

In The Provincial Court of Alberta
Fort McMurray
(Civil)

P0602000047
Jan.10,2007

Between:

The Owners:
Condominium Plan 0122336

Plaintiff

AND

Zulfik Shivji, Nulifar Shivji
Jeffrey Banks, Bradly Abbott, Kayla Funk

Defendants

Judgment of the Honourable Judge. S.G. Peck

The Plaintiff condominium association sues for water damage to two units in the condominium . The defendants Zulfik and Nunifar Shivji were at all material time the registered owners of unit 238. They had rented the property to the remaining three defendants. (These three defendants have never been served with notice of this action).

The facts and quantum of damage are not in dispute. On or about the 27th day of December 2005 the occupants of unit 138 noticed water dripping from there ceiling, further investigations revealed that someone in suite 238 (the suite directly above suite 138) had inadvertently, deliberately or negligently turned the thermostat down to "0". Not surprisingly on December 27, 2005 in Fort McMurray the pipes froze and water damage resulted. The plaintiffs arranged for and had the two units repaired at a cost of \$11,005.65 for unit 238 and \$12,461.77 for unit 138. The corporation had insurance but the amount of the two claims did not exceed the insurance deductible of \$25,000.

The defendants deny liability on 4 grounds:

1. The loss or damage was caused by the tenants and they are not responsible for the same
2. They deny any breach of a bylaw of the corporation by themselves and if there tenants breached a bylaw they are not responsible.

3. The damage was caused by a break in a pipe that was the property of the Plaintiff ie. common property
4. The action itself is not maintainable as the Plaintiffs had a obligation to insure and the deductible of \$25,000 was unreasonable.

The rights and obligations of the parties are as defined by the Condominium Property Act, the Regulations thereunder and the Bylaws of the corporation. In a somewhat abbreviated form I have set out what I consider to be the relevant sections of each:

The Condominium Property Act.

- S 1 (s) Owner means a person who is the registered owner.
- (y) Unit means
- (i) In the case of a building a space that is situated within a building as described as a unit in a condominium plan by reference to floors, walls and ceilings within the building.
- S 9 Boundaries of a condominium unit;
- Unless otherwise stipulated in the condominium plan if
- (a) a boundary of a unit is described by reference to a floor, wall or ceiling, or
 - (b) a wall located within a unit is a load bearing wall, the only portion of that floor, wall or ceiling, as the case may be, that forms part of the unit is the finishing material that is in the interior of that unit ...
- S 32 (2) The owners and anyone in possession of a unit are bound by the bylaws
- S 35 (1) The corporation may by bylaw impose a monetary or other sanction on owners, tenants ... who fail to comply with these bylaws
- S 37 Duties of a Corporation include the following;
- (a) keep in a state of good repair the personal property of the corporation and the common property.
- S 53 Rental of units:
- (1) An owner shall not rent the owners unit until the owner has

- given written notice to the corporation...
- (2) It is a condition of the tenancy... that the person in possession shall not cause damage to the real or personal property of the corporation or contravene the bylaws.

- S 47 Insurance : A corporation shall
- (a) ... shall place insurance in the units and the common property against loss resulting from destruction or damage caused by any peril prescribed or otherwise required by the regulations

Condominium Property Act - Regulations

- R 61 For the purpose of S 47 of the CPA a corporation must place Insurance against the following perils :..
- (i) water damage caused by... the sudden and accidental escape of water or steam from within a plumbing, heating ... system
- (k) riot vandalism or malicious acts
- (l) any other perils required by the bylaw.
- R 62 Property that is insured... must be insured for the replacement value subject to any reasonable deduction that is agreed to by the Insurer and the Board.

The Bylaws

- 2 (j) "Occupant means any person present in a unit or on the common property with the permission of the owner. Occupant includes owners and tenants.
- 3 Duties of the Corporation:...
- © maintain all the common property within the development

- 4 Powers of the Corporation: ...
- (h) levy fines for contravention of any by-law
 - (i) Commence such legal proceedings as it deems necessary to carry out its duties under the Act and these by-laws.

27 Occupants and Users Duties

- (e) keep the interior of the unit in a good state of repair

28 Restrictions on Occupants

- (a) use the unit.. in a way that unreasonably interferes with the use and enjoyment by other occupants ..
- (b) use the unit ... in a manner ... that is likely to cause a nuisance or a hazard to other occupants.

37.1 The corporation may sue any owner, by an action in debt, to recover:

- (b) any costs incurred by the corporation in performing the owners duties as outlined in the Act or these by-laws.

The Defendants Shivjis" allege that the unserved defendants, their tenants, were to blame for the setting of the thermostat at 0 and the resultant damage. It is interesting to note that at the time of service of the original claim the Shivjis never attempted to file a 3rd party notice and even after the Plaintiffs amended their civil claim naming the tenants as defendants the Shivjis have not filed a notice to co-defendant. These defendants cannot escape liability by saying they were no longer occupants - the relationship of the parties is defined by the CPA and the bylaws. S32 of the CPA uses the wording "the owners and any one in possession" it does not say "the owners or anyone in possession". The Bylaws define occupant as including the owner. An owner is responsible for the tenants infractions of a Bylaw. (see York Condominium Corporation No. 71 v Sullivan [1990] O.J. 840.

The Shivjis may well have been in breach of S 53 of the CPA as well the tenants may well have been in breach of S 28 of the bylaws in setting or

permitting the thermostat to be set to 0 - but the bylaws only provide for a sanction or monetary penalty for breach of a bylaw not the recovery of damages.

The defendants argument with respect to the covenant to Insure being a bar to the plaintiffs claim pre- supposes an insurable interest in the deductible. Assuming it was an " Sudden and Accidental" escape of water and the Plaintiff had a claim under the Insurance it was obliged to obtain, what then of the deductible ? The Regulations provide for a reasonable deductible as agreed upon by the Board and the Insurer. There is no evidence before me of \$25,000 being unreasonable as a deductible for water damage insurance on a condominium in Ft. McMurray. The defendants were entitled to obtain a copy of the insurance policy and if they wished could have secured excess insurance to cover the deductible.

Counsel have both cited Stevens v Simco Condominium Corporation #60 (1998) 42 OR 3rd 451 wherein an action on the deductible was decided in the Condominiums favor. The case itself dealt with a specific clause in the by-laws regarding liability for air conditioning units however the headnote provided support for both sides in this dispute.

" the issue of liability for the deductible is to be determined by analogy to the prevailing practice in the Insurance industry which is to shift the deductible portion of the loss to the party causing the loss as a means of controlling insurance claims and in accordance with the provisions of the declaration, by-laws and rules of a particular condominium assoc."

" There is no universal rule and condominium corporations and owners may design their own particular schemes."

The later of the two quotes is probably more applicable to two other cases cited by counsel.

Mr Justice Lee in Reilly v Freedom Gardens Condominium Association, [2001] AJ 1703 found in favor of the unit holder who was being sued by the Association for water damage to his suite when his dog chewed off the water line to the toilet. It was a finding of fact that the dog had not shown any previous tendencies to chew water lines and thus Reilly did not commit any act or omission giving rise to a claim for negligence. The Association had a specific bylaw to establish a liability scheme for repayment of the

deductible wherein if the cause of the loss was an act or omission of the occupier then the corporation could recover the deductible.

My brother Judge Skitsko in *Lesyk v Owners of Condominium Plan 8220184* (unreported - decided April 20, 1990 -PC-Edmonton P0190305154) found in favor of the Association where the Plaintiff was seeking reimbursement for the deductible on a claim for damages done to her entrance door on an attempted break and enter. The corporation had in its bylaws a specific exclusionary clause

“the corporation shall not be responsible for any damage to common property designated for the exclusive use and enjoyment of the unit holder, nor will it be responsible for any loss or damage from any cause whatsoever”.

Judge Skitsko indicated that Lesyk should or could have had her own insurance to cover this portion of the loss.

Judge Skitsko relied in part on a unreported decision of Mr. Justice Sulatycky in *Three Sisters Place Corporation v Ernest David Drover* another unreported decision (April 20, 1990, QB# 8901-12889). Drover sued the Association to recover his portion of the deductible. The claim arose out of a boiler ceasing to function. Mr Justice Sulatycky indicated that

“the question of maintenance is not material in this case and neither is the question of negligence or any conduct on the part of Drover which may have led to the eventual loss”.

Mr Justice Sulatycky rejected the argument that Association was an insurer for the deductible because the corporation is obliged to provide full replacement cost insurance on the property of the corporation and the unit holders.

“The board does not become an insurer to the extent of the deductible if a loss should occur ... that simply does not follow from the bylaws of this corporation”

Back to the question - what of the deductible in this case (assuming we are dealing with a deductible) ? A determination must flow from the Bylaws

which are silent as to the responsibility for the deductible. If one accepts (and I am bound to accept) Mr. Justice Sulatycky's rationale that the association is not an insurer for the deductible or to take it one step further the deductible does not form part of the covenant to insure then an action by the corporation to recover the deductible is only restricted to the contents of the by-laws.

One must look at the rights and obligations of the association and the unit holders as set out in the bylaws.

The association has an obligation to insure - it did. The association through its board agreed to a deductible of \$25,000 - that is contemplated in the Regulations. If one takes the position that the deductible is not an insurable obligation then that portion does not constitute an obligation or promise to insure.

Did the Corporation have an obligation to pay for the repairs - The obligation of the corporation flows from the Act S.37.2(a)

"The Corporation is obliged keep in a state of good and serviceable repair and properly maintain the real and personal property of the corporation and the common property"

The corporation's obligation to repair does not include the interior of a particular unit. The responsibility to repair and maintain the interior of a unit is only mentioned in S.27(e) of the Bylaws - the unit holder or Occupant (by definition this includes owner)

"shall keep the interior of the unit in a good state of repair"

. Save for a covenant to insure which is not present in these circumstances there is nothing in the By-laws exempting the respective unit holders from the initial responsibility for the repair and maintenance of their units irrespective of the cause of damage. This would include a leaking water pipe even if the pipe were "common property".

Accordingly the Plaintiffs shall have judgement as against the Defendant, Mr. and Mrs. Shivji's for the cost of repairs of their unit in the sum of \$ 11,005.65.

As regards the claim for unit 137, the owners of that unit are responsible for those damages (save for an action by the registered owner of that unit against the Shivji's). That is to say the corporation has alleged no status to sue for damages on behalf of the owners of unit 137 in this claim and accordingly that portion of the claim for those repairs is dismissed.

As each party was equally successful in this action there shall be no costs awarded.

S.G. Peck 
Judge of the Provincial Court of Alberta

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