

Date Issued: August 28, 2018

File: 15790

Indexed as: Kates v. Strata Plan VAS2844, 2018 BCHRT 203

IN THE MATTER OF THE *HUMAN RIGHTS CODE*,
RSBC 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

BETWEEN:

Anne Kates

COMPLAINANT

AND:

Owners, Strata Plan VAS2844

RESPONDENT

REASONS FOR DECISION
APPLICATION TO DISMISS A COMPLAINT
Section 27(1)(c)

Tribunal Member:

Emily Ohler

On their own behalf:

Anne Kates

Counsel for the Respondent:

Philip Dougan

I INTRODUCTION

[1] Anne Kates filed her complaint on November 4, 2016, alleging that the Owners, Strata Plan VAS2844 [**Strata**] discriminated against her in the provision of accommodation, service or facility on the basis of physical disability contrary to s. 8 of the BC *Human Rights Code* [**Code**].

[2] Ms. Kates is an owner in the Strata. Her complaint arises from what she says is the Strata's failure to adequately remediate mould resulting from a water ingress issue, which has exacerbated her disability.

[3] The Strata has applied to dismiss the complaint on the basis that there is no reasonable prospect that the complaint will succeed (s. 27(1)(c)) and on the basis that it would not further the purposes of the *Code* to proceed because the Strata has made a reasonable offer to settle the complaint (s. 27(d)(ii)).

[4] While I do not refer to it all in my decision, I have considered all of the information filed by the parties in relation to this application to dismiss. This is not a complete recitation of the parties' submissions, but only those necessary to come to my decision. I make no findings of fact.

II PROCEDURAL NOTE

[5] The Strata originally filed its application to dismiss the complaint [**Application**] on October 23, 2017 – the same day on which it filed its response to Ms. Kates' complaint and before disclosing its documents. This does not accord with the Tribunal's *Rules of Practice and Procedure* [**Rules**], which requires that disclosure occur in order to enable parties to adequately deal with such an application. Accordingly, the Strata's Application was held in abeyance pending disclosure.

[6] On February 7, 2018, Ms. Kates filed an application for disclosure that was addressed by way of a pre-hearing conference [**PHC**] held by telephone on February 23, 2018. During the PHC, I advised the parties that in appropriate circumstances, in lieu of lengthy written

submissions processes, further PHCs could be scheduled in future to provide more efficient resolution of procedural matters. In the reporting letter to the parties, I confirmed that:

By consent, the Respondent will provide to Ms. Kates copies of the requested documents by March 16, 2018. The parties are to notify their Case Manager ... promptly that this has been done, and are to similarly notify him promptly of any issues that arise from the disclosure.

[7] The parties did not raise any issues. The Strata notified the Tribunal that it had completed its disclosure to Ms. Kates by sending a letter outlining its efforts [**Disclosure Letter**], providing an amended Form 9.2 List of Documents, and attaching various documents. The preliminary question I address here is whether to consider the Disclosure Letter and attached documents in the context of the Application. For the following reasons, I have decided to consider both the Disclosure Letter and documents, but emphasize that the Strata's approach is problematic and ought not to be followed again.

[8] I note, at the outset, that while Rule 20(3) directs respondents to deliver copies of documents to any other parties, it does not require documents to be sent to the Tribunal at this time and Form 9.2 expressly says not to do so. I further note that it is not immediately apparent whether the documents relate to the amended disclosure or to counsel's reference that "documentation will follow shortly, [to] illustrate the legal concept of a 'failure to mitigate'."

[9] In the Disclosure Letter, counsel suggested that "at the next call" the Strata would like to review issues that are "very pertinent to recharacterizing Ms. Kates' claim." However, no "call" was scheduled or requested. The Strata then laid out various arguments. The Strata concluded the Disclosure Letter saying it would "like to revisit the idea of the dismissal of the claim...".

[10] On April 13, 2018, the Tribunal set a schedule for submissions in respect of the Application, wherein it noted that "the Tribunal can only make a decision based on the information you provide."

[11] In deciding an application under s. 27(1)(c) of the *Code*, the Tribunal can only consider information that it has before it – it cannot consider what evidence might be given if there is a hearing: *University of British Columbia v. Chan*, 2013 BCSC 942, at para. 77. It is the responsibility of the parties to advance the information which they believe is necessary to enable the Tribunal to make decisions under s. 27(1)(c): *Bell v. Sherk and others*, 2003 BCHRT 63 at paras. 25-26.

[12] The Strata's Application consists of brief submissions; the Strata submitted no evidence in support of its Application. Following conclusion of its disclosure obligations, it did not submit or indicate any intention to amend its Application, and did not reply to Ms. Kates' response to the Application. In the meantime, there was no indication from counsel that the material accompanying the Disclosure Letter – either the documents or the arguments – was intended as part of the Application.

[13] The effect of this was my having to determine whether and how to consider the documents and arguments provided with the Disclosure Letter as part of the Application, especially as the documents would constitute the only evidence provided by the Strata.

[14] The Strata should have filed an application from which the whole of its position could be readily ascertained without the Tribunal having to undertake what is in essence properly counsel's job of sifting through documents to piece together the overall argument. The Strata's approach in this case does not aid the just and timely resolution of the complaint or foster respect for its Rules. On the other hand, the objective of a dismissal exercise under s. 27 is to ensure that only cases of sufficient merit go forward to a hearing. This is done so that resources, time and expense are not wasted on matters that have no reasonable prospect of success: *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95 at para. 22. Most importantly, Ms. Kates has responded to the arguments raised in the Disclosure Letter so there is no unfairness to her in my considering those arguments.

[15] Therefore, in reaching my decision, I have considered the arguments made by Strata in its Disclosure Letter and the materials attached thereto together with the Strata's Application, the initial Complaint and Response, and Ms. Kates' response to the Application.

III BACKGROUND

[16] There have been a number of issues in the past between the Strata and Ms. Kates arising from water ingress into her unit and resulting mould. For clarity, I have focused on the most recent allegations that appear to anchor this complaint.

[17] Ms. Kates has submitted medical information that outlines an array of health problems, and shows doctors linking mould to an exacerbation of those problems. She has also submitted materials showing that she has brought those problems and their link to mould in her unit to the attention of Strata at various points over the years.

[18] I note at the outset that it is undisputed that the entire Strata building requires work to address a pervasive water ingress issue. In a February 17, 2015 letter related to repairs in two units, engineers wrote, "...Building Owners should be aware that the visible signs of water ingress discovered at the two units show clearly a water premature failure within the building wall assembly. [We] recommend a comprehensive strategic plan on how to remediate the exterior wall system and implementation of a rain screen technology."

[19] On August 4, 2016, a tile layer performing renovations for Ms. Kates discovered mould in the second bedroom of her unit. Ms. Kates took pictures and notified the Strata. She also had an environmental company conduct a mould test. The resulting report [**Mould Report**] says that two kinds of mould were discovered. It says they are "considered toxigenic moulds and should not be found at any level in a normal indoor environment. [Another kind of mould] was also elevated to almost three times outdoor concentrations. This indicates mould sources in the second bedroom ... The second bedroom is not safe for occupancy."

[20] Ms. Kates says she was scared from her previous experience with mould in her unit so she had the contractor immediately seal the entire second bedroom with plastic sheets. It appears that communication with Strata garnered no response for some time.

[21] On September 20, 2016, Ms. Kates sent medical information to the Strata through its property manager hoping to get progress in the repair of her unit. The doctor's note said that Ms. Kates "suffers from significant heart and lung ailments under certain environmental exposures, mould being one. For the benefit of maintaining her health over time I recommend repairs be done to remove the mould including adequate ongoing ventilation." In the meantime, she says and the Strata does not deny that it was making Strata-funded repairs to similar mould issues in another strata unit. Minutes from a February 2015 Strata Council meeting show the Strata approved payment for repairs including to the interior wall of that unit **[Neighbouring Unit]**.

[22] In the meantime, it appears that there was a Special General Meeting on September 22, 2016 where a resolution to move forward with financing a building envelope rehabilitation project at a cost of \$2.4 million did not pass.

[23] On September 23, 2016, a Strata Council member expressed frustration about not having learned of the Mould Report earlier, and pushed to have a remediation team attend at Ms. Kates' unit immediately.

[24] On September 26, 2016, the Strata wrote to Ms. Kates seeking access to her unit the following day for remediation contractors **[Strata Contractors]** to investigate the mould problem and report their recommendations for remediation as necessary.

[25] On September 29, 2016, the Strata circulated a note amongst the owners seeking to identify "active visible water leaks". On September 30, 2016, Ms. Kates emailed the Strata's property manager thanking her for addressing the ongoing moisture and mould issues in the two back bedrooms, and mentioning her "serious health issues" resulting therefrom.

[26] On October 14, 2016, Ms. Kates reported to the Strata that the Strata Contractors had attended her unit but told her they could only work for one and a half hours resulting in their “opening the walls, spraying them and leaving the debris.” She wrote that she had “no idea what the next step is.”

[27] On October 16, 2016, Ms. Kates wrote to the Strata through its property manager asking for an update on the repairs to the walls. The property manager replied on October 20, 2016 saying that “there would not be any closing of the walls at this time as obviously the work to stop the leak has not been done.”

[28] On October 22, 2016, Ms. Kates wrote to Strata expressing her concerns related to the mould not having been properly remediated, noting again its impact on her health, and seeking information about how the Strata was going to address the issue.

[29] Minutes from an October 26, 2016 Strata Council meeting show that the Strata considered the remediation of mould by the Strata Contractors completed, but the cause of the mould, which is typically moisture, was not. It is not entirely clear what the Strata based this understanding on. A number of steps were agreed upon with a focus on ascertaining the scope and scale of the water ingress issue throughout the building as a whole, and to approve funding to obtain a building envelope condition assessment.

[30] Within one or two weeks the Strata Council acknowledged that Ms. Kates’ unit had not been air tested following the opening and spraying of the walls. This raises further questions about why the Strata believed the matter had been successfully addressed. The Council adopted a motion to have sampling and testing arranged right away.

[31] On November 7, 2016, the Strata Council conveyed to the property manager the need to get Ms. Kates’ and the Neighbouring Unit air tested immediately for the presence of mould. “We absolutely need to know that both those environments are safe”, they said.

[32] In November 2016 the Strata Contractors returned to Ms. Kates’ unit to conduct the mould test of the opened bedroom wall. I have been provided with a report showing the

numbers from the lab analysis but no context or other means to interpret it. Minutes from a December 7, 2016 Strata Council meeting report that the Strata Contractors had found active mould during their assessment of Ms. Kates' and another unit. The Council noted that "Prior to moving forward on the remediation Council requested additional information in regards to the assessment and coordinating process." It is unclear to me how this coordinates with the work carried out in October or to the testing done in November, but subsequent correspondence suggests the mould problem persisted.

[33] Around this time, the Strata wrote to Ms. Kates seeking access to her unit by an engineering firm [**Strata Engineers**] that had been retained to investigate active or potential leaks throughout the building.

[34] There is an email chain from December 12, 2016 showing the Strata manager referencing the Strata Contractors' availability to "do the mould remediation on the 20th or 21st next week", and a further email from the Strata manager to Ms. Kates on December 13, 2016 saying that the Strata Contractors "are still looking at the 20th and 21st to do the remediation." I have been provided with a further report showing the numbers from the lab analysis for samples collected in December, 2016 but again there is no context or other means to interpret it, or even to understand the situation in which the samples were collected. In any event, the Strata management company further followed up with Ms. Kates on January 4, 2017, and again on January 26, 2017 where the Strata manager writes, "This is further to our emails on January 4, 2017, December 19, 2016, December 13, 2016, November 9, 2016 and November 8, 2016 requesting access for the mould remediation – we have not heard back from you."

[35] On January 26, 2017, the Strata manager again wrote to Ms. Kates noting that the Strata required access "for the purpose of mould remediation on your unit...". Ms. Kates points out that while the letter suggests she was uncooperative in allowing access, she was in fact in timely contact with the Strata throughout. The Strata has not disputed this. Ms. Kates provides a number of correspondences between herself and the Strata throughout the period regarding scheduling. She says that even though she was available to the Strata Contractors for them to

return to do a second treatment of the persisting mould issue, they have not done so and the mould issue accordingly persists. The Strata has not denied this.

[36] On April 29, 2017, the Strata emailed Ms. Kates advising her that the Strata Engineers were working on plans for addressing various moisture ingress issues within her unit and the Neighbouring Unit, noting that the Neighbouring Unit would likely undergo extensive wall rebuilding but the extent of the work would be determined when exterior walls were removed during rain screening. Ms. Kates responded that she would like “the same consideration to my walls during the rain screening process as my suite is a mirror image of [the Neighbouring Unit] and still has moisture issues....”

[37] On May 18, 2017, the Strata manager wrote to the owners following up on the current status of the building envelope rehabilitation project. The letter noted that after the failure of the September 2016 resolution, the Strata Council had obtained legal advice on how to meet its responsibilities in addressing both actual and potential issues related to the building envelope, and, based on that, had obtained an engineering report dated January 24, 2017 [**Moisture Report**]. The letter invited owners to review the report, and advised that various recommended options would be discussed at the June 2017 annual general meeting.

[38] The Strata Council president circulated the Moisture Report by e-mail on May 23, 2017. The Moisture Report included a section on Ms. Kates’ unit, referencing the Mould Report and reviewing a number of remediations completed in 2012 in the northeast corner of the kitchen. It noted that no water ingress had been reported in that area since the remediation. It also noted, however, apparent moisture in other areas of the unit. Among other things, the Moisture Report made recommendations for targeted repairs to Ms. Kates’ unit, the Neighboring Unit, and the lobby meeting room as follows:

we recommend the north exterior wall at the ground floor units and the Southeast wall at the lobby meeting room to be completely redone. This would include:

- removal of the cladding, sheathing membrane, sheathing, insulation, windows, doors, skylights, and minimum of 3 feet of the concrete patio measured along the exterior wall;
- structural members and podium membrane would be reviewed. Damaged members would be replaced and depending on the condition of the podium slot membrane, the membrane may or may not be replaced;
- installation of the new insulation, sheathing, sheathing membrane, rain screen cladding system, sealants, flashing, membrane tie into the podium slot membrane, and other related accessories;
- window, skylights, and door upgrades.

It should be noted that the condition and/or existence of the podium slab membrane is unknown. However, it has reached the end of its service life and should be replaced. We recommend replacing the podium slab membrane in conjunction with the remainder of the building envelope work.

[39] The Moisture Report estimated costs in the range of \$200,000-\$250,000 for Ms. Kates' unit and the Neighboring Unit. The Moisture Report also provided an overall recommendation to proceed with comprehensive repairs as soon as possible, noting that work done on a targeted basis would have to be redone once a comprehensive repair was undertaken.

[40] In June 2017, counsel for the Strata wrote to Ms. Kates seeking medical documentation regarding her disability within the context of the human rights complaint.

[41] In July of 2017, the Strata Contractors attended at Ms. Kates' unit after telling her they had to prepare a quote. According to Ms. Kates, they did a visual inspection but did not discuss anything with her; nor was work done subsequently.

[42] On September 14, 2017, the Strata Contractors reported to the Strata that they were retained by the Strata to remove the mould growth in Ms. Kates' unit and confirmed that it had been completed based on there being no visible mould as at July 13, 2017. Ms. Kates points out that once again no air testing was done and that, as mentioned, the second treatment never occurred.

[43] On September 29, 2017, counsel for the Strata wrote to Ms. Kates with a “with prejudice” settlement offer [**Settlement Offer**]. The Settlement Offer confirms the Strata Contractor’s assertion that “there are no outstanding issues which require attention”, and goes on to set out a number of terms.

[44] In December 2017, various neighbours contacted Ms. Kates seeking her support in the impending vote on implementing repairs that had been set out in a building envelope repair proposal. That vote was not successful, with Ms. Kates among those owners voting against it, apparently on the basis of the nature and cost of the repairs sought. This appears to have become the subject of a proceeding in the Supreme Court of British Columbia where the Strata is seeking to override the owners opposed to the building envelope repairs in order to proceed with it. Ms. Kates has submitted a transcript from an April 18, 2018 Chambers application in that proceeding which was adjourned to allow the opposed owners time to obtain further reports. The matter was adjourned to May 28, 2018 and I do not have before me information on what transpired on or since that date.

[45] As I understand Ms. Kates’ complaint, her allegation is not only with respect to the remediation of the mould within her unit, but with the external building repairs required to prevent future mould growth arising from water ingress. Ms. Kates seems to have a concern that the repairs the Strata seeks to undertake do not adequately address the mould issues in her unit, in particular the podium slab concerns that were raised in the Moisture Report. I note that I do not have before me a coherent explanation of what the repairs are that are being sought by the Strata and how they relate (or do not relate) to the Moisture Report. I have only a depreciation report for the building, the Mould Report, and the Moisture Report.

IV ANALYSIS AND DECISION

A. Is there no reasonable prospect the complaint would succeed (s. 27(1)(c))?

[46] In order to succeed in her complaint of discrimination at a hearing, Ms. Kates must satisfy a three-part test. She must establish (i) that she has the protected characteristic of physical disability; (ii) that she experienced an adverse impact in the Strata's provision of a service; and (iii) that her disability was a factor in the adverse impact: *Moore v. British Columbia*, 2012 SCC 61 at para. 33. If Ms. Kates proved these elements at a hearing, the burden would shift to the Strata to justify its conduct. If it did, there would be no discrimination. If it did not, there would be discrimination and the Tribunal would order a remedy.

[47] On this Application, however, the Tribunal considers the likelihood that facts supporting the complaint will be proved at a hearing. The threshold for Ms. Kates is low. She must merely take her complaint beyond the realm of conjecture: *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95, leave to appeal re'd [2006] S.C.C.A. No. 171, at paras. 22-26. The Strata has the burden to persuade me that there is no reasonable prospect that the complaint would succeed at a hearing: *Stonehouse v. Elk Valley Coal (No. 2)*, 2007 BCHRT 305; *Purdy v. Douglas College and others*, 2016 BCHRT 117, at para. 50.

1. Is there no reasonable prospect Ms. Kates would prove her case?

[48] The Strata has the burden of persuading me there is no reasonable prospect that Ms. Kates could succeed in her complaint.

[49] The Strata does not contest that Ms. Kates has a physical disability.

[50] With respect to the question of whether Ms. Kates has experienced an adverse impact within s. 8 of the *Code*, the Strata asserts that it "has no duty to repair strata lot property", citing *Baekhava v. Strata Plan NW877*, 2016 BCHRT 186, "even if the 'cause' is from common property." It says that "there is nothing pled that shows the respondent's conduct did any more harm than such a situation would induce in any person required to live in mouldy

circumstances.” This argument does not, however, negate or even directly dispute the allegation that the mould in Ms. Kates’ unit and the Strata’s approach to remediation has caused or continues to cause an adverse impact on her. There is medical evidence before me that could support a finding that the impact of the mould was worse for Ms. Kates as a direct result of her disability. Further, she alleges and the Strata has not directly denied that Ms. Kates has lost the use of a part of her Strata unit as a result of the persistent mould issue.

[51] On the point that the Strata has no obligation to repair strata property even where the cause is common property, I distinguish *Baekhove* on the basis, among other things, that the bylaws of the strata in that case clearly delineated the boundaries of individual owners’ ownership and repair obligations, and the complainant (who made no submissions in response to the application to dismiss in that case) had not disputed the fairness or applicability of those bylaws. Further, Ms. Kates’ as yet uncontested evidence that the Strata took responsibility for like repairs of other units could undermine the Strata’s assertion here.

[52] With respect to the question of nexus between Ms. Kates’ disability and the adverse impact, the Strata argues:

...this claim is about an allegation that the Strata Corporation has failed to repair and maintain the common property of the building. There is no allegation that ‘because of’ the disability of the claimant that she has been treated differently. There is no allegation that even the assertion of ‘toxic mould’ was of any significance such that the complainant could not continue to live in the building. The Strata says, it is not good for anyone to live with mould, and the complainant does not allege greater impact on her life than on anyone that would not particularly want to live with mould. The complainant is simply looking for damages for an alleged failure on the Strata Corporation’s part to make timely repairs. This is a strata governance issue mischaracterized as a human rights issue.

[53] This argument is unpersuasive. In particular, the Strata’s argument that this is a strata governance issue seems to misapprehend the way in which human rights law works in a strata context.

[54] There is uncontested evidence that living with mould did have a particularly adverse impact on Ms. Kates because of her disability. Ms. Kates' complaint is that the moisture caused the mould, the mould had a negative impact on her health exacerbating a disability, and the Strata failed to take reasonable steps to address the problem. In response to the Strata's application, Ms. Kates has submitted an affidavit with extensive exhibits attached. The gist of Ms. Kates' argument is that she brought her disability and the impact of mould thereon to the Strata's attention on several different occasions over the years, backing it up with medical support. There are medical reports wherein Ms. Kates' doctor links her exposure to mould in her unit to negative health impacts related to her disability. She has outlined in some detail the negative impact that the situation continues to have on her, including that "every day I live in fear of what is going to happen to my health and quality of life, my relationships with others, the portrayal of who I am not, by the strata council, blaming me for all their issues." She has not been able to use her second bedroom since August 8, 2016 given the walls have been left opened since October 4, 2016, and relates this to the Strata's failure to appropriately address the mould and moisture problems in her unit. These things could establish that she has experienced an adverse impact connected to her disability.

[55] In sum, the Strata has not persuaded me that there is no reasonable prospect Ms. Kates could establish at a hearing that her disability was a factor in the adverse impacts she alleges.

2. *Is it reasonably certain the Strata would establish that it accommodated Ms. Kates to the point of undue hardship?*

[56] Were Ms. Kates to establish her case at a hearing, the issue would become whether the Strata fulfilled its duty to accommodate her because of the impact of the mould on her disability.

[57] In order to succeed in a defence that the Strata accommodated Ms. Kates, it would have to establish that it accommodated her up to the point of undue hardship: *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 ("*Grismer*"). The accommodation process is a cooperative one – no one is entitled to a perfect accommodation: *Central Okanagan School District v. Renaud*, [1992] 2 S.C.R. 970. If

the Strata could establish that it had accommodated Ms. Kates to the point of undue hardship or that Ms. Kates refused a reasonable accommodation, that would constitute a defense to her claim.

[58] In *Purdy v. Douglas College and others*, 2016 BCHRT 117, the Tribunal said at para. 63:

Whether a respondent has met the duty to accommodate is a question of fact. It will depend on the specific circumstances and relevant considerations appropriate to each case. In an application under s. 27(1)(c), the Tribunal's role is not to determine, as a matter of fact, whether the respondent met its duty. Rather, the Tribunal considers the likelihood that the respondent will be able to establish that defence. The respondent must persuade the Tribunal that it is reasonably certain it will be able to do so.

[59] There is a large gap in the evidence with respect to the Strata's actions to remediate the mould in Ms. Kates' suite. First, with respect to the mould issue itself, after the Strata Contractors first opened and sprayed Ms. Kates' walls, the Strata noted that no air test was done at that time. It appears from the evidence before me that a subsequent air test revealed the continuing presence of mould. It is unclear whether a second spray treatment was scheduled or occurred. Then, some months later, the Strata Contractors wrote to the Council asserting the mould issue was successfully addressed. However, I cannot reconcile this on the materials before me, particularly absent any meaningful evidence from the Strata on the point. In fact, aside from the assertion in the Settlement Offer, I have no information from the Strata at all about what it did or did not do to address the mould in Ms. Kates' unit, and no information about how the building envelope repairs they are seeking to undertake relate to it. Further, with respect to the question of addressing the water ingress issue to prevent further mould, the Strata has not responded to Ms. Kates' concerns about the podium slab recommendations (among others) from the Moisture Report not being addressed in its building envelope repairs, nor how doing so would constitute undue hardship.

[60] In the Disclosure Letter, the Strata argues that "[i]t is not open to Ms. Kates to complain that the Strata is failing to act to repair her unit, when it is her own actions that are causing the

delay or the proliferation of the mould in her unit.” The Strata asserts that “the actual repair of Ms. Kates’ unit depends upon the repair of the envelope first”, but it provides no information about why that is the case or how that would interact with or otherwise resolve the issues facing Ms. Kates.

[61] In its Disclosure Letter, the Strata makes the following arguments, which I address in turn.

[62] “Ms. Kates has necessitated a court application to force the owners to pay for a full envelope remediation because she held sufficient votes of her own or his proxy to defeat the levy proposed to repair the building.” [reproduced as written]

According to the Chambers transcript from that proceeding, however, it appears that Ms. Kates was among a number of owners who opposed the remediation, and I have no evidence from which to glean the extent to which she herself wielded control. In any event, as already mentioned, in the absence of information about the full envelope remediation, it is unclear why or how this point impacts the matter before me. It could be that Strata is trying to argue that through her opposition, Ms. Kates is failing to participate in the accommodation process, but absent evidence or fulsome submissions on this point, I cannot assess that question meaningfully.

[63] “The engineering reports all say the building has to be repaired as a whole, and individual unit repair would not be successful and would be more expensive.”

The Moisture Report does appear to suggest this; however, the Moisture Report also points to recommended components of that which Ms. Kates says are not included in the plan the Strata now seeks to pursue. As mentioned, the Strata has not addressed this point or submitted any evidence to support its argument in the face of it.

[64] “Ms. Kates has repeatedly created barriers for contractors to enter her unit to repair the interior damage.”

While counsel asserts this, I have before me evidence from Ms. Kates of her ongoing emails with the Strata manager trying to schedule access to her unit.

[65] “Ms. Kates in the strata’s opinion has far more personal property in her unit and the sides of the unit reasonably provides for, and her accumulation of personal property exacerbates the damp and mold in her unit.”

This may be so, but I have no evidence of that or of its impact on the remediation or mitigation of the mould issue. It is also unclear how this supports the Strata’s application.

[66] “Ms. Kates, as a matter of primary strata law, is required to repair and maintain her own strata lot. The engineers confirm that the cause of the leaks and mould is an envelope issue, but it is an entire envelope issue that must be resolved. In the meantime, Ms. Kates has a basic responsibility to repair her own property; even if in this case it would simply be to take all reasonable steps to minimize mould growth....”

This statement in isolation and without any surrounding evidence about communications between the parties about their various responsibilities does little to speak to the accommodation question.

[67] “Ms. Kates has failed to accept an offer that would guarantee the repair of her unit.”

I address this point in the context of Strata’s application under s. 27(1)(d)(ii) below, but note the offer is predicated on the contested assertion that the mould issue has been resolved.

[68] There is something incongruent on the face of Ms. Kates’ alleging the Strata’s failure to adequately address water ingress issues and resulting mould in her unit while simultaneously rejecting the Strata’s apparent efforts to move forward with holistic building repairs to address water ingress. However, without any evidence from the Strata to put these arguments into context, it is impossible for me to understand the relationship between the mould issues, which

may be persisting in Ms. Kates' unit, and the broader building envelope repairs that the Strata says are required prior to resolving them.

[69] Among other things, while the Strata references "engineering reports" that say the building has to be repaired as a whole, the only engineering report before me is the Moisture Report. This may be true, but it does not set out what such whole-building repairs would look like or where specific repairs to Ms. Kates' unit would fit within that scheme. Rather, the Moisture Report provides for targeted repairs before recommending that such targeted repairs be avoided in place of a more holistic approach. While there is reference throughout the materials to the building envelope plan, and indeed the transcript from the chambers proceeding in the Supreme Court matter reference a bid for holistic building envelope work valued at \$2.6 million, I do not appear to have materials related to that before me. In the meantime, the Moisture Report also points to repairs to the podium slab as being of importance and Ms. Kates asserts the plan Strata seeks to implement does not address that.

[70] It is possible that Ms. Kates' water ingress issues are adequately addressed by the planned remediation. Conversely, it is possible that making repairs such as those to the podium slab that Ms. Kates advocates for would constitute undue hardship. It is impossible to make such an assessment, however, given the absence of substantive submissions and evidence from the Strata. It follows that I am not persuaded that at a hearing it is reasonably certain the Strata would establish that it accommodated Ms. Kates to the point of undue hardship in its efforts to remediate the mould.

[71] I decline to exercise my discretion to dismiss the complaint under s. 27(1)(c).

B. Has the Strata made a reasonable settlement offer such that proceeding would not further the purposes of the *Code* (s. 27(1)(d)(ii))?

[72] The Tribunal will exercise its discretion to dismiss a complaint where the complainant has refused a settlement offer, which remains open, and where the settlement offer is reasonable and it would not serve the purposes of the *Code* to proceed with the complaint in the face of that offer: *Carter v. Travelex Canada Limited*, 2009 BCCA 180.

[73] I must first consider whether the Settlement Offer is reasonable. A leading authority regarding the determination of whether an offer is reasonable is *Issa v. Loblaw Companies*, 2009 BCHRT 264, where the Tribunal listed the following requirements:

- a) Whether it is with prejudice so that it may be referred to in an application to the Tribunal;
- b) Whether it fully addresses the allegations and available remedies, both monetary and non-monetary; and
- c) Whether the respondent's remedial actions adequately remedy the alleged violation and are consistent with the types of orders the Tribunal might make if the complaint were successful.

[74] The Settlement Offer, as previously noted, confirms the Strata Contractor's assertion that "there are no outstanding issues which require attention", and goes on to offer to settle the complaint on the following terms:

- The Strata Corporation has confirmed that no further mould remediation is required in your strata lot however, we understand there still may be some exposed walls which will be closed by a contractor within a reasonable time on a date and time mutually agreeable to the parties.
- The Strata Corporation will pay for the 2 ... Environmental air assessments that the owner had obtained relating to the HRT Proceeding.
- The Strata Corporation will pay the sum of \$6,000 to you pursuant to your claims of loss of dignity, stress and other various heads of damage claimed in your Notice of Complaint.
- Ongoing repairs with the Strata Corporation's building envelope will continue to be made pursuant to the engineer's recommendations. [It is unclear which recommendations this refers to.]
- The Strata Corporation, through its building envelope engineer and remediation specialists, will monitor your strata lot as necessary. The frequency of

monitoring/inspection will be determined by the building envelope engineer or remediation specialists until completion of the building envelope repairs to ensure that no further mould issues arise.

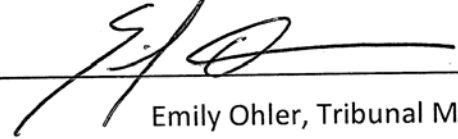
[75] The Strata's Settlement Offer is, on its face, robust, addressing several points. I recognize with appreciation its efforts to find a resolution. Having said that, the primary shortcoming of the Settlement Offer is that while the Strata says it will complete any remaining work on the walls of Ms. Kates' unit or common property, its scoping of this work is predicated on its assertion that "there are no outstanding issues which require attention". The first element of the Settlement Offer thereafter asserts that no further mould remediation is required but there are exposed walls which require closing. Yet this is a central fact in dispute. Ms. Kates says that in fact the mould and related issues persist, and has submitted evidence that could support that. In the meantime, conversely, in the absence of any information from the Strata – neither in its submissions nor in any evidence – on the substantive issues in dispute in this case, there is no basis upon which I can be satisfied that the Strata's statement alone puts that central issue to rest.

[76] It was the Strata's burden to persuade me that the Settlement Offer was reasonable, in-line with the criteria set out above, and that as a result it would not serve the purposes of the *Code* to proceed with the complaint. To succeed in this argument under s. 27(1)(d)(ii), it is not enough to simply put the terms of an offer that does not clearly address an issue in dispute before the Tribunal and assert that it is reasonable. The reasonableness of a settlement offer is assessed on the assumption that the allegations in a complaint are true: *Issa* at para. 35. In the absence of any evidence from the Strata it is impossible for me to determine on this Application whether or not more work, and if so what work, is necessary to address the issue of mould in Ms. Kates' unit. The Strata has not met its burden.

[77] I am not persuaded that there is no public purpose to be served by having the Tribunal hear evidence and apply its expertise to the facts at issue in this case

V CONCLUSION

[78] The application to dismiss the complaint is denied. The complaint will proceed.



Emily Ohler, Tribunal Member