Court of King's Bench of Alberta

Citation: Catterall v Condominium Plan No. 752 1572 (Park Towers), 2024 ABKB 329

Date: 20240603
Docket: 2203 07686
Registry: Edmonton

Between:

Brian Catterall and Sharon Maybroda

Applicants

- and -

Condominium Plan No. 752 1572 (o/a Park Towers)

Respondents

Reasons for Decision
of the
Honourable Justice G.S. Dunlop

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1. Overview

[1] The Applicants own a unit in a condominium in Edmonton called Park Towers. It is their home. Park Towers was built in the 1960s and converted to a condominium in the 1970s. The Applicants' unit is one of 49 units in the building. The Respondent is the Park Towers condominium corporation.

[2] In these reasons, all references to the *Act* and the *Regulation* are to the *Condominium Property Act*, RSA 2000, c C-22 and the *Condominium Property Regulation*, AR 166/2000, as amended to date.

[3] The Applicants apply for four items of relief:

1. a declaration that the corporation has engaged in improper conduct;
2. an order requiring the corporation to repair or replace the common property;
3. appointment of an administrator of the corporation; and
4. alternatively, appointment of an investigator to review the corporation's conduct and provide a report to the Court.

[4] The Applicants' claim is based on two alleged breaches of the governing legislation and the corporation's bylaws:

1. the corporation failed to keep the common property in a state of good and serviceable repair; and
2. the corporation and its board failed to establish a reserve fund and a reserve fund plan that provide sufficient funds to repair or replace depreciating common property.

[5] In the circumstances of this case, proof of each of those allegations would require expert opinion evidence regarding the existing state of repair of the common property and the required remedial action. The Applicants have adduced no expert opinion evidence directly. Instead, they rely on engineering reports provided to the Respondent. The authors of those reports have not provided evidence in this action directly. In the form those reports come before me, attached as exhibits to affidavits of people other than the authors of the reports, they are hearsay. The engineers' reports include both what the engineers observed as well as their opinions regarding the building's condition and remediation including estimated costs. The Applicants have failed to establish the necessary foundation for the admission of that expert opinion evidence.

[6] Although not specifically pled in the originating application, the Applicants also allege that the Park Towers board is dysfunctional. Proof of that fact does not necessarily require expert opinion evidence, but the evidence before me does not establish that the board is dysfunctional to a degree that would justify intervention by the Court.

[7] Furthermore, even if the expert reports were admissible, the evidence as a whole would not establish any of the facts upon which the Applicants' claim is based, and would not justify any of the relief sought by the Applicants.

[8] Consequently, I dismiss the Applicants' action.

2. The Condominium Property Act and Regulation

[9] The Applicants' claim is based on two statutory causes of action created by the *Act*. Section 58 of the *Act* permits this Court to appoint an administrator for a condominium corporation and give that administrator whatever powers the Court considers appropriate. The only guidance provided by the *Act* for the exercise of that power is that there must be "cause shown". Section 67 of the *Act* permits this Court to grant one or more of several remedies if the Court is satisfied that "improper conduct" has taken place. Improper conduct is defined in s. 67(1) and s. 67(2) lists the possible remedies including "any other order the Court considers appropriate in the circumstances". Both sections 58 and 67 use the word "may" in describing the Court's authority to grant relief.

2.1. The Act Generally

[10] In ***Condominium Plan No. 982 2595 v Fantasy Homes Ltd.*** 2006 ABQB 325 at para 23 Master Smart describes the *Act* as follows:

> The Act permits the creation of a unique scheme for the ownership of land. It provides some guidelines and rules related to their development along with an element of consumer protection. Finally, it provides for a mechanism to manage and administer a complex joint ownership structure having regard to the need for responsible and efficient management of the common elements created by that structure. It includes the ability of a majority to control the administration and management of the property which permits infringement upon property rights otherwise enjoyed by a fee simple owner of real property. Each case must be examined and assessed on the basis of the facts and circumstances within the context of the scheme of the Act.

2.2. Repair and Maintain, s. 37

[11] The relevant portion of s. 37 of the *Act* reads:

> **37(1)** A corporation is responsible for the enforcement of its bylaws and the control, management and administration of its real and personal property, the common property and managed property.
>
> **(2)** Without restricting the generality of subsection (1), the duties of a corporation include the following:
>
> (a) to keep in a state of good and serviceable repair and properly maintain the real and personal property of the corporation, the common property and managed property;
>
> (b) to comply with notices or orders by any municipal authority or public authority requiring repairs to or work to be done in respect of the parcel.
>
> (underlining added)

[12] In ***Lauder v Condo Corp No 932 1565 (Grand Carlisle)*** 2022 ABQB 382 at paras 33 – 41, Friesen, J (as she then was) reviews and restates the law regarding a condominium corporation's duty to repair and maintain:

The leading case on the duty to maintain and the duty to repair is *Leeson v Condominium Plan No 9925923* 2014 ABQB 20 [Leeson]. *Hnatiuk v Condominium Corporation* No 032 2411(cob Eaglewood Village), 2014 ABQB 22, applies the same principles.

In *Leeson*, there was water damage caused by ice damming on the roof of a condominium townhouse, and the condo owner alleged that the repairs by the condominium corporation were delayed, and the work was poor. Master Schlosser adopted O'Ferrall J's reasons, as he then was, in *Philips v Condominium Plan 9512639*, 2010 ABPC 33: Leeson at paras 9-10. Simply put, pursuant to s 37, a condominium corporation has a duty to repair common property which arises when something is broken. Until something is broken, there is no duty to repair. Once the duty to repair is triggered, the condominium corporation is held to a standard of a reasonable effort within a reasonable time: *Leeson* at paras 24-25.

Under s 37, a condominium corporation also has a duty to maintain, which can create a positive obligation on the condominium corporation to inspect, test, service, clean, or conduct other preventative maintenance: *Leeson* at para 9. If something falls into disrepair, this is prima facie evidence that the condominium corporation breached its duty to maintain. However, the condominium corporation can defend the allegation of a breach by showing that it exercised due diligence in maintaining the common property.

The question of whether a condominium board acted in good faith is irrelevant to either the duty to repair or the duty to maintain. The Act does not require that an owner establish that a board acted in bad faith in order to make out a complaint of improper conduct. Section 67(1)(a)(i) does not require proof of intent; rather, the condo owner need only prove that the condominium corporation did not comply with the Act.

The Master's finding that the Board acted in "good faith" in this matter confused the issue. In any event, that finding cannot be sustained. The affidavit evidence in this case is simply insufficient with respect to drawing conclusions about whether the Board, though its directors, acted in good or bad faith.

In *Leeson*, Master Schlosser found that the condominium corporation had initially met its duties by relying on an engineering report that the roof was in good condition and then by removing the ice damming. However, when it was clear there were still issues with the roof, the condominium corporation was no longer entitled to rely on the report and, by doing nothing, breached its duty to maintain.

In this case, Ms. Lauder alleged a breach of the duty to repair and of the duty to maintain. This is fundamentally a fact-based inquiry into whether the corporation met the required standards for each of these duties. I agree with the Master's conclusion that the Board initially met its duties to inspect and repair. However, in 2018, the Board turned a blind eye to the continued water issues, which triggered the duty to maintain and, in this case, to investigate the problem. It also triggered the duty to repair the leaking window.

Up until 2018, the Board was entitled to rely on the reports from November 2017, which indicated that the problem had been resolved and the windows did not need to be replaced until 2019. However, when it was clear the window was still leaking, the Board had an obligation to investigate the problem and to repair the leak. The subsequent engineering reports do not show due diligence on the part of the Board, given that the reports did not address the issue of the leaking on the east wall and did not include an interior inspection. In other words, they did not address the issue of the continued leak.

Therefore, I find that the Board violated s 67(1)(a) of the CPA by failing to comply with its obligations to "keep in a state of good and serviceable repair and properly maintain the real and personal property of the corporation, the common property and managed property" as described in s 37(2)(a) of the Act.

(underlining added)

2.3. Reserve Fund, s. 38

[13] Section 38 of the *Act* reads:

38(1) Subject to the regulations, a corporation shall, from funds levied under section 39(1)(a) or under section 39.1, establish and maintain a reserve fund that is reasonably sufficient to provide for major repairs and replacement of the following, where the repair or replacement is of a nature that does not normally occur annually:

(a) any real and personal property of the corporation;

(b) the common property;

(c) managed property.

(underlining added)

[14] The most relevant portions of s. 23 of the *Regulation* read:

23(1) The corporation must retain a reserve fund study provider to carry out a study of the depreciating property for the purposes of determining the following:

(a) an inventory of all of the depreciating property that, under the circumstances under which that property will be or is normally used, may need to be repaired or replaced within the next 30 years or a time period longer than 30 years;

(b) the present condition or state of repair of the depreciating property and an estimate as to when each component of the depreciating property will need to be repaired or replaced;

(c) the estimated costs of repairs to or replacement of the depreciating property using as a basis for that estimate costs that are not less than the costs existing at the time that the reserve fund report is prepared;

(d) the life expectancy of each component of the depreciating property once that property has been repaired or replaced.

…

(3) After the reserve fund study under this section is completed, the reserve fund study provider must prepare and submit to the board a reserve fund report in writing in respect of the study setting out the following:

(a) the qualifications of that person to carry out the reserve fund study and prepare the report;

(b) a signed statement that the person is a reserve fund study provider and no grounds of disqualification under section 21.1 or 21.2 apply;

(c) the findings of the reserve fund study in respect of the matters referred to in subsections (1) and (2);

(d) any other matters that the person considers relevant.

(4) On receiving the reserve fund report under subsection (3), the board must, after reviewing the reserve fund report, approve a reserve fund plan

(a) under which a reserve fund is to be established, if one has not already been established, and

(b) setting forth the method of and amounts needed for funding and maintaining the reserve fund.

[15] Slatter, J (as he then was) describes the main purpose of a reserve fund in ***Scotwick Realty Services Inc. v Condominium Plan No. 7510479*** ABQB 550 at paras 7 – 8:

> The provisions of the *Act* on reserve funds are quite short and the bulk of the detail is to be found in the *Condominium Property Regulation*, A/R 168/2000. Section 38(1) of the *Act* sets out the main purpose of the reserve fund. It is "to be used to provide sufficient funds that can reasonably be expected to provide for major repairs and replacement". This major theme is picked up in Regulation 27(1), which states that a corporation must maintain the funding of its reserve fund at an appropriate amount or in an appropriate state, so that the requirements of the Act, "continue to be met".
>
> It is my view that all of the other provisions of the *Act* are really supportive of this main theme. The theme is that the reserve fund must be sufficient to meet the reasonably anticipated repair needs of the corporation. Regulation 27(1) specifically states that these requirements must, "continue to be met". <u>All the provisions about the commissioning of a reserve fund study, the preparation of a reserve fund report and plan, and the implementation of that plan, are really there to support the basic idea that the reserve fund must always be sufficient to meet the needs of the condominium corporation.</u>
>
> (underlining added)

[16] The provisions of the *Act* and the *Regulation* relating to reserve funds are outlined by the Court of Appeal in ***Francis v Empire Gardens Condominium Corporation*** 2019 ABCA 471 at paras 6 – 12:

The *Condominium Property Act* contains provisions to ensure the long term maintenance of condominium properties. Each condominium corporation must establish a "capital replacement reserve fund to be used to provide sufficient funds that can reasonably be expected to provide for major repairs": *Act* s. 38. The reserve funds are to be spent on repairs, and after any expenditure there must still be sufficient funds in the reserve fund to meet other anticipated major maintenance costs: *Act* s. 38; *Condominium Property Regulation*, AR 168/2000, s. 27(1).

Each condominium corporation must commission a "reserve fund study" at least every 5 years: *Regulation*, s. 23, 30. That study must be prepared by a qualified person, and must estimate the anticipated repair expenses over the next 25 years. The study must also recommend the amounts that must be raised from the unit owners in order to cover the anticipated expenses. The board of the condominium corporation must then adopt a "reserve fund plan" that will provide "sufficient funds . . . by means of owners' contributions, or any other method that is reasonable in the circumstances, to repair or replace, as the case may be, the depreciating property in accordance with the reserve fund report": *Regulation*, s. 23(5); s. 27(1).

The appellants raise several objections to the special levy to pay for the Swale Project. First of all, they appear to object that the Swale Project was not anticipated in the Dynamic Reserve Fund study. It seems clear that the deficiencies in the foundation which led to the Swale Project were a) not identified by Dynamic Reserve Fund Studies Inc., b) were accordingly not included in the 25 year maintenance plan, and c) were also not anticipated in the recommended level of fees and levies. There is, however, no requirement that major maintenance items can only be paid for out of the reserve fund if they were anticipated in the reserve fund study: *Scotwick Realty Services Inc. v. Condominium Plan No. 7510479*, 2003 ABQB 550 (Alta. Q.B.) at para. 17. Unanticipated major expenses can be funded from the reserve fund, so long as after that expenditure there are sufficient funds remaining in the capital replacement reserve fund to meet the requirements of the reserve fund study: *Act* s. 38; *Regulation*, s. 27(1). It follows that the board was entitled to spend reserve funds on the Swale Project, so long as it levied sufficient additional funds to restore the reserve fund to a suitable level: *Scotwick Realty* at para. 19.

…

The appellants' second objection is that the special levy to fund the Swale Project was not recommended in the Dynamic Reserve Fund study. The amounts required by the Regulation to be paid into the reserve fund are, however, minimum amounts. There is no prohibition on the board increasing the size of the reserve fund, and indeed a conservative and prudent board might well elect to do so. Specifically, if the board becomes aware of necessary repairs that were missed by the reserve fund study, the board has a duty to supplement the reserve fund accordingly. There was no legal impediment to the board raising funds to fund the Swale Project, even though that levy was over and above those recommended in the Dynamic Reserve Fund study.

> The appellants' third objection is that Wade Engineering is not qualified under the *Regulation* to prepare reserve fund studies, and that the Wade Engineering report does not meet the statutory qualifications for a "reserve fund study". Again, the requirement for a reserve fund study, prepared every five years by a duly qualified person, is a minimum requirement. The statute does not preclude the board of the condominium corporation from retaining other experts, to prepare other reports, and to act on those reports if the board considers that to be prudent. The board was lawfully entitled to implement the recommendations made by Wade Engineering.
>
> Finally, the appellants argue that the Respondent was required to retain Dynamic Reserve Fund Studies Inc. to investigate the problems of the foundation, and it was not entitled to retain Wade Engineering, at least without a public tendering process. There is, however, no requirement in the Act that the condominium corporation only use a single consultant when it comes to repairs and improvements to the building. The Board is entitled to select whichever consultant it feels is most appropriate for a particular task, and negotiate a suitable contract with it.
>
> (underlining added)

[17] ***Scotwick Realty Services*** at paras 15 – 16 addresses the fluidity of reserve funds and repairs:

> The next question is then the consequences of there being an unexpected expenditure from the reserve fund. One possible interpretation of the Act is that the corporation is not permitted to make any expenditure from the reserve fund unless that expenditure is anticipated in the reserve fund study and the reserve fund plan. In my view, this is not the correct interpretation of the Act. Preparing a reserve fund plan that projects many years into the future is always going to be a bit of a guessing game. The exact timing of the expenditure and the exact quantum of the expenditure will always be an estimate only. I note that Regulation 23 specifically states that the study is to be an "estimate". That the estimate will not always be accurate is obvious.
>
> In this case, for example, the roof was scheduled to be replaced in 2002, but the owners have managed to squeeze a few extra years out of it and that expenditure has not yet been made. There will be other cases where unexpected expenditures arise.
>
> (underlining added)

2.4. Appointment of an Administrator, s. 58

[18] Section 58 of the *Act* reads:

> **58(1)** A corporation or a person having a registered interest in a unit may apply to the Court for appointment of an administrator.
>
> **(2)** The Court may, on cause shown, appoint an administrator for an indefinite period or for a fixed period on any terms and conditions as to remuneration or otherwise that it thinks fit.

> **(3)** The remuneration and expenses of an administrator appointed under this section are administrative expenses within the meaning of this Act.
>
> **(4)** An administrator has, to the exclusion of the board and the corporation, those powers and duties of the corporation that the Court orders.
>
> **(5)** An administrator may delegate any of the powers or duties so vested in the administrator.
>
> **(6)** The Court may, on the application of an administrator or a person referred to in subsection (1), remove or replace the administrator.
>
> (underlining added)

[19] There appears to be no reported case in Alberta interpreting what "cause shown" is. Both counsel referred to cases from British Columbia and Saskatchewan.

[20] In ***Goertz v The Owners Condominium Plan No 98SA12401*** 2018 SKCA 41 at para 165, the Court wrote:

> The statutory responsibility to manage and administer the corporation under s. 35 lies with its elected board pursuant to s. 39(1). While in some cases the appointment of an administrator is warranted, it is a drastic step that seriously undercuts that responsibility. Any application for the appointment of an administrator will need cogent evidence that the board is no longer able to adequately discharge its statutory duties and that the corporation is in a state of such dysfunction that its actions will adversely affect the collective owners. Whether there is such dysfunction must be decided on a case-by-case basis.
>
> (underlining added)

[21] In ***Norenger Development (Canada) Inc. v Strata Plan*** NW 3271 2016 BCCA 118 at paras 43 – 44, the Court wrote:

> Under s. 174(2) of the Act, an administrator may be appointed if, in the court's opinion, "the appointment of an administrator is in the best interests of the strata corporation". In *Lum v. Strata Plan VR519*, 2001 BCSC 493 (B.C. S.C.) [*Lum*], Mr. Justice Harvey identified the following factors as relevant to the court's exercise of discretion to appoint an administrator under s. 174:
>
> > (a) whether there has been established a demonstrated inability to manage the strata corporation,
> >
> > (b) whether there has been demonstrated substantial misconduct or mismanagement or both in relation to affairs of the strata corporation,
> >
> > (c) whether the appointment of an administrator is necessary to bring order to the affairs of the strata corporation,
> >
> > (d) where there is a struggle within the strata corporation among competing groups such as to impede or prevent proper governance of the strata corporation,

> (e) where only the appointment of an administrator has any reasonable prospect of bringing to order the affairs of the strata corporation.
>
> These factors illustrate that the overarching purpose of s. 174 is to address dysfunction within a strata corporation

[22] An administrator was appointed by consent where there was "an almost complete failure of the Board to perform its duties": ***1212443 Alberta Ltd. v Condominium Corporation No 0721898*** 2021 ABQB 329 at para 1.

[23] Coutu, J in ***Tataryn v Condominium Plan No. 7810994*** 2003 ABQB 810 at para 17 describes the appointment of an administrator as the "ultimate relief" under the *Act* in contrast to the more "minor" relief under s. 67.

[24] I agree with Coutu, J that the appointment of an administrator pursuant to s. 58 is more drastic relief that any of the options set out in s. 67 because an administrator takes over, at least to some degree, the corporation and management of the building in place of the board: s. 58(4). In contrast, all remedies under s. 67 leave the board in control, but subject to an investigation or Court orders to do or not do certain things.

[25] As Master Smart notes in ***1597130 Alberta Ltd v Condominium Corp. No. 1023241*** 2015 ABQB 698 at para 11, the role of an administrator appointed under the *Act* is analogous to that of a receiver appointed under the *Judicature Act*. Romaine, J. established in ***Paragon Capital Corp. v Merchants & Traders Assurance Co*** 2002 ABQB 430 at para 27 some of the factors relevant to the appointment of a receiver. Many of those have no application to the appointment of an administrator of a condominium corporation, but some apply by analogy.

[26] In this case two of the alleged facts relied upon by the Applicants, failure to repair and maintain the common property and failure to establish and maintain an adequate reserve fund, would be improper conduct pursuant to s. 67(1)(a)(i), because those would be breaches of the *Act*. This is an additional factor relevant to the appointment of an administrator: the availability of an alternative, less severe and intrusive, remedy. Generally, the less interference by the Court in the affairs of a condominium corporation, the better. In extreme cases, such as ***Holliday v Prairie Heights Condominium Corp.*** 2021 SKQB 171, the appointment of an administrator, will be the best option.

[27] With those case authorities in mind, I would list the factors relevant to the appointment of an administrator under s. 58 of the *Act* as including the following:

1. Has the *Act*, the *Regulation* or the condominium corporation's bylaws been breached as a result of decisions or inaction by the board?
2. Has the board failed to manage affairs of the corporation?
3. Has there been substantial misconduct in relation to the corporation's affairs?
4. Is irreparable harm likely to result if an administrator is not appointed? This would include potential waste or loss to the common property or any owner's property.
5. Is there a reasonable prospect for improvement in the corporation's affairs if an administrator is appointed?

6. How long will an administrator be required and at what cost to the corporation?

7. Do the circumstances warrant displacing a democratically elected board from its role in governing the corporation and its affairs?

8. Is an alternative remedy available which would be as effective but less severe and intrusive?

[28] Other factors may also be relevant.

2.5. Improper Conduct, s. 67

[29] Section 67 of the *Act* reads:

67(1) In this section,

(a) "improper conduct" means

(i) non-compliance with this Act, the regulations or the bylaws by a developer, a corporation, an employee of a corporation, a member of a board or an owner,

(ii) the conduct of the business affairs of a corporation in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party,

(iii) 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,

(iii.1) the conduct of an owner that is oppressive or unfairly prejudicial to the corporation, a member of the board or another owner,

(iv) the conduct of the business affairs of a developer in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party or a purchaser or a prospective purchaser of a unit, or

(v) the exercise of the powers of the board by a developer in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party or a purchaser or a prospective purchaser of a unit;

(b) "interested party" means an owner, a corporation, a member of the board, a registered mortgagee or any other person who has a registered interest in a unit.

(2) Where on an application by an interested party the Court is satisfied that improper conduct has taken place, the Court may do one or more of the following:

> (a) direct that an investigator be appointed to review the improper conduct and report to the Court;
>
> (b) direct that the person carrying on the improper conduct cease carrying on the improper conduct;
>
> (c) give directions as to how matters are to be carried out so that the improper conduct will not reoccur or continue;
>
> (d) if the applicant suffered loss due to the improper conduct, award compensation to the applicant in respect of that loss;
>
> (e) award costs;
>
> (f) give any other directions or make any other order that the Court considers appropriate in the circumstances.
>
> **(3)** The Court may grant interim relief under subsection (2) pending the final determination of the matter by the Court.
>
> (underlining added)

[30] Section 67 creates two categories of improper conduct: breaches of the *Act*, *Regulation* or the condominium corporation's bylaws (s. 67(1)(a)(i)), and conduct that is oppressive, unfairly prejudicial or unfairly disregarding of the interests of one or more persons (s. 67(1)(a)(ii – (v)).

[31] Master Schlosser in ***Leeson v Condominium Plan No 9925923*** 2014 ABQB 20 at paras 15 – 20 discusses s. 67:

> Subsections 67(1)(a)(ii) - (v) use the words 'oppressive or unfairly prejudicial'. An oppression remedy is well established in a company law setting, though it goes without saying that the remedy in that context protects a narrower range of interests than those that might be found in a condominium setting.
>
> The learned authors of *Condominium Law and Administration*, Carswell, vol. 2, (Looseleaf) Ch. 23 (T. Rotenberg), identify British Columbia as the pioneering jurisdiction for an oppression remedy in the condominium context. Mr. Rotenberg notes five general principles that apply in this setting:
>
> > (a) It is a broad remedy, broadly applied; attempts to narrow its impact and effectiveness should therefore be resisted.
> >
> > (b) The purpose of the oppression remedy is to protect the objectively reasonable expectations that caused the relationship to begin or continue.
> >
> > (c) Either the cumulative results of the conduct complained of or a specific egregious act ultimately determines whether there is an actionable wrong.
> >
> > (d) <u>The court must balance the competing interests of the minority, who are to be treated fairly, with the rights of majority to govern. Only if the minority's interest is unfairly treated will the courts intervene.</u>

> (e) The selection of a remedy must be sufficient to achieve the desired result. Remedies should not be narrowly limited, and may be granted against individuals in appropriate cases.
>
> *Condominium Law and Administration*, p. 23-3.

The source of the remedy is the recognition that there are different, sometimes competing, interests within any group. Not every interest can prevail, so the law requires due consideration and fair treatment of the various stakeholders.

The relationship between the Board and the owners is democratic and consensual. The idea of the statute is to acknowledge this, not to provide a vehicle to give individual interests precedence over the wishes of the majority.

This case, like others, is fact driven. The section 67 remedy is discretionary. In this case, six condominiums leaked. As far as we know they were all dealt with in the same fashion. The absence of a complaint from other members of this group is not determinative of whether the Board's treatment of them was unfair or oppressive. However, I do not see that the Board's action or (inaction) falls within the ambit of oppressive or unfairly prejudicial treatment of the Applicants.

No doubt the Board and the Property Manager were less than perfectly attentive to the wishes of the Applicants but it seems to me that subsections 67(1)(a)(ii) - (v) require a marked departure from an acceptable standard of fair conduct. I do not think this has been made out on the evidence.

20 This leaves section 67(1)(a)(i), which allows the Court to provide a remedy if there is noncompliance with the *Act*. In a manner of speaking, section 67(1)(a)(i) is a kind of Condominium law all-terrain vehicle. Non-compliance with the *Act* is 'improper conduct'. It may be remedied in the ways set out in section 67(2).

(underlining added)

[32] In ***934859 Alberta Inc. v Condominium Corp. No. 0312180*** 2007 ABQB 640 at paras 92 – 95, Chrumka, J writes as follows:

> 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. The interested party in this case is the owner 934859.
>
> 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.
>
> The term "unfairly prejudicial" has been defined to mean acts that are unjustly or inequitably detrimental.
>
> 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."
>
> (underlining added)

[33] In ***Ryan v Condominium Corporation No 0610078*** 2021 ABCA 96 at paras 10 – 11, the passage underlined above is endorsed by the Alberta Court of Appeal. Friesen, J (as she then was) in ***Lauder*** at para 43, citing ***Ryan***, adds the following:

> Not every questionable or offensive action is oppressive. Instead, to be oppressive, the conduct must exceed the reasonable expectations of volunteer condominium boards in their dealings with owners:

[34] In ***Spicer v Condominium Corp. 041156*** 2023 ABKB 611 at para 54, Armstrong, J adopts a two-part test, relying on ***BCE Inc. v 1976 Debentureholders*** 2008 SCC 69 at para 68 and ***Dollan v The Owners, Strata Plan BCS 1589***, 2012 BCCA 44 at para 30:

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

[35] In ***Condominium Plan No. 982 2595 v Fantasy Homes Ltd.*** at para 25, Master Smart writes as follows regarding s. 67 of the *Act*:

> Section 67 deals with Court ordered remedies where there is improper conduct. Presumably Fantasy would fall under Section 67(1)(a)(ii) and (iii), that is, the conduct of the business affairs of the Corporation or the exercise of the powers of the board is oppressive or unfairly prejudicial to or unfairly disregards the interest of Fantasy as an owner. The Court is given the power under Section 67(2) to summarily deal with abuse by the Condominium Corporation or its board and declare the subject Caveat improper together with directing its discharge. Apparently Fantasy expects that the Court would disregard the effect of Section 67(1)(a)(iv) which also defines improper conduct to include where the business affairs of a developer is conducted in a manner that is oppressively or fairly prejudicial to or that unfairly disregards the interests of an owner, purchaser or perspective purchaser of a unit. Clearly this section brings forward again the concept of fairness. The Court must look to all of the facts relevant to its assessment of conduct. In assessing the fairness of the situation the Court must examine the purported improper conduct of the Corporation and its Board in light of the owner/developers alleged improper conduct. Regardless, it seems that the Court is in a position to grant a number of remedies to deal with circumstances which fall under improper conduct.
>
> (underlining added)

[36] Disagreement by a unit owner with a decision of the condominium board is not, on its own oppression: ***Spicer*** at para 65.

2.6. Business Judgment Rule

[37] In ***Aubin v Condominium Plan No 862 2917*** 2024 ABKB 156 at paras 72 – 75, Mandziuk, J holds that the business judgment rule applies to this Court considering an application under s. 67 of the *Act*:

> Alberta case law supports the principle that, as a matter of general application and in absence of improper conduct on the part of the board, a Court should defer to decisions of duly elected condominium boards: see ***934859 Alberta Inc v Condominium Corporation No 0312180***, 2007 ABQB 640 at paras 54–55; ***Spicer*** at paras 67-68. However, if the Court is satisfied that there has been improper conduct on the part of the board, then it may order an appropriate remedy pursuant to s 67(2) of the CPA.
>
> …
>
> As I have not found improper conduct, I decline to issue a remedy under s 67(2). Following Alberta jurisprudence cited earlier, the Court should defer to the business judgment of the Board. The Board manages the corporation's business and is better suited to determine what is in the best interests of the Corporation.

[38] In ***3716724 Canada Inc v Careleton Condominium Corp. No 375*** 2016 ONCA 650 at para 51 – 52, the Court explains its reasons for applying the business judgment rule to condominium corporations:

> Moreover, the rationale underlying the business judgment rule in the corporate law context is also applicable to condominium corporations. As representatives elected by the unit owners, the directors of these corporations are better placed to make judgments about their interests and to balance the competing interests engaged than are the courts. For instance, in this case the security concerns arose in part as a result of the condominium's location, and the Board members' knowledge of that area is clearly an advantage that they enjoy over any court subsequently reviewing their decision.
>
> The *Act* provides that the directors are the ones responsible for managing the affairs of a condominium corporation: s. 27(1). They are also required to act honestly and in good faith, and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances: s. 37(1). Like their counterparts in corporate statutes, these provisions suggest that courts should be careful not to usurp the functions of the boards of condominium corporations.

[39] In my view the business judgment rule and judicial deference to the judgment of democratically elected boards of condominium corporations applies to applications pursuant to both s. 58 and s. 67 and it applies to condominium corporation’s maintenance and reserve fund obligations pursuant to ss. 37 and 38.

3. Condominium Bylaws

[40] The repair and maintenance and reserve fund provisions of the Park Towers bylaws add nothing to the provisions of the *Act* and *Regulation* discussed above. A breach of those provisions in the legislation would be a breach of those provisions in the bylaws and vice versa.

4. Relevant Point in Time for Consideration

[41] In oral argument on March 5, 2024, the Applicants submitted that I should not consider on this application anything that occurred after the originating application was filed (April 25, 2022). The Applicants did not make that submission in their written brief filed June 22, 2023. Their written brief refers to facts after April 25, 2022 as does Ms. Maybroda's June 1, 2023 affidavit. The Applicants' counsel advised he had no authority for this proposition and that he was not aware of any Alberta case authority on this point. However, he submitted that otherwise the remedies in the *Act* would be meaningless because, by the time an application can be heard in Court, the Respondent may have corrected any deficiencies in existence at the time the application was filed, thus depriving an Applicant of relief to which they were entitled when the application was filed.

[42] I do not agree with the Applicants' submissions on this point. The consistent practice of this Court is to consider events up to the time of hearing on applications under the *Act*:

- In ***Leeson*** at para 28 evidence of repairs completed after the action commenced was considered.
- In ***Lauder*** at para 18 numerous reports and evidence regarding repairs after the action was commenced were admitted.
- In ***Thai v Poffenroth*** 2010 ABCA 347 at para 24 a promise to "adopt a more formal approach" in the future was a factor considered in declining to order a remedy under s. 67.
- In ***Aubin*** at para 24 – 34 evidence of reports and repairs after the originating application was filed was admitted and relied on.

5. Hearsay and Opinion Evidence

[43] The evidence in this action consists of multiple affidavits by one of the Applicants, Sharon Maybroda, and multiple affidavits by Elizabeth Richards, a member of the condominium corporation board, along with a few affidavits by others. There are also transcripts of questioning on some of those affidavits. The affidavits are enormous. Ms. Maybroda's first affidavit is over 1000 pages including exhibits. The other affidavits and the transcripts bring the total to over 2000 pages of evidence. What is almost entirely missing is direct evidence of the current or past condition of Park Towers' common property. The sole piece of direct evidence is Sharon Maybroda's April 25, 2022 affidavit, at paragraph 65 and photographs of the Applicants' unit taken in October 2021 attached as exhibit 27, showing what Ms. Maybroda describes as balcony and exterior window deterioration.

[44] The Applicants' claim is primarily based on an alleged failure to repair and maintain the Park Towers' common property. The alleged failures to establish and maintain an adequate reserve fund and adopt an adequate reserve fund plan depend on the condition of the building, as

well as the anticipated cost and timing of repairs. Having chosen to rely on disrepair as a factual basis for their claim, the Applicants must prove it. The photographs of the Applicants' balcony prove almost nothing. They show cracks in paint and concrete and a gap between the concrete and windowsills in one unit out of forty-nine in a sixty-year-old structure. Furthermore, that was the condition of the Applicants' balcony in October 2021. Since then, the Respondent has undertaken window and balcony repairs, with the window repairs 72% complete as of December 16, 2022 and the balcony repairs scheduled to be completed in September 2024.

[45] Several of the affidavits filed in this action attach reports recording the observations of people other than the affiants about the condition of the building. Those reports often contain opinions of professional engineers or engineers-in-training. Some of the reports are signed, sealed and stamped with an engineer's permit to practice. None of the reports sets out the author's qualifications other than that he or she is a professional engineer or engineer-in-training. None of the authors of those reports swore or affirmed an affidavit filed in this action and none was questioned on his or her reports.

[46] In that form, as exhibits to affidavits of others, the engineers' reports are inadmissible because they are hearsay and they include opinion evidence without the authors having been properly qualified by the Court. I am not saying the authors of those reports are not qualified engineers nor I am saying they could not be qualified to give expert opinion evidence in court. I am saying they have not been qualified to give expert opinion evidence in this action in accordance with the procedure for doing so.

[47] An affidavit attaching an engineer's report is not admissible for the truth of the opinions in the report: ***Condominium Corporation No. 0613782 v Country Hills Landing Limited Partnership*** 2018 ABQB 963 at paras 9 – 13. As Price, J holds in ***DH v Woodson*** 2020 ABQB 367 at para 71:

> An expert report attached to an affidavit is hearsay evidence; the expert has neither sworn the evidence nor can the expert be cross-examined on it: *Sturgeon Lake Indian Band v. Canada (Attorney General)*, 2016 ABQB 384 (Alta. Q.B.) at para 186, aff'd [*Goodswimmer v. Canada (Attorney General)*] 2017 ABCA 365 (Alta. C.A.), leave to appeal to SCC refused, 37899 (5 July 2018) [2018 CarswellAlta 1331 (S.C.C.)]; *Fong v. Tinga*, [1995] A.J. No. 1454 (Alta. Q.B.) (QB Master) (QL).

[48] Master Schlosser in ***Kerich v Victoria Trail Physiotherapy Ltd*** 2017 ABQB 471 at para 18 addresses the proper format to introduce expert evidence on a chambers application:

> Expert evidence ought to be approached in this setting as it would at trial. In other words, the Court needs, at a minimum: the qualifications of the expert, (so that the Court can determine the admissibility and the scope of the opinion); the information and assumptions on which the opinion is based (sometimes put to the expert as a set of hypothetical facts that the litigant hopes will be proved); and, a summary of the expert opinion. It is appropriate that both the substance of the expert's opinion and the expert report itself be included. If an expert's affidavit is tendered under 6.11(1)(a), it should conform to Form 25, at a minimum.

[49] Topolniski, J reaches the same conclusion on this point in ***ANC Timber Ltd. v Alberta (Minister of Agriculture and Forestry)*** 2019 ABQB 653 at paras 117 – 125.

[50] Slatter, JA in ***Canadian Natural Resources Limited v Wood Group Mustang (Canada) Inc. (IMV Projects Inc.)*** 2018 ABCA 305 at paras 19 – 26 explains that the mere possession of an expert's report by party does not make it admissible under the documents in possession rule:

> The classic statement of the "documents in possession" exception to the hearsay rule is found in H.M. Malek, *Phipson on Evidence*, 19 th ed, (Thomson Reuters, 2018: London) at para. 37-10:
>
> > 37-10 Documents which are, or have been, in the possession of a party will, as already have seen, generally be admissible against him as original (circumstantial) evidence to show his knowledge of their contents, his connection with, or complicity in, the transactions to which they relate, or his state of mind with reference thereto. They will further be receivable against him as *admissions* (i.e. exceptions to the hearsay rule) to prove the truth of their contents if he has in any way *recognised, adopted or acted upon them*. (Emphasis in original)
>
> There are thus two branches to the doctrine: first to show knowledge of the contents of the document, and second to imply an admission of the truth of the contents of the document.
>
> The first branch of the doctrine has primarily been used in criminal prosecutions, or conspiracy actions, to show participation by the defendant in a transaction. If the defendant is in possession of documents disclosing the existence and execution of a conspiracy or a criminal transaction, that is circumstantial evidence that the defendant knew of it, or participated in it: *R. v. Bridgman*, 2017 ONCA 940 (Ont. C.A.) at paras. 67-9, (2017), 138 O.R. (3d) 721 (Ont. C.A.); *R. v. Gausal*, 2017 BCSC 1194 (B.C. S.C.) at paras. 63-5. As such, this branch of the doctrine is a variant of the "admissions against interest" exception to the hearsay rule.
>
> The first branch of the doctrine can also be used to prove knowledge of the existence of the document or the information in it, but not as proof of the truth of the contents of the document: e.g. *Dassen Gold Resources Ltd. v. Royal Bank* (1993), 138 A.R. 275, 12 C.P.C. (3d) 141 (Alta. Q.B.); *E. (D.) (Guardian ad litem of) v. British Columbia*, 2003 BCSC 1013 (B.C. S.C.) at para. 43, (2003), 18 C.C.L.T. (3d) 169 (B.C. S.C.). The second branch of the doctrine, on the other hand, can extend to implying an admission that the contents of the document are true. For example, in *Mask v. Silvercorp Metals Inc*., 2015 ONSC 5348 (Ont. S.C.J.) at appendix para. 2 an exchange of letters with the Securities Commission was evidence, in the nature of an admission, that there were deficiencies in the issuer's disclosure statements.
>
> IMV Projects relies on the second branch of the rule, namely that if a defendant is a) in possession of a document, and b) recognizes, adopts or acts on the document, then c) the document can be taken as an admission by the defendant that the contents are true. IMV Projects points out that CNRL clearly was in possession of the reports, and used them in its decision-making with respect to the replacement or repair of the Emulsion Pipeline. It therefore argues that under the

documents in possession doctrine, CNRL should be taken to have admitted the truth of the contents of the reports.

Witnesses who are qualified as experts are permitted to give opinion evidence. There is a hearsay aspect to their evidence: *R. v. Lavallee*, [1990] 1 S.C.R. 852 (S.C.C.) at pp. 896, 898-9. For example, in a technical context a number of scientists or technicians might feed information to a lead expert, who actually signs the expert report and testifies in court. Experts are entitled to develop their expertise by relying on information they have received from third parties over the course of their careers, for example by reading technical literature on the subject. Experts are also entitled, within limits, to rely on hearsay information about the specific problem on which their expertise is focussed. The rule of evidence permitting expert opinion evidence is not, however, at its core about "hearsay".

In addition to the general rule of evidence excluding the admission of hearsay, there is an independent rule that generally excludes "opinion evidence". Witnesses are to testify about the facts they perceived, but generally not the inferences or opinions that they drew from them. One exception to this general rule is for expert opinion evidence on matters requiring specialized knowledge. There is a further threshold requirement, namely that the expert witness must be sufficiently objective and impartial. If a witness is qualified as an "independent expert", then the witness's opinions are admissible: *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 (S.C.C.) at paras. 14-5, 34, [2015] 2 S.C.R. 182 (S.C.C.). The documents in possession rule is an exception to the "hearsay" rule, not the "opinion evidence" rule.

There is a formal regime for the admission of expert opinion evidence. The Rules of Court require advance notice of the qualifications of the expert, and the nature of the opinion evidence: R. 5.34. Before the witness's evidence is received, the trial judge will examine the expert's qualifications, and determine the scope of the admissible opinion. The trial judge will also determine if the necessary objectivity and impartiality are present, ensuring that the expert can discharge his or her obligations to the court. Once that threshold is crossed, the expert's report and opinion are introduced in evidence in chief, and the expert is subject to cross-examination.

The Aptech Engineering and RAE Engineering reports are clearly in the nature of expert evidence. IMV Projects argues that the test results are merely "facts", but those facts are uninformative without technical or scientific opinions as to what they mean. Contrary to IMV Projects' submission, it would be inappropriate for a trial judge to interpret and draw inferences from that technical test data without accompanying expert opinion: *R. v. Collins* (2001), 150 O.A.C. 220 (Ont. C.A.) at paras. 20-1, (2001), 160 C.C.C. (3d) 85 (Ont. C.A.). IMV Projects seeks to bypass all the procedural safeguards surrounding the admission of expert opinion evidence by use of the "documents in possession" rule. That application of the rule is beyond its intended scope.

(underlining added)

[51] I raised the hearsay and opinion evidence issues during oral argument. The Applicants made the following submissions on those points:

- The Applicants are not seeking final relief, because an administrator or investigator would report back to the court with further orders following. Consequently, hearsay evidence is permitted by r 18.18.
- The *Act* does not require direct evidence and does not prohibit hearsay and it supersedes the rules.
- It would be virtually impossible for an owner to prove improper conduct by a board because owners are not privy to everything a condominium corporation has.
- If hearsay were not permitted, s. 58 would be neutered.
- Requiring an owner to adduce expert opinion evidence would make it impossible for an owner to advance an action based on a breach of the duty to repair and maintain to common property.

[52] None of those points is persuasive. Specifically:

- The Applicants are seeking final relief. The hearing before me was the final hearing of this action, not an interlocutory application. While it is possible for the Court on a hearing of a s. 58 or 67 application to grant an order that includes or leaves open the possibility of future hearings, that does not change the nature of the hearing of the action. Furthermore, one possible outcome of this action is an order for the Respondent to repair the common property, with no future hearings. The fact that this hearing may dispose of all or part of a claim requires that only direct evidence by relied upon by the Applicants: r 13.18(3).
- The rules apply to all actions in this Court: r 1.1. The *Act* does not exclude the application of the rules.
- Difficulty in proving a claim is no reason to relax the rules of evidence.
- Claims under s. 58 and s. 67 will not always require expert evidence, but claims based on generalized deficiencies in the common property almost always will. I expand on this point in the next section of these reasons.

[53] The engineers' reports attached as exhibits to affidavits are inadmissible because they are hearsay and they contain expert opinion evidence without the procedural requirements for admission of that evidence having been met. This is fatal to the Applicants' s. 67 claim. Nevertheless, I will address whether their claim would be proven had those reports been admissible, in sections 7 and 8 of these reasons, below.

6. Proving Common Property Deficiencies

[54] Claims pursuant ss. 58 and 67 will not always require expert opinion evidence. For example, failure to hold meetings or provide information to owners could be proven without expert evidence. A complete failure of the board to perform its duties and consequent decay in the building can be proven without expert evidence, as was done in ***Holliday***.

[55] Some failures to repair and maintain can be proven without expert evidence, particularly where they are localized deficiencies affecting specific units, such as:

- a wall permitting noise to infiltrate from the lounge to one unit: ***Aubin;***
- a leaky window: ***Lauder***; and
- a roof leaking into a specific unit: ***Leeson.***

[56] In each of those cases, the unit owner provided his or her own evidence regarding the noise or the leaks. They may also have had expert evidence.

[57] In this case the Applicants allege deficiencies in the common property throughout the building: all the balconies, railings, windows, patio doors, and exterior cladding. It is practically impossible for me to determine if those things require repair without expert opinion evidence, preferably from a professional engineer. The fact that expertise is required to assess the overall condition of a condominium's common property is reflected in s. 21.1(1) of the *Regulation* which strictly limits who is qualified to prepare a reserve fund study.

7. Maintenance and Repair of Park Towers

[58] In this section I will assume the engineers' reports attached to affidavits are admissible for the truth of their contents and accuracy of the opinions expressed in them.

[59] The originating application alleges that the exterior building envelope requires repair. The specific items identified in the originating application and Ms. Maybroda's affidavits are:

- windows;
- patio doors;
- balconies and railings;
- caulking; and
- exterior cladding.

[60] Several documents from engineers touching on those issues are in evidence. I also have Ms. Richards' evidence regarding repairs to date and planned for the future.

7.1. Aegis West 2020 Reserve Fund Report

[61] The most recent reserve fund report in evidence is by Aegis West Engineering, dated September 2020. It addresses the building envelope components raised as issues by the Applicants in sections 6.4, 6.5 and 6.6, which I quote below, but without the tables and photographs included in the report:

> **EXTERIOR CLADDING**
>
> The exterior of the building is protected with a number of finishes, which include brick veneer, concrete block veneer, cementitious stucco, metal siding and painted concrete.
>
> Visual review of the brick and concrete block masonry from grade, roof top and isolated balcony locations, indicates that the cladding is generally in satisfactory condition for its age, with only minor mortar joint cracking/deterioration noted at

random isolated locations, which is not unusual for cladding of this age. If properly installed, detailed and maintained, masonry veneer is an extremely durable and long lasting exterior cladding. No specific issues relating to the brick or concrete block veneer clad wall areas were reported. However, it should be noted that the proximity of the brick cladding to the original aluminum framed windows increases the potential that some moisture infiltration behind the cladding may have occurred at/around windows over the life of the building, which could have impacted the condition of underlying wall elements. Further review, beyond the scope of this study, would be required in order to ascertain if such conditions exist. For the purpose of this study, funds have been budgeted for review, repair and repainting of the masonry elements every 10 years, to coincide with exterior painting renewal work and to take advantage of the cost savings relating to access and mobilization. Further information regarding the condition of wall elements should be gathered in conjunction with window replacement and related work. At that time, adjustments to brick and block cladding service life and costing should be made to suit actual conditions.

The stucco cladding was observed to be in fair condition, consistent with its age. Based on the age and location of the stucco, replacement of the stucco cladding should be carried out in conjunction with window replacement work, to allow for proper integration of the window and wall cladding components and repair of any deteriorated elements. Funds for replacement of the stucco have been budgeted accordingly.

The painted exterior concrete wall cladding elements were observed to be in satisfactory condition, with no issues or problems reported. However, deterioration, fading and peeling of the paint finish was observed. Funds for renewal of the exterior paint finish have been budgeted in conjunction with window replacement, and on a 10 year cycle in conjunction with brick cladding repair work.

For the purpose of this study, ongoing repairs of brick/block cladding and exterior concrete wall elements, including painting and repainting have been included to maintain the majority of the exterior cladding components over the study horizon. However, based on the age and configuration of the building components, combined with rising energy costs and an increased awareness of the reduced environmental impacts associated with more energy efficient buildings and cladding systems, there is a potential that future Owners may desire an upgrade/modification of exterior wall cladding elements to improve the overall aesthetics and performance of the building envelope. This work could include new cladding systems combined with additional exterior insulation, to improve overall thermal resistance, reduce heat loss as a result of cold bridging at wall studs and exposed slab edges, and improve overall air infiltration/exfiltration performance. In co-ordination with this, further analysis and possible modification of existing mechanical/environmental systems would also be required. Costs for such an upgrade have not been included as part of this study. However, it is strongly recommended that current and future Boards consider this

potential eventuality and take steps to determine potential options, associated costs and reserve fund budget ramifications.

GLAZING & ENTRANCE SYSTEMS

The glazing systems in the units include the original aluminum framed single pane double horizontal slider type windows and aluminum framed patio doors with double pane operators and fixed glazing at balconies.

Access to the building is provided by aluminum framed entrance glazing systems on the north and south sides of the building. Aluminum framed commercial style fixed windows/glazing systems with double pane glazing units are present at the pool and south building elevation. A number of insulated metal man doors are present at other locations providing access to the parkade and building. Access to the parkade is provided by an overhead garage door. Acrylic domed skylights are also present on the pool roof.

Visual review of the original aluminum framed windows and patio doors from grade and select units, indicates that the existing glazing systems are at the end of their useful service lives, and generally provide poor overall thermal and air infiltration resistance, when compared to modern glazing systems. Accordingly, funds for replacement of the windows and patio doors with new PVC framed awning or casement type assemblies have been budgeted in coordination with other exterior work over the two year period of 2022-2023.

The aluminum framed glazing systems, which include entrance systems and fixed glazing on the north and south elevations of the building, are original to the building and have reached the end of their typical service lives, with a number of fogged windows noted as well as deteriorated gaskets and sealants. Funds for replacement of these glazing systems have been budgeted in 2023, in conjunction with other exterior building renewal work.

The pool skylights were reportedly recently replaced and appear to be in satisfactory condition. Funds for the eventual replacement of the skylights have been included.

The overhead garage door was observed to be in satisfactory condition at the time of the review. With regular maintenance repairs, the doors should provide approximately 15 years of service and funds for replacement have been budgeted accordingly.

BALCONY DECK WATERPROOFING AND RAILINGS

Reinforced concrete balconies with painted steel guardrails are present at each upper floor level. The surface of most of the balconies is protected with a traffic bearing waterproofing membrane. At a number of balconies, it was noted that Owners had installed tile or other coverings over the surface of the balconies. A number of units have also installed sunroom type glazing at the balcony.

Visual review of the balconies was carried out from grade, roof level and isolated balconies. The balconies directly reviewed were covered with Owner installed tile or other finishes, preventing direct observation of the membrane or slab condition.

> Areas of slab edge spalling/concrete deterioration was present at a number of balconies. Loose rail connections and deterioration of the rail finish was also observed.
>
> Based on the age and condition of the existing balcony components, funds have been budgeted for localized concrete repairs, installation of a new traffic bearing waterproofing membrane system and replacement of the existing rails, with new prefinished guard rails over the two year period of 2022-2023. The budget costing for this work does not include costs associated with removal of tile or other materials installed on balcony surfaces or deconstruction/reconstruction of sunroom components, as it is assumed that costs for this work are the responsibility of the Owners. A more in depth review of all of the balconies is scheduled for 2020. Accordingly, adjustments to Reserve Fund Costing should be made if/as required to suit the additional information provided by the investigation. The traffic bearing membrane should provide approximately 15-20 years of service before renewal is again required, assuming regular cleaning and repairs are carried out as required using funds from the operating budget.
>
> (underlining added)

[62] The Aegis report sets out proposed timing and costs for renewal and repairs to the cladding, windows, patio doors and balconies:

Item	**Renewal Year**	**Estimated budget cost**
Masonry Repair Allowance	2022 – 2023	$40,000
	2032	$40,000
	2042	$40,000
Stucco Renewal	2022 – 2023	$70,000
Stucco Repairs	2032	$10,000
	2042	$10,000
Concrete Exterior Walls Paint Renewal	2022 – 2023	$200,000
	2032	$200,000
	2042	$200,000
Windows (Units)	2022 – 2023	$260,000
Patio Door	2022 – 2023	$330,000
Main Floor & Exterior Pool Glazing & Entrance Systems	2023	$80,000
Skylights	2035	$6,000
Overhead Parkade Garage Door	2029	$3,000
	2044	$3,000
Balcony Waterproofing	2022 – 2023	$280,000
	2037	$280,000
Balcony Railings	2022 – 2023	$140,000

7.2.Wade Engineering 2020 Balcony Review

[63] The next report in evidence is dated December 2020 by Wade Engineering. Wade was commissioned by the Respondent to "perform an inspection of the balconies and railings to express an opinion on the existing conditions and provide options for repair." The summary and recommendations section of that report includes the following:

> In summary, a variety of concerns were found including:
>
> - Steel railings that in most cases are at or near the end of their service life coupled with the fact that picket spacing is contrary to minimum Code requirements (4").
> - Concrete balconies and adjacent structures were found to have cracks and delaminationsin the concrete which can pose safety concerns. The existing deterioration will continue to increase over time and become more costly to repair.
>
> The following repairs are recommended:
>
> **RAILINGS**
>
> In the majority of cases the condition of the railings that were inspected varied from needing repairs (cleaning, painting) to unsafe extremely rusted condition. There may also be corrosion inside the guardrails which is not visible from the outside. In addition, due to being non-Code compliant, it is a requirement that all railings be removed and replaced (liability and insurance concern).
>
> Note that it recommended to reconfigure new railings post locations to be significantly offset from the current post locations (which are at the corners and middle of balconies) to ensure adequate concrete coverage and spacing from the slab edges. A powder coated aluminum system would provide a long term low maintenance guard rail option. An additional structural review is required for a new guard rail system, particularly if the continuous vertical tubing from balcony to balcony is to be removed. Opinion of costs will be based on new aluminum guard rails installed after the balcony slabs are repaired.
>
> **CONCRETE SLAB REPAIRS**
>
> - Where cracking and delaminations are occurring, remove deteriorated concrete to a point where un-corroded reinforcing steel has been exposed.
> - Clean or replace corroded reinforcing steel; conduct repair and place new concrete in accordance with CSA standard A23.3.
> - Clean and prep the balcony surfaces and apply a waterproof coating or pedestrian traffic tile (porcelain or quarry tile) weather proof the top surface and slab edges.
> - Note: exceptions are possible where: balconies are well protected and remain in excellent condition; i.e. the recessed balcony of Unit 1201 and enclosed balconies which are not in need of slab edge repair above or below.

BALCONY ENCLOSURES

Balcony enclosures are beneficial in protecting balconies from the elements and prolonging the life of the balcony slabs; however the vast majority of enclosures are 'non-permitted' according to City records.

- It is recommended that development and building permits be obtained for all enclosures, panels and railings where no permit is on record.
- Determine whether removal and reinstallation of enclosures will be necessary to accomplish balcony repairs. In those cases where both the top and bottom concrete slabs remain in good condition it is possible that the existing enclosures and the flooring within could remain as is. However, where delaminations are occurring, the concrete should be repaired and brought to a safe condition (it is likely that if concrete repair is required and the delamination's extend inward, then the enclosures and flooring will need to be removed during the repair process).
- There are two options to consider regarding the railings mounted outboard of the enclosures. The first option is the use of brackets that mount to the surface of the balcony that carry a guard rail post on the face of the guard rail base plate. The placement of this bracket may require minor grouting for a proper fit. The attachment of the bracket may extend under the enclosure into the living space. Alternately a free standing anodized aluminum railing could be installed on the edge of the deck with guardrail base plates possibly extending under the enclosures. In both of these viable options the vertical tubing from balcony surface to the above balcony soffit will be removed.
- If removing the original outer guardrails, the enclosures would need to be removed as well, because the concrete around the steel guardrails will need to be cut out and removed to get the railings out.

[64] The Wade report estimates the costs of the balcony repairs to be $1,300,000 in 2020 dollars but does not include a proposed date range for the work.

7.3.Morrison Hershfield March 2021 Design Briefs

[65] There are two unsigned letters from Morrison Hershfield in evidence, both dated March 12, 2021. One deals with windows and doors and the other deals with cladding. Each letter includes a statement under the heading "Background Information" regarding decisions already made by the Respondent:

windows and doors letter

It is our understanding that Condominium Corporation is planning to replace all of the exterior windows and doors in the building, excluding the skylights which were replaced recently as noted in the 2020 Reserve Fund Study (RFS) report.

cladding letter

It is our understanding that Condominium Corporation is planning to engage in a remediation project related to all of the exterior wall cladding assemblies.

[66] The discussion and recommendations sections of windows and doors letter includes the following:

> The windows and doors at Park Towers appear to be at the end of their service life. As noted in this report, deterioration of various components of the window and door assemblies was evident, which can reduce their performance. In turn, this can lead to a decrease thermal comfort and increase the potential of moisture ingress and/or condensation which in turn, can cause damage to adjacent wall assembly components (including the structure) and interior finishes.
>
> We recommend replacement of all windows and doors at Park Towers within two to three years. This excludes the skylights, which are outside MH's scope of work and have been reportedly replaced recently.

[67] The discussion and recommendations section of the cladding letter includes the following:

> **Stucco Cladding**
>
> Deterioration of the stucco cladding is evident at multiple locations. Patch repairs of the stucco are very challenging to complete; therefore, as a more cost-effective approach MH recommends completing a full replacement of the stucco cladding at the time of the window replacement. This will also allow the best possible building envelope tie-ins to the windows. In conjunction with the window replacement, the cementitious stucco cladding would be replaced with new non-combustible cladding, flashing, and sealant as required.
>
> MH recommends installing the new exterior wall assembly as a rain-screen system complete with a new weather resistive barrier. With any cladding option, through-wall flashings should be used at each floor level over the projecting floor slab, as well as at all penetrations, for improved moisture control. The inclusion of the rain-screen assembly will prolong the service life of the cladding assembly and reduce significantly the risk of moisture intrusion.
>
> …
>
> **Concrete Cladding**
>
> The existing concrete cladding assemblies appears to be designed as a face sealed system, which is heavily reliant on the performance of the sealant used at cladding transitions and the water tightness of the panels. While the concrete cladding generally appears to be in fair condition, with only isolated areas of concrete delamination, deterioration of the sealant at cladding transitions was evident.
>
> MH understands that there have not been any recent reports of water ingress; however, given the condition of the sealant MH recommends that The Owners consider a sealant replacement project. Further, at areas where rebar is exposed, it is recommended concrete repairs be conducted at the same time as the balcony rehabilitation project.
>
> MH understands that the Owners would like to repaint the concrete cladding. As the paint coating on the precast panels is presently unknown, MH recommends that a paint adhesion test is conducted prior to the repaint project in order to

> determine the current coating and compatibility of any new coating. As some concrete surfaces are containing of asbestos, abatement procedures may be required if the underlying coating or skim coat is disturbed. MH recommends replacement of joint sealants at the same time as repainting.
>
> **Brick Veneer**
>
> Similar to the concrete cladding, the brick veneer cladding appears to be designed as a face sealed system. Weepholes, which are typically including in a brick veneer for drainage, were not observed. Generally, the brick cladding appears to be in fair condition with only localized areas of spalling and cracked mortar joints observed. That noted, deterioration of the sealant at brick to cladding transition was evident at multiple locations.
>
> As the brick cladding is predominantly installed adjacent to glazing assemblies, MH recommends replacement of the sealant and repair of the brick at the same time as the window and stucco replacement.
>
> **Metal Cladding**
>
> The metal cladding is primarily installed below the punch window on Levels 13 and 14 of the north and south elevation. The metal lap siding appears to be reaching the end of its service life and deterioration of the sealant around the metal cladding perimeter was evident. We recommend replacement of the metal panels at the same time at the stucco and windows.
>
> (underlining added)

[68] Both letters have a section entitled “Hierarchy of Repairs”, with similar wording. That section in the cladding letter reads:

> We understand that balcony, cladding, window and door remediation projects are under consideration by The Owners and that prioritization of remediation projects are dependent upon assessment report recommendation associated with those projects.
>
> That noted, the brick, stucco and metal panel assemblies are predominantly adjacent to the glazed areas and will typically require building envelope tie-in to the glazed assemblies. We recommend that remediation at these areas is completed at the same time as the window replacement project in order to avoid multiple efforts related to mobilization and demobilization of the Contractor. Essentially, as the contractor is already onsite, additional mobilization, demobilization, access and permitting costs involved with a targeted style replacement are avoided. This will also allow for better building envelope tie-ins to the windows.
>
> Similarly, we recommend that any required concrete repairs in the immediate vicinity of the balconies are completed during the balcony repairs. Other elements of concrete repair, if not urgent, could be completed at the same time as the repainting of the concrete cladding. In addition, there may be a slight cost saving by completing the concrete repair and repainting work at the same time as either the balcony repair or window replacement project. That noted, large sections of

> the concrete cladding are only be accessible from swing-stage drops that will not be utilized during the balcony or window rehabilitation project.
>
> (underlining added)

[69] Morrison Hershfield estimated the cost of the window and door replacement to be $1,545,00 with small adjustments up or down depending on options selected. The estimated cost of the repairs of the brick and concrete cladding and replacement of the stucco and metal cladding was $485,000, with small adjustments depending on the options chosen. Morrison Herschfield also provided an estimated cost of $2,500,000 for the addition of overcladding to achieve increased energy performance, air tightness and water resistance.

7.4. Morrison Hershfield April 2021 Balcony Assessment Report

[70] This report, dated April 12, 2021, begins with a review of the Wade Engineering December 2020 balcony report and then moves on to Morrison Hershfield's own assessment based on its site visits on February 23 and 24, 2021. The summary of findings includes the following:

> **BALCONY FLOOR SLAB**
>
> Per the findings noted in Section 6, in general. the balcony floor slab was found to be in poor to critical condition, with the majority of balcony floors having cracks and local concrete deterioration at the edges (e.g. spalling, delamination). However, many balcony floors were covered or partially covered with carpet and/or deck at the time of review, so visual assessment of the floor slabs was limited to the balconies with exposed top surface only. MH recommendations four possible repair strategies are provided below. That noted, the exact extent of the total repair area, the required repair details and the related specifications are beyond the present scope of work.
>
> …
>
> **METAL RAILINGS**
>
> Per the findings noted in Section 6, in general, the existing metal railing system was found to be in critical condition. During the site review, MH observed that multiple railing post had significant rust and material loss. causing the posts to be discontinuous and unable provide any support. Furthermore, the openings between the vertical metal pickets were observed to be approximately 6" wide, however per Part 9, Section 9.8.8.5., Openings In Guards of the National Building Code - 2019 Alberta Edition [NBC(AE)2019], openings shall not be more than 4" (100mm) wide. The significant rust and 6" wide openings both pose a life safety concern for the tenants. Several handrails were also observed to have insufficient connections at support locations which require immediate attention. Corrosion and rust on the handrails and fasteners was observed at multiple locations. It 1s important to note that the handrail system deficiencies are related to safety of the tenants and/or public and should be addressed immediately. MH recommends to replace all balcony railings to conform to the current building code and the Alberta Occupational Health and Safety Act, however possible repair strategies for the handrails are provided below.

[71] In Morrison Herschfield's opinion, the probable cost to repair the balcony concrete and replace the balcony railings was $1,110,000.

7.5. RJC Engineers May 2022 Balcony Assessment

[72] RJC Engineers conducted a "condition assessment of the exterior balcony slabs at the Park Towers Condominium" based on site visits between April 19 and 22, 2022 and prepared a report dated May 9, 2022. The discussion of findings section of the report includes the following:

> Deterioration of the balcony and railing assemblies was noted during our review. We determined that four balconies should be closed due to deterioration of the railing supports. The remainder of the balconies are structurally safe to occupy at this time.
>
> **Concrete Balcony Slabs**
>
> The majority of the balconies are exhibiting corrosion-related deterioration in the form of concrete delaminations and spalled concrete along the slab edges and slab surfaces Although the deterioration does not appear to be affecting the overall structural integrity of the balcony slabs, the slab edge delaminations could compromise the railing embedded anchors in the slab edges. Deterioration can be expected to increase if left unattended.
>
> Furthermore, the deterioration of the balcony slab edges has progressed to a point where pieces of concrete have fallen or are at risk of falling off the building to the ground or balcony slabs below. This poses a risk of injury and property damage. As a minimum, loose concrete should be removed to reduce this risk. We understand that the Board is presently working with a Contractor and the City to provide short-term overhead protection in the main entrance public areas and restrict access in other areas around the building.
>
> **Balcony Guardrails**
>
> The railing system is generally showing a significant amount of deterioration in key areas. Although the majority of railings remain secure at this time, the extent of corrosion of the support posts, as well as the risk of hidden corrosion within these posts, is a concern for the long-term stability of the railings.
>
> As noted above, the railing anchors may also be compromised by concrete deterioration and the balcony connections do not allow for differential movement of the slab. Furthermore, the existing railings do not meet the requirements of the current Alberta Building Code and if modifications were made, they would need to be brought up to the current code.

[73] RJC proposed a four-stage restoration program for the balcony slabs and railings, consisting of:

1. Immediate Repairs
2. Balcony Slab Concrete Repairs
3. Balcony Deck Protection
4. Balcony Railing

[74] RJC did not propose a timeframe for or estimate the cost of that work.

7.6. RJC Advice Regarding Windows and Patio Doors August 9, 2022

[75] Ms. Richards states in her September 27, 2022 affidavit at paragraph 11 as follows:

> Park Towers' engineering consultant, RJC, completed the assessment on the windows on August 9, 2022 and determined that the windows could be refurbished instead of having to be replaced. RJC completed the bidding process for the window assembly repair and 3 quotes have been submitted to the Board as of September 19, 2022. The three bids have been submitted to the Building Committee and the Board will consider the Building Committee's comments and/or recommendation at the October Board meeting.
>
> (underlining added)

[76] The June 21, 2022 board meeting minutes refer to "RJC's draft Window and Patio Door Assessment". Neither the draft nor the completed assessment is in evidence. Based on the fact that the Respondent proceeded with refurbishing, rather than replacing, both the windows and the patio doors, which was done under the supervision of RJC Engineering, I infer that RJC advised the board that both the windows and the patio doors could be refurbished rather than replaced.

7.7. Initial Balcony Repair Work July – September 2022

[77] The Respondent undertook repairs to the balconies, which are described in field reports by RJC Engineers. The Project Field Review Record 2, dated September 15, 2022 describes work performed by AllVert Structural Solutions and observed by RJC Engineers as follows:

> RJC was on site to review the progress of the work. The Contractor has completed removal of the loose concrete on all balcony drops outlined in the contract documents. The Contractor has begun preparations for the welding repairs and anticipates that they will be completed this work next week.
>
> 1. Concrete materials generally appear to have been removed as outlined in the contract documents.
> 2. Contractor has indicated that suite balcony access will be required to complete the welding repairs. Contractor is to provide the Site Manager with a list of required resident suites a minimum of 48 hours prior to entry.
> 3. Locations of loose concrete have been identified outside of the specified repair areas. Contractor to provide RJC pricing for removal of loose concrete in the noted building envelope areas. Include for installation of building sealants as may be required to reduce the risk of water entry into the suites once concrete materials have been removed

7.8. Balcony, Window and Patio Door Work October 2022 – September 2024

[78] Ms. Richards' affidavits detail repairs completed and planned by the Respondent, with board minutes, repair contracts and field reports from RJC Engineering attached as exhibits. In summary, the Respondent retained RJC Engineering to advise it regarding repairs and to oversee the execution of those repairs, which was done primarily by two contractors: Allvert Construction and Major League Glazing. The repair program includes repairs to the balcony

concrete, replacement of the balcony railings, and caulking, sealing and replacing weatherstripping on the patio doors and windows. The repairs of those elements were partially complete at the time of Ms. Richards' most recent affidavit in June 2023.

[79] In April 2022, the City of Edmonton issued a safety codes order to the Respondent with respect to the condition of the balcony concrete and railings as well as glass enclosures on some balconies. As of December 2022, the work done on the balconies and railings satisfied the City with respect to those aspects of its order and the City of Edmonton issued a revised order in February 2023 relating to the glass enclosures only. Those were installed by the owners of certain units which makes compliance with the safety codes order relating to the glass enclosures the responsibility of each owner, not the condominium corporation. The Respondent has communicated with the owners reminding them of their obligations on this point.

[80] Ms. Maybroda notes in her June 1, 2023 affidavit that the windows and patio doors have been recaulked but there is no plan to replace them, as Aegis West recommended in its 2020 reserve fund report and which, in Ms. Maybroda's view, is necessary for the maintenance and repair of the common property.

[81] The Respondent also undertook reviews and replacement of other elements of the common property, such as the underground parkade and the building foundation. Those are not at issue in this action.

7.9. Conclusion Regarding Maintenance and Repair

[82] The Applicants claim that the Respondent failed to repair and maintain the common property, specifically the windows, patio doors, balconies and railings, caulking, and exterior cladding. Even if the engineers' reports were admissible in the form they have been put before me (which they are not, as set out in section 5 of these reasons, above), the Applicants have failed to prove their claim on this point.

[83] The evidence in the engineers reports, as a whole, together with Ms. Richards' evidence of the work completed up to her June 2, 2023 affidavit, establishes that the windows, patio doors, and balcony concrete and railings have been repaired, or repairs are underway, in accordance with the most recent recommendations, being those of RJC Engineering.

[84] No substantial repairs to the cladding were recommended in the 2020 Aegis West reserve fund report. The Morrison Hershfield letters in March 2021 recommend cladding repairs in conjunction with window replacements, but RJC Engineering advised in August 2022 that the windows could be refurbished rather than replaced. Consequently, I am not satisfied that any substantial cladding repairs or replacement has been required to date. I note that RJC provided a proposal for a review of the cladding dated January 13, 2023 and Ms. Richards indicates in her June 2, 2023 affidavit at paragraph 13 that cladding work will be done in accordance with RJC's recommendations.

[85] The Applicants were involved in the Park Towers board and its committees up to 2021 and Ms. Maybroda spent substantial time and energy working with consultants on a more extensive and accelerated repair program than the Respondent implemented. Reasonable people may have different views regarding the best course of maintenance and repair for a condominium building and several alternatives may satisfy the maintenance and repair requirements of s. 37 of the Act. The Respondent's board was entitled retain new consultants, consider their advice and exercise its judgment about the best course to take. The Applicants have failed to prove that the

course taken by the Respondent left the common property in a state of disrepair amounting to a breach of s. 37 of the *Act*.

8. Reserve Fund Plans

8.1. November 2022 Reserve Fund Plan

[86] The Park Towers board approved a reserve fund plan on November 14, 2022. The narrative portion of that plan includes the following:

> The Reserve Fund Study was completed in 2020, authorized by the Corporation Board of that time, they retained Aegis West Engineering Inc. to conduct the Study and provide the current Reserve Fund Report. The Report was made available to the Owners December 7, 2020, on the Corporation's digital document site CondoGenie.
>
> Following the receipt of the Reserve Fund Report in 2020, no Reserve Fund Plan was approved by any of the previous Corporation Boards. After the May 10, 2022 Annual General Meeting, the current Board commenced to develop the Reserve Fund Plan based on the Reserve Fund Report, recommendations from Board committees, consulting engineers, contractors, and cost estimates from quotations for repair work.
>
> (underlining added)

[87] The table portion of the November 2022 reserve fund plan shows an opening balance in the reserve fund of $1,000,000, and planned annual contributions and expenditures for the years 2022 – 2028. The plan anticipates annual expenditures of ranging from $80,850 to $783,310 over that period with a total anticipated expenditure of $2,598,750 over those seven years. The plan forecasts a positive balance in the reserve fund at the end of each year.

[88] The table includes $260,000 for window replacement over the years 2026 and 2027.

[89] The notes to the reserve fund plan include the following:

1. Actuals to July 31, 2022, based on MMG books
2. Data is post Aegis (2020) RFStudy & 2021 audit; includes 2022 updates
3. After 2022 audit and AGM May 2023, plan will be revisited. Special levy may have to be imposed in 2025 after knowing repair costs.

[90] The reserve plan includes the following expenditures anticipated for 2023 and 2024 which according to the notes were not part of the Aegis 2020 reserve fund plan:

- Masonry Veneer – Repair Allowance
- Metal Siding – Replace
- Concrete Panels – Repair
- Asbestos Abatement
- Windows – Pool – Replace Failed Sealed Units
- Asbestos Abatement for Pool Windows

- Balcony slab edge and surface concrete repairs

[91] The Respondent's audited financial statements for the year ending 2022 include a note referring the November 2022 reserve fund plan and record opening and closing balances in the reserve fund in 2022 close to the figures in the plan. The opening and closing balances in the plan are $1,000,000 and $770,886. The opening and closing balances in the financial statements are $955,412 and $730,503. The financial statements are dated April 25, 2023. The relatively small variances between estimated and actual balances are reasonable.

[92] The November 2022 reserve fund plan complies with the requirements of s. 23(5) of the Regulation:

> (5) A reserve fund plan approved under subsection (4) must provide that, based on the reserve fund report, sufficient funds will be available by means of owners' contributions, or any other method that is reasonable in the circumstances, to repair or replace, as the case may be, the depreciating property in accordance with the reserve fund report.
>
> (underlining added)

[93] The reference to "the reserve fund report" in s. 23(5) includes reference to other information obtained after the reserve fund report is prepared, because, as noted in ***Scotwick Realty*** at paras 7 – 8, the main purpose of the reserve fund is to provide sufficient funds that can reasonably be expected to provide for major repairs and replacement of the common property, and, as noted in ***Francis v Empire Gardens*** at para 11, a board is entitled to obtain expert reports subsequent to the reserve fund study and act on those reports.

[94] Assuming the engineers' reports are admissible on the issue of whether the Respondent approved a reserve fund plan and maintained a reserve fund in compliance with the *Act* and the *Regulation*, I find that it did, because the November 2022 reserve fund plan on its face incorporates the 2020 Aegis West reserve fund report as modified by subsequent engineers reports, cost estimates and contracts, and the plan provides for contributions to the reserve fund sufficient to keep it in a positive balance.

[95] On the other hand, if the engineers' reports are not admissible on this issue, then there is no evidence on the condition of the common property which is an essential element of the Applicants' claim that the Respondent failed to maintain a maintain a sufficient reserve fund (s.38 of the *Act*) or that the board failed to approve an adequate reserve fund plan (s. 23 of the *Regulation*).

8.2. Reserve Fund Plan 2020 - 2021

[96] Mr. Dal Bello states in his affidavit that he understood that the board approved a reserve fund plan at its September 8, 2020 meeting. The minutes of that meeting record that the board approved the Aegis West 2020 reserve fund study but there is no mention of the board approving a reserve fund plan. Based on the minutes, it appears that Mr. Dal Bello was not a member of the board at the time and was not in attendance at the meeting.

[97] Ms. Maybroda states in her April 2022 affidavit that the board accepted her committee's recommendation regarding the project schedule at a meeting on April 21, 2021. The applicants submit that the board approved a reserve fund plan referring to four documents:

- Ms. Maybroda's April 2022 affidavit;

- minutes of the April 21, 2021 board meeting;
- a document dated April 2021 entitled “Financial Analysis of Reserve Fund Projects”; and
- a letter dated June 16, 2021 from Lloyd Sadd Insurance Brokers

[98] Whether read together or separately those four documents are not a reserve fund plan because they do not meet the requirement of s. 23(5) of the *Regulation*, in that they do not provide for a means by which sufficient funds would be available to fund the work approved by the board. The Financial Analysis of Reserve Fund Projects documents sets out alternatives, but there is no evidence that one alternative was chosen. The October 20, 2021 demand letter from the Applicants’ counsel refers to financing alternatives which supports the conclusion that no alternative had be chosen as of that date.

[99] Mr. Mills was a member of the Park Towers board up to March 16, 2022. He provided an affidavit in support of the Applicants’ action, but he provides no evidence about any reserve fund plan being adopted by the board.

[100] There is no evidence of a reserve fund plan being approved by the board after the Aegis West 2020 reserve fund study report and before the November 2022 reserve fund plan.

8.3. Reserve Fund Plans Before 2020

[101] The Applicants have adduced into evidence four reserve fund reports for Park Towers dated between August 1998 and August 2015. Each of those reports recommends increased contributions to the reserve fund. According to Ms. Maybroda none of those recommendations was followed. There is no evidence before me of any reserve fund plans prior to 2020. It may be that prior to November 2022 the corporation and the board were in breach of the *Act* or the *Regulation* with respect to the reserve fund and the reserve fund plan. I would need better evidence in the form of board minutes, annual financial statements and any reserve fund plans for that period to make that finding. I would also need submissions on the applicable legislation at different points in time during that period as I note that both the *Act* and the *Regulation* were amended several times after 2000. However, nothing turns on this. Even if the Park Towers condominium corporation or its board failed in the past to maintain an adequate reserve fund or to adopt an adequate reserve fund plan, they have satisfied those obligations as of November 2022. No remedial order would be necessary or useful and I would exercise my discretion to decline to make even a declaration. There may also be a limitations issue with respect to claims discoverable more than two years before this action was filed.

9. Board Dysfunction

[102] The Applicants allege that the Park Towers board became dysfunctional starting in July 2021 when the composition of the board changed at an annual general meeting. Board dysfunction is subjective concept and there is neither a definition nor a prohibition of it in the legislation or the Park Place bylaws. The real issue on this point is whether the functioning of the board has descended to the level of “cause shown” pursuant to s. 58 or conduct that is oppressive, unfairly prejudicial or unfairly disregards the interests of an interested party pursuant to s. 67.

[103] At paragraph 6 of his affidavit, Mr. Mills provides the following evidence:

> In my time on the Board over the months since the 2021 AGM, I found the new Board operated at a level of dysfunction that I had not experienced on the past Board nor on any volunteer board on which I have held a seat. To be sure, the previous Board had its issues, as any collective decision making body will experience a certain level of disagreement and debate amongst its members, but the flow of information and open discussion was common practice. Some members of the previous Board may have not liked the opposing views or the conclusions and decisions ultimately made by the group, which is typical, but at least everyone was informed, and discussions were open and professional. This was not the case with the new Board elected following the 2021 AGM. After the 2021 AGM, I found no such collegial, open cooperation and communication.

[104] In paragraphs 7 – 20 Mr. Mills describes what he sees as poor communication among the board and between the board and the owners, poorly run meetings and a failure of the board to come to grips with the maintenance and repair issues facing the board. Mr. Mills resigned from the board in March 2022.

[105] Ms. Maybroda in her June 1, 2023 affidavit describes poor communications by the board with the owners from July 2021 onward, as she sees it.

[106] Ms. Richards in her affidavits describes the initiatives the board has taken since the July 2021 annual general meeting including the balcony and window repair work described in section 7.8 of these reasons, above. A large number of board minutes and communications are included in the evidence. The evidence satisfies me that, though the board may have gone through a rough patch in the period covered by Mr. Mills' affidavit, even then it was functioning, and it has continued to function since. The fact that there is disagreement among the owners, particularly over the expensive repair program, is not dysfunction; it is properly functioning democracy. Similarly, communication by the board with the owners may have been less than ideal, but the board has generally fulfilled its duties, including its duty to communicate with the owners.

10. Conclusion

[107] The Applicants have failed to prove any of the facts on which their claim is based.

[108] They have adduced virtually no direct evidence of the condition of the building. Even if the hearsay and opinions in the engineers' reports were admitted, it would not establish that the corporation has failed to repair and maintain the building or that it has failed to establish and maintain an adequate reserve fund or adopt an adequate reserve fund plan. There is no evidence of a breach of the legislation or the bylaws and thus no improper conduct as defined in s. 67(1)(a)(i) of the *Act*.

[109] While the evidence does establish some disagreements within the board and among the unit owners, the Park Towers board continues to function. Nothing the board or the corporation has done has been oppressive, unfairly prejudicial to or unfairly disregarding of the interests of the Applicants or anyone else. The Applicants do not agree with what the board has done, but that is not oppression nor is it unfair. The board was democratically elected by the owners. It received and relied upon the various engineers' reports and exercised its business judgment to choose a course of action. The course taken was not the only alternative, but it was a reasonable alternative. Consequently, improper conduct as defined in s. 67(1)(a)(ii) – (v) has not been proven.

[110] In the absence of improper conduct, the Applicants are not entitled to relief pursuant to s. 67 of the *Act.*

[111] Furthermore, none of the relevant factors favours the appointment of an administrator:

1. The *Act*, *Regulation* and bylaws have not been breached.
2. The board has managed affairs of the corporation, perhaps not perfectly, but not so poorly as to warrant court intervention.
3. There has been no substantial misconduct in relation to the corporation's affairs.
4. No irreparable harm is imminent or even foreseeable absent the appointment of an administrator.
5. If an administrator were appointed they might make different choices than the board has but the evidence does not establish that that would be an improvement.
6. However long an administrator would be in place, there would be a cost to the corporation without any demonstrated benefit.
7. The circumstances do not warrant displacing a democratically elected board from its role in governing the corporation and its affairs.
8. No remedy is warranted so the availability of an alternative is moot.

[112] The Applicants have failed to show cause for the appointment of an administrator pursuant to s. 58 of the *Act.*

[113] For those reasons, the action is dismissed.

11. Costs

[114] In accordance with my discussion with counsel at the end of the oral hearing, the Respondent shall provide written submissions on costs within two weeks of the date of this decision, the Applicants shall provide their written submissions on costs within two weeks of receiving the Respondent's submission and the Respondent may, but is not required to, provide a reply submission within one week of receiving the Applicant's submission.

[115] The initial costs submissions from each side is limited to ten pages and the reply submission by the Respondent, if it choses to make one, is limited to five pages. Each initial submission should include:

- that party's position with respect to the factors set out in r 10.33;
- any formal offers or other settlement proposals they wish to have considered;
- a proposed bill of costs; and
- a summary of the costs actually incurred for this action.

[116] They last three of those things may be attachments to the submissions and not subject to the page limit. If the parties wish to refer to cases, citations are sufficient, but if they chose to include copies of cases or other authorities, they are not subject to the case limit. Cases already provided to me for the March 5, 2024 hearing should not be provided again.

[117] If the parties are able to agree on costs, they may simply advise me of that rather than providing any written submissions.

Heard on the 5th day of March, 2024
Dated at the City of Edmonton, Alberta this 3rd day of June, 2024

G.S. Dunlop
J.C.K.B.A.

Appearances:

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for the Respondents, Condominium Plan No. 752 1572 (o/a Park Towers)