

Action No.: 1601-16535
E-File No.: CVQ18POTTERL
Appeal No.: _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

BETWEEN:

THE TORONTO DOMINION BANK

Plaintiff

and

LEANNE POTTER also known as LEANNE HANLON
and NOLAN FRANCIS P. HANLON

Defendants

PROCEEDINGS

Calgary, Alberta
October 20, 2017

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1 Proceedings taken in the Court of Queen's Bench of Alberta, Calgary Courts Centre, Calgary,
2 Alberta

3
4 October 20, 2017 Afternoon Session

5
6 Master Robertson Court of Queen's Bench of Alberta

7
8 T. Bond For the Plaintiff

9 D. Cumming For the Defendants

10 M. DeVeyrac Court Clerk

11

12

13 **Decision**

14

15 MASTER ROBERTSON: This is my decision on the *Toronto Dominion*
16 *Bank v. Potter* action number 16-0116535. The Toronto Dominion Bank has commenced
17 foreclosure proceedings on both its first and its second mortgage on this property. The
18 first mortgage is an insured mortgage, but the second mortgage is not. The step it takes
19 next depends on the entitlement of the condominium corporation to claim an insurance
20 deductible against the specific unit that is the subject of the bank's mortgage.

21

22 The condominium corporation claims that the chargeback is an assessment that stands in
23 priority ahead of the bank. The bank asserts that there was no proper resolution with the
24 board of directors of the condominium corporation and, therefore, the chargeback is
25 ineffective. I have concluded that the chargeback is effective and it stands ahead of the
26 bank in priority. There's water damage to unit 1403 caused by freezing and I am told that
27 the total amount of the damage was in excess of \$100,000. Condominium corporation's
28 insurance company paid for the repair beyond the deductible which was \$50,000.

29

30 There is no evidence before me as to whether a \$50,000 deductible is reasonable, but it is
31 not argued that it is not. It appears that the condominium corporation paid the \$50,000
32 deductible and that it believed that it was properly charging it as an assessment against
33 this specific condominium unit; however, there was no formal board resolution to that
34 effect and the bylaws contain certain provisions which the bank says are prerequisites to
35 the amount being charged against the unit.

36

37 The bank says that the amount is not properly chargeable to the unit in priority of the
38 bank's mortgages. Section 43 paragraph (g) of the bylaws of this corporation addresses
39 damage to the privacy areas of the unit and all outside services of the unit and provides
40 that each owner shall be responsible for such damage "arising from any wilful, careless,
41 or negligent acts of himself, his family members, his guests, servants, agents, tenants,

1 invitees, contractors, licensees, that are not required by these bylaws to be insured against
2 by the corporation."

3
4 Paragraph 43(h) provides that: (as read)

5
6 Each owner shall indemnify and save harmless the corporation
7 from the expenses of any maintenance, repair, or replacement
8 rendered necessary to the common property or to any unit by the
9 owner's act, omission, or by that owner or any invitee but only to
10 the extent that such expense is not met by the proceeds of
11 insurance carried by the corporation.
12

13 Paragraph 43(g) specifically provides that: (as read)

14
15 Should the owner fail to repair the damage [and I'm quoting
16 again] the board may do or cause to be done such repairs and the
17 owner affected agrees to and shall reimburse the corporation for
18 all monies expended for labour, materials, normal overhead and
19 profit, and all costs incurred in connection with respect to the
20 doing of such repairs and the board or representatives may use all
21 or any of the remedies available to it as herein set out to recover
22 such monies for the corporation and such monies shall be a charge
23 on the owner's unit to the same extent as they would be if they
24 were common expenses assessed upon his unit.
25

26 Paragraph 44(g) provides that [and again I'm quoting]: (as read)

27
28 In the event an owner incurs damage to . . . any improvements of
29 his unit and/or the common property adjacent thereto that is
30 covered or insured under any insurance policy of the corporation
31 and such owner elects to pursue recovery of such loss or damage
32 under any insurance policy of the corporation, such owner shall be
33 responsible for, and pay the full amount of, any deductible on such
34 claim if, in the sole opinion of the board, such damage or losses
35 caused by or arose out of any act or omission by such owner, his
36 servants, licensees, invitees, or tenants and such amount shall be
37 recoverable by the corporation as a contribution from such owner
38 for all other costs, charges, and liabilities arising out of any such
39 loss that may be sustained or incurred by the corporation.
40

41 The cumulative effect of all of these provisions would seem clearly to be that the board

1 may claim against the owner for damage that the owner or his invitees or tenants causes
2 and that is a proper chargeback as a contribution. Where there is insurance, it expressly
3 provides that the board may charge the deductible back to the unit as a contribution.
4

5 I note that it does not expressly require either a meeting or a resolution by the board; it
6 simply requires the board to form the opinion that the damage was caused by or arose out
7 of any act or omission by the owner or his or her invitees.
8

9 Accordingly, the decision in *Shivji v. Owners Condominium Plan Number 0122336* (2007)
10 ABQB 572, which said that in that case, the condominium corporation could not claim the
11 deductible from the owner has no application. I note as well that the *Shivji* decision was
12 questioned in *Condominium Plan Number 8222909 v. 837023 AB Limited* (2010) ABQB
13 111 at paragraphs 85 and 86; however, even if the board of directors is authorized to
14 charge the deductible back to the unit as a contribution, the Toronto Dominion Bank
15 argues that there was no resolution passed to this effect by the board and, therefore, the
16 board's intention to charge back the deductible was ineffective. The bank refers to *Bank*
17 *of Montreal v. Bala* (2017) ABQB 38 where the Court said this at paragraph 38: (as read)
18

19 I conclude that Manor (phonetic) Condo Corp. can levy
20 disproportionate contributions on the condominium owners within
21 these parameters if:
22

23 (a) its bylaws authorize a disproportionate contribution, and
24

25 (b) it has passed a resolution authorizing the contribution be
26 levied.
27

28 A review of the affidavit of Helen Olsen (phonetic) discloses that at a meeting of the
29 board on January 18, 2016, there were two references to the damage to unit 1403. One of
30 them said this: (as read)
31

32 Motion to approve ark (phonetic) restoration for the rebuilt portion
33 of the insurance claim from 1403 made by Jose Savala (phonetic),
34 seconded by Dennis Ogle (phonetic) - carried.
35

36 The second one said this: (as read)
37

38 December 21 unit 1403 motion to have insurance claim opened for
39 burst pipe, leaking water into units below. Motion by Kirstie
40 McKeen (phonetic), seconded by Ian Griffin - carried.
41

1 These motions do not deal with the chargeback, but they demonstrate that the board of
2 directors was aware of and dealing with the damage to unit 1403.

3
4 A question of the chargeback of the insurance deductibles was later specifically discussed
5 by the board members by way of email exchange in October 2016. There was an email
6 from the insurance adjuster saying that: (as read)

7
8 Under the bylaws, it would be up to the board to go after 1403 for
9 deductible. This is outside of insurance.

10
11 The property manager then wrote to the board saying: (as read)

12
13 Hi, everyone, please confirm that we have board (majority) and
14 instructions to charge back unit 1403 with the \$50,000 insurance
15 deductible. The insurance adjuster states that it is a board
16 resolution at this -- or board decision at this point.

17
18 There is another email from one of the board members to the others saying, "I thought we
19 already agreed to charge back 1403 at the last meeting!"

20
21 Another board member, the deponent Ms. Olsen herself responded, "I think we should go
22 ahead with this chargeback for the damage."

23
24 Another board member responded, "Proceed with the chargeback by all means."

25
26 These were "reply all" emails that were all sent on October 5, 2016, except the last one
27 which was sent October 6th. It seems clear that the board members were all in agreement
28 to charge the insurance deductible in connection with unit 1406 back to the owner. The
29 question is whether they were required to pass a formal resolution to that effect.

30
31 The bylaws that I have reviewed do not seem to require a formal resolution, although of
32 course, having a formal recorded resolution is the preferred way for any board of directors
33 to operate. Perhaps more importantly, the bylaws as a whole to the extent that they
34 discuss the operation of the board of directors do not require the board to pass a
35 resolution to make every decision. Section 17 of the bylaws specifically says that the
36 board may meet together for the conduct of business, adjourn, and otherwise regulate its
37 meetings as it thinks fit. It may appoint or employ for and on behalf of the corporation
38 such agents and servants as it thinks fit in connection with the control, management, and
39 administration of the common property and exercise and performance of the powers and
40 duties of the corporation and it may delegate to one or more members of the board,
41 subject to ballot restrictions imposed pursuant to a resolution passed at a general meeting

1 of owners. The bylaws go on addressing various duties of the board.

2
3 Section 18 requires the board to keep minutes of its proceedings; however, I have been
4 unable to find any express requirement that a formal signed resolution must be created in
5 order for a decision of the board to have effect. Furthermore, the decision in the *Bank of*
6 *Montreal v. Bala* does not require a resolution. It says that once one has been created, that
7 requirement has been met. That does not lead to the conclusion that if a board has clearly
8 made a particular decision, it is nonetheless ineffective without a formal resolution
9 appearing in the board minutes.

10
11 I note that section 26(6) of the *Condominium Property Act* specifically addresses the
12 potential for resolutions to be signed by a majority of the persons who would be entitled
13 to vote as opposed to calling a meeting, but it also does not specifically require a
14 resolution to be recorded in any fashion to reflect a decision having been made. It applies
15 where something under the *Act* or the bylaw specifically requires a meeting of the
16 corporation and provides that other alternative instead. If no meeting is otherwise required,
17 the subsection has no application.

18
19 In my view, so long as it is clear that the board of directors of the condominium
20 corporation have reached a particular agreement and acted on it, and no meeting to record
21 it is expressly required, it is not a valid complaint that it was not formally recorded by
22 way of resolution.

23
24 This approach reflects how volunteer boards of directors function because work is often
25 done in a fairly casual manner, particularly where the decisions are made by neighbours
26 who may have meetings in the street, in hallways, at casual functions as well as by
27 email, but it also reflects the modern means of communication by email. Business today,
28 important decisions are often made by email by professionals and other business people as
29 well as by both professional boards and volunteer members of boards of directors.
30 Lawsuits are sometimes settled by email exchanges. Contracts are made by email.

31
32 The Court should accept this current reality. If no formal written resolution is required,
33 the question is simply whether the board made a decision; resolution is the best evidence
34 but not the only evidence, Here, the board did make a decision.

35
36 In all of the circumstances, in my view the board of directors in this case elected to
37 charge back the \$50,000 deductible to the unit in question and it is a contribution that
38 ranks in priority to the bank's mortgages.

39
40 MR. BOND:

41 Thank you, Sir. So the balance of my
application was for a redemption order; I'm going to withdraw that because I need to now

1 go amend my pleadings and come back eventually for (INDISCERNIBLE).

2

3 MASTER ROBERTSON: Okay, so we'll see you next week.

4

5 MR. CUMMING: Do you want me to address the issue of costs as
6 well?

7

8 **Submissions by Mr. Bond (Costs)**

9

10 MR. BOND: Well, my client has a solicitor-client cost
11 provision in its mortgage.

12

13 MASTER ROBERTSON: As against the mortgagor.

14

15 MR. BOND: As against the mortgagor.

16

17 MASTER ROBERTSON: But you find yourselves in a fight with a third
18 party?

19

20 MR. BOND: I -- my position is that it ought to be a bill of
21 costs that gets assessed and put onto the roll for the unit. My client ends up paying that;
22 they get to add it to their judgment against the defendant.

23

24 **Submissions by Mr. Cumming (Costs)**

25

26 MR. CUMMING: I have nothing to say about vis-a-vis your client
27 and the unit owner. I think *Bala* does govern this and I'll pass it up. Section 42 of the
28 *Condominium Property Act* speaks about recovery of a person from whom steps are taken.
29 This *Bala* is a very analogous case wherein the condominium corporation had to apply to
30 revise a redemption order in an insurance chargeback situation.

31

32 In that case, the person against whom steps were taken was the bank as in this case and
33 they were entitled to solicitor-client costs as against the bank. I would concede that that
34 does not attract the same statutory charge that the deductible or the fees to register the
35 caveat should, but it should be an in personam remedy as against the bank for
36 solicitor-client costs.

37

38 MASTER ROBERTSON: Well, what Mr. Bond is suggesting is that you
39 have a proper claim for costs as against your own owner and you add that to the
40 chargeback which somebody's going to have to pay at some point in time, so effectively,
41 the bank pays it, so I think you're both at the same end; it's just a question of how you

1 get there. And frankly, what he's suggesting I think is probably right because your
2 complaint is you -- the condominium corporation has had to defend its priority because of
3 a problem created by your owner with this flood.

4
5 MR. CUMMING: Yes.

6
7 MASTER ROBERTSON: And I'm assuming that your bylaws specifically
8 say you get solicitor-client costs in this --

9
10 MR. CUMMING: Yes, as against the owner.

11
12 MASTER ROBERTSON: Right.

13
14 MR. CUMMING: Right. The -- I guess in fairness to the owner,
15 the owner did not -- was not responsible for these proceedings I guess is the one point I
16 make.

17
18 MASTER ROBERTSON: But was responsible for the flood which placed
19 the condominium corporation in this position.

20
21 MR. CUMMING: Yes, Sir.

22
23 MASTER ROBERTSON: If I award costs against the bank, the bank will
24 simply add them to the costs against the borrower.

25
26 MR. BOND: It's added to the balance of the mortgage.

27
28 MASTER ROBERTSON: Well, they do have a solicitor-client entitlement.

29
30 MR. BOND: At the end of the day, the borrower's the one
31 on the hook for the whole thing no matter how he sets it up.

32
33 MR. CUMMING: I suppose.

34
35 MASTER ROBERTSON: Yes. I mean the bottom line through -- in the
36 bylaws that I read were basically if you cost the condo corporation something, you got to
37 pay for it unless we've got insurance. I mean there is this potential for the board not to
38 require the deductible be paid by the individual because there might be some specific
39 circumstances where it's not appropriate to go after the individual. I can't imagine what
40 they are right now.

41

1 So it seems to me that the proper thing to do is for you to send your bill to the
2 condominium corporation and have them add it to the chargeback which gets you the
3 same priority that we've been talking about because I think it's all a part of the same
4 plate.

5
6 MASTER ROBERTSON: So it's not that I'm really disagreeing with you,
7 it's just a question of how you get there.

8
9 MR. CUMMING: All right. Thank you. You've given me an even
10 greater priority.

11
12 MASTER ROBERTSON: Yes. You want to actually be ahead of the
13 game.

14
15 MR. CUMMING: M-hm.

16
17 MASTER ROBERTSON: Well, maybe you want a judgment against the
18 Toronto Dominion Bank; that's probably likely to get paid, but . . .

19
20 Okay, we stand adjourned.

21
22 MR. BOND: You don't know the Toronto Dominion Bank
23 very well.

24
25 THE COURT CLERK: Court is adjourned.

26
27 _____
28 PROCEEDINGS CONCLUDED
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1 **Certificate of Record**

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I, Melinda DeVeyrac, certify that this recording is the record made of the evidence in the proceedings in the Court of Queen’s Bench, held in courtroom 904, at Calgary, Alberta, on the 20th day of October, 2017, and I was the court official in charge of the sound-recording machine during these proceedings.

1 **Certificate of Transcript**

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