IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan VIS 1210 v. Ngai Estate,* 2024 BCSC 2232

Date: 20241209
Docket: 210312
Registry: Victoria

Between:

The Owners, Strata Plan VIS 1210

Plaintiff

And:

The Estate of Vun Wong Ngai, The Estate of Mui Tai Ngai, Simon Yuk Hing Ngai, Tommy Yuk Fai Ngai, Amy Ying Yu Yan, Shirley Ngai, Rainbow Tang and Alex Yuk Wah Ngai

Defendants

Before: The Honourable Justice K. Wolfe

Reasons for Judgment

Counsel for the Plaintiff:	T.W. Morley
Counsel for the Defendants:	C.A. Siver S. Constantine
Place and Date of Summary Trial:	Victoria, B.C. May 14-17, 2024
Written Materials Received:	May 30, 2024
Place and Date of Judgment:	Victoria, B.C. December 9, 2024

Table of Contents

Introduction

[1] The plaintiff is a strata corporation (the "Strata Corporation") that governs a ten-lot strata property located at 3274 Glasgow Avenue in Victoria, British Columbia (the "Strata Property"). The first two named defendants are the estates of the now-deceased owner developers, Vun Wong Ngai ("Vun") and Mui Tai Ngai ("Mui") (together, the "Owner Developers"), who purchased all ten strata lots in March 1989. The remaining defendants are the executors of the estates, Simon Yuk Hing Ngai ("Simon") and Tommy Yuk Fai Ngai ("Tommy") (collectively, the "Executors"), as well as the beneficiaries of those estates. As most of the defendants have the same final name, where required, I use their first names without meaning any disrespect.

[2] In March 2019, the Executors sold the first strata lot. The beginnings of this dispute came to light after the Executors conveyed the sixth lot in or around November 2019. That sale triggered an obligation under the *Strata Property Act*, S.B.C. 1998, c. 43 [*SPA*] to hold a first annual general meeting ("AGM") within a defined period of time. The Strata Corporation argues the meeting held on behalf of the Executors in December 2019 did not comply with all of the *SPA*'s requirements. As a result, in August 2020, the purchasers held what they characterize as the first proper AGM. It is common ground that one of the purposes of the first AGM is to transfer control over the Strata Corporation to subsequent purchasers.

[3] Through the process of working to assume control, the Strata Corporation says it discovered the defendants (including the Owner Developers) had failed to fulfill multiple other statutory and fiduciary obligations to the Strata Corporation over the more than 30 years that they controlled it. The allegations primarily relate to failures to: estimate the operating expenses and make appropriate payments and contributions during the period of the interim budget; properly establish and fund the contingency reserve fund; and obtain proper insurance and address other operational details. The Strata Corporation says the defendants' failures to meet their statutory and fiduciary obligations have, among other losses, left the Strata Corporation without sufficient reserve funding to undertake necessary deferred maintenance, including window replacements.

[4] To address the alleged failures and their impacts, the Strata Corporation filed a claim against the defendants seeking statutory penalties, damages for breaches of statutory and fiduciary duties, punitive damages and unjust enrichment, the latter of which is advanced as a form of alternative position. In total, the Strata Corporation seeks orders for payment of more than $1.035 million.

[5] The Strata Corporation acknowledges it is advancing novel legal positions in three areas: that failure to comply with all statutory requirements precludes a meeting from constituting the first AGM; that an owner developer must contribute more than the statutory minimum to a contingency reserve fund for an older building with known deferred maintenance costs; and that a claim against an owner developer only becomes discoverable once control is transferred to at least one new purchaser. The Strata Corporation says this Court has the evidence necessary to make new law in each area.

[6] The defendants deny each of the Strata Corporation's allegations. They say the first AGM was held as required in December 2019 and any deficiencies did not nullify it. With respect to the other statutory and fiduciary obligations, the defendants say they were either appropriately satisfied, or they did not arise or apply. The defendants also advance preliminary objections to the claim. First, they say the claims fall within the presumptive jurisdiction of the Civil Resolution Tribunal ("CRT"), so are not properly addressed by this Court. Second, they say these matters are not suitable for disposition by summary trial. Finally, they say certain claims were either extinguished when the *SPA* replaced the *Condominium Act,* R.S.B.C. 1996, c. 64 (repealed), or, if not, are now time-barred in any event.

[7] I heard the application for summary trial over four days and reserved judgment on both the preliminary objections and the merits of the claim.

Overview of the relevant statutory frameworks

[8] This matter primarily engages the statutory framework under the *SPA*, which was designed to address all matters relating to the governance and operation of strata property in British Columbia. At a high level, its purpose is to set out "the

respective rights and responsibility of those who develop strata plans, and those who purchase or who may subsequently wish to transfer a strata property": *The Owners, Strata Plan NES 97 v. Timberline Developments Ltd.*, 2011 BCCA 421 at para. 16.

[9] The *SPA* was brought into force on July 1, 2000. It was described as legislation providing "consumer protection in strata ownership": *HighStreet Accommodations Ltd. v. The Owners, Strata Plan BCS2478*, 2019 BCCA 64 at para. 45. The *SPA* establishes the obligations of owner developers before control is transferred to the elected council of a strata corporation at the first AGM (Part 3), specifies the requirements and timing for the transfer of responsibility (Part 3, Division 3) and sets out the role of a strata corporation (and a strata council) after assuming control, as well as the rights and duties of owners under that governance structure (Parts 2, 4-10). The *SPA* also establishes statutory penalties for failure to perform certain of its obligations and duties.

[10] The *SPA* replaced the *Condominium Act*, which governed the management and operation of the Strata Property from the time the Owner Developers purchased all ten strata lots in 1989 until the *SPA* came into force on July 1, 2020. The *Condominium Act* also imposed certain obligations on the Owner Developers in relation to the Strata Corporation, some of which changed with the transition to the *SPA*. Whether certain obligations from the *Condominium Act* regime survived the transition to the *SPA*, and if yes, when time begins to run for any such claim, are issues raised before the Court.

[11] Finally, this matter requires consideration of the CRT's jurisdiction over strata property matters under the *Civil Resolution Tribunal Act*, S.B.C. 2012, c. 25 [*CRTA*]. The *CRTA* lists considerations that may inform the Court's decision about whether the interests of justice and fairness require the Court to dismiss the claim in favour of the CRT adjudicating it. If only some of the issues raised in the claim are within the CRT's jurisdiction, the goals of resolving disputes efficiently and avoiding "litigation in slices" may require the Court to deal with the whole of the claim.

Issues

[12] The Strata Corporation advances a complex, multi-issue claim. The defendants' preliminary objections raise further issues. I have framed the issues before the Court as follows.

[13] The three preliminary or threshold issues are:

1. Does the Strata Corporation advance claims that the interests of justice and fairness require the Court to adjudicate, rather than the CRT?

2. If there are claims the Court should properly adjudicate, are they suitable for determination by way of summary trial?

3. Did the *SPA* coming into force extinguish the Strata Corporation's claims under the *Condominium Act*, and if not, are those claims now time-barred?

[14] The Strata Corporation's substantive claims raise the following issues:

1. Do the defendants owe the Strata Corporation a statutory penalty for failure to call the first AGM on time or other compensation as a result of alleged deficiencies with the December 2019 meeting?

2. Do the defendants owe the Strata Corporation a debt and a statutory penalty as a result of alleged failures during the period of the interim budget to:

    a) properly estimate the operating expenses; and

    b) pay their respective share of those operating expenses and their required contribution to the contingency reserve fund?

3. Are the defendants required to pay the Strata Corporation money as a result of alleged failures to establish and pay into the contingency reserve fund based on one or more of the defendants' statutory obligations, fiduciary duties and representations?

4. Did the defendants fail to insure the Strata Corporation in a manner that exposes it to potential liability and thus warrants an award of damages?

5. Is the Strata Corporation entitled to an award of punitive damages as a result of the defendants' alleged disregard of and refusal to acknowledge their responsibilities?

6. Is the Strata Corporation entitled to an award of restitution because the defendants were unjustly enriched by failing to meet their statutory and fiduciary obligations?

[15] The Strata Corporation also seeks special costs against the estates of the Owner Developers and costs against the defendants generally.

Background and procedural history

[16] Before addressing the specific issues listed above, it is helpful to briefly outline the relevant and uncontroversial pieces of the historical background. Given the preliminary issues, it is also helpful to briefly touch on certain elements of the procedural history of the claim.

History of the strata property

[17] The Strata Property consists of a ten-unit, four-storey residential condominium complex with common areas built in 1982. The Strata Corporation was created when the strata plan was deposited in the Victoria Land Title Office on October 7, 1982.

[18] Vun and Mui jointly purchased all ten strata lots and the common property on March 31, 1989. The strata lots had been rented since they were built in 1982, and Vun and Mui continued to manage the Strata Property in the same way, owning all ten strata lots and the common property, and simply renting the units. It is common ground the units were rented, but other than that, there is no detailed evidence before the Court about how Vun and Mui operated the Strata Property before the *SPA* came into force. In their written and oral submissions, the defendants admitted Vun and Mui did not elect a strata council during their lives and therefore did not

hold AGMs. To the extent Vun and Mui failed to specifically create a contingency reserve fund (an assertion for which the defendants say there is no evidence), the defendants effectively submit any such failing would be one of form rather than substance. As the only two owners, the defendants say, during their lives, Vun and Mui paid all expenses for the Strata Property as required, including those that would ordinarily have been paid out of a contingency reserve fund, and there is no evidence to suggest otherwise.

[19] It is agreed that Vun and Mui were "owner developers" within the *SPA*'s definition. They continued to jointly hold the entire Strata Property until Mui passed away on December 2, 2009. After Mui's death, on or about January 26, 2010, all ownership rights and obligations passed to Vun as sole owner developer. Vun passed away on December 3, 2013. Vun's will named Simon and Tommy as executors and trustees. The Executors received the grant of probate for Vun's estate on April 24, 2014; they received the grant of probate for Mui's estate on February 26, 2015. The defendants admit that on or about July 30, 2014, titles for all of the strata lots were transferred to the Executors in their capacity as executors of Vun's estate.

[20] During their lives, Vun and Mui worked with Alan Pratten, a property manager and licensed real estate agent, on various issues related to the Strata Property. Mr. Pratten continued to assist Vun after Mui's death, and then worked with the Executors after Vun's death. In September 2012, Vun had engaged Equitex Management ("Equitex") to provide bookkeeping services and management of the Strata Property. Equitex continued to work for the Executors in this capacity after Vun's death.

[21] In 2018, the Executors began to prepare for and take steps to market the individual strata lots to the public for sale. They engaged both Mr. Pratten and Larry Wong, a lawyer at Wong & Doerksen, to assist with the marketing and sale of the strata lots. Mr. Pratten, in his capacity as a property manager and licensed real estate agent, managed the individual unit sales. In March 2018, Mr. Pratten arranged for the preparation of a depreciation report. In April 2018, the Executors

received a depreciation report dated April 20, 2018 (the "First Depreciation Report"). The First Depreciation Report was included as part of an August 14, 2018 disclosure statement for the strata lots, which was filed with the Superintendent of Real Estate on August 30, 2018 (the "First Disclosure Statement").

[22] In or about the first quarter of 2019, the Executors completed certain repair work at the Strata Property, primarily relating to decks and exterior walls, in an effort to make the strata lots more marketable. As this made the First Depreciation Report inaccurate, Mr. Pratten arranged to have a second depreciation report prepared. In March 2019, the Executors received the second report, dated March 12, 2019 (the "Second Depreciation Report"), which Mr. Pratten then uploaded to the MLS document service. In his affidavit, Mr. Pratten indicates an updated disclosure statement was also created but it is acknowledged it was not filed. The updated disclosure document does not appear to have been placed before the Court.

[23] The Executors, on behalf of Vun's estate, conveyed the first strata lot to a purchaser on March 14, 2019. The remaining nine strata lots were sold over approximately the next year, with the final lot being conveyed on February 21, 2020. The conveyance date and selling price for each of the ten strata lots is as follows:

# / 10 lots	Date	Strata Lot Conveyed	Sale Price
1	March 14, 2019	Lot 3	$318,000
2	May 14, 2019	Lot 1	$312,000
3	May 31, 2019	Lot 9	$357,000
4	August 15, 2019	Lot 6	$345,000
5	September 30, 2019	Lot 4	$326,000
6	October 31, 2019	Lot 7	$335,000
7	November 1, 2019	Lot 5	$283,000
8	November 29, 2019	Lot 10	$364,000
9	February 14, 2020	Lot 2	$280,000
10	February 21, 2020	Lot 8	$305,000
	Combined Sale Price (10 lots):		**$3,225,000**

[24] As set out in the above table, on or about November 1, 2019, 50 percent plus one of the strata lots had been conveyed to purchasers.

Relevant procedural history

[25] The Strata Corporation filed its notice of civil claim January 25, 2021. The defendants filed their response April 1, 2021. The parties exchanged lists of documents and the Strata Corporation examined the defendants' representative, Simon, in May 2021. The defendants indicated an intention to examine Richard Halliburton as the Strata Corporation's representative, but did not ultimately schedule a discovery. The defendants repeatedly took the position they required additional particulars to know the case to be met.

[26] In March 2022, the defendants provided the Strata Corporation details regarding their position that the issues in the claim fell within the CRT's jurisdiction. The Strata Corporation did not agree. In the fall of 2023, the parties discussed their differing perspectives on whether this matter was suitable for summary trial and the Strata Corporation advised of possible dates for a four-day summary trial hearing. In early January 2024, after having received no response from the defendants about dates, the Strata Corporation advised that it would be reserving the one remaining four-day block in mid-May 2024. That same day, the defendants replied that they were finalizing an application to have the claim moved to the CRT. No such application was ever filed.

[27] On April 3, 2024, the Strata Corporation filed an amended notice of civil claim, adding a claim for unjust enrichment. The defendants filed their amended response on April 17, 2024, which, for the first time, referred to issues about the CRT's jurisdiction and whether the claims are statute- or time-barred. On April 23, 2024, the Strata Corporation filed its notice of application for summary trial.

[28] On May 2, 2024, the defendants filed a notice of application seeking to adjourn the summary trial and, instead, have the Court set a one-day application, to be heard before any summary trial application. The defendants proposed that in that one-day application, they would seek dismissal of the claim on the basis that the

CRT has jurisdiction and the claims are either statute- or time-barred. Associate Judge Scarth heard the defendants' application on May 8, 2024 and dismissed both requests, awarding the Strata Corporation costs in the cause. The parties agree that Associate Judge Scarth's ruling did not preclude the defendants from arguing the jurisdictional and suitability issues at the hearing of the summary trial application.

[29] On May 10, 2024, the defendants filed a late affidavit of Mr. Pratten. The Strata Corporation consented to it being included as part of the materials for the summary trial application (as permitted under R. 8-1(14), *Supreme Court Civil Rules* [*Rules*]). On May 15, 2024, the defendants filed a second late affidavit to which the Strata Corporation did not object. However, on May 16, 2024, I ruled a third late affidavit from the defendants (Affidavit #2 of A. Slusarczyk) inadmissible.

Analysis

[30] I will deal with the three preliminary issues first as my analysis of those points bears on what must be decided substantively. I will then turn to the Strata Corporation's substantive claims.

Preliminary Issue 1: Should the Court defer to the CRT's jurisdiction?

The legal framework

[31] Section 2.1 of the *CRTA* specifies the general authority of the CRT to adjudicate particular disputes in relation to defined "claim categories". Section 2.1(c) provides that the CRT may, under Division 4 of Part 10 of the *CRTA*, adjudicate "claims in relation to the *Strata Property Act*".

[32] Section 121 of the *CRTA* identifies claims in respect of the *SPA* over which the CRT has "specialized expertise":

> **Claims within jurisdiction of tribunal for strata property claims**
>
> **121**(1) Except as otherwise provided in section 113 *[restricted authority of tribunal]* or in this Division, the tribunal has jurisdiction over a claim, in respect of the *Strata Property Act*, concerning one or more of the following:
>
> (a) the interpretation or application of the *Strata Property Act* or a regulation, bylaw or rule under that Act;
>
> (b) the common property or common assets of a strata corporation;

> (c) the use or enjoyment of a strata lot;
>
> (d) money owing, including money owing as a fine, under the *Strata Property Act* or a regulation, bylaw or rule under that Act;
>
> (e) an action or threatened action by a strata corporation, including the council, in relation to an owner or tenant;
>
> (f) a decision of a strata corporation, including the council, in relation to an owner or tenant;
>
> (g) the exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.
>
> (2) For the purposes of this Act, the tribunal is to be considered to have specialized expertise in respect of claims within the jurisdiction of the tribunal under this Division.
>
> [Emphasis added.]

[33] Section 116 of the *CRTA* provides that where the CRT is considered to have specialized expertise, the CRT has "specialized expertise to inquire into, hear and determine all those matters and questions of fact, law and discretion arising under this Act or required to be determined" by the CRT under the *CRTA*, "and to make any order permitted by [the *CRTA*] to be made".

[34] Under the *CRTA*, "specialized expertise" is not the same as "exclusive jurisdiction". The *CRTA* expressly distinguishes between claims in relation to which the CRT has exclusive jurisdiction and those over which it has specialized expertise. In a court proceeding where the Court determines that all matters in that proceeding are within the exclusive jurisdiction of the CRT, the Court must dismiss the proceeding (*CRTA* s. 16.1(1)(a)). In that situation, the Court has no discretion to order the CRT not to adjudicate the claim (*CRTA* s. 16.2(2)). In contrast, in a court proceeding where the Court determines that all matters in that proceeding are within the CRT's specialized expertise, the Court must dismiss the proceeding "unless it is not in the interests of justice and fairness for the tribunal to adjudicate the claim" (*CRTA* s. 16.1(1)(b)). It is for the Court to determine what is in the interests of justice and fairness. The language of s. 16.1(1) of the *CRTA* contemplates that determination being made "in a court proceeding".

[35] With respect to strata property claims specifically, this Court has previously confirmed that the CRT continues to share concurrent jurisdiction over such claims

with the Court: *Dolnick v. The Owners, Strata Plan LMS 1350*, 2023 BCSC 113 at para. 52, citing *West v. The Owners, Strata Plan BCS 2637*, 2021 BCSC 824 at para. 36. In *Dolnick*, Justice Brongers held that, together, ss. 16.1, 16.3 and 16.4 of *CRTA* "impose a rebuttable presumption" that the Court will dismiss a strata property claim in favour of the CRT exercising its specialized expertise, unless it is not in the interests of justice and fairness for the CRT to do so (*Dolnik* at para. 52).

[36] Section 16.3(1) of the *CRTA* lists factors the Court may consider in deciding if the interests of justice and fairness require the CRT to adjudicate a claim:

> **Considerations in the interest of justice and fairness**
>
> 16.3 (1) For the purposes of sections 16.1(1) and 16.2(1), when deciding whether it is in the interests of justice and fairness for the tribunal to adjudicate a claim, the court may consider the following:
>
> (a) whether an issue raised by the claim or dispute is of such importance that the claim or dispute would benefit from being adjudicated by that court to establish a precedent;
>
> (b) whether an issue raised by the claim or dispute relates to a constitutional question or the *Human Rights Code*;
>
> (c) whether an issue raised by the claim or dispute is sufficiently complex to benefit from being adjudicated by that court;
>
> (d) whether all of the parties to the claim or dispute agree that the claim or dispute should not be adjudicated by the tribunal;
>
> (e) whether the claim or dispute should be heard together with a claim or dispute currently before that court;
>
> (f) whether the use of electronic communication tools in the adjudication process of the tribunal would be unfair to a party in a way that cannot be accommodated by the tribunal.

[37] The Court's determination of what the interests of justice and fairness require in the context of a particular claim will necessarily be informed by the circumstances of that case. In a given case, there may well be considerations relevant to the interests of justice and fairness apart from those expressly listed. I agree with now Associate Judge Robertson that the list of factors in s. 16.3(1) is neither mandatory nor exhaustive: *The Owners, Strata Plan LMS205 v. 0806933 B.C. Ltd.*, 2022 BCSC 91 [*0806933 B.C. Ltd.*] at paras. 85-86.

[38] Section 16.4 of the *CRTA* prohibits a person from bringing or continuing a claim that is within the jurisdiction of the CRT in a Court unless one or more of the listed exceptions applies. Under s. 16.4(1)(c), one exception is if the Court makes an order under s. 16.2 of the *CRTA* that the CRT not adjudicate the claim. The Court can make such an order where the CRT has no jurisdiction over the matter or where the CRT has specialized expertise but it is not in the interests of justice and fairness for the CRT to adjudicate the matter (*CRTA* s. 16.2(1)). While it may be a best practice, the language of s. 16.2 of the *CRTA* does not require that a specific application be made before the Court can exercise its discretion to make an order under that provision: *0806933 B.C. Ltd.,* at paras. 79-84.

The parties' positions

[39] The defendants say the Strata Corporation's claims fall within the CRT's jurisdiction over strata property matters. As a result, they say this Court should decline to address these claims in favour of referring them to the CRT for adjudication. The defendants say, at core, the claims involve disputes about the application and interpretation of the *SPA*, the resulting powers and duties of owner developers and the Strata Corporation, and money owing under the *SPA*. These issues fall squarely within the CRT's specialized expertise under s. 121 of the *CRTA*. The defendants also note there is no monetary limit on the amount of a strata property claim that the CRT can hear: *Yas v. Pope*, 2018 BCSC 282 at para. 14.

[40] The defendants say further the Strata Corporation cannot rely on its *Condominium Act* and unjust enrichment claims to attempt to remove these matters from the CRT's jurisdiction. They rely on *Downing v. Strata Plan VR2356*, 2019 BCSC 1745 at paras. 39-40, for the proposition that additional claims arising from the same underlying factual situation do not change the fundamental complexion of a matter in a manner that defeats the CRT's jurisdiction. As well, the defendants note the Strata Corporation has not exhausted the CRT's process or sought an order from this Court under s. 16.2 of the *CRTA* that the CRT not adjudicate the claims. The defendants say, in the circumstances of this case and absent such an order,

s. 16.4 of the *CRTA* presumptively precludes the Strata Corporation from continuing its claims before the Court.

[41] The Strata Corporation says either ss. 16.1 and 16.4 of the *CRTA* do not apply to preclude its claims being pursued in this Court, or this Court should order that the interests of justice and fairness require the Court to decide its claims. On the first point, the Strata Corporation says the jurisdictional provisions of the *CRTA* must be interpreted to avoid bifurcating or splitting proceedings between the Court and the CRT. While s. 16.4 precludes a "claim" from being brought or continued in court where the claim is within the CRT's jurisdiction, the term "claim" is defined in s. 1 of the *CRTA* as "any matter that may be resolved by the [CRT]". In a case where, as here, a party seeks to advance multiple claims in the same action, some of which are outside the CRT's jurisdiction, s. 16.4 should not be interpreted as requiring that the action be split between two fora. The Strata Corporation says its interpretation is consistent with the language of s. 16.1(1) of the *CRTA*, which addresses proceedings where the Court determines that "all matters are within the jurisdiction of the [CRT]" [emphasis added]. The Strata Corporation says it advances multiple claims, including those under the *Condominium Act* and for unjust enrichment, that are outside the CRT's jurisdiction.

[42] Second, the Strata Corporation says the interests of justice and fairness require adjudication by the Court. It says several of its claims may have precedential value (s. 16.3(1)(a)), including the questions of what is needed for a meeting to constitute a first AGM and the minimum required contribution to a contingency reserve fund. The Strata Corporation says its claims are also "sufficiently complex" to benefit from being adjudicated by the Court (s. 16.3(1)(c)), noting the test does not require the matters to be beyond the CRT's competence. The Strata Corporation also relies on ss. 16.3(1)(e) and s. 16.3(2). I note that the specific language of s. 16.3(2) only applies for purposes of s. 16.1(2), which addresses claims alleged to relate to a minor injury. However, it is uncontroversial that proportionality concerns are often engaged when the Court addresses the interests of justice and fairness. Procedurally, the Strata Corporation says the Court need not have a formal

application to grant an order under s. 16.2 of the *CRTA*. Among other things, the Court has inherent jurisdiction to control its processes, which includes the ability to address in-hearing applications (for example, to admit late-filed affidavits) without formal application materials.

Discussion

[43] On its face, the Strata Corporation's action raises multiple issues concerning the interpretation and application of the *SPA* and the *Strata Property Regulation*, B.C. Reg. 43/2000 [*SP Regulation*], bringing some of the claims within the purview of s. 121(1)(a) of the *CRTA*. In addition, the *SPA* expressly treats certain statutory penalties payable by owner developers as "money owing" to a strata corporation (see, for example, s. 18), meaning some of the claims fall within s. 121(1)(d) of the *CRTA*. The Strata Corporation did not suggest otherwise. As at least some of the claims fall within the CRT's jurisdiction, two additional questions arise: does the Strata Corporation also advance claims that are outside the CRT's jurisdiction; and, in any event, do the interests of justice and fairness require the action to be adjudicated by the Court?

[44] On the first question, the defendants argue the CRT has jurisdiction in respect of claims under the *Condominium Act*, but did not refer the Court to any authority for that assertion. Section 2.1 of the *CRTA* does not establish a "claim category" in respect of claims under the *Condominium Act* itself. To the extent the *SPA* preserves or incorporates elements from the *Condominium Act*, the CRT may have jurisdiction to address them under s. 121 of the *CRTA*. The CRT likely also has jurisdiction to determine if an element from the *Condominium Act* has been preserved under the *SPA*, as part of its role in interpreting the *SPA*. As discussed further below, in this case, the nature of the Strata Corporation's claim under the *Condominium Act* is not one that was preserved or continued under the *SPA* in that form. As a creature of statute, the CRT can only exercise the jurisdiction given to it under the *CRTA* or another enactment, or that it enjoys by necessary implication. It is not clear that the CRT's jurisdiction extends so far as to permit it to address claims

that *only* arise under the *Condominium Act* and were not carried forward in some fashion to the *SPA*.

[45] Conversely, the Strata Corporation's claims for unjust enrichment (and even punitive damages) may fall, at least in part, within the CRT's jurisdiction. In *Downing*, Justice Crear found that although Ms. Downing had amended her petition to add claims for trespass and mental distress, those additional claims still arose from the core dispute about the scope of the strata corporation's powers and duties to enter and repair strata property (*Downing* at para. 40). To the extent the Strata Corporation's claims for unjust enrichment and punitive damages arise from allegations that the defendants breached their statutory and fiduciary obligations under the *SPA* (as opposed to obligations only arising under the *Condominium Act*), the reasoning from *Downing* appears applicable.

[46] Ultimately, however, my decision does not turn on the extent to which the Strata Corporation may or may not be raising claims outside the CRT's jurisdiction, so I need not reach a definitive conclusion on those issues. I have determined that the interests of justice and fairness require the Court to adjudicate the Strata Corporation's claims in any event.

[47] The Strata Corporation has advanced a complex and interrelated series of claims stretching back to 1989 and straddling two different statutory regimes (one of which, as noted, is not part of a "claim category" in respect of which the CRT has been granted jurisdiction). The claims also involve numerous allegations against multiple different players who, at one time or another, exercised control over, and are alleged to have owed obligations to, the Strata Corporation. Unlike in *Downing*, or *Yas* or the more recent case of *Majithia v. The Owners, Strata Plan EPS 2884*, 2024 BCSC 1519, the background to the present claim does not arise from a discrete incident or source of complaint with relatively simple facts. Based on my assessment of the factual and legal background to this matter, I am satisfied the Strata Corporation's claim is "sufficiently complex" that it would benefit from being adjudicated by the Court (*CRTA* s. 16.3(1)(c)).

[48] I am also satisfied the Strata Corporation has raised several issues of sufficient importance to warrant adjudication by the Court (*CRTA* s. 16.3(1)(a)). In particular, as noted above, there are three areas where the Strata Corporation is asking the Court to make new law. In *Strata Plan VR2213 v. Schappert*, 2023 BCSC 2080 [*Schappert*] at para. 14, Justice Coval held that the question of whether a subrogated claim was barred in the circumstances of that case was legally complex and of sufficient importance to warrant the Court assuming jurisdiction. The Court reached a similar conclusion at para. 9 of *Kunzler v. The Owners, Strata Plan EPS 1433*, 2020 BCSC 576, finding there might be precedential value in deciding if the passage of bylaws preventing construction and operation of a cannabis production facility was significantly unfair under the *SPA*.

[49] I acknowledge that in *Schappert* and *Kunzler*, the parties consented to the Court assuming jurisdiction. Although decided under a previous version of the *CRTA*, the same was true in *The Owners, Strata Plan VR 855 v. Shawn Oaks Holdings Ltd.*, 2018 BCSC 1162. In all three cases, the consent of the parties was not the only basis on which the Court assumed jurisdiction; complexity also played a role. Still, the defendants say it would be unprecedented for the Court to assume jurisdiction over their objections (relying on para. 50 of *Downing* and the facts in *Schappert* and *Kunzler*). While there may not be a precedent in respect of strata property claims, this Court has assumed jurisdiction over one party's objections in the context of claims arising under the *Societies Act*, S.B.C. 2015, c. 18: see *Canadian Ramgarhia Society v. Pansear*, 2022 BCSC 751. Further, the lack of a precedent in the strata property context is not, in my view, a bar where the Court must conduct an individualized assessment of what the interests of justice and fairness require. In addition, whether all parties agree the Court should assume jurisdiction (*CRTA* s. 16.3(1)(d)) is only one factor that may be considered; no single factor under s. 16.3(1) is determinative.

[50] At a more fundamental level, the defendants say the interests of justice and fairness favour this Court dismissing the Strata Corporation's claims because the personal defendants have been waiting more than a decade to enjoy the estate left

to them by their late parents. However, if I dismiss claims within the CRT's specialized expertise under s. 16.1(1)(b), those claims should be referred to the CRT under s. 16.4. As in *Allard v. The Owners, Strata Plan VIS 962*, 2019 BCCA 45, the relief the defendants seek will not end the matter or even move it closer to resolution; rather it will prolong resolution while the parties proceed through the CRT's process. The Strata Corporation's notice of civil claim was originally filed in January 2021. Even granting that the CRT aims to provide a speedy and economical dispute resolution process, if I grant the defendants' request, it seems unlikely these matters would be resolved until at least some point in 2025.

[51] Further, to the extent the *Condominium Act* claims, and potentially others, are outside the CRT's jurisdiction, a decision to refer some claims to the CRT will create bifurcated or split proceedings, with some claims being addressed by this Court and others left to be addressed by the CRT. In *Schappert*, the Court found that because assuming jurisdiction would allow the Court to resolve all claims, rather than leaving residual issues to be addressed by the CRT, that fact weighed in favour of the Court proceeding (at para. 15). The same rationale applies here.

[52] Finally, I reject the defendants' position that the lack of a formal application for an order under s. 16.2 of the *CRTA* is a procedural impediment. As noted above, while it may be best practice to formally seek an order under s. 16.2, nothing in the *CRTA* requires a separate or formal application or precludes the Court from granting an order in the absence of one. Section 16.2 of the *CRTA* does not specify that the Court may only exercise its discretion "on application" of a party.

[53] Here, all parties knew there was a dispute about the jurisdiction of the CRT. As early as January 2024, the defendants indicated they were finalizing their application to transfer this matter to the CRT. For reasons unknown, it was not filed in the next two months. In mid-April 2024, the Strata Corporation amended its claim and applied for summary trial. While the defendants addressed CRT issues in their mid-April response to the summary trial application, they then unsuccessfully sought to adjourn the summary trial, in part so they could file the application that was to have been finalized in January. Given this history, it was not unreasonable for the

Strata Corporation to assume that, to the extent the issues were going to be raised, they could be addressed as part of the summary trial application. The language of s. 16.1(1) of the *CRTA* contemplates the Court addressing these questions "in a court proceeding", which encompasses the present summary trial application.

[54] For all of the reasons above, I conclude the interests of justice and fairness require the Court to adjudicate the Strata Corporation's claims. On that basis, I grant an order under s. 16.2 of the *CRTA* that the CRT not adjudicate the claims raised in the Strata Corporation's action.

Preliminary Issue 2: Is this matter suitable for summary trial?

The legal framework

[55] There is no dispute about the legal principles that apply to the question of suitability for summary trial. Under R. 9-7(15) of the *Rules*, on a summary trial application, the Court has discretion to grant judgment either on an issue or generally unless the Court is unable, on the whole of the evidence, to find the facts necessary to decide the issues, or the Court is of the opinion that it would be unjust to decide the issues. Rule 9-7(11)(b) confirms the Court's discretion to dismiss a summary trial application on grounds that: i) the issues raised are not suitable for summary disposition; or ii) the summary trial application will not assist the efficient resolution of the proceeding.

[56] Suitability for summary trial necessarily depends on the facts and legal issues of each case. The basic principles set out in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202, 1989 CanLII 229 (BC CA) continue to govern. The Court cannot grant judgment on a summary trial application where, based on the materials before it, the Court is unable to find the facts necessary to decide the issues, or the Court considers it would be unjust to decide the matter summarily. These two points are often dealt with together: *MacKenzie Delta Industrial Ltd. v. North American Enterprises Ltd.*, 2019 BCSC 1980 at para. 14 and cases cited therein.

[57] The Court's decision on suitability involves an exercise of discretion: *Gill v. Gill*, 2022 BCCA 264 at para. 56, citing *Gichuru v. Pallai*, 2013 BCCA 60 at para. 34. As reflected in the object of the *Rules* (see R. 1-3), the underlying consideration is the need to ensure the fair and just adjudication of the issues in a manner proportionate to the case at hand: *Morin v. 0865580 B.C. Ltd.*, 2015 BCCA 502 at para. 48.

[58] With respect to finding the necessary facts, a conflict in the evidence is not necessarily fatal to a summary trial application, however a judge should not decide issues of fact or law solely on the basis of conflicting affidavits: *Cory v. Cory*, 2016 BCCA 409 at para. 10; *Morin* at para. 56; *Greater Vancouver Water District v. Bilfinger Berger AG*, 2015 BCSC 485 at paras. 58-60. Where other admissible evidence corroborates or contradicts one side's affidavits, the Court may be able to find the necessary facts despite a conflict in the evidence: *Greater Vancouver Water District* at paras. 59-60.

[59] In determining if it would be unjust to decide the matter summarily, the relevant factors for a Court to consider include, but are not limited to: the amount involved, the complexity of the matters, urgency, prejudice by reason of delay, the cost of a conventional trial in relation to the amount involved, the course of proceedings, the time of the summary trial, whether credibility is a critical factor and whether the summary trial will create unnecessary complexity or result in litigation in slices: *Gichuru* at paras. 30-31. This list is not a checklist but provides a good indication of the factors that typically concern the Court: *Ferrer v. 589557 B.C. Ltd.*, 2020 BCCA 83 at para. 28.

[60] At para. 74 of *Greater Vancouver Water District*, Justice Griffin (then of this Court) referred to *Hryniak v. Mauldin*, 2014 SCC 7, for the principle that a summary process need not replicate a full trial in order to achieve a fair and just adjudication of the issues. In *Hryniak,* the Court held:

> [50] … It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but <u>whether it gives the judge</u>

> confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.
>
> [Emphasis added.]

[61] With respect to complexity specifically, Griffin J. (as she then was) confirmed that, since being introduced, the summary trial procedure "[has not been] limited to simple cases and is used frequently in complex cases involving multiple factual and legal issues" (*Greater Vancouver Water District* at para. 145; see also para. 60).

[62] All parties to an action have an obligation to come to a summary trial hearing prepared to prove their claim or their defence, regardless of which party files the application: *Gichuru* at para. 32. It is no answer for a respondent to a summary trial to fail to take pre-trial steps or fail to put their best foot forward, and then claim a trial is necessary to fairly adjudicate a proceeding. The respondent to a summary trial application – whether plaintiff or defendant – does not have a "veto" with respect to the procedure: *Brown v. Douglas*, 2011 BCCA 521 at paras. 29-30.

Discussion

[63] In their response to the summary trial application and in their written submissions, the defendants took the position that the matter was unsuitable for summary trial. Among other reasons, the defendants listed the significant amounts involved, the complexity of the issues, the cost of a conventional trial compared to the significant amounts involved and the need for certain *viva voce* evidence, including evidence of the December 2019 meeting held on behalf of the Executors. As noted, the defendants attempted unsuccessfully to have the summary trial adjourned shortly before it was heard. In oral submissions, the defendants did not strongly press their suitability arguments, but they were not expressly abandoned.

[64] The Strata Corporation maintains its claim is suitable for summary trial. It says there are no material conflicts in the evidence that this Court must resolve and credibility is not a crucial issue. While acknowledging that it advances several novel legal arguments, the Strata Corporation maintains most of its claims are arithmetic in nature and not overly complex. In any event, the Strata Corporation says summary trials are not reserved only for simple matters.

[65] On an application for summary trial, the Court must satisfy itself that the matter is suitable for summary trial, even if the parties agree: *Westsea Construction Ltd. v. 0759553 BC Ltd.*, 2012 BCSC 1799 at para. 93. In this case, the parties did not agree the matter was suitable, at least at the commencement of the hearing, but as it was not possible for me to determine suitability at that point, I requested counsel proceed to use the time we had. Having heard the parties' submissions on suitability and the merits, and having reviewed the material and considered the matter further, I find this matter appropriate for summary trial.

[66] As noted above, in my view, the Strata Corporation's claim is complex, particularly given the multiple issues advanced. However, the factual and legal questions are not ones that require exploration through a full trial process. There are no material evidentiary conflicts and neither party sought to challenge the credibility of any of the other side's affiants. I am satisfied I am able to find the facts necessary to decide the issues based on the voluminous materials before the Court. Proceeding by way of summary trial will allow me to address all of the Strata Corporation's claims, furthering their just, speedy and inexpensive determination. This is not a situation where the summary trial will result in litigating in slices or increased complexity; quite the contrary. As I result, I exercise my discretion to decide the merits by way of summary trial.

Preliminary Issue 3: Are the *Condominium Act* claims statute- or time-barred?

The parties' positions

[67] The Strata Corporation advances claims based on statutory and fiduciary obligations it says the Owner Developers owed to the Strata Corporation under the *Condominium Act*. The primary claim is that the Owner Developers (as the sole members of the Strata Corporation) had a statutory obligation to establish and fund a contingency reserve fund to pay "unusual or extraordinary future expenses".

[68] As the defendants deny that the Owner Developers failed to contribute to a contingency reserve fund between March 1989 and June 30, 2000, the Strata Corporation says there must have been a contingency reserve fund on July 1, 2000,

when the *SPA* came into force. The Strata Corporation says those funds were the property of the Strata Corporation and ought to have been transferred to it. The failure to do so warrants punitive damages. Alternatively, if the Owner Developers did not contribute as required, that breach of statutory and fiduciary duties warrants an award of punitive damages. In other words, the Strata Corporation asserts that since it never received the contingency reserve funds the Owner Developers were required to contribute under the *Condominium Act*, this Court should award it punitive damages. If punitive damages are not awarded, the Strata Corporation says the defendants were unjustly enriched by the Owner Developers' failure to fulfill their obligations under the *Condominium Act*, and it should be granted restitution.

[69] The defendants say that any rights or obligations owed by or to the Strata Corporation or the defendants under the *Condominium Act* ceased to exist when it was repealed on July 1, 2000. Section 293(1) of the *SPA* explicitly provides that the *SPA* applies to strata plans deposited and strata corporations created under the *Condominium Act*. As a result, except where expressly preserved, the rights and obligations under the *Condominium Act* were wholly replaced by those under the *SPA*. In particular, the defendants note that while the *Condominium Act* required owner developers to establish and fund a contingency reserve fund before the first strata lot was sold, under the *SPA*, the obligation to create a contingency reserve fund is not triggered until the first strata lot is sold. As a result, to the extent the Owner Developers owed any obligation regarding a contingency reserve fund under the *Condominium Act*, which is denied, the defendants say that obligation ceased to exist on July 1, 2000.

[70] In the event the *Condominium Act* claims are not statute-barred, the defendants argue they are time-barred under both the previous and current limitations statutes, even if one of the ultimate limitation periods applies. The Strata Corporation counters that its claims cannot be time-barred because they could not reasonably have been discovered (in the sense of the Strata Corporation being able to evaluate the possibility of pursuing a claim) while the defendants remained in control of the Strata Corporation. Accordingly, the Strata Corporation says its claims

could not have been discovered until August 2020, when it asserts control was formally transferred. I note that neither of the two cases the Strata Corporation relies on for this proposition (*Ren v. Eastern Platinum Ltd.*, 2023 BCSC 404 and *Ridel v. Goldberg*, 2019 ONCA 636) involved situations where there was an intervening change in the applicable statutory scheme.

Discussion

[71] It is uncontroversial that when the *SPA* came into force on July 1, 2000, it replaced the statutory regime that previously existed under the *Condominium Act*. The *SPA* represented a deliberate legislative choice to transition to a new legislative framework for strata property in British Columbia. The transition provision in s. 293 of the *SPA* applies the *SPA* to all pre-existing strata plans and strata corporations, as if they had been deposited and created under the *SPA*. In other words, the *SPA* generally applies even in respect of issues that may have arisen prior to July 1, 2000. While certain provisions from the *Condominium Act* expressly continued to apply after the *SPA* came into force,[1] that was not the case for the provisions concerning contingency reserve funds. In fact, the *SPA* changed many of the obligations previously imposed on owner developers under the *Condominium Act* during the period before the first conveyance of a strata lot.

[72] Unlike under the *Condominium Act*, pursuant to s. 5 of the *SPA*, owner developers must exercise the powers and perform the duties of a strata council, but are no longer required to elect a strata council or hold strata meetings while they own the entirety of the strata property. Instead, when the first strata lot is conveyed to an independent purchaser, that triggers obligations on the owner developer to take steps that will facilitate the eventual transfer of control over the strata corporation to an elected strata council at a first AGM. When the first strata lot is conveyed, an owner developer must establish and fund a contingency reserve fund (*SPA* s. 12). The logic for these changes is obvious. It is only when there are

[1] For example, under s. 17.16 of the *SP Regulation*, if an arbitration had been commenced under s. 44 of the *Condominium Act* before that section of the *SP Regulation* came into force, s. 45 of the *Condominium Act* continued to apply and the relevant arbitration provisions of the *SPA* did not apply.

additional owners that there is a need to operate through a strata council and establish defined funds.

[73] In the first four years after the transition to the *SPA,* this Court considered the extent to which certain rights under the *Condominium Act* survived the transition to the *SPA* on multiple occasions. For example, in *Butterfield v. Strata Plan NW 3214*, 2000 BCSC 1110*,* Justice Preston held that certain issues between the parties relating to the creation of separate sections in a strata were to be decided under the *Condominium Act* rather than the *SPA* because the rights at issue had vested in the owners under the former statute. The circumstances that led the Court to that conclusion were unique: all of the proceedings had taken place under the *Condominium Act*, the matter before the Court involved rights that had come into existence under the *Condominium Act* and the hearing would have taken place before the *SPA* came into force but for the respondents' adjournment request (*Butterfield* at para. 10).

[74] In *Strata Plan LMS 1537 v. Alvarez*, 2003 BCSC 1085 [*Alvarez*], Justice Bauman (as he then was) canvassed a number of earlier decisions that had reached competing conclusions on whether the *SPA* or the *Condominium Act* should govern issues that arose before July 1, 2000. At least one case concluded that, based on the plain language of s. 293 of the *SPA*, the *SPA* should govern despite the dispute in question having occurred prior to July 1, 2000. Others held that, because of s. 35(1)(c) of the *Interpretation Act*, R.S.B.C. 1996, c. 238, rights or obligations acquired, accrued, accruing or incurred under the *Condominium Act* were not affected by its repeal (*Alvarez* at paras. 18-35).

[75] In considering whether the allocation of common expenses should be governed by the *SPA* or the *Condominium Act*, Bauman J. held that s. 35 of the *Interpretation Act* must be read subject to s. 2(1) of that statute, which provides that provisions of the *Interpretation Act* apply to other enactments unless there is a "contrary intention". Bauman J. concluded that the detailed provisions in the *SPA*, *SP Regulation* and new standard bylaws addressing common expenses constituted

a “contrary intention”. As a result, he held s. 35 of the *Interpretation Act* did not apply, and the dispute was to be governed by the *SPA* (*Alvarez* at paras. 55-77).

[76] In *Coupal v. Strata Plan LMS* 2503, 2004 BCCA 552, the British Columbia Court of Appeal relied on the reasoning in *Alvarez* to reach the conclusion that, after July 1, 2000, the *SPA* governs the allocation of common expenses, regardless of when the dispute arose (at paras. 30-33; 47-58). *Alvarez* was also followed in *Wilfert v. Ward*, 2004 BCSC 289*,* where the Court held at para. 23 that “any right or obligation [under the *Condominium Act*] that may have existed prior to the effective date of the *Strata Property Act* ceased to exist on that date” (see paras. 13-28 for the full analysis).

[77] I find the reasoning in *Alvarez, Wilfert* and *Coupal* applies equally to the issues of contingency reserve funds sought to be raised by the Strata Corporation in this case. The *SPA* and *SP Regulation* contain detailed provisions regarding the owner developer’s obligation to establish a contingency reserve fund after conveyance of the first strata lot, as well as how the minimum contribution to that fund is to be calculated. Those obligations represent a substantial change from the previous obligations under s. 35 of the *Condominium Act*, which imposed an immediate requirement on a strata corporation to establish a contingency reserve fund upon on the creation of the strata corporation. I consider the deliberate legislative choice to modify the owner developer’s obligations respecting the contingency reserve fund to constitute a contrary intention within the meaning of s. 2(1) of the *Interpretation Act*. As a result, I conclude s. 35 of the *Interpretation Act* statute does not apply to preserve any rights or obligations respecting contingency reserve funds under the *Condominium Act* beyond its repeal.

[78] In the circumstances it is not necessary for me to decide if the Strata Corporation had any rights or if the Owner Developers owed any obligations in relation to the contingency reserve fund under the *Condominium Act*. Even if there were such rights or obligations, they ceased to exist on July 1, 2000, when the *SPA* came into force. Further, given my conclusion that any rights or obligations respecting contingency reserve funds under the *Condominium Act* were

extinguished by the coming into force of the *SPA* on July 1, 2000, it is not necessary for me to engage with the parties' arguments regarding discoverability or limitations on those claims and I decline to do so.

Overview of Substantive Claims

[79] As I have concluded that the Strata Corporation's claims in relation to the *Condominium Act* did not survive the transition to the *SPA*, I will not address any of the Strata Corporation's claims for breach of statutory or fiduciary duties, punitive damages or restitution for unjust enrichment arising from alleged failures to establish and fund a contingency reserve fund before July 1, 2000.

[80] I will address the remaining substantive issues in the order set out above, namely, the alleged failures respecting: the first AGM; the period of the interim budget; the contingency reserve fund and insurance. I will then address the Strata Corporation's claims for punitive damages and restitution for unjust enrichment.

Issue 1: Did the defendants fail to hold a first AGM under the *SPA*?

The legal framework

[81] The *SPA* requires an owner developer to hold the first AGM for a strata corporation within a defined period, and imposes obligations on the owner developer with respect to notice, the documents to be provided with the notice, documents and records to be provided at the first AGM, and the business to be addressed. The purpose of the first AGM is to transfer control of the strata corporation to an elected strata council.

[82] Section 16 of the *SPA* provides:

> **First annual general meeting to be held by owner developer**
>
> **16** (1) The owner developer must hold the first annual general meeting during the 6 week period that begins on the earlier of
>
> (a) the date on which 50% plus one of the strata lots have been conveyed to purchasers, and
>
> (b) the date that is 9 months after the date of the first conveyance of a strata lot to a purchaser.

> (2) The owner developer must give notice of the meeting in accordance with section 45 and must include with the notice the budget and financial statement referred to in section 21.

[83] Section 45(1)(a) of the *SPA* requires two weeks' written notice of an AGM be given to every owner. Section 45(3) sets out required elements of the notice, including a description of the matters to be voted on. Section 45(4) requires notice for an AGM to include the budget and financial statement referred to in s. 103. Section 61 establishes how any required or permitted notice can be given.

[84] Section 20 of the *SPA* sets out the required business at a first AGM, which includes the election of a strata council for a term of one year (s. 20(1)). Under s. 20(2)(a), an owner developer is obligated to both place before the first AGM and give the strata corporation copies of various plans, documents and records. This includes all plans that were required to obtain building permits, the names and addresses of all contractors, all warranties and other documentation respecting the common property or any common assets, and all records required under s. 35 of the *SPA*. Section 35 in turn contains a long list of records such as (but not limited to) minutes for strata-related meetings, lists of owners, books of account, budgets and financial statements, and other records required by regulation. Together, ss. 20(2)(b) and 21 of the *SPA* confirm an owner developer must prepare and place both an annual budget and a financial statement before the first AGM, so the budget may be approved. Sections 3.3 and 6.6 of the *SP Regulation* specify the information that the annual budget and financial statement must contain. Under s. 20(3) of the *SPA*, if an owner developer does not comply with the obligations in s. 20(2)(a) to provide the listed documents and the strata corporation must pay to obtain any of those documents, the cost the strata corporation incurs for that purpose is money owed to it by the owner developer.

[85] Bylaw 28 of the Schedule of Standard Bylaws under the *SPA*, which is agreed to apply to the Strata Corporation, establishes the order of business at an AGM.

[86] If an owner developer does not hold the first AGM as required by s. 16, then s. 17 of the *SPA* permits an owner to hold the first AGM after giving the requisite

notice to other owners and to the owner developer. Where the owner calls the first AGM, s. 17(b) of the *SPA* provides that the owner developer must pay the strata corporation a penalty calculated under the regulations. In particular, s. 3.1(2) of the *SP Regulation* sets the penalty as follows: $1,000 if the first AGM is delayed for a period of up to 30 days after the deadline under s. 16, and $1,000 for each additional delay of 7 days.

The parties' positions

[87] The parties agree that by November 1, 2019, 50 percent plus one of the strata lots had been sold, such that the Executors were required, under s. 16(1)(a) of the *SPA*, to hold a first AGM on or before December 13, 2019.

[88] There is no real controversy that a meeting was held on December 2, 2019, within the required six-week period. That meeting was organized and attended by Mr. Pratten on behalf of the Executors. It is not disputed that Mr. Pratten sent a notice and agenda by email on November 17, 2019 and in some cases, either left a paper copy of the notice and agenda with some owners or posted a copy to their doors. The Strata Corporation says Mr. Pratten's efforts did not meet the technical requirements for notice under ss. 45 and 61 of the *SPA*. For example, Mr. Haliburton deposed he had not provided an email "for the purpose of receiving the notice" as required under s. 61(1)(b)(vii) of the *SPA*. The Strata Corporation also notes that while leaving a paper notice with a person or providing it under the door of their unit is sufficient under s. 61, posting a notice on a door is not a statutorily-recognized method of service. As well, s. 45(1) requires two weeks' written notice, but because of when emails are deemed to be received under s. 61(3), the emails were not received two weeks before December 2, 2019.

[89] Despite these disputes, representatives from all eight of the strata lots that had been sold by late November 2019 did attend the meeting on December 2, 2019. This suggests they at least had notice in a practical sense. Given the other alleged deficiencies, the Strata Corporation did not strongly press its technical concerns regarding timing and service method of the notice and I need not decide those issues.

[90] The core of the disagreement between the parties is whether the December 2, 2019 meeting constituted the first AGM at all. The Strata Corporation says there were such significant deficiencies in advance of and at the meeting that it does not legally count as the first AGM. In particular, the Strata Corporation says:

a) the notice package for the meeting did not include the first annual budget or a financial statement (*SPA* ss. 16(2), 21(2), 45(4), 103);

b) at the December 2, 2019 meeting, Mr. Pratten and / or the Executors did not place before the meeting or give the Strata Corporation copies of all of the required documents, including a first annual budget and financial statement, and information about contracts and contractors (*SPA* ss. 20(2), 35; *SP Regulation* ss. 3.2, 3.3 and 6.6);

c) the agenda for the December 2, 2019 meeting did not conform to the requisite order of business (*SPA* Schedule of Standard Bylaws, bylaw 28); and

d) the business conducted at the December 2, 2019 meeting did not involve discussion of the financial governance of the Strata Corporation (including the budget, strata fees, expenses paid, existing contracts, etc.).

[91] The Strata Corporation says that since the December 2, 2019 meeting did not constitute the first AGM, under s. 17 of the *SPA*, Mr. Haliburton was entitled to give notice of and hold the first AGM, which it says occurred on August 9, 2020. Mr. Haliburton deposes that on or about July 15, 2020, he gave the requisite notice (with agenda) to the other owners as well as to the Executors (both at their home addresses and through Mr. Wong's office). In addition to the notice and agenda, the Executors were provided a letter from the Strata Corporation's counsel asking them to comply with their obligations, including providing the financial records from the interim budget period and an annual budget, on the basis the purchasers could not provide those. Mr. Pratten admits he also received a copy of the notice and agenda.

[92] There is no dispute that another meeting took place on August 9, 2020. There is also no dispute that neither the Executors nor Mr. Pratten attended. The Strata Corporation says the evidence shows they made a conscious decision not to attend, despite having been advised of their obligations. As a result, the minutes of the August 9, 2020 meeting indicate very little business was conducted because the ability to deal with most of the items was dependent on the Executors or their agent providing the requested financial information and records. However, the Strata Corporation says a strata council was elected, and immediately after the August 9, 2020 meeting, the new strata council held a meeting and resolved to call a special general meeting to address the Strata Corporation's need for an annual budget. The Strata Corporation says it held a special general meeting as soon as possible on August 30, 2020, and at that meeting, an annual budget was adopted to take effect September 1, 2020.

[93] The Strata Corporation says that as the defendants failed to hold a first AGM as required, and Mr. Haliburton held the AGM instead, it is entitled to the statutory penalty established in s. 17(b) of the *SPA* and s. 3.1 of the *SP Regulation.* It calculates the total amount of the statutory penalty owed as $31,000, since the August 9, 2020 meeting occurred 240 days (one 30-day period and 30 7-day periods) after the expiry of the original six-week deadline on December 13, 2019.

[94] The defendants say the December 2, 2019 meeting was properly convened and it, rather than the August 9, 2020 meeting, constitutes the first AGM. They say the December 2, 2019 meeting is presumptively valid and before this Court can find otherwise, the Strata Corporation would need to seek and be granted a declaration that the December 2, 2019 meeting was invalid (which it has not done). As a result, the defendants say the statutory penalty provisions do not apply, and any deficiencies should be addressed through s. 20(3) of the *SPA* and / or an award of damages.

[95] The defendants admit the December 2, 2019 meeting was not perfect. They admit the notice provided by Mr. Pratten did not include a financial statement or annual budget, and admit they did not subsequently prepare and provide those

documents. In the absence of that having been done, they say the Strata Corporation was right to hold a special general meeting to pass the budget so it could move forward. The defendants also admit the documents identified under ss. 20 and 35 of the *SPA* (and provisions of the *SP Regulation*) were not provided to the owners at the December 2, 2019 meeting. They say that, given the age of the building, most of those records were not in the possession of the Owner Developers or Executors. The defendants point to correspondence between counsel in March 2022 in which, pursuant to their obligations under s. 20(3) of the *SPA*, the defendants committed to reimbursing the Strata Corporation for the costs of producing the necessary building plans upon receipt of invoices for that work. The defendants say no invoices have ever been provided by the Strata Corporation.

[96] The defendants say, despite the shortcomings identified, the Strata Corporation's own evidence indicates the owners considered the December 2, 2019 meeting to have had valid legal effect. The defendants point to the minutes taken by Susan Tam, one of the owners, which are labelled "Annual General Meeting Minutes / Strata Plan VIS 1210". Those minutes, and Ms. Tam's evidence, reveal there was business conducted at the December 2, 2019 meeting. Of particular note, the owners elected a strata council consisting of a president, a treasurer (Mr. Haliburton), a secretary (Ms. Tam) and two members at large. The Strata Corporation does not dispute the fact of this election. The minutes and Ms. Tam's affidavit also confirm there was discussion, among other things, about: whether the Strata Corporation should self-manage, insurance, the need to open bank accounts to receive funds to be provided by the Executors, and current service providers and contracts. This is consistent with Mr. Pratten's evidence that a council was elected, the council voted to open accounts and other *SPA* business was conducted. While there is no evidence of a specific discussion about a budget or strata fees, there is evidence at least some financial matters were discussed.

[97] Further, the defendants say the Strata Corporation conducted itself as if control was properly transferred to it at the December 2, 2019 meeting. The elected individuals acted in reliance on the authority they were granted at that meeting. The

minutes show a further strata council meeting was set. Mr. Haliburton's evidence is that he opened bank accounts in the Strata Corporation's name, obtained new insurance, communicated to the other owners their obligations to make payments, received funds from the Executors, changed accounts with utilities and other contractors into the Strata Corporation's name, and located and contacted service providers. The defendants do not dispute that Mr. Haliburton expended considerable time and energy putting the affairs of the Strata Corporation into order, including preparing financial records and the annual budget eventually adopted on August 30, 2020. The defendants say, however, that if the December 2, 2019 meeting had not been the first AGM, all of those actions would have been taken without lawful authority.

[98] The defendants say that between December 2019 and the summer of 2020, the Strata Corporation did not object to the December 2019 meeting or suggest it was without authority to act. Before Mr. Haliburton provided his notice in July 2020, there is no evidence the owners were treating the Executors as if they were still in control. As a result, the defendants say it is not unreasonable that the Executors and Mr. Pratten did not attend the August 9, 2020 meeting; they did not perceive themselves to still be involved. When the Executors received Mr. Haliburton's notice, they asked Mr. Pratten for advice and he in turned consulted with Mr. Wong. Mr. Pratten's evidence is that he was advised not to attend because the strata council had been elected and begun operating the Strata Corporation as of December 2, 2019, and the remaining two lots had been sold (by February 2020), ending the Executors' and Mr. Pratten's involvement.

Discussion

[99] I am not prepared to find that the December 2, 2019 AGM was a nullity. Among other things, the evidence is clear that there was an election of members to the strata council who subsequently acted in reliance on their elected positions to carry out business on behalf of the Strata Corporation. Steps were taken to organize the Strata Corporation's affairs and finances. The evidence shows the owners began to operate, manage and make payments to the Strata Corporation after December

2019. Apart from tidying a few loose ends and selling the last two units, there is no evidence the Executors continued to be involved in the daily operations of the Strata Corporation after December 2, 2019 as if still owner developers. This is also the timeframe when they ceased paying all of the Strata Corporation's expenses.

[100] Had there been no transfer of control from the Executors to the members of the strata council in December 2019, the subsequent steps taken by Mr. Haliburton and others (including to hire present counsel before the August 9, 2020 meeting) would have been unauthorized. No party suggests those actions were unlawful. While I accept that there was no annual budget presented or approved at the December 2, 2019 meeting, s. 14(8) of the *SPA* expressly contemplates there may be situations where a budget is not approved by the end of the first AGM. That fact alone does not preclude a meeting from being a first AGM. Based on all the evidence before the Court, I am satisfied the December 2, 2019 meeting, even with what the defendants admitted were its "warts" and "defects", constituted a first AGM for the Strata Corporation.

[101] The first AGM was therefore called and held by Mr. Pratten as agent for the Executors (which is permitted under s. 19(a) of the *SPA*) within the six-week period under s. 16 of the *SPA*. Accordingly, there is no basis to find the defendants liable to the Strata Corporation for a statutory penalty under s. 17. In *The Owners, Strata Plan KAS 3549 v. 0738039 B.C. Ltd.*, 2016 BCCA 370, the Court of Appeal confirmed the chambers judge's conclusion that the statutory penalty under s. 17 of the *SPA* is only available where the owner developer fails to call the first AGM and it is, instead, called by an owner. As that is not the situation here, the statutory penalty does not apply.

[102] However, the evidence also clearly reveals that the Executors did not fulfill their statutory obligations to provide records and documents to facilitate the owners' assumption of control of the Strata Corporation. Although the defendants suggest that, given the age of the building, many of the required documents would not be useful to the Strata Corporation (for example, the limitations for claims under original

warranties will have long since expired), the defendants admit they failed to provide and / or prepare them.

[103] In the circumstances, Mr. Haliburton deposes that, given his background as a Chartered Professional Accountant and Chartered Accountant, he volunteered to assist the Strata Corporation by coordinating its insurance and finances, including dealing with contractors, service providers and accounts. He was also responsible for preparing its financial records and the annual budget. Had Mr. Haliburton not possessed the skills to assist with those tasks, I am satisfied the Strata Corporation would have had to pay someone to assist with obtaining and preparing the necessary documents. It is irrelevant that Mr. Haliburton volunteered his time and efforts, rather than charging professional fees for his work. What matters is that, but for the defendants' failure to provide what they were statutorily required to provide, the Strata Corporation would not have needed his assistance with these tasks, or at the very least, not to the same extent.

[104] In light of the admitted deficiencies with the first AGM, which required the Strata Corporation to obtain professional assistance to put its financial and operational affairs in order, I consider the following orders appropriate.

[105] Under s. 20(3) of the *SPA*, I order the defendants to reimburse the Strata Corporation for any costs it incurs to obtain documents required to be provided under s. 20(2)(a). In making this order, I acknowledge that, at least as of the date of the summary trial hearing, there was no evidence the Strata Corporation had yet incurred such costs. However, I am conscious the Strata Corporation may have been awaiting the outcome of this proceeding before taking those steps. As a result, the Strata Corporation will have six months from the date of this order to obtain any documents under s. 20(2)(a) that it considers reasonably necessary to have prepared and to submit invoices for reimbursement. Given the defendants had previously offered to reimburse such costs, I am hopeful the parties can agree on what is reasonably necessary. To the extent any disputes arise, the parties may request leave, through Supreme Court Scheduling, to make further brief written submissions, or if necessary, to reappear before me.

[106] With respect to the assistance provided by Mr. Haliburton, it is clear he did not volunteer his time and skills for the benefit of the defendants. In my view, the defendants should not be able to avoid paying for the value of that work simply because he did not charge for it. I therefore declare the Strata Corporation entitled to payment from the defendants in an amount equivalent to the value of the work performed by Mr. Haliburton if it had been performed at the usual rates for a Chartered Professional Accountant undertaking similar tasks, or such other amount as the parties may agree. If the parties are unable to agree on the amount to be paid, they may again request leave through Supreme Court Scheduling to make further brief written submissions, or if necessary, to reappear before me.

Issue 2: Did the defendants fail to fulfill their obligations with respect to the interim budget period?

The legal framework

[107] Before the first conveyance of a strata lot, s. 7 of the *SPA* requires an owner developer to pay the actual expenses of a strata corporation that accrue in the period up to the last day of the month in which the first conveyance to a purchaser occurs. In other words, the owner developer is responsible for all expenses of the strata corporation until the owner developer takes steps to sell one or more strata lots. Section 13 of the *SPA* then requires an owner developer to prepare an interim budget for the strata corporation. Before November 1, 2023, s. 13 read as follows:

> **Interim budget following first conveyance**
>
> **13**(1) The owner developer must
>
> > (a) prepare an interim budget for the strata corporation for the 12 month period beginning the first day of the month following the month in which the first conveyance of a strata lot to a purchaser occurs, and
> >
> > (b) deliver a copy of the interim budget to each prospective purchaser of a strata lot before the prospective purchaser signs an agreement of purchase and sale.
>
> (2) The interim budget must include
>
> > (a) the estimated operating expenses of the strata corporation for the 12 month period,
> >
> > (b) the contribution to the contingency reserve fund for the 12 month period, which must be at least 5% of the estimated operating expenses, and

> (c) each strata lot's monthly share of the estimated operating expenses and contribution to the contingency reserve fund, calculated in accordance with section 99.

[108] Accordingly, if the first strata lot is conveyed to a purchaser (as it was here) in mid-March 2019, the presumptive period of the interim budget would run from April 1, 2019 to March 31, 2020.

[109] After the first conveyance of a strata lot, s. 14(1) of the *SPA* requires the strata corporation to pay the expenses that accrue in the period from the first day of the month following the month the first strata lot is conveyed until the date the first annual budget takes effect. Under s. 14(2), until a first annual budget takes effect, each month, the owners must pay the strata corporation their monthly share of the estimated operating expenses and contribution to the contingency reserve fund as set out in the interim budget prepared by the owner developer. To the extent an owner developer continues to own one or more strata lots, the *SPA* contemplates that owner developer will pay their monthly share for each such strata lot.

[110] Subsections 14(4) and 14(5), respectively, create a statutory debt and establish a statutory penalty where the owner developer fails to properly estimate the operating expenses for the strata corporation during the period of the interim budget. Those provisions read:

> **Payments during period of interim budget**
>
> (4) Subject to subsection (5), if the expenses accrued by the strata corporation, for the period referred to in subsection (1), are greater than the operating expenses estimated in the interim budget for that period, the owner developer must pay the difference to the strata corporation within 8 weeks after the first annual general meeting.
>
> (5) If the accrued expenses referred to in subsection (4) are 10% or more greater than the operating expenses estimated in the interim budget for that period, the owner developer must include in the payment referred to in subsection (4) an additional amount calculated according to the regulations.

[111] Section 3.1(1) of the *SP Regulation* establishes the formula for calculating the statutory penalty payable under s. 14(5) of the *SPA*. It provides as follows:

> **Amounts payable to strata corporation**
>
> **3.1** (1) For the purposes of section 14 (5) of the Act, the owner developer must pay to the strata corporation an additional amount calculated as follows:

> (a) if the accrued expenses are at least 10% greater but less than 20% greater than the estimated operating expenses, the additional amount is the amount payable under section 14 (4) of the Act multiplied by 2;
>
> (b) if the accrued expenses are at least 20% greater than the estimated operating expenses, the additional amount is the amount payable under section 14 (4) of the Act multiplied by 3.

[112] However, as noted above, s. 14(8) of the *SPA* recognizes that a budget may not be approved at the first AGM. In that scenario, s. 14(8) provides "the period referred to in subsections (4), (5) and (6) ends at the first annual general meeting". This means that when determining the extent to which the interim budget underestimated expenses, the period of comparison between the accrued operating expenses and the estimated operating expenses does not extend beyond the end of the first AGM, regardless of when the first annual budget takes effect.

[113] Section 18 of the *SPA* deems amounts payable by an owner developer under ss. 14(4) and (5) to be "money owing to the strata corporation".

The parties' positions

[114] It is agreed that the defendants provided a document as part of the First Disclosure Statement that estimated the annual operating expenses for the Strata Corporation to be $35,273.40. The same document estimated the annual contribution to the contingency reserve fund to be $3,528, representing 10 percent of the estimated operating expenses, rather than the 5 percent required by the *SPA* at that time. The defendants characterized this document as the interim budget; the Strata Corporation did not call it that, but did not suggest otherwise. While the First Disclosure Statement also included a second document entitled "List of Strata Owners' Monthly Strata Fees Based on Unit Entitlement", the Strata Corporation disputes the accuracy of the calculations in that document.

[115] The parties agree that as the first strata lot was conveyed on March 14, 2019, the period of the interim budget began April 1, 2019. There is no dispute that the first annual budget did not take effect until September 1, 2020. However, the parties disagree on which end date or dates should be used for purposes of the various obligations under s. 14 of the *SPA.*

[116] For its part, the Strata Corporation says the defendants are liable for two distinct failings in relation to the period of the interim budget: 1) failing to pay their respective share of the operating expenses and required contribution to the contingency reserve fund (*SPA* s. 14(2)) based on their continued ownership of a number of strata lots during that period; and 2) failing to properly estimate the operating expenses of the Strata Corporation in the interim budget (*SPA* ss. 14(4) and 14(5)).

[117] In relation to the first, the Strata Corporation says the defendants did not make any payments to the Strata Corporation as required under s. 14 of the *SPA*, despite continuing to be owners of strata lots until February 2020. At para. 23 of his first affidavit filed in this matter, Mr. Haliburton deposes to how he believes the monthly strata fees for the period of the interim budget should be calculated. Specifically, he deposes that the estimated operating expenses of $35,273.40 should be divided by 12 months to arrive at monthly expenses of $2,939.45.[2] That amount is then multiplied by the unit entitlement of each strata lot (as a percentage). Based on that method, at para. 25, he calculated the amounts owed by the Executors for the period of the interim budget, based on how many months they owned the remaining strata lots after March 2019. Mr. Haliburton calculated the Executors to owe $21,855.64.

[118] However, on review of the table at para. 25 of Mr. Haliburton's first affidavit, it became clear there was a decimal place error in relation to strata lot 9 ($323.96 X 2 months = $647.92, rather than the $6,479.20 that was listed). That error was reflected in the total sum for the table. When the correct figure of $647.92 is used for strata lot 9, the total sum is $16,024.36. I have reproduced the table, using the corrected figures, below.

[2] There is a typographical error in para. 23 of Mr. Haliburton's first affidavit. $35,273.40 ÷ 12 = $2,939.45, rather than $2,939.43. The correct figure was used in his calculation tables.

Strata Lot	Unit Entitlement as percentage	Monthly Contribution ($2939.45*Unit Entitlement)	# of Months Owned	Arrears
1	9.95	292.51	2	585.02
2	8.21	241.36	10	2413.60
3	11.03	324.25	0	0
4	10.78	316.90	6	1901.40
5	8.21	241.36	7	1689.52
6	11.02	323.96	5	1619.80
7	10.78	316.90	7	2218.30
8	8.21	241.36	10	2413.60
9	11.02	323.96	2	647.92
10	10.78	316.90	8	2535.20
		Total Debt – Operating Fund		**16,024.36**

[119] Mr. Haliburton performed a second calculation at para. 27 for the amount of the Executors' required contribution to the contingency reserve fund during the same period based on their continued ownership of strata lots. He calculated the Executors to owe $1,600.57. There is a minor typographical or arithmetic error in relation to strata lot 9 in the second table as well ($32.40 X 2 = $64.80, rather than the $62.80 that was listed). When the correct figure of $64.80 is used for strata lot 9, the total sum is $1,602.57. I have reproduced the table, using the corrected figures, below as well.

Strata Lot	Monthly Operating Fund Contribution ($2939.45*Unit Entitlement)	Monthly Contingency Fund Contribution (Operating Fund*10%)	# of Months Owned	Arrears
1	292.51	29.25	2	58.50
2	241.36	24.14	10	241.40
3	324.25	32.43	0	0
4	316.90	31.69	6	190.14
5	241.36	24.14	7	168.98
6	323.96	32.40	5	162.00
7	316.90	31.69	7	221.83
8	241.36	24.14	10	241.40
9	323.96	32.40	2	64.80
10	316.90	31.69	8	253.52
		Total Debt – Contingency Fund		**1602.57**

[120] The Strata Corporation acknowledges the Executors made a payment of $1,572.94 in January 2020, which was described in the cover letter from Mr. Wong as the “Purchasers’ share of the strata fees at month of purchase”. The Strata Corporation says the amount owed by the defendants under s. 14(2) of the *SPA* should be offset by the amount of that payment.

[121] In relation to the second claim, the Strata Corporation says the expenses accrued by the Strata Corporation for the period of the interim budget exceeded the estimated operating expenses in the interim budget. As the first annual budget took effect September 1, 2020, the Strata Corporation compared the estimated expenses in the interim budget against its accrued expenses between April 1, 2019 and August 30, 2020. Mr. Haliburton deposes that he calculated the accrued expenses for that time period based on two things: the invoices he was able to locate from April 2019 to December 31, 2019, and then bank statements after he opened the accounts for the Strata Corporation on December 31, 2019. At Exhibit “S” to his first affidavit, Mr. Haliburton provided a month by month table of expenditures by category of expense from April 2019 to August 30, 2019. Based on his calculations, he deposes the accrued expenses over that timeframe totalled $56,056.71. When compared to the $35,273.40 of estimated operating expenses provided by the defendants, the Strata Corporation says there is a difference of $20,783.31.

[122] As a result, the Strata Corporation says it is owed both the difference of $20,783.31 under s. 14(4) of the *SPA*, as well as a penalty under s. 14(5) because the accrued expenses are more than 10 percent greater than the estimated operating expenses. Based on the formula set out in s. 3.1(1) of the *SP Regulation*, the Strata Corporation says that because the accrued expenses are at least 20% greater than the estimated operating expenses, it is entitled to an additional statutory penalty of $62,349.93 (three times the difference of $20,783.31).

[123] The defendants say they met all of their obligations during the period of the interim budget. With respect to operating expenses, before the conveyance of the first strata lot in March 2019, the defendants paid all the expenses for the Strata Corporation, consistent with their obligations under s. 7 of the *SPA.* However, even

after the first conveyance, the defendants say they continued to pay all the expenses for the Strata Corporation up until December 2, 2019, not just their required contributions based on their continued ownership. Although the defendants did not provide specific evidence of the total amounts they paid for expenses on behalf of the Strata Corporation between April 1, 2019 and December 2, 2019, the defendants say there is no evidence the Strata Corporation's expenses for that timeframe went unpaid. Nor is there any evidence that anyone else paid those expenses. The Strata Corporation did not put in evidence of either unpaid invoices, or invoices paid by someone other than the defendants. As well, the defendants note Mr. Haliburton deposed to having sought payment from the other owners for their required payments under s. 14(2) of the *SPA* after the December 2, 2019 meeting.

[124] The defendants say, in the circumstances, the Strata Corporation cannot demonstrate any specific operating expenses the defendants failed to pay or any budget overruns the Strata Corporation was forced to bear. As a result, the Strata Corporation has not demonstrated any loss for which it must be compensated.

[125] With respect to whether the defendants properly estimated the operating expenses in the interim budget, the defendants say the Strata Corporation is not comparing the appropriate timeframes in determining if the accrued expenses exceeded the estimated operating expenses. The Strata Corporation has based its claim on the expenses accrued between April 1, 2019 and August 30, 2020, which is a period of 17 months. Under s. 13 of the *SPA*, the interim budget was to be prepared for a period of 12 months. The $35,273.40 represents estimated expenses for a 12-month period and cannot properly be compared to accrued expenses over a 17-month period.

[126] Further, the defendants note that, under s. 14(8) of the *SPA*, where, as here, no budget was approved at the first annual general meeting, the period of time over which estimated and accrued expenses must be compared ends at the end of the first AGM. Based on the defendants' position that the December 2, 2019 meeting was the first AGM, they say that to determine if the defendants underestimated the operating expenses in the interim budget, the estimated and accrued expenses

should only be compared up until December 2, 2019. The defendants say, viewed through that lens, the interim budget was not incorrect.

Discussion

[127] Dealing first with the owners' payments during the period of the interim budget, while the *SPA* creates an obligation for owners to make the required payments under s. 14(2), the *SPA* does not establish a statutory penalty for an owner who fails to do so. Nor does the *SPA* deem the amounts payable by owners under s. 14(2) to be "money owing to the strata corporation". The Strata Corporation argues that while the defendants may have paid third parties for the expenses of the Strata Corporation up until December 2, 2019, that does not satisfy their obligations to make the required payments to the Strata Corporation directly. On the facts of this case, I cannot accept the Strata Corporation's position.

[128] After April 1, 2019, s. 14(1) of the *SPA* required the Strata Corporation to pay its expenses. Presumably, the s. 14(2) payments from the owners are designed to enable a strata corporation to pay its expenses. In this case, instead of the Strata Corporation paying its expenses between April 1, 2019 and December 2, 2019, the defendants made all of those payments on behalf of the Strata Corporation as a whole. This went beyond the defendants' obligations as continuing owners and was a clear benefit to both the Strata Corporation and the other owners. It is not a situation where the Strata Corporation was out of pocket and had to cover the portion of expenses the defendants ought to have paid to them. To accede to the Strata Corporation's request would result in the Strata Corporation obtaining a second benefit for the period of April 1, 2019 to December 2, 2019. There is no legal basis to justify such an outcome for that timeframe.

[129] However, after December 2, 2019, the defendants admit they did not pay in respect of the two strata lots they continued to own. I appreciate that the defendants' payment of all expenses up until December 2, 2019 may well equal or surpass the amounts they were required to pay as owners from April 1, 2019 until the sale of the last two strata lots in late February 2020. However, the defendants did not provide evidence that would allow me to reach that conclusion.

[130] Further, while I accept that the defendants paid all of the Strata Corporation's expenses between April 1, 2019 and December 2, 2019, there is no evidence that, in their capacity as continuing owners, the defendants made the required contributions to the contingency reserve fund either during that timeframe or before they ceased to be owners in February 2020. The *SPA* treats the contingency reserve fund separate from funds used to pay for other strata corporation expenses. For example, s. 14(3) of the *SPA* prohibits a strata corporation from using funds in the contingency reserve fund to pay expenses that accrue before the approval of the first budget. Similarly, s. 12(4) of the *SPA* prohibits an owner developer from using money in the contingency reserve fund to pay strata corporation expenses. Accordingly, any expenses paid by the defendants during the April 1, 2019 to December 2, 2019 period cannot serve as the defendants' required "owner" contribution to the contingency reserve fund.

[131] Based on these conclusions, I find the defendants liable to the Strata Corporation for payment of their monthly share of the estimated operating expenses for the two strata lots they continued to own from December 2019 through February 2020 (strata lots 2 and 8). Using the formula from the table originally prepared by Mr. Haliburton, I calculate that the defendants owe the Strata Corporation a total of $1,448.16 for their share of estimated operating expenses for those three months.[3] I also find the defendants liable to the Strata Corporation for their required contribution to the contingency reserve fund from April 1, 2019 to February 2020. Subject to the minor correction noted above, I otherwise accept Mr. Haliburton's calculations of the amount owing in respect of the required contributions to the contingency reserve fund and order the defendants to pay the Strata Corporation $1,602.57. The amounts owed by the defendants are properly setoff against the payment of $1,572.94 they made in January 2020. Accordingly, the total amount owing by the defendants to the Strata Corporation for its obligations under s. 14(2) of the *SPA* is $1,477.79.

[3] As the monthly contribution is the same for strata lots 2 and 8 ($241.36 per month) and both lots continued to be owned by the defendants for approximately 3 months, the total was calculated as: ($241.36 X 3) X 2 = $1,448.16.

[132] With respect to the estimated operating expenses, this is a situation where the first annual budget was not approved at the end of the first AGM, which I have found occurred on December 2, 2019. As a result, s. 14(8) of the *SPA* dictates that for purposes of deciding if the accrued expenses of the Strata Corporation exceeded the estimated operating expenses in the interim budget, the appropriate period of comparison begins April 1, 2019 and ends December 2, 2019. From a practical perspective, as the evidence of accrued expenses was provided on a monthly basis, I will consider the accrued expenses for April 1, 2019 through to the end of November 2019. It is neither appropriate nor fair to compare 17 months' worth of expenses against estimated operating expenses for a 12-month period, as the Strata Corporation sought to do.

[133] As indicated above, the interim budget reflected annual estimated operating expenses of $35,273.40, which works out to estimated operating expenses of $2,939.45 per month. Mr. Haliburton provided evidence of the Strata Corporation's accrued expenses for April 1, 2019 to November 30, 2019 at Exhibit "S" to his first affidavit. The following table compares the accrued expenses (using Mr. Haliburton's figures) to the estimated operating expenses from the interim budget over the same 8-month period.

Month	**Accrued Expenses (from Exhibit "S" to Affidavit #1 of R. Haliburton)**	**Estimated Operating Expenses (from the interim budget)**
April 2019	$3,085.22	$2,939.45
May 2019	$2,769.35	$2,939.45
June 2019	$3,032.56	$2,939.45
July 2019	$3,121.90	$2,939.45
August 2019	$2,872.17	$2,939.45
September 2019	$3,564.90	$2,939.45
October 2019	$2,597.80	$2,939.45
November 2019	$2,952.25	$2,939.45
Total:	**$23,996.15**	**$23,515.60**
Difference:	**$480.55**	

[134] As the table above demonstrates, the accrued expenses for the relevant period were $480.55 more than the estimated operating expenses for that same period. This means the accrued expenses for the relevant period were 2.04% greater than the estimated operating expenses.

[135] As a result, I find the defendants liable to pay the Strata Corporation the difference of $480.55, pursuant to s. 14(4) of the *SPA*. As the percentage difference between the accrued expenses and the estimated operating expenses is less than 10 percent, the statutory penalty under s. 14(5) of the *SPA* does not apply.

Issue 3: Did the defendants fail to properly establish and fund the contingency reserve fund?

The legal framework

[136] At the time of the first conveyance of a strata lot, s. 12 of the *SPA* requires an owner developer to establish a contingency reserve fund by paying a minimum contribution into the fund based on a statutory formula. In March 2019, when the defendants sold the first strata lot, s. 12 of the *SPA* read as follows:

> **Owner developer to establish contingency reserve fund**
>
> **12** (1) At the time of the first conveyance of a strata lot to a purchaser, the owner developer must establish a contingency reserve fund by paying into the fund an amount calculated according to this section.
>
> (2) If the first conveyance of a strata lot to a purchaser occurs no later than one year after the deposit of the strata plan, the minimum contribution to the fund must be 5% of the estimated operating expenses as set out in the interim budget referred to in section 13.
>
> (3) If the first conveyance of a strata lot to a purchaser occurs later than one year after the deposit of the strata plan, the minimum contribution to the fund must be the lesser of
>
> > (a) 5% of the estimated annual operating expenses as set out in the interim budget referred to in section 13 multiplied by the number of years or partial years since the deposit of the strata plan, and
> >
> > (b) 25% of the estimated annual operating expenses as set out in the interim budget referred to in section 13.
>
> (4) The owner developer must not use money in the contingency reserve fund to pay strata corporation expenses.
>
> (5) The contingency reserve fund belongs to the strata corporation.

[137] Subsections 12(2) and (3) were amended effective November 1, 2023. The effect of those changes is to increase the amount of the minimum contribution that an owner developer must make in each of the two possible scenarios. Rather than setting defined percentages in the *SPA* itself, the amended provisions set the required minimum contribution as the "prescribed percentage" of the estimated operating expenses. At present, for a situation where the first conveyance of a strata lot to a purchaser occurs later than one year after the deposit of the strata plan, s. 3.01 of the *SP Regulation* prescribes the minimum contribution to be the lesser of: 10percent of the estimated annual operating expenses multiplied by the number of years or partial years since the deposit of the strata plan, and 50 percent of the estimated annual operating expenses. The legislature thus made a deliberate choice in 2023 to increase the amount of an owner developer's required minimum contribution to the contingency reserve fund.

The parties' positions

[138] It is agreed that in early January 2020, the defendants made a payment of $38,801.40 to the Strata Corporation. The January 3, 2020 cover letter from Mr. Wong described that payment as "representing the contingency reserve funds due to [the Strata Corporation]". The Strata Corporation does not dispute that it received those funds.

[139] It is also agreed that, since the strata plan was deposited on October 7, 1982, and the first conveyance of a strata lot was not until March 2019, the defendants' required minimum contribution to the contingency reserve fund is governed by s. 12(3) of the *SPA* (as it read at that time).

[140] However, the Strata Corporation says, in the circumstances of this case, where the Strata Property was 37 years old at the time of the first conveyance, the defendants were required to contribute more to the contingency reserve fund than the statutory minimum amount. It advances two arguments in this regard.

[141] First, the Strata Corporation says that the defendants had a statutory fiduciary duty to fund the contingency reserve fund at an "appropriate amount" because the

defendants were aware that significant deferred maintenance items were accruing. The Strata Corporation points to what it characterizes as deferred maintenance costs of $399,619 in the First Depreciation Report and a slightly lower figure of $376,873 in the Second Depreciation Report. The Strata Corporation says the defendants ought to have contributed $376,873 to the contingency reserve fund as that was the amount of deferred maintenance costs known to the defendants at the time the first strata lot was conveyed.

[142] Relying on *The Owners, Strata Plan 1229 v. Trivantor Investments International Limited*, 4 B.C.L.R. (3d) 259,1995 CanLII 1753 (BC SC) [*Trivantor*], the Strata Corporation says the defendants owed a statutory fiduciary duty to the Strata Corporation under ss. 5 and 6 of the *SPA*, which included an obligation to plan for known deferred maintenance costs by appropriately funding the contingency reserve fund. The Strata Corporation says it would be unfair and inconsistent with the overall purposes of the *SPA* to interpret the statutory minimum contribution in s. 12 of the *SPA* as overriding or eliminating the defendants' statutory fiduciary obligations to act with a view to the best interests of the Strata Corporation. In essence, the Strata Corporation says a reasonably prudent person, exercising appropriate care and diligence and acting in good faith, who knew what the defendants knew about the deferred maintenance items, would have contributed more to the contingency reserve fund to ensure those items could be addressed without the need to impose a special levy on the owners.

[143] Second, the Strata Corporation says the defendants made multiple representations that they would contribute additional funds to the contingency reserve fund. In particular, under heading 7.4.2 Contingency Reserve Fund in the First Disclosure Statement, the defendants quoted ss. 12(1) to 12(3) of the *SPA* and then stated:

> Notwithstanding Section 12 of the *Strata Property Act*, the [Executors] will be contributing 100% of the estimated annual operating expenses as set out in the interim budget to the Contingency Reserve Fund.

[144] The Strata Corporation submits that, in this context, "notwithstanding" means "in addition to", and therefore the defendants represented they would contribute 100

percent of the estimated annual operating expenses on top of whatever amounts were required by s. 12 of the *SPA*. The Strata Corporation also refers to the Second Depreciation Report, page 5 of which lists an "Initial Contingency Reserve Fund" of $41,641. As s. 12(5) of the *SPA* provides that the contingency reserve fund belongs to the strata corporation, the Strata Corporation says this is the amount that ought to have been paid to it.

[145] Lastly, the Strata Corporation points to a subsequent explanation letter that Mr. Pratten uploaded to the MLS document service in March 2019 to address the Second Depreciation Report. The Strata Corporation says in that explanation letter, the defendants made a further representation that they would donate additional money to the contingency reserve fund. That letter reads in relevant part:

> We have prepared a Developers Disclosure Statement and a copy is attached to the supplements on the listing. That statement informs the new buyers that the Seller is making a donation to the Strata Corporation's Contingency Reserve Fund on the creation of the strata corporation's bank accounts, in the amount equal to the first years' budget, approximately $45,000. This will help with starting the fund with a healthy balance.

The Strata Corporation says the language of "donation" used in the letter indicates something distinct from a statutory obligation.

[146] In sum, the Strata Corporation says the defendants were required to contribute the following amounts to the contingency reserve fund:

a) $376,873 to fulfill their statutory fiduciary obligations in light of the known deferred maintenance costs;

b) the amount required under s. 12 of the *SPA*;

c) either $38,801.40 based on the representation made in the First Disclosure Statement or $41,641 based on the representation made in the Second Depreciation Report; and

d) an additional donation of $38,801.40 based on the further representation made in the explanation letter.

The Strata Corporation agrees the above amounts should be offset by the $38,801.40 the defendants paid in January 2020.

[147] The defendants say they not only met but exceeded their obligations to establish and fund a contingency reserve fund. Starting with s. 12(3) of the *SPA*, the defendants admit they had a statutory obligation to make a minimum contribution of the lesser of the two amounts calculated under ss. 12(3)(a) and 12(3)(b) (as those provisions existed in 2019). The defendants say the formula for the statutory minimum contribution does account for the age of the building (as reflected in s. 12(3)(a)), however it is balanced against a policy choice to impose an ultimate cap on an owner developer's required contribution of (at the time) 25 percent of the estimated operating expenses (as reflected in s. 12(3)(b)). On the facts of this case, the defendants say s. 12(3)(b) governed their obligations.

[148] The defendants estimated their statutory obligation under s. 12(3)(b) of the *SPA* to be approximately $9,700. Despite that, they contributed $38,801.40 to the Strata Corporation's contingency reserve fund – four times the statutory minimum contribution amount. The defendants admit owner developers have a duty under the *SPA*, but say the Strata Corporation has failed to establish any breach of that duty or any damages flowing from an alleged breach. The defendants say they acted prudently and on a reasonably informed basis, in reliance on the advice of Mr. Wong and Mr. Pratten, when they made their contribution of $38,801.40 to the contingency reserve fund.

[149] Further, the defendants say there is no merit to the Strata Corporation's suggestion that the word "notwithstanding" in the First Disclosure Statement was a representation they would provide funds "in addition to" the statutory minimum contribution under s. 12 of the *SPA*. They say the statement means what it says – that in lieu of only providing the statutory minimum contribution required by s. 12, the defendants committed to provide 100 percent of the estimated annual operating expenses. The defendants say the explanation letter merely reaffirmed that commitment. At best, the defendants say there may be some merit to the Strata Corporation's suggestion that the inclusion in the Second Depreciation Report of a

figure of $41,641 for an “Initial Contingency Reserve Fund” obligated them to pay $41,641 rather than the $38,801.40 they paid in January 2020.

Discussion

[150] There is no dispute the defendants were required to contribute the statutory minimum amount to the Strata Corporation’s contingency reserve fund, based on the formula in s. 12(3) of the *SPA*. Using the annual estimated operating expenses figure of $35,273.40 from the interim budget, I calculate the two possible scenarios under s. 12(3) of the *SPA* as follows:

> Section 12(3)(a) = (5% X $35,273.40) X 36.42 years[4] = $64,232.86
> Section 12(3)(b) = 25% X $35,273.40 = $8,818.35

[151] As s. 12(3) obligates an owner developer to pay the lesser of the two possible amounts, I find the defendants were statutorily required to pay the Strata Corporation a contribution of $8,818.35 to the contingency reserve fund. I also find they met that obligation with their January 2020 payment of $38,801.40.

[152] I am unable to accept the Strata Corporation’s argument that, despite the clear language of s. 12 of the *SPA*, ss. 5 and 6 of the *SPA* should be read as imposing a statutory fiduciary duty on owner developers to contribute more than the minimum amount to the contingency reserve fund. At a very general but principled level, a fiduciary duty imposes on a trustee an obligation of honesty and loyalty, a requirement to avoid conflicts of interest and a duty not to profit at the expense of a beneficiary: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at 646-647, 1989 CanLII 34. Where the legislature has set a statutory minimum contribution to a contingency reserve fund, in my view, it is not dishonest or disloyal for an owner developer to contribute that amount, nor does it result in the owner developer profiting at the expense of a strata corporation.

[4] The strata plan was deposited October 7, 1982. The first conveyance occurred on March 14, 2019. There were 36 years and 5 months, or 36.42 years, between the date the strata plan was deposited and the date of the first conveyance.

[153] I agree with the defendants that *Trivantor* is distinguishable. *Trivantor* was decided under the *Condominium Act*, which, as noted above, imposed very different requirements on owner developers to establish and maintain a contingency reserve fund almost immediately on creation of a strata corporation. Under the *SPA*, the obligation to create a contingency reserve fund is not engaged until the owner developer conveys the first strata lot. Further, in *Trivantor,* the owner developer took the position it was not required to establish a contingency reserve fund at all and it did not establish any such fund. Here, the defendants paid the Strata Corporation $38,801.40 as their contribution to the contingency reserve fund. Far from denying their obligations, the defendants accepted their obligations and made a payment of more than four times the amount of the statutory minimum contribution required under s. 12 of the *SPA*.

[154] At its core, the Strata Corporation's argument amounts to a submission that the legislature ought to have set the minimum contribution amount in s. 12(3) of the *SPA* at a higher level where the strata property in question is older and the owner developer is aware of significant deferred maintenance items. While there may well be policy arguments that could be advanced in support of such a change, that is not the choice the legislature made at the relevant time. It is true that in November 2023, the legislature amended s. 12(3) of the *SPA* to increase the cap on the minimum required contribution to 50 percent of the annual estimated operating expenses. But in 2019, when the defendants' obligation to establish a contingency reserve fund was engaged, s. 12(3) of the *SPA* only required them to contribute 25 percent of the annual estimated operating expenses. As noted, the defendants' contribution exceeded the required amount.

[155] I am equally unable to accept the Strata Corporation's argument that the defendants made representations in the First Disclosure Statement, the Second Depreciation Report or the explanation letter that require them to contribute more to the contingency reserve fund. Viewed in context, I agree with the defendants that the intention of each of those documents was to confirm the defendants' commitment to

contribute 100 percent of the estimated annual operating expenses to the contingency reserve fund, rather than merely contributing the statutory minimum.

[156] Further, the Strata Corporation relied on *The Owners, Strata EPS401 v. Findlay*, 2023 BCSC 500, as supporting a strata corporation's ability to sue based on representations in a disclosure statement. Subsequent to the hearing of the summary trial before me, in reasons indexed at 2024 BCCA 305, the Court of Appeal overturned the lower court decision in *Findlay*, holding that a strata corporation does not have standing to sue on behalf of initial purchasers for representations in disclosure statements. As the Strata Corporation is the only plaintiff in this matter, I find it lacks standing to advance any claim based on the alleged representations.

[157] Accordingly, I dismiss the Strata Corporation's claims in respect of the defendants' contribution to the contingency reserve fund.

Issue 4: Did the defendants fail to properly insure the Strata Corporation?

[158] Sections 149 and 150 of the *SPA* require a strata corporation to obtain and maintain both property insurance and liability insurance. The property insurance must cover common property, common assets, buildings shown on the strata plan and fixtures built or installed on a strata lot if they were built or installed by the owner developer as part of the original construction. The property insurance must be on the basis of full replacement value and must insure against major perils as set out in the regulations or specified in the bylaws (*SPA* s. 149 as it existed in 2019). Section 153 provides that a strata corporation has an insurable interest in any property insured under s. 149. The liability insurance must "insure the strata corporation against liability for property damage and bodily injury" and be at least the amount required in the regulations (*SPA* s. 150).

[159] Before the election of the first council, responsibility for obtaining and maintaining insurance for a strata corporation rests with the owner developer (*SPA* s. 5). Section 15 of the *SPA* specifically requires an owner developer to "ensure that

the term of any insurance policy entered into by or on behalf of the strata corporation continues for at least 4 weeks after the first annual general meeting". Section 155 of the *SPA* provides that, despite the terms of an insurance policy, named insureds in a strata corporation's insurance policy include the strata corporation, the owners and tenants from time to time of the strata lots on the strata plan and persons who normally occupy the strata lots.

[160] The Strata Corporation says the defendants failed to obtain and maintain proper insurance, as required under the *SPA*. The Strata Corporation says it was not until Mr. Haliburton obtained the necessary insurance policy effective February 18, 2020 that the Strata Corporation was properly protected in its own name. The Strata Corporation acknowledges there was a form of insurance policy previously in place. However, as that policy was not in the name of the Strata Corporation itself, the Strata Corporation says it faces potentially significant liability for claims that could still be made. The Strata Corporation notes that, given how limitations work, if a former minor tenant was injured on the property during the period before February 18, 2020, they could still advance a claim and the Strata Corporation did not have an insurance policy that would respond.

[161] The Strata Corporation says this amounts to a failure by the defendants to meet their statutory fiduciary obligations to the Strata Corporation (*SPA* ss. 5-6). While the Strata Corporation admits the *SPA* does not prescribe a statutory penalty for failure to obtain and maintain the required insurance, it nonetheless says this is a significant failure that, in this context, represents a marked departure from ordinary standards of behaviour, and should thus attract some form of redress. In its summary trial application, the Strata Corporation argued the defendants should pay the equivalent of six years' worth of insurance premiums as restitution because the defendants unjustly benefitted from avoiding their obligations. In its written and oral submissions, the Strata Corporation pivoted to requesting an award of punitive damages to denounce the defendants' actions and deter others from similar failures. The Strata Corporation maintains that an insurance policy in the name of anyone other than the Strata Corporation itself is not a reasonable or sufficient way to meet

the obligations under the *SPA*. There is no certainty for the Strata Corporation that it will actually be covered in the event of a claim, and no protection against costs that might be incurred to address any disputes with the insurance company.

[162] The defendants say there was insurance in effect throughout the relevant periods that insured the Strata Property against all risk of direct physical loss or damage (except as excluded in the policy itself) up to a limit of $2.3 million, with additional earthquake coverage. The insurance also covered general liability, including for bodily injury and property damage. The evidence shows the insurance was obtained through the brokerage firm of Megson FitzPatrick, with one policy in effect from February 18, 2018 to February 18, 2019, and a second in effect from February 18, 2019 to February 18, 2020. The second policy expired about ten weeks after the December 2, 2019 meeting. While the policies listed the named insureds as the Executors of Vun's estate (first policy) and "Vun Wong Ngai" (second policy), the description of the property covered is the address for the Strata Property as a whole (the first policy also specifically lists "Strata Lots 1-10, Section 7, Victoria District, Strata Plan VIS1210"). The defendants say information about insurance was included in the First Disclosure Statement, and no claims were made against the policies before their expiration.

[163] The defendants say the insurance policies that were in place met the requirements under the *SPA*. The defendants say the fact that they were taken out in the names of the Executors or Vun's estate is irrelevant; instead, what matters is the insured interest and it is clear that the insured interest was that of the Strata Corporation. They rely on the decision in *Kosmopoulos v. Constitution Ins. Co. of Canada*, [1987] 1 S.C.R. 2, 1987 CanLII 75, for the proposition that what is being insured is the beneficial interest. At all material times, Vun (or his estate) was the owner of the entirety of the Strata Property and therefore held the beneficial interest of the Strata Corporation. As a result, the defendants say the interests insured under the policy were the interests of the Strata Corporation. As there is no suggestion that Vun or his estate obtained the insurance for their own personal benefit, the

defendants say there is no principled basis on which an insurance company could refuse to honour the policies for the benefit of the Strata Corporation.

[164] The defendants say this is also confirmed by the provisions of the *SPA* itself. Section 153 of the *SPA* deems a strata corporation to have an insurable interest in the property that must be insured under s. 149 (overcoming any concerns that might arise because the individual owners, rather than a strata corporation, own the common property). Further, since the insurance policies were purchased for the benefit of the Strata Corporation (rather than Vun personally), they can be considered the Strata Corporation's insurance policies. The defendants say, as a result, s. 155 of the *SPA* deems the Strata Corporation (among others) to be "named insureds", regardless of the terms of the insurance policy itself. In other words, the defendants say, as it is clear that the insurance policy was for the benefit of the Strata Corporation, the name on the front of the policy does not matter.

[165] While the reasoning in *Kosmopoulos* may support the defendants' arguments that the insured interests under the insurance policies were those of the Strata Corporation, that is not actually the question before me. I am not tasked with deciding if the Strata Corporation can recover under previous insurance policies obtained by the defendants. Rather, the question is whether there was a failure by the defendants for which this Court should grant a remedy to the Strata Corporation.

[166] Although the *SPA* imposes a statutory requirement to obtain and maintain insurance, the legislature has not chosen to create a statutory penalty for failure to meet that requirement. That may be a policy issue to be addressed in future, but as the Strata Corporation itself admitted, there is no statutory provision that entitles the Strata Corporation to a remedy. Nor, on the facts of this case, can the Strata Corporation prove it has suffered a loss for which compensation should be paid. There is only an allegation of a potential for future liability and loss. If a claim is ultimately made for the period prior to February 2020, there will presumably be an attempt to rely on the policies obtained by the defendants. If the insurance company honours the policy, there will be no issue. If an insurable claim is denied, or there are complications in relying on the policies, then there will be losses or expenses for

which the Strata Corporation can seek relief, including by involving one or more of the defendants as required. At this stage, the potential loss is wholly speculative.

[167] Further, and while I address punitive damages in more detail below, the defendants' actions in respect of insurance do not approach the requisite threshold for an award of punitive damages. This is not a situation where the defendants wholly neglected to obtain any insurance to protect the Strata Property and the Strata Corporation. There was insurance in place, albeit in the name of Vun or his estate. While it would have been preferable for the insurance to have been in the name of the Strata Corporation, obtaining insurance in the name of the entities that held the full beneficial interest of the Strata Corporation at the relevant time is not conduct that offends the Court's sense of decency, or that requires retribution, denunciation and deterrence, at least at this point.

[168] Accordingly, I dismiss the Strata Corporation's claims in respect of the defendants' alleged insurance failings.

Issue 5: Is the Strata Corporation entitled to an award of punitive damages?

[169] In addition to any statutory penalties or compensation for breaches of fiduciary duties, the Strata Corporation seeks punitive damages for what it calls the defendants' deliberate and egregious disregard of their obligations to the Strata Corporation. The Strata Corporation characterizes the defendants' failings as a "complete dereliction" of their fiduciary duties. It says there is a clear pattern of the defendants disregarding the requirements of the *SPA*, including almost complete non-compliance with their obligations as owner developers under ss. 12-22.

[170] The Strata Corporation says the defendants failed in big ways and small ways. They failed operationally by not opening bank accounts in the name of the Strata Corporation, and not maintaining financial records and records of contracts and warranties. They failed in relation to the sale of the strata lots, including by not reviewing and understanding the First Disclosure Statement, not properly considering the depreciation reports, failing to pay strata fees and contributions to

the contingency reserve fund as required, failing to properly hold an AGM in December 2019 and generally failing to adequately inform themselves. Further, the Strata Corporation says the defendants took inadequate steps to rectify their failures regarding the December 2019 meeting and then failed to properly respond to the notice for the August 2020 meeting and to subsequent, pre-litigation correspondence regarding their alleged obligations. The Strata Corporation emphasizes that Simon's answers on discovery demonstrate a lack of the kind of care and diligence the *SPA* imposes on owner developers in order to protect purchasers.

[171] The Strata Corporation says, taken as a whole, the defendants' continued non-compliance was not a technical breach or a minor misunderstanding. Instead, their conduct falls well short of what is expected of owner developers under the *SPA*. It says punitive damages are required both to denounce that behaviour and to deter other owner developers from ignoring their statutory and fiduciary obligations. The Strata Corporation seeks punitive damages of $483,750, based on 15 percent of the $3.225 million sale price for all ten strata lots. The Strata Corporation says this strikes the appropriate balance because it allows the defendants to retain significant equity from the sale of the strata lots, while still sending a clear message that their behaviour was significantly offside and will not be tolerated.

[172] The defendants say the Strata Corporation has failed to establish that the defendants' conduct meets the very high threshold required for an award of punitive damages. While the defendants admit minor failings, including with respect to the notice for the December 2019 meeting and not having provided certain documents, they maintain there is no proof of any bad faith or deceit or intent to mislead that approaches the requisite level of moral culpability. Further, the defendants say it was both reasonable and prudent for them to rely on Mr. Pratten and Mr. Wong for advice and assistance to understand and navigate their responsibilities. The decision to do so, even if it resulted in imperfections, does not amount to the kind of malicious or high-handed conduct that warrants denunciation through punitive damages.

The applicable legal principles

[173] The leading case on the principles for an award of punitive damages remains *Whiten v. Pilot Insurance Co.*, 2002 SCC 18. Writing for the majority, Justice Binnie confirmed that punitive damages are very much an "exceptional" remedy to be awarded with restraint (*Whiten* at para. 69). They are only awarded where the defendant's conduct is "malicious", "oppressive", "high-handed", "arbitrary" or "highly reprehensible", representing such a marked departure from ordinary standards of decent behaviour that it "offends the court's sense of decency": *Whiten* at paras. 36 (citing *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 1995 CanLII 59 at para. 196), 70, and 94.).

[174] A punitive damages award (sometimes referred to as "exemplary damages") is not compensatory; it is concerned with addressing the defendant's conduct rather than the plaintiff's loss (*Whiten* at paras. 73, 94). Such an award has three objectives: retribution, deterrence and denunciation (*Whiten* at para. 43). Punitive damages are usually only awarded where the defendant's misconduct would otherwise go unpunished or where other penalties are or are likely to be inadequate to achieve these objectives (*Whiten* at para. 94).

[175] Where punitive damages are warranted, the Supreme Court of Canada has confirmed that proportionality must govern the assessment of quantum (*Whiten* at para. 74). In particular, a punitive damages award must be proportionate to the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, while also taking into account any other fines or penalties to which the defendant is subject (*Whiten* at paras. 94). The award must be no greater than necessary to rationally accomplish the objectives of retribution, deterrence and denunciation (*Whiten* at paras. 71, 94). In practice then, the impact of such an award on a defendant is a relevant consideration.

Discussion

[176] To assess whether the defendants' conduct represents a "marked departure" from ordinary standards, it is necessary to consider the overall context. In this case,

the Owner Developers were a couple who, for all intents and purposes, owned all of the Strata Property and managed the Strata Corporation as if it was simply a rental building for the duration of their lives. When the last of them passed away in late 2013, the Executors had to determine what to do next. From 2013 to 2018, they continued to manage the Strata Property as a rental with assistance from Mr. Pratten and Equitex. In 2018, they asked Mr. Pratten and Mr. Wong to help them market the strata units for sale.

[177] In the First Disclosure Statement, the Executors candidly admitted they have "no experience in developing properties" (page 1). Mr. Pratten's uncontested evidence is that, prior to conveying each of the strata lots, he confirmed with each of the purchasers' licensed real estate agents that their clients had received a copy of "the relevant disclosure documents" (which I understood to mean both disclosure statements), as well as the Second Depreciation Report. Mr. Haliburton confirms that prior to his purchase, he received and reviewed the First Disclosure Statement. As a result, I find the purchasers were on notice that they were not dealing with a professional real estate developer with significant experience in such transactions.

[178] The defendants have admitted they made certain mistakes and failed to fulfill a number of requirements under the *SPA*, largely in the context of the December 2019 meeting. As noted above, the evidence indicates that in March 2022, the defendants offered to reimburse the Strata Corporation for the preparation of building plans not provided at the December 2019 meeting (they were not in the defendants' possession). As of the hearing of the summary trial, the Strata Corporation had not requested any reimbursement. However, in light of this admitted failing, I have granted an order that the defendants reimburse the Strata Corporation once those plans and other required documents are prepared. I have also made orders and granted a declaration to address certain other failings by the defendants. These orders and declaration confirm the *SPA* requirements cannot be ignored.

[179] There is no evidence before the Court that the defendants' failings were motivated by a desire to increase their profit or maximize a power imbalance. This situation bears no resemblance to that in *Whiten*, where the insurance company

deliberately persisted with a completely unfounded theory of its case in a conscious effort to force a settlement far below what Ms. Whiten was entitled to – behaviour the Supreme Court of Canada termed "abominable". Nor does the defendants' conduct even approach that in *Hall v. The Owners, Strata Plan EPS 2116*, 2022 BCSC 2167, where Justice Dley found a strata corporation acted oppressively and significantly unfairly by passing a bylaw amendment that specifically targeted the petitioners and impeded their construction of a home on their bare land strata. Despite finding the strata corporation failed to fulfill its obligations to the petitioners and imposed excessive demands in response to their reasonable requests, Dley J. still concluded the impugned behaviour fell short of warranting punitive damages.

[180] I recognize this is not a situation where the Strata Corporation identified a single failure. As set out above, there were multiple issues with the defendants' conduct, not all of which were minor. However, in my view, the issues stem from an admitted lack of understanding and experience in this area, not from a malicious or deliberate effort to evade responsibilities to the Strata Corporation and thereby gain an advantage. In the circumstances, I am satisfied it was both prudent and reasonable for the defendants to rely on Mr. Pratten and Mr. Wong to both inform themselves of their obligations and to fulfill them. While the defendants admit some of their efforts fell short, the Strata Corporation has not proven those failings were oppressive or high-handed.

[181] Further, this is not a situation where the defendants "did nothing" in the face of their obligations. To the contrary, and by example, they engaged Mr. Pratten and Mr. Wong, who did have experience selling strata units, to prepare the necessary sale documents and conduct the December 2019 meeting. They obtained insurance over the Strata Property, paid all the expenses during the period of the interim budget, and asked questions when they received the subsequent notice for the August 2020 meeting. The defendants' behaviour does not "shock the conscience" in the manner required for an award of punitive damages. Such awards are designed to punish truly reprehensible conduct; they are not awarded against individuals who, despite efforts to understand and comply, still got things wrong. The

Strata Corporation's claim for punitive damages seeks to hold the defendants to a standard that might potentially be appropriate for a sophisticated, professional real estate developer; that is not a realistic standard in the context of this case. The claim for punitive damages is therefore dismissed.

Issue 6: Is restitution warranted because the defendants were unjustly enriched by not meeting their obligations to the Strata Corporation?

[182] Under the principled framework confirmed by the Supreme Court of Canada in *Moore v. Stewart*, 2018 SCC 52 at para. 37, a plaintiff will establish a *prima facie* cause of action in unjust enrichment if the plaintiff can show three things:

a) that the defendant has been enriched or has benefitted;

b) that the plaintiff has suffered a corresponding deprivation; and

c) that there is no juristic reason for the benefit and corresponding deprivation.

If the plaintiff can establish the above three things, at the second stage of the analysis, the burden shifts to the defendant to show why the enrichment should nonetheless be retained, based on the parties' reasonable expectations and public policy: *Moore* at para. 58, citing, among others, *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at paras. 45-46.

[183] An enrichment is a tangible benefit conferred on the defendant, which can be either positive (such as the payment of money) or negative (such as sparing the defendant an expense they would have otherwise incurred): *Garland* at para. 31. A deprivation need not be an out of pocket expenses or a benefit taken directly from a plaintiff; it can also include a benefit that was never in the plaintiff's possession but would have accrued to the plaintiff had it not been received by the defendant instead: *Moore* at para. 44.

[184] The Strata Corporation says the defendants have been unjustly enriched, and it has suffered a corresponding deprivation, because the defendants failed to create and provide necessary documents, failed to pay the required amounts during the

period of the interim budget, did not fund the contingency reserve fund to an amount sufficient to address all of the deferred maintenance, and did not properly insure the Strata Corporation thus exposing it to liability. The Strata Corporation says the defendants benefitted because they have been spared the expenses of fulfilling their statutory and fiduciary obligations, and there is no juristic reason for their enrichment.

[185] The defendants dispute they were unjustly enriched in any way and say an award of restitution would create an unwarranted windfall for the Strata Corporation. Alternatively, the defendants argue the equitable doctrine of laches would bar the Strata Corporation's unjust enrichment claim due to its delay in seeking relief.

[186] In *Moore,* the majority wrote that "the doctrine of unjust enrichment applies when a defendant receives a benefit from a plaintiff in circumstances where it would be "against all conscience" for him or her to retain that benefit" (at para. 35). I am not satisfied the Strata Corporation has established that the defendants were enriched in a manner that deprived the Strata Corporation of a benefit without juristic reason.

[187] I have found the defendants liable to the Strata Corporation for failings in relation to the creation and provision of documents and certain payments during the interim budget period and have made remedial orders and a declaration to address those issues. There is no basis on which to make an equitable award in addition to those remedies.

[188] I also rejected the Strata Corporation's claims that the defendants failed to properly insure it. In that regard, the Strata Corporation has not demonstrated a loss that corresponds to any alleged gain by the defendants.

[189] Finally, I have determined the *SPA* did not require the defendants to contribute more to the contingency reserve fund than the $38,801.40 they paid. While I do not agree the Strata Corporation has suffered a loss, to the extent I am incorrect in that conclusion, I consider the *SPA* provides a juristic reason by setting the required contribution amount, which in any event was exceeded in this case. The Strata Corporation's claim for restitution for unjust enrichment is therefore dismissed.

Summary of orders and costs

[190] In conclusion, I make the following declarations and orders:

a) A declaration that this action is suitably disposed of by summary trial;

b) A declaration that the Strata Corporation is entitled to payment from the defendants in an amount equivalent to the value of the work performed by Mr. Haliburton to put the Strata Corporation's affairs in order if that work had been performed at the usual rates for a Chartered Professional Accountant, or such other amount as the parties may agree.

c) An order pursuant to s. 16.2 of the *CRTA*, that the CRT is not to adjudicate the claims raised in the Strata Corporation's action;

d) An order that the Strata Corporation's claims regarding the obligation of an owner developer to establish and fund a contingency reserve fund under the *Condominium Act* are dismissed as statute-barred;

e) An order pursuant to s. 20(3) of the *SPA*, that the defendants are to reimburse the Strata Corporation for any costs it incurs to obtain documents required to be provided under s. 20(2)(a) of the *SPA* within six months of the date of this order;

f) An order pursuant to s. 14(2) of the *SPA*, that the defendants must pay the Strata Corporation the sum of $1,477.79 for the outstanding amount of the defendants' monthly share of the estimated operating expenses from December 2019 to February 2020 and their required contribution to the contingency reserve fund between April 2019 and February 2020;

g) An order pursuant to s. 14(4) of the *SPA*, that the defendants must pay the Strata Corporation $480.55 for the difference between the accrued expenses and the estimated operating expenses from April 1, 2019 to November 30, 2019; and

h) An order that the remainder of the relief sought in paras. 2 to 6 of Part 1 of the Strata Corporation's notice of application for summary trial, filed April 23, 2024, is dismissed.

[191] If there are disputes regarding the amounts to be reimbursed or paid pursuant to the above orders and the one declaration that requires payment, the parties may request leave through Supreme Court Scheduling to make further brief written submissions, or, if necessary, to reappear before me.

[192] The parties sought significant costs awards against each other, including special costs, on the basis that each considered the other's conduct (including litigation conduct) or positions to be deserving of rebuke. The Strata Corporation submits the defendants' complete dereliction of their duties while they owned the Strata Property, and failures during the sales and transfer of control, warrant an award of special costs against the Executors (as representatives of the Owner Developers' estates), as well as regular costs against the other defendants. The defendants submit the Strata Corporation's conduct in pursuing this litigation as it has, including making baseless allegations of bad faith or otherwise unmeritorious claims, warrants special costs against it.

[193] I have rejected many of the Strata Corporation's claims as well as their overall characterization of the defendants' conduct. However, I have also found fault with some of the defendants' actions and have granted orders and a declaration accordingly. In my view, an award of special costs is not warranted against either side. Each advanced positions that I ultimately found to have some merit.

[194] Further, in light of the relief sought by the Strata Corporation, I do not consider either side to have been substantially successful as that term is used in the costs context. Given that conclusion, I find it appropriate for each side to bear their own costs. However, should either party wish to provide additional written submissions on costs (to a maximum of 5 pages), they may request leave to do so through Supreme Court Scheduling. Any such request must be accompanied by a proposed schedule for the exchange of written submissions.

[195] Finally, for clarity, on May 8, 2024, Associate Judge Scarth granted the Strata Corporation "costs in the cause" in respect of the defendants' application before her. Unless I modify the costs order I have made above after receipt of further written submissions, the outcome means neither party is entitled to costs of that application.

"K. Wolfe J."