiffs

And

Bruce Findlay and GPI Developments Inc.

Defendants

Before: The Honourable Justice Majawa

Reasons for Judgment

Counsel for the Plaintiffs:	J.M. Aiyadurai
Appearing in person:	B.R. Findlay
No other appearances	
Place and Dates of Trial:	Victoria, B.C. February 1-3, and 6-7, 2023
Place and Date of Judgment:	Victoria, B.C. March 30, 2023

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OVERVIEW

[1] This is an action brought by a strata corporation on behalf of the owners of a strata development. The claim is for damages in respect of various misrepresentations that the owners say the real estate developer made in documents required to be filed with a statutory authority and that were provided to the owners in advance of purchasing their individual units.

[2] The action was brought against GPI Developments Inc. ("GPI") and one of its directors, Bruce Findlay, in his personal capacity. GPI has since been dissolved from the corporate registry and did not file a response to civil claim. Mr. Findlay filed a response to civil claim and represented himself at the trial.

[3] This action raises the following issues:

1) Does the strata corporation have standing to commence and prosecute this action on behalf of the individual owners?

2) Did GPI and/or Mr. Findlay make misrepresentations in the statutorily required disclosure documents provided to the strata development unit's owners?

3) If misrepresentations were made, what damages are the defendants liable for?

[4] For the reasons that follow, I have concluded that this claim was properly commenced and prosecuted in the name of the strata corporation on behalf of the owners. I have further concluded that Mr. Findlay is liable for the damages resulting from certain misrepresentations made in the disclosure documents.

BACKGROUND FACTS

[5] GPI was the developer of a residential project located at 218 Bayview Avenue, Ladysmith, BC. The development is known as Seaview. GPI was wholly-owned by Generation Properties Inc., and at all times Mr. Findlay was a shareholder

of Generation Properties Inc. At all material times, Mr. Findlay was also a director of GPI.

[6] GPI purchased Seaview, which consisted of 44 individual rental suites. GPI's intention was to convert the apartment building into a strata development, undertake certain renovations to the individual suites and the common areas, and sell the strata units to investors who sought to purchase the units as a source of rental income.

[7] In November 2010, Meicor Property Management ("Meicor") was hired by GPI, at the direction of Mr. Findlay, to be the property manager for Seaview. Meicor had worked with GPI as a property manager on other real estate development projects in the past.

[8] On April 12, 2011, GPI deposited its strata plan for Seaview with the Land Title Office and Strata Plan EPS401 (the "Strata Corporation") came into existence shortly thereafter. The first strata units were sold by GPI to an individual purchaser in May 2011. The remaining strata units were sold by GPI to individual purchasers between May 2011 and December 2011.

[9] GPI entered into sales and marketing agreements with Strategic Investment Realty Ltd. ("Strategic") and Street Smart Investing Ltd. ("Street Smart") (collectively the "Marketing and Sales Agents") to sell the strata lots in Seaview. Prospective purchasers were provided with a marketing brochure prior to entering into a contract of purchase and sale (the "Brochure"). The Brochure was provided to prospective purchasers by the Marketing and Sales Agents. The Brochure contained information on the Seaview development, including projected rental income, renovations proposed to be completed by GPI and other matters that GPI committed to completing. The Brochure contained a memorandum signed by Mr. Findlay that stated that GPI would undertake common area and exterior renovations, including a new asphalt parking lot and line painting, and the replacement of the entrance communication system. The Brochure also indicated that GPI would establish a contingency reserve fund with an initial capitalization of $55,000. Mr. Findlay, and

GPI, knew that the information it provided to the Marketing and Sales Agents by way of the memorandum would likely be made known to prospective purchasers as part of the process of generating sales interest in the Seaview project.

[10] GPI created a disclosure statement (the "Disclosure") in respect of the Seaview development and filed it with the Superintendent of Real Estate as it was required to under s. 14 of the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41 [*REDMA*]. The Disclosure was dated September 22, 2010, and is just under 200 pages in length. It states that Mr. Findlay has extensive experience as a developer and references his more than 15 years experience and involvement in the development of over 6000 units. The Disclosure was signed by Mr. Findlay both in his personal capacity and on behalf of GPI. The Disclosure was provided to prospective purchasers before they entered into a contract to purchase a strata unit at Seaview. The Disclosure is incorporated by reference into each and every contract of purchase and sale between GPI and the original purchasers of the Seaview strata units. There was no other disclosure statement for Seaview created or filed at any time.

[11] The Disclosure contains a document entitled Property Condition Assessment and Reserve Fund Study created by an engineering company on behalf of GPI (the "Property Assessment and Fund Study"). The Property Assessment and Fund Study forms part of the Disclosure. The engineering company was dealing with Mr. Findlay on behalf of GPI while preparing the Property Assessment and Fund Study.

[12] Like the Brochure, the Disclosure refers to a one-time initial contribution of $55,000 to be made by GPI to the Strata Corporation's contingency reserve fund. The Disclosure also states that GPI will replace Seaview's plumbing supply lines in the common hallway on the main floor as part of the 2010/2011 renovation program. The Disclosure further states that the asphalt parking surface is at the end of its expected life and needs to be replaced, and that the resurfacing and repainting of parking lines would be done as part of the renovation program. The projected cost for resurfacing the parking lot is referenced as being $45,000. The Disclosure also

refers to the replacement of the front entrance communication system as being part of the renovation program to be completed by GPI. The cost of replacing the entrance communication system is referenced as being $4,000.

[13] The Disclosure, at Schedule I, also contains a document entitled “Reno Sheet” which further sets out the proposed renovations to Seaview’s common areas. The proposed renovations listed include a new asphalt parking lot and painted lines, and new common area plumbing supply lines, among other things.

[14] It is common ground that GPI did not make a $55,000 contribution to the Strata Corporation’s contingency reserve fund. It is also common ground that GPI did not cause the parking lot to be repaved, nor did it cause the common area plumbing supply lines to be replaced, and nor did GPI cause the entryway communication system to be replaced.

[15] GPI was dissolved on May 25, 2015. This lawsuit was commenced on June 3, 2016. The plaintiff is the Strata Corporation which seeks damages in respect of the representations made by GPI that were not fulfilled. Mr. Findlay and GPI are the named defendants. The plaintiff seeks damages from Mr. Findlay personally pursuant to s. 22(3) of *REDMA*.

STANDING TO COMMENCE THE APPLICATION IN THE NAME OF THE STRATA CORPORATION

[16] A preliminary issue of standing must be determined before the matter is considered on its merits.

The Parties’ Positions

[17] The plaintiff in this action is “The Owners, Strata EPS401”. There are no individual owners of strata units in Seaview who are listed as a plaintiff. The Strata

Corporation argues that the action is properly brought pursuant to s. 171 of the *Strata Property Act*, SBC 1998, c. 43 [*SPA*]. The relevant portions of s. 171 read:

> **171** (1)The strata corporation may sue as representative of all owners, except any who are being sued, about any matter affecting the strata corporation, including any of the following matters:
>
> (a)the interpretation or application of this Act, the regulations, the bylaws or the rules;
>
> (b)the common property or common assets;
>
> (c)the use or enjoyment of a strata lot;
>
> (d)money owing, including money owing as a fine, under this Act, the bylaws or the rules.
>
> (2)Before the strata corporation sues under this section, the suit must be authorized by a resolution passed by a 3/4 vote at an annual or special general meeting.

[18] It is common ground that when this action was commenced in June 2016, there had been no 3/4 vote resolution passed at an annual or special general meeting of the Strata Corporation to authorize the commencement and prosecution of the action as is required by s. 171(2). Rather, a 3/4 resolution authorizing the commencement and prosecution of the action was not passed until the Strata Corporation's annual general meeting on June 28, 2021. The plaintiff submits that s. 173.1 of the *SPA* authorizes the retroactive approval of this action. Section 173.1 of the *SPA* reads:

> **173.1** (1)The failure of a strata corporation to obtain an authorization required under section 171 (2) or 172 (1) (b) …
>
> (a)does not affect the strata corporation's capacity to commence a suit or arbitration that is otherwise undertaken in accordance with this Act,
>
> (b)does not invalidate a suit or arbitration that is otherwise undertaken in accordance with this Act, and
>
> (c)does not, in respect of a suit or arbitration commenced or continued by the strata corporation that is otherwise undertaken in accordance with this Act, constitute
>
> (i)a defence to that suit or arbitration, or

> (ii)an objection to the capacity of the strata corporation to commence or continue that suit or arbitration.
>
> …
>
> (3)This section is retroactive to the extent necessary to give full force and effect to its provisions and must not be construed as lacking retroactive effect in relation to any matter merely because it makes no specific reference to that matter.

[19] Mr. Findlay submits that s. 171 of the *SPA* does not authorize the Strata Corporation to commence an action for damages for misrepresentation under the *REDMA*. He argues that s. 171 only operates to authorize a strata corporation to commence actions against contractors or tradespeople, for example with respect to claims for leaky condos, faulty windows, or other construction deficiencies.

[20] Mr. Findlay further argues that, if s. 171 does authorize the Strata Corporation to commence the action for damages for misrepresentation pursuant to the *REDMA*, the Strata Corporation nonetheless does not have standing to commence this action because it did not comply with the 3/4 vote requirements of s. 171(2) of the *SPA* and that s. 173.1 does not cure this defect.

Analysis

[21] For the reasons that follow, I have concluded that the Strata Corporation has standing to commence and prosecute this action.

[22] In my view it was appropriate for the Strata Corporation to commence an action as a representative of the individual owners. In *Strata Plan LMS 1468 (Owners) v. Reunion Properties Inc.*, 2002 BCSC 929, this court held, at para. 28, that s. 171 “now permits representative actions in respect of claims for strata lots as well as claims concerning common areas.”

[23] When this lawsuit was commenced, all of the owners of the strata units in Seaview were the original purchasers who purchased their units from GPI. Section 22 of the *REDMA* provides that a purchaser of a development unit is deemed to have relied upon a misrepresentation made in a disclosure statement, and that purchaser has a right of action for damages against the developer and a number of

other individuals, including the director of the developer and persons who signed the disclosure statement. There is no evidence that would rebut the presumption of reliance in this case. Sections 22(1) and (3) of the *REDMA* read:

> **22** (1)In this section:
>
> "developer" means a developer that is required by the Act or regulations to
>
> (a)file a disclosure statement with the superintendent, or
>
> (b)provide a disclosure statement to a purchaser
>
> in respect of a development property;
>
> "director" means a director of a developer at the time that the developer
>
> (a)filed a disclosure statement with the superintendent, or
>
> (b)provided a disclosure statement to any purchaser
>
> in respect of a development property.
>
> …
>
> (3)If a developer files a disclosure statement respecting a development property and the disclosure statement contains a misrepresentation, a purchaser of a development unit in the development property, whether the purchaser received the disclosure statement or not,
>
> (a)is deemed to have relied on the misrepresentation, and
>
> (b)has a right of action for damages against
>
> (i)the developer,
>
> (ii)a director,
>
> (iii)a person who consented to be named, and was named, in the disclosure statement as a developer or director,
>
> (iv)a person who authorized the filing of the disclosure statement, and
>
> (v)a person who signed the disclosure statement.

[24] It is common ground that the Seaview strata units are development units under the *REDMA*. It is also common ground that GPI was the developer, and that

Mr. Findlay was a director of GPI and also the person described in ss. 22(3)(b)(iii), (iv) and (v) of the *REDMA*.

[25] While I was not directed to any authority that definitively decides the ability of a strata corporation to commence an action as a representative of the owners for claims made under the *REDMA*, I am satisfied that such claims fall under s. 171 of the *SPA.* In *Owners v. Lark Odyssey Project Ltd.*, 2008 BCSC 316 [*Lark Odyssey Project BCSC*], the defendants applied to strike on the basis of standing, arguing that *REDMA* claims are personal claims of original purchasers and do not fall within the scope of either s. 171 or s. 172 of the *SPA*. This court dismissed the application to strike and in doing so referenced *The Owners, Strata Plan LMS 1463 v. Krahn Bros. Construction Ltd.*, 2003 BCSC 903, where the court stated at para. 19:

> [19] … [w]ith respect to the claim pursuant to s. 75 of the *Real Estate Act*, I am satisfied that this raises a proper cause of action and is not frivolous. I do not see why the plaintiff strata corporation cannot bring this action pursuant to the s. 75 of the *Real Estate Act* if it is properly authorized.

Section 75 of the now repealed *Real Estate Act*, R.S.B.C. 1996, c. 397 was the predecessor to s. 22 of the *REDMA* and provided for individual causes of action by purchasers for misrepresentations made in a disclosure statement (or a “prospectus” as it was called under the *Real Estate Act*).

[26] The defendants in *Lark Odyssey Project BCSC* unsuccessfully appealed: *Strata Plan LMS 1564 v. Odyssey Tower Properties Ltd.*, 2008 BCCA 509. In dismissing the appeal, the Court stated:

> [4] In the impugned paragraphs, the Strata Corporation advances claims on behalf of strata lot owners that disclosure statements issued by Odyssey contained material misrepresentations. These include failure to disclose Phase I Tower design and construction deficiencies and defects. The paragraphs in issue also allege misrepresentations with respect to Phase II, and that consequently the owners have lost the benefit of the contribution to common expenses and facility costs that they reasonably anticipated from Phase II owners as well as the benefit of additional common facilities to have been constructed as part of Phase II. The Strata Corporation on behalf of the owners claims damages for misrepresentation and breach of the disclosure statement…

…

> [9] The *Strata Property Act* provisions replaced s. 15(7) of the *Condominium Act*, R.S.B.C. 1996, c. 64 that limited a strata corporation's capacity to sue to matters affecting the common property and facilities or its other assets. In *Strata Plan LMS 1328 v. Marco Polo Properties*, 2000 BCSC 776, 17 C.B.R. (4th) 149 at para. 44, Holmes J. observed that the wider and more general capacity to sue in the *Strata Property Act* stands in stark contrast to the limited and specific capacity of the predecessor statute. The *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 8 directs that the new provisions are to be given "such fair, large and liberal construction and interpretation as best ensures the attainment" of the objects of the Act.
>
> …
>
> [12] The issue before us is whether the chambers judge erred in concluding that there is at least an arguable case that the respondent has standing to bring the action on behalf of the owners. I am not persuaded that there was any error by the chambers judge in reaching that conclusion. It is at least arguable that the financial interests of owners in shared expenses and their benefit from additional common facilities affects their use and enjoyment of their strata lots. I think that the standing of the strata corporation to bring claims for disclosure statement misrepresentation on behalf of owners is also arguable.
>
> [Emphasis added.]

[27] It does not appear that this Court has had the opportunity to further consider whether the strata corporation in *Lark Odyssey Project BCSC* had standing to bring a claim on behalf of all of the owners for misrepresentations made in a disclosure statement. This is because the individual owners were ultimately added as plaintiffs in *The Owners, Strata Plan LMS 1564 v. Odyssey Tower Properties Ltd.*, 2009 BCSC 1024 and there are no further reported decisions in respect of that case.

[28] In my view, the language of s. 171 of the *SPA* supports a conclusion that a strata corporation can commence an action as a representative of the owners for claims made under the *REDMA*. The language of s. 171 of the *SPA* suggests that the capacity of a strata corporation to pursue an action on behalf of the owners is broad and would include an action commenced under the *REDMA*: "the strata may sue… about any matter affecting the strata corporation…" Furthermore, the word "sue" is broadly defined in s. 1 of the *SPA* to mean "the act of bringing any kind of

court proceeding". Mr. Findlay's argument that s. 171 of the *SPA* only operates to authorize a strata corporation to commence actions against contractors or tradespeople is entirely inconsistent with the words of the *SPA.*

[29] Furthermore, the subject matter of this lawsuit falls squarely within the enumerated types of matters listed in s. 171(1)(b) and (c) of the *SPA* as matters in respect of which a strata corporation may pursue as a representative action. Seaview's owners' financial interest in the Strata Corporation's contingency reserve fund is a matter that affects the common property and assets of the Strata Corporation. Pursuant to ss. 91 and 92(b) of the *SPA,* a strata corporation is responsible for establishing and managing a contingency reserve fund for common expenses that occur less frequently than once a year or that do not usually occur. Section 1 of the *SPA* defines "common expenses" to mean expenses that relate to common property and common assets of the strata corporation. Consequently, I find that GPI's representations to make an initial contribution to the Strata Corporation's contingency reserve fund are properly the subject of a representative action under s. 171(1)(b) of the *SPA.*

[30] It was common ground at trial that the parking lot, the common area plumbing lines, and the entranceway communication system are all within the common areas of the Strata Corporation. In my view, the representations made in the Disclosure about repaving the parking lot, the replacement of the common area plumbing lines, and the replacement of the entranceway communication system are all matters that affect the Strata Corporation's common property or common assets pursuant to s. 171(1)(b) of the *SPA*. Moreover, the parking lot, the common area plumbing lines, and the entranceway communication system are also matters that affect the use and enjoyment of strata lot pursuant to s. 171(1)(c).

[31] I agree with the plaintiff that the failure of the Strata Corporation to obtain a 3/4 vote approving the action under s. 171(2) does not invalidate the plaintiff's claim and cannot be a defence to this action; nor can it be the basis of an objection to the capacity of the Strata Corporation to commence or continue the action. In my

opinion, the plain words of s. 173.1 are a complete answer to this issue. I find support for this conclusion from the Court of Appeal decision in *The Owners, Strata Plan LMS 2940 v. Squamish Whistler Express and Freight*, 2010 BCCA 74, at para. 33:

> [33] I agree with Edwards J. who described the effect of s. 173.1 in *Dockside Brewing Co. v. Strata Plan LMS 3837,* 2005 BCSC 1209, 46 B.C.L.R. (4th) 153, as follows:
>
> > [15] Section 173.1 of the *SPA* addresses the failure of a strata corporation to obtain the 3/4 authorization required under s. 171(2). It provides that such failure does not constitute "a defence" to any suit or arbitration which requires 3/4 authorization, nor "an objection" by a defendant to "the capacity of a strata corporation to commence or continue any suit or arbitration" not undertaken in accordance with the *SPA*.
> >
> > [16] Section 173.1 is retroactive and ensures that any unauthorized suit or arbitration is not defeated by a defendant to such a suit or arbitration for failure of a strata corporation to obtain the required 3/4 authorization. …

[32] Finally, Mr. Findlay argues that the Strata Corporation is unable to proceed with the action because at the time when the 3/4 vote resolution was eventually passed in June 2021, Seaview's owners were not all the original owners who purchased their units from GPI. I do not accept this argument. When this action was commenced in June 2016, Seaview's individual owners were all the original purchasers who had purchased their units from GPI. They knew the action was going to be commenced and they knew that it had been commenced, as reflected in the annual general meeting minutes which were distributed to the owners. In any event, s. 171 does not provide that an action may be commenced in the name of the Strata Corporation, or a 3/4 vote must be taken, only when all of a strata's unit owners are the owners that originally purchased the units from the developer. Had the legislature intended this to be the case, it would have said so.

MISREPRESENTATIONS

[33] Pursuant to ss. 14(1)(a) and (2)(b) of the *REDMA*, the Disclosure made by GPI and Mr. Findlay in respect of Seaview must "without misrepresentation, plainly disclose all material facts". A material fact is defined in s. 1 of the *REDMA* to include

"a fact, or a proposal to do something, that affects, or could reasonably be expected to affect, the value, price, or use of the development unit or the development property" (emphasis added).

[34] It was common ground at trial that references in the Disclosure that GPI would make an initial payment of $55,000 to the contingency reserve fund, would repave the parking lot, and would replace common area plumbing lines were each a "material fact" regarding the Seaview development as defined in *REDMA.*

[35] Mr. Findlay concedes that a representation that the front entranceway communication system would be replaced would be a material fact; however, he disputes that the Disclosure contains a representation that the communication system would in fact be replaced. He bases this position on the fact that the Reno Sheet does not reference the replacement of the entranceway communication system. Instead, the only reference in the Disclosure in this regard is found in the Property Assessment and Fund Study which is incorporated into the Disclosure.

[36] Although it does not appear on the Reno Sheet, I find that the Disclosure does in fact contain a representation that the front entranceway communication system would be replaced. The Property Assessment and Fund Study says that Mr. Findlay stated that the front entranceway communication system would be replaced as part of the renovation program. The Property Assessment and Fund Study is incorporated in the Disclosure. Mr. Findlay on behalf of GPI, and in his personal capacity, reviewed the Disclosure carefully before signing it and should have instructed the engineering company to remove the statement if it was untrue or inaccurate.

[37] Mr. Findlay confirmed that the items listed in the Reno Sheet were obligations that GPI intended to fulfill at the time the Disclosure was filed despite the presence of a "draft" watermark on the Reno Sheet in the filed Disclosure. Mr. Findlay concedes that: no contribution of $55,000 was made by GPI to the Strata Corporation's contingency reserve fund; GPI did not repave the parking lot; GPI did

not replace the common area plumbing supply lines; and that GPI did not replace the entranceway communication system.

[38] Nonetheless, Mr. Findlay argues that no misrepresentation was made with respect to these obligations because he and GPI honestly intended to undertake those renovations at the time the Disclosure was signed. Therefore, he says, at the time the Disclosure was signed it did not contain any misrepresentations.

[39] I accept that Mr. Findlay and GPI honestly intended to complete the renovations listed in the Disclosure at the time it was signed and filed. However, this does not mean that the Disclosure was free of misrepresentations in respect of the promises to complete the renovations in the future. The problem with Mr. Findlay's argument is that no developer would be found to have made a misrepresentation in a disclosure statement about "a proposal to do something" if they honestly intended to do that something at the time the Disclosure was signed. Mr. Findlay and GPI's intent at the time the Disclosure was signed would be relevant if the plaintiff's claim was for fraudulent misrepresentation; however, the plaintiff's claim is not framed in this manner.

[40] Moreover, s. 22(3) of the *REDMA,* which establishes liability for misrepresentations made in a disclosure statement, does not require that a misrepresentation be made fraudulently. Rather, the *REDMA* requires developers such as GPI to disclose material facts to prospective purchasers, including proposals to do things in the future, and creates liability for the developer, and certain individuals including directors and individuals who sign a disclosure statement containing misrepresentations. In my view, liability for misrepresentations under s. 22(3) of the *REDMA* must be applicable to all material facts in a disclosure statement, including those that relate to promises to undertake things in the future. If those promises are not met, then the disclosure contains a misrepresentation. Parties are free to contractually determine what statements in a disclosure are material and what statements are not; however, there are no such contractual exclusions in the case at hand.

[41] Mr. Findlay did not plead, nor did he refer to in his written submissions, any of the defences set out in ss. 22(5) – (8) of the *REDMA*, and in any event, none of those defences have been established on the evidence.

[42] I will briefly address two further points that were raised during submissions. The first was raised by Mr. Findlay. As I understand his argument, while he admits that GPI did not make the promised $55,000 initial contribution to the contingency reserve fund, he states that he should not be liable for this amount because GPI met its statutory obligation to contribute at least 5% of the Strata Corporation's estimated operating budget. I accept that GPI's contribution of $7,500 in 2011 met its statutory obligation as provided for in ss. 12(1) and (2) of the *SPA*. However, the representation made in the Disclosure was that an initial contribution of $55,000 would be made. The fact that this far exceeds GPI's statutory obligation does not negate the fact that GPI promised to make this contribution and did not do so.

[43] The second issue is in respect of whether the plaintiff commenced the action within the two-year limitation period provided for in the *REDMA*. Section 22(9) of the *REDMA* reads:

> An action for damages under this section may not be commenced more than 2 years after the misrepresentation on which the action is based first comes to the knowledge of the purchaser.

[44] I have no trouble in concluding that the plaintiff's action was commenced within the time period required by the *REDMA*. While the renovations were not completed in 2011 as the Disclosure suggested they would be, Mr. Findlay, on behalf of GPI, repeatedly assured the Strata Corporation and Meicor that the renovations referred to in the Disclosure would be completed after 2011. The owners initially accepted the delay. In an email from Mr. Findlay to Meicor in September 2012, Mr. Findlay assured Meicor that the $55,000 reserve fund contribution would be made upon completion of all the common area renovations. The common area renovations include the asphalt repaving and re-piping of the common area plumbing system. The last written communication from Mr. Findlay in evidence in this respect is an email exchange that occurred between Mr. Findlay and Larry

McGuinness, a member of the Strata Corporation, on May 26 and 27, 2014. In those emails, Mr. Findlay assures Mr. McGuinness that GPI intended to complete its remaining obligations (i.e. the outstanding common area renovations) “in the summer”. Mr. Findlay testified that he understood that to mean between June 21 and September 21, 2014. Furthermore, Mr. Findlay never told anyone at the Strata Corporation or at Meicor that GPI did not intend to carry through with these obligations; in fact, Mr. Findlay testified that it remained GPI’s intention to complete those obligations right up until the time GPI was dissolved in May 2015.

[45] Given these communications, it was reasonable for the Strata Corporation to have assumed that the outstanding renovations would be completed by the end of summer 2014 and the deposit to the contingency reserve fund would be made shortly thereafter. Consequently, I find that the Strata Corporation first had knowledge that the Disclosure contained misrepresentations about the contribution to be made to the contingency reserve fund and the outstanding common area renovations by September 21, 2014. This is when the misrepresentation crystalized because this is when it became clear that those promises would not be fulfilled. This action was commenced on June 3, 2016, which is within two years of that date, and consequently, the action was filed within the limit provided in s. 22(9) of the *REDMA.*

Conclusion

[46] In the present case, I find that the Disclosure contained misrepresentations in respect of GPI’s commitment to make the initial contribution of $55,000 to the contingency reserve fund, to replace the asphalt in the parking lot and repaint the lines, to replace the main floor common area plumbing pipes, and to replace the entranceway communication system.

DAMAGES

[47] The plaintiff seeks damages in respect of the misrepresentations found in the Disclosure pursuant to s. 22 of the *REDMA*. Before I discuss the amount of damages to be awarded, I will address what I understand to be Mr. Findlay’s

argument in respect of his defence to the quantum of damages awarded as well as a mitigation argument.

The Defendant's Position on Quantum of Damages

[48] As I understand his argument, Mr. Findlay submits that GPI went "above and beyond" in other aspects of its development of the Seaview project and that the extra expenses that it incurred in doing so should serve to offset any damages that are to be awarded to the plaintiff. Mr. Findlay tendered evidence that GPI completed approximately $87,000 in renovations that were not detailed in the Disclosure and I accept that this was the case.

[49] I also accept that GPI paid in excess of $130,000 more to Seaview's owners than it was obliged to under a short-term rental fund agreement or "rental top-up program" as it was often referred to at trial. The rental top-up program was implemented by GPI as a means of providing Seaview's purchasers with the equivalent of rental income lost due to other renovations undertaken at Seaview (a considerable renovation of the interior of the individual suites). The short-term rental fund agreements entered into with the individual purchasers provided a maximum amount to be paid as a rental top-up; that maximum was based on a calculation done by GPI and Mr. Findlay based on their previous experience.

[50] I am of the view that the excess rental top-ups paid by GPI and the renovations that were completed which were not referenced in the Disclosure cannot be used to set-off any damages awarded for misrepresentations in the Disclosure. First, Mr. Findlay's response to civil claim, which was filed when he was represented by counsel, does not plead a defence of set-off; it simply mentions that excess amounts of rental top-ups were paid in the material facts section. This would not normally be sufficient to enable Mr. Findlay to argue a set-off defence at trial. However, counsel for the plaintiff anticipated the argument and provided submissions on the point and I have considered it on its merits.

[51] GPI's decision to pay in excess of $130,000 more in rental top-ups than it was obligated to was GPI's unilateral decision. Mr. Findlay testified that GPI made these

excess payments because the units were taking longer to sell than was expected when the original calculations were made and that it was the "right thing to do". He blames the delay in selling the units on Meicor's property managers and the Sales and Marketing Team. There was evidence which also supports a finding that the delays in selling the units were also partially attributable to delays in the completion of renovations.

[52] However, at the end of the day, the reason for the delay does not matter. This is because there was no trade that contemplated excess rental top-ups would be made to the owners in exchange for GPI not completing the promised common area renovations or the contribution to the contingency reserve fund. The same can be said in respect of the $86,000 in renovations that were completed but were not listed in the Disclosure. At no time did Mr. Findlay, or anyone on behalf of GPI tell the owners, the Strata Corporation, or Meicor that the additional top-ups and the extra renovations would be done in lieu of the promises made in the Disclosure that are at issue in this matter. There was no indication whatsoever that accepting these payments and additional renovations would excuse GPI from completing the promises it made in the Disclosure. There is simply no connection between them.

[53] I accept that GPI was saddled with significant debt and ran out of money. I also accept that GPI's decisions to continually pay rental top-ups in excess of its contractual obligations, which it deemed "the right thing to do", was a poor business decision and ultimately contributed to the company's demise. It does appear that Mr. Findlay, on behalf of GPI, was trying to do what he thought was the "right thing" at the time, given the circumstances he found himself in. Unfortunately, this decision, no matter how well intentioned, cannot operate as defence to an award of damages for misrepresentation.

[54] The issue of mitigation was also raised during trial. As with the defence of set-off, the response to civil claim does not plead that the plaintiff failed to mitigate its damages. However, it became clear throughout the course of the trial that Mr. Findlay took the position that the Strata Corporation failed to mitigate its

damages by not properly funding its contingency reserve fund and by not earlier undertaking the common area renovations that GPI had promised but not completed. The plaintiff also anticipated this argument and made submissions in this respect.

[55] Mr. Findlay submits that the annual contingency reserve fund contributions made by the owners of Seaview were insufficient because they were significantly below the approximate $30,000 per year suggested in the contingency reserve fund study that forms part of the Disclosure. He suggests that had the Strata Corporation funded the contingency reserve fund as recommended, it could have completed much of the work at issue in this litigation itself. However, I agree with the plaintiff that this fact has no bearing on whether the Strata Corporation should be responsible for any cost increase over time for repaving, or whether the Strata Corporation could have replaced the plumbing lines instead of repairing them from time to time. This is because the annual contributions recommended in the Property Assessment and Fund Study were contemplated to pay for other future capital expenditures and not for repaving, plumbing, and replacing the entranceway communication system. Those capital expenditures were to be performed by GPI, and not paid for from the contingency reserve fund, as explicitly contemplated in the Property Assessment and Fund Study that forms part of the Disclosure. Moreover, in any event, it cannot be overlooked that the Strata Corporation's contingency reserve fund was less than initially recommended in part because GPI failed to contribute the initial $55,000 to it.

Assessment of Damages

The Contingency Reserve Fund Contribution

[56] GPI failed to meet its obligation of depositing $55,000 as its initial contribution to the contingency reserve fund. There is no indication in the evidence before me that GPI promised to contribute $55,000 in addition to the $7,500 contribution to the contingency reserve fund it made in 2011, pursuant to ss. 12(1) and (2) of the *SPA*. Consequently, I find that the defendants are jointly and severally liable for $47,500.

This amount is subject to pre-judgment interest from September 22, 2014, that being the date that the Strata Corporation had accepted the remaining renovations would be done by and the contribution made, to the date of judgment. The plaintiff is entitled to post-judgement interest thereafter.

Repaving of the Driveway and Parking Lot

[57] The Brochure and the Disclosure provide that the cost of repaving and repainting the parking lot was $45,000 in 2010. Mr. Findlay testified that this was a reasonable amount for the cost of that work at that time. The plaintiff tendered a number of quotations in respect of the present cost of completing the work. In 2014 and 2015, Meicor obtained quotes from Duncan Paving in the amount of $55,000 (plus tax) and $57,000 (plus tax) respectively. In July 2021, Meicor obtained a quote from Duncan Paving for $69,700 (plus tax).

[58] Kathleen Knight is a Seaview unit owner and strata council member. In the spring of 2022, Mrs. Knight, on behalf of the Strata Corporation, obtained a geotechnical assessment of the parking lot from a geotechnical engineering company, Coast Geotechnical. The assessment recommends that the parking lot requires more than a simple repaving; rather, it recommends that a significant amount of excavation be undertaken in order to improve the substandard base materials.

[59] Royal City Paving also provided quotes. The first was dated December 2021 and was in the amount of $74,354 (plus tax) and was based on a visual analysis completed by Royal City’s principal, Jeffrey McDonald, who has been in the paving business for 48 years. Mr. McDonald’s second quote was issued in May 2022 in the amount of $160,763 (plus tax) and was based on the scope of work set out in the geotechnical assessment which included a significant amount of work in respect of replacing the substandard base material in addition to repaving the parking lot.

[60] The Strata Corporation’s entitlement to damages is limited to the representation made in the Disclosure. That representation was that the parking lot would be repaved; there was no representation made that the underlying base

material would be replaced. Furthermore, the evidence before me does not support a finding that the current substandard state of the parking lot's base materials is a result of the parking lot not being repaved earlier. In fact, there is no evidence before me which suggests that the parking lot did not have a substandard base at the time GPI began the Seaview redevelopment. In my view, it is just as likely as not that had GPI met its obligation to repave the parking lot, its base would nonetheless be substandard today and in need of replacement.

[61] Consequently, I find that the Strata Corporation is only entitled to damages in respect of repaving the parking lot. Mr. McDonald provided evidence at trial that the costs for repaving have increased by approximately 20% since he provided his December 2021 estimate. This evidence was unchallenged, and given Mr. McDonald's nearly half-century experience in the industry, I accept that this is the best evidence before the Court in respect of the current cost of repaving the parking lot. Therefore, I award the Strata Corporation $90,000 in respect of the misrepresentation made in the Disclosure regarding the repaving of the parking lot.

Replacement of the Common Area Main Floor Plumbing Supply Lines

[62] The Strata Corporation claims $30,000 in damages arising from GPI's failure to replace the common area plumbing system on the main floor. The Strata Corporation submits that this amount represents the costs of repairs arising from various instances of failure of the system which would not have happened had GPI fulfilled the representation it made in the Disclosure.

[63] I do not agree with Mr. Findlay that the Strata Corporation's damages should be limited to $12,000 in respect of the plumbing costs. Mr. Findlay testified that this was the amount that it would have cost to replace the system when GPI made its representation to do so in the Disclosure in 2011. However, none of the witnesses from the Strata Corporation or Meicor recalled this amount being communicated to them at any time before the trial and there is no documentary evidence in support of this being the cost.

[64] Nor do I agree with Mr. Findlay that he has proven that the Strata Corporation could have mitigated its damages by replacing the plumbing system instead of making repairs as problems arose. The decision to proceed in this manner was made by the Strata Corporation's council members. There is no evidence before me that this was an unreasonable decision given the financial constraints the Strata Corporation was operating under, in part due to the fact that GPI did not make the $55,000 contribution to the contingency reserve fund. Furthermore, there is no evidence before me of what the cost would have been to replace the plumbing system in September 2014, when it became apparent that the system would not be replaced by GPI. Without some evidence in this respect I cannot determine whether the Strata Corporation's damages would have been less had they decided to replace the entire system.

[65] In cross-examination, Mr. Findlay acknowledged that the repairs the Strata Corporation has made to the common main floor plumbing lines were directly a result of the fact that those plumbing lines were not replaced by GPI. The evidence before me on this point consists of numerous invoices and the evidence of one of the property managers at trial. I accept that the Strata Corporation has incurred expenses of $30,000 in respect of repairs related to the plumbing system and that those repairs are causally related to GPI's failure to replace the system. The Strata Corporation is entitled to an award of $30,000 in this respect.

Entranceway Communication System

[66] I accept the evidence before me that the Strata Corporation paid $3,460 to replace the entranceway communication system. Having found that GPI made a misrepresentation in the Disclosure in respect of replacing this system, I find that the Strata Corporation is entitled to damages in the amount of $3,460.

CONCLUSION AND DISPOSITION

[67] GPI made various misrepresentations in the Disclosure and the plaintiff is entitled to an award of damages in respect of those misrepresentations as follows:

Contingency Reserve Fund Contribution	$47,500
Repaving of the Driveway and Parking Lot	$90,000
Main Floor Common Area Plumbing Lines	$30,000
Entranceway Communication System	$3,460
Total	**$170,960**[1]

[68] Pursuant to s. 22(3) of the *REDMA*, Mr. Findlay is personally liable for the damages awarded.

[69] The plaintiff is entitled to its costs of the action at Scale B.

"Majawa J."

[1] The total amount of damages awarded is approximate as the award in respect of the contingency reserve fund contribution is subject to pre-judgment interest from September 22, 2014.