

Court of Queen's Bench of Alberta

Citation: Hnatiuk v. Condominium Corporation No. 032 2411, 2014 ABQB 22

Date: 20140110
Docket: 1203 12114
Registry: Edmonton

2014 ABQB 22 (CanLII)

Between:

Delton Hnatiuk and Sandy Hnatiuk

Applicants

- and -

Condominium Corporation No. 032 2411 (o/a Eaglewood Village)

Respondent

**Reasons for Judgment
of
W. S. Schlosser, Master in Chambers**

[1] The issue in this case is the extent of the duties of a Condominium Corporation when a risk has been identified with the common property that could affect the health or safety of unit owners.

[2] The Applicants are unit owners in the Eaglewood Village Condominium complex in St. Albert. From time to time they smelled cigarette smoke emanating from the unit below. Mr. Hnatiuk is allergic to cigarette smoke. The Applicants notified the Board and retained Sintra Engineering to investigate.

[3] The Condominium Corporation engaged Academy Mechanical and Abba Drywall to address the second-hand smoke issue. The investigation may have revealed a larger, more significant problem that has yet to be resolved satisfactorily.

Where there is smoke ...

[4] When Academy Mechanical opened up the bulkhead over the furnace room in the lower suite it was discovered that the fire separation between the two units had not been installed.

[5] Fire separation and other remedial work was done in this bulkhead. The work itself had to be postponed because it required removal of the furnace that services the lower unit. The Board decided to wait roughly six months from the January inspection, when the weather had warmed up, to complete the work.

[6] The work substantially reduced the odour of smoke but did not eliminate it. Sintra Engineering observed some remaining infiltration. Since the second bulkhead was not opened up there may be cause to suspect that fire separation had not been installed in this area as well. There are no 'as-built' drawings for the condominium complex, so a physical inspection is the only way to tell.

[7] The Condominium Corporation takes the position that the air infiltration issue has been resolved to an acceptable standard. The second bulkhead is in the unit below that of the Applicants. The Corporation is rightly concerned with displacing and inconveniencing that unit owner on what they say is only a suspicion.

[8] The Applicants' expert report does not prove (to the ordinary civil standard) that there is deficient fire separation in the second bulkhead or anywhere else in the building for that matter, but it does, at least, raise a prima facie case for investigation.

[9] The law in this area is discussed generally in *Leeson v. Owners: Condominium Plan No. 9925923*, 2014 ABQB 20. Section 37(1) of the *Condominium Property Act*, and, in this case, by-law No. 4, gives the Respondent responsibility for the control and management of the common property. The statute and the by-law impose a specific obligation to maintain and keep the common property in a state of good and serviceable repair. In my view, section 37 and the corresponding by-law cannot be read to require the corporation only to preserve a state that may prove to be deficient, or to maintain the status quo, particularly if this might create a danger to the health and safety of the occupants. The statute and the by-law impose not only a duty to maintain, but an obligation to correct deficiencies or, at the very least, to investigate and bring the conclusions to a meeting of the owners. *Condominium Plan No. 982-2595 v. Fantasy Homes Ltd.*, 2006 ABQB 325 at para. 14 et seq (and the cases cited there) per Smart, M.

[10] The Respondents have made a series of 'with prejudice' offers along the lines of: 'if we open up the second bulkhead and the fire separation meets Code – you pay: if not, we pay'. In my view, this is insufficient to discharge the duty, which is almost strict where the health and safety of the unit owners is concerned.

[11] It may well be that the investigation shows the second bulkhead to have adequate and proper fire separation and be within the permissible limits for air infiltration. But where there is smoke, there may be fire. In my view, the corporation has a duty to find out.

[12] Accordingly, I am content to issue the following direction pursuant to section 67(2)(c): the Respondents shall at their own expense and at a time that is convenient to the owners of unit 104 open and inspect the second bulkhead to confirm that there are adequate fire separation between the unit and that the fire separation meets all Code requirements.

[13] The Applicants are free to have their engineer present to monitor the inspection. Furthermore, if the fire separation is deficient in this area as well, the Board should consider whether more extensive investigations are required in other areas of the building.

[14] The Applicants are entitled to the costs of this application. If the appropriate scale cannot be agreed upon, the parties may apply.

Heard on the 10th day of October, 2013.

Dated at the City of Edmonton, Alberta this 10th day of January, 2014.

W. S. Schlosser
M.C.C.Q.B.A.

Appearances:

Robert Noce
Miller Thomson LLP
for the Applicants

Victoria Archer
Gledhill Laroque LLP
for the Respondent