IN THE PROVINCIAL COURT OF SASKATCHEWAN
CIVIL DIVISION

Citation: 2019 SKPC 70

Date: December 10, 2019
File: 248 of 2019
Location: Regina

Between:

Cornerstone Heights Condominium Corporation

- and -

Payam and Sanaz Holdings Limited

Dallas Senft — For the Plaintiff
Randall Sandbeck Q.C. and Emily Erhardt — For the Defendant

JUDGMENT **DEMONG, J**

Introduction

[1] The plaintiff is a condominium corporation. The defendant is the owner of unit #401 within the condominium complex. The complex is 'apartment style' rather than 'row housing' in the sense that it is a multi-level facility with what I understand to be four floors of units. Unit #401 is presumably on the top floor. The defendant has, for the last couple of years, rented unit #401 to a tenant by the name of Mr. Huvenig, something which it has the right to do under the

corporation's bylaws.

[2] The plaintiff alleges that water escaped from the furnace room of unit #401 and flowed down and into each of the furnace rooms of unit #301 and unit #201 - which in turn are located directly beneath unit #401. It alleges, and the defendant acknowledges, that the cost to repair the water damage equated to the sum of $6,214.95. It is conceded that the plaintiff's insurer responded to an insurance claim that was made by the plaintiff and, subject to payment of a $2,500.00 deductible, paid monies out in order to repair the damage in each of those units. The plaintiff now seeks to recover, from the defendant, the cost of the deductible that it paid. It also seeks prejudgment interest on that amount and its costs.

[3] The plaintiff is self-represented, and as is common in these situations, the statement of claim does not identify with precision the legal foundation upon which the claim is brought. It simply asserts that a water leak caused damage to the units below unit #401 and it seeks damages as 'a result of the defendant's failure to ensure that the air conditioner condensate line was connected to the condensate drip pan of their furnace'. Notwithstanding the lack of detail in the plaintiff's claim, I am satisfied that each of the parties are, and always have been, aware of the legal foundation upon which the claim is based.

[4] The plaintiff's claim is based on a right of recovery set forth in section 65(6) of *The Condominium Property Act, 1993*, SS 1993, c C-26.1 [*Act*]. While I will discuss that section in more detail shortly, it authorizes a condominium corporation to add to the common expenses of a unit owner, the deductible limit of an insurance policy which responds to damage caused to another condominium unit through an act or omission of that unit owner.

[5] The defendant is represented by counsel. In reply to the claim, it asserts that the furnace in unit #401 is part of the common property and therefore it is not obligated to maintain the furnace. Second, it denies that the escape of water was caused by the condensate line, but was, more likely than not, attributable to a couple of days of heavy rain which may have caused water to leak into the condominium complex. Third, it asserts that because it was not provided with a

maintenance schedule nor materials on how to properly maintain the furnace when it bought the unit, it cannot be held accountable for a defect which may or may not have existed prior to taking ownership of the property. Even if the loss arose as suggested by the plaintiff, it asserts that in order to be held accountable for the loss, it is incumbent on the plaintiff to prove that its failure to ensure that the condensate line was attached to the drain was negligent. Having failed to lead evidence of the standard of care of a reasonable and prudent condominium owner and, having failed to show that the defendant was ever aware of a potential problem, it asserts that there can be no finding of negligence and the claim must be dismissed.

The Issues

[6] The Court is called upon to address the following issues:

1. Factually speaking, did the damage to units #301 and #201 arise from an escape of water from the condensate line which was improperly attached, or is there a more probable alternate cause?

2. Factually speaking, if the cause of the loss arose because of an unattached condensate line, are the furnace and air conditioner and related attachments part of the common property of the condominium corporation or is it owned by the defendant?

3. Was the defendant or its tenant negligent in failing to ensure that the condensate line was properly attached?

4. If neither the defendant nor its tenant was negligent, does that necessarily deprive the plaintiff of the right to recover its deductible?

Evidence, Analysis and Findings of Fact

Issue 2

[7] I wish to address issue number 2 first. While the defendant has pled that the furnace is situated on the common property of the corporation and that as such, maintenance and repair of

the air conditioning unit and the furnace is the sole responsibility of the plaintiff, the evidence at trial does not bear this out. The air conditioning unit and the furnace in each of the respective units under consideration are located in a room that is beside the exterior balconies of each of the units in question. Exhibit P-12 comprises blueprints of the condominium complex and these blueprints in turn highlight the boundaries of each of the respective units. The boundaries of unit #401 (and the other units in question) clearly show that the furnace room in which the fixtures are located are part of the unit owned by the defendant and are not identified as common property.

[8] In addition, Exhibit P-13, which is the *pro forma* Condominium Purchase and Sale Agreement clearly indicates - at Article 13 - that the electrical plumbing and heating fixtures and attachments, and the furnace and water heater which were installed by the developer are, by execution of the agreement, being conveyed to the purchaser under the agreement free and clear of all encumbrances. While the defendant testified that it was unaware of having signed that agreement, Mr. Senft, who is or was a board member, indicated that it was an obligation of each of the purchasers of units to sign this form of Purchase Agreement. Since there would have to be some written agreement in order to give effect to the purchase, and because the defendant has not adduced evidence of any other agreement, I am satisfied, more likely than not, that it was this form of agreement that the defendant executed, and as such, the defendant would have become owners of the appliances, fixtures, and attachments that are envisaged by the Agreement and which are under consideration in this action. I conclude that the air conditioner, the furnace, their attachments, and the room in which they were situated are not common property but rather, are owned by the defendant and therefore things which the defendant had under its exclusive care and control.

Issue 1

[9] For the reasons which follow, I am satisfied, more likely than not, that the water leak which damaged the ceilings and furnaces in units #301 and #201 was caused by the escape of condensate from the unattached condensate line running from the furnace and air conditioner

belonging to the defendant and located in the furnace room of unit #401.

[10] Mr. Grossman was, at all pertinent times, a board member of the plaintiff corporation. He stated that on or about the beginning of June, 2018, he received notice from the tenants of units #301 and #201 complaining of water saturation in the ceilings and furnaces in each of their furnace rooms. He checked their balconies and found no discernible accumulation of water. He did this because at or about that time there had been rather significant amount of rainfall. The Court was not advised of the amount of rainfall other than that it was significant. When he looked at the ceilings of each of these furnace rooms, he could see saturation but no identifiable source location. He attempted to contact the tenants of unit #401 but was unable to get in touch with them. In the ensuing days (the timelines are unclear) he contacted certain contractors and the corporation's insurance company to investigate. Between June 1 and June 19, an independent adjuster working for the plaintiff's insurer attended at the complex and he originally felt that the loss may have been occasioned by rainwater which had somehow entered the complex. He ultimately concluded otherwise, based in part on the opinion that he received from a repair company that attended to inspect the damage. Unfortunately, that repair person was not called to give evidence at trial, and therefore, his opinion is hearsay. I do not find his failure to give evidence to be fatal. I say this because certain repair work was undertaken which included the removal of wet and ruined drywall. Some two weeks later, on or about June 19, Mr. Grossman noticed that additional moisture had, once again, leaked into the furnace rooms of units #301 and #201 – each of which had, in the intervening period of time, dried out and then become wet again. He managed to contact the tenant of unit #401 and together they investigated that unit's furnace room. He noted that the condensate line was not properly attached, thereby allowing the accumulating water to run down and drip into the furnace ducts into the units below. He cannot say how long the line may have been unattached, nor could he comment on the amount of water which would have, over any given period of time, escaped - other than to state that there would have been, in his experience, a constant or steady drip, something which he says he observed when he visited the unit. All things being equal, he invites the Court to conclude that this steady drip could have been ongoing for a long period of time, although its flow rate would be dependent on the amount of time that the air conditioner would be in use. He advised Mr.

Huvenig to re-attach the condensate line to the drip pan and he says that once this had been done, no further water leaked into the lower units.

[11] Mr. Huvenig was not specifically asked whether he attached, or detached, or even knew about the condensate line prior to this episode. He did mention that on June 1, 2018 or thereabouts, there had been a significant rainfall and that he attempted to sweep the water which had accumulated on his balcony into the drain which is in the center of his balcony and which then flows through exterior drainpipes to the ground. He stated that the balcony was slightly angled towards the building and that the balcony has a lip around its perimeter which was about two inches high. He could not say whether the water on his balcony leaked into the units below. He did check his furnace room and noted that the floor was completely dry.

[12] The defendant could add little in the way of evidence in relation to this matter. Ms. Dehghnai, a shareholder and beneficial owner of the defendant testified, but the only thing that she commented on was that the defendant holding company had purchased the unit brand new in or about 2015, and when it was purchased the defendant did not conduct a comprehensive inspection of the premises, nor did it receive a maintenance booklet or maintenance schedule in relation to the furnace. Since acquiring the unit, she stated that to her knowledge she had the furnace serviced once, but she could not say when that had been done.

[13] The civil burden of proof, as it relates to causation, is on the balance of probabilities. A plaintiff is not obligated to prove, beyond any reasonable doubt, the precise cause of a loss. In the instant circumstances, the plaintiff has adduced evidence that the condensate line was not properly attached and that it had, more likely than not, been unattached for an uncertain duration. It has led evidence to show that water may have consistently leaked from that line into the furnaces below. The plaintiff has led evidence of a potential and reasonable cause of the damage. While the defendant has alleged a potential alternative cause, it has led precious little evidence in order to support that alternative cause. The defendant has not denied that an unattached condensate line would cause water to leak down and into the lower units. Rather it has invited the Court to conclude, without any further evidence, that the rainfall was the cause of the water

leak. It invites the Court to draw that conclusion based on the proximity in time between when the rain occurred and when the initial damage was discovered. While this is somewhat compelling, it does not explain why the lower units would, after having dried out, once again suffer further and ongoing water damage within two weeks during which no further rain fell - but during which time, the condensate would continue to escape. An ongoing condensate leak would explain this continuing problem. Even if it could prove that there was penetration of rainwater into the unit's furnace room (and it has not proved that to my satisfaction), this would not explain an ongoing problem when no rain had fallen in the interim. I therefore conclude, more likely than not, that water dripped from the unattached condensate line over time, and eventually saturated the units below. Once the saturated drywall and insulation was removed, the moisture was no longer evident, but then became evident again, after a couple of weeks, when the dripping water would again cause saturation. This cause and effect, in my view, is much more compelling when it became clear that once Mr. Huvenig re-attached the condensate line, the problem failed to recur.

Issue 3

[14] The defendant has argued that even if water leaked from its condensate line, it was unaware of this problem and on the facts before the Court, the Court would be unable to conclude that the owner was negligent. For the reasons which follow, I agree.

[15] Section 65 of the *Act* speaks to the obligation of a condominium corporation to obtain insurance and it speaks to a corporation's right of recovery against its unit holders. The relevant portions of that section read as follows:

> (2) The corporation shall obtain and maintain insurance on its own behalf and on behalf of the owners with respect to the units, other than improvements that are made or acquired by owners with respect to the units, the common property, the common facilities and service units:
>
> (a) against major perils in an amount equal to the replacement costs of the insured property; and

(b) against any other perils that are specified in the bylaws of the corporation or directed by the board.

…

(5) Subject to subsection (6), if an insurance policy obtained by the corporation in accordance with this section contains a deductible clause that limits the amount payable by the insurer, the portion of a loss that is excluded from coverage is a common expense.

(6) If the owner of a unit, or a person residing in the owner's unit with the permission or knowledge of the owner, through an act or omission causes damage to a unit, the amount determined pursuant to subsection (7) may be added to the common expenses payable by the owner of that unit.

(7) For the purposes of subsection (6), the amount is the lesser of:

(a) the cost of repairing the damage to the unit; and

(b) the deductible limit of the insurance policy obtained by the corporation.

(8) For the purposes of this section, the corporation is deemed to have an insurable interest in the replacement value of the units, including developed bare land units, the common property, the common facilities and the service units.

…

(10) For the purposes of this section, the corporation is deemed to have an insurable interest in the subject-matter of the insurance.

…

(13) Nothing in this section is to be construed as restricting the capacity of a corporation, an owner or any other person from obtaining and maintaining insurance with respect to any insurable interest.

[16] As stated earlier, the plaintiff relies on this section of the *Act* to recover, from the defendant, the insurance claim deductible that it had to pay in order for its insurance to respond and pay for the repair of two of the units in the complex. It says, and I accept, that once it had made its claim, it paid the deductible, and its insurer paid out on the claim. Thereafter the plaintiff added this deductible, in the sum of $2,500.00, to the defendant's condominium

common expense account as an amount due and owing to the plaintiff.

[17] The plaintiff's argument is straightforward. It argues that it is entitled as a matter of right to recover this sum because the statute under which it operates gives this right to them. It argues that it has met the burden of showing that either the defendant ('the owner of the unit'), or his tenant ('a person residing in the owner's unit with the permission or knowledge of the owner') 'caused damage' to units #301 and #201 (each of which are 'a unit') by allowing water to escape from its unit by either not attaching the condensate line in the first place, or by failing to ensure that its condensate line was properly attached ('through an act or omission'). In consequence, it added the sum of $2,500.00 to the common expense payable by the owner of that unit ('the lesser of the cost of repairing the damage to the units and the deductible limit of the insurance policy obtained by the corporation').

[18] However, the defendant argues that the Court should interpret the phrase 'act or omission' as set forth in section 65(6) as implying a 'negligent' act or omission and it argues that it can only be held accountable for the loss, if it, or its tenant, can be found to be negligent. In doing so it asserts that when it first obtained the unit it was not provided with, nor made aware of, a maintenance manual for the furnace; nor was it made aware of any problem with the furnace when it took possession of it. It also argues that it had hired a technician to service the furnace, and it invites this Court to find, more likely than not, that the condensate line was not properly attached when the defendant originally took possession of the unit, or alternatively, that the technician failed in its contractual duty to ensure that the condensate line was attached when the service was performed. In either event, it then argues that it cannot be held to be negligent because reasonable people should not be required, in the absence of any reasonable concerns, to second guess the efficacy of a furnace that was purchased new and installed at first instance, or to second guess the efficacy of the services provided by a furnace technician. It argues that absent any notice that the condensate line was not properly attached, the requisite knowledge component of a claim in negligence is lacking and therefore it did not fall below the standard of care of a reasonable and prudent condominium owner.

[19] I was left to surmise that the defendant felt that it was incumbent on the plaintiff to call expert evidence in order to prove that the defendant fell below its standard of care. I do not think that this is necessary. I do not think that an assessment of a condominium unit owner's standard of care requires expert opinion. In my view, the status of a condominium unit owner, and their obligations in relation thereto, need not be tested by expert opinion - but rather by the reasonable person standard.

[20] Negligence is conduct which falls below the standard of care demanded by society for the protection of others against an unreasonable risk of harm caused by another person. That standard is generally measured by what a reasonable person of ordinary prudence would do in the circumstances. However, an analysis of a standard of care only arises if there is, in any given circumstance, a duty for that person to exercise reasonable care. In the instant circumstances, the defendant is an owner of an apartment style unit within a multi-storied condominium complex with neighbors directly below and arguably beside the unit that is owned. They are separated by common walls and conjoined by common electrical lines, water lines, furnace ducting and sewage lines and each of these units may be impacted, by virtue of their proximity, to each other, by the actions or inactions of another unit holder. In my view, this proximity anticipates that each of the unit holders owe a duty of care, one to the other, to take reasonable care to ensure that their conduct does not expose their neighbor to an unreasonable risk of harm.

[21] This duty of care is also spelled out under the corporation's bylaws. Section II, entitled **DUTIES OF THE OWNERS** states in part:

> 9. <u>General</u>
>
> …
>
> (b) Each owner shall be responsible for damage caused to Common Property, exclusive use property, or other property owned by the corporation where such damage is caused by the willful or negligent acts of his/herself, member of their family, their invitees, contractors, and licensees.
>
> (c) Nor use his or her Unit or permit it to be used in any manner for any

purpose which may be illegal, injurious or that will cause nuisance or hazard to any occupier of a Unit (whether and Owner or not) or the family of such an occupier.

(d) An Owner shall not use or allow their Unit to be used for activities that interfere with the comfort, repose, health, peace and safe use and enjoyment by persons in any other Unit.

11. Unit Maintenance

An Owner shall maintain their Unit in a state of good repair and shall be responsible for any damage on associated exclusive use common areas including balcony, deck or patio.

…

17. Renting/Leasing Units

…

(e) Owner Liable for Tenant Activities -The owner shall not be released of any of their obligations as Owner and shall be jointly and severally liable with the proposed lessee or Occupant with respect to compliance with the provision of the Act and the Bylaws.

[22] That stated, the standard of care that the defendant is required to meet in the exercise of a duty of care is dependent, in part, on its being able, as John G. Fleming, in his text The Law of Torts, 6th Ed., The Law Book Company Limited, 1983, notes at page 103:

> to perceive and appreciate what risks are involved in a certain activity. Perception of risk is the correlation of past experience with the specific facts in a situation which depends to a large extent on knowledge as the basis for judging the harmful potentialities of contemplated conduct.

[23] In other words, in order to identify and respond to a risk, a person must be able to have some reasonable appreciation that a risk exists or is likely to exist and it is up to this Court to determine whether or not the defendant either knew or ought to have known that this risk existed. This analysis is conducted in the context of reasonableness. Negligence, as Fleming points out at page 103 of his text, ‘consists in failure to do what the reasonable [person] would have done

under the same or similar circumstances'. The evidence before me suggests that the defendant purchased its unit brand new and that the furnace and air-conditioning unit were transferred to it brand new. In the absence of evidence to the contrary, I can only assume that when purchased brand new, these appliances were functioning. Does a person who purchased something brand new, and in functioning order, then call for an inspection of the very thing that they have purchased to see if it is, in all respects, functioning as it ought to? If, having bought something brand new, and then having had it serviced, is it incumbent on a reasonable person to, and again, in the absence of any real or apprehended problem, have that service technician's work checked over?

[24] By analogy, if a person buys a new propane tank for their farm, in the absence of any perceived problem, do they immediately have it checked out by an authorized technician to see if it is functioning perfectly? I do not think that a person who fails to do so could be seen to be unreasonable. In the same context, if that propane tank is then serviced, as was the furnace in question, does the person who has had their tank serviced, and in the absence of a perceived problem, then have the integrity of that service checked to ensure that the service was performed adequately? I do not think that a person who fails to do so would be seen to be unreasonable. If the tank in question, unbeknownst to the new owner, had a defective valve which caused the tank to improperly ventilate eventually causing damage to a neighbor, could one conclude that the owner was negligent, when they had no foreknowledge, nor any reason to inquire of the latent defect that existed in the tank? I conclude that the owner could not, in those circumstances, be found to be negligent, and I think that the analogy extends to the defendant. I agree with defense counsel. Absent any act or omission which could be said to have created this risk of harm, and absent any foreknowledge of a latent problem, and absent any reason to suspect a problem, the requisite 'perception of risk' is lacking. Based on the evidence before me, I cannot conclude that the defendant was negligent.

Issue 4

[25] If I cannot find the defendant negligent, the defendant maintains that I must dismiss the

claim. As indicated, it argues that the phrase 'act or omission' as set forth in section 65(6) of the *Act* should be interpreted as implying a 'negligent' act or omission – and therefore, in the absence of a finding of negligence, there is no right of recovery under the *Act*. For the reasons which follow, I disagree.

[26] Section 65(6) of the *Act* uses the phrase 'if the owner of a unit, or a person residing in the owner's unit with the permission or knowledge of the owner, through an act or omission causes damage to a unit …'. The defendant advances three arguments in relation to the interpretation of this clause.

[27] First, it argues that because section 9(b) of the bylaws provides that an owner will be held responsible for damages caused to common property, exclusive use common property or other property owned by the corporation, where such damage is caused by 'the willful or negligent acts' of that owner [emphasis added], it must have been the intent of the corporation to extend that same qualification 'willful or negligent' to any claim made under section 65(6) of the *Act*. I cannot agree. Article 9(b) speaks to common property and not units that are individually owned by others. Section 65(6) of the *Act* speaks to units, and not the common property of the unit holders. They are distinct types of properties. I do not know why the corporation decided to hold unit holders to be held accountable for only their willful or negligent actions if damage was caused to common property. There is no evidence before me explaining what the motivation might have been. However, and with due respect to defense counsel, I see this to be a situation of comparing apples and oranges. I do not think that this Court should purport to attempt an interpretation to a piece of legislation by reference to what one condominium corporation (of which there are many) may decide to do with its common property under its bylaws. I also note that it is the legislation which defines the powers that may be expressed in a condominium corporation's bylaws. Bylaws, by comparison, do not define the powers that may be expressed in legislation. As a final note, I take specific notice of the fact that Article 9(c) in the bylaws speaks to a unit holder's injurious affectation to another unit, in much broader terms, employing the word 'nuisance', which I will discuss shortly.

[28] The defendant next invites this Court to interpret the legislative clause - 'if the owner of a unit, or a person residing in the owner's unit with the permission or knowledge of the owner, through an act or omission causes damage' - in such a manner so as to conclude that the words 'act or omission' are qualified or circumscribed by the words 'permission or knowledge'- and in that way conclude that the clause is only operative if the act or omission which caused the loss occurred with the permission or knowledge of the owner.

[29] With due respect, the defendant has asked me to torture this portion of the *Act*, by stretching it out, cutting it apart, and resurrecting it in a manner that best accords to the defendant's interests. Ruth Sullivan, in her text Statutory Interpretation 3rd Ed., Irwin Law Inc. 2016, at p 95 has noted that the word 'or' is always disjunctive in the sense 'that it always indicates that the things listed before and after the 'or' are alternatives'. In that sense section 65(6) speaks to two distinct entities - an owner, and a person residing in the owner's unit. If, as the defendant would have me conclude, that the phrase 'with the permission or knowledge of the owner' is intended to qualify the nature of the act or omission of 'the person residing in the owner's unit' then I do not see how that helps the unit owner in this situation. Read in that context, liability would arise to the owner and resident respectively, if 'the owner … through an act or omission causes damage' - or – 'if the person residing in the owner's unit causes damage by an act or omission with the permission or knowledge of the owner'. If the defendant suggests that the 'permission or knowledge' phrase also extends to the owner's act or omission, then it would leave the interpreter to read the entire phrase, vis-a-vis the owner, as follows: 'if the owner of a unit, through an act or omission with the permission or knowledge of the owner, causes damage …'. This tortuous interpretation does not make sense. Presumably an owner would always act with their own knowledge and permission. Who else's knowledge or permission would they act upon?

[30] As Sullivan notes, at page 129, in her summary of textual analysis techniques and interpretive presumptions:

- The legislature has flawless linguistic competence and encyclopedic

knowledge.
- It has intelligible goals and a rational plan for achieving its aims.
- Its choice of words, word order, and structure and its sequencing of material are careful and orderly, with an accurate appreciation of the impact on meaning.
- It uses a direct, straightforward style, avoiding rhetorical devices and relying on fixed patterns and pattern variations.
- Every feature of the text is there for a reason and has its own work to do.

[31] With due respect to the defendant, the interpretation that it would seek to foist upon the Court would suggest less than flawless linguistic competence, a less than orderly word order and poor sequencing of material, and an indirect and less than straightforward style. In my respectful view, the phrase 'permission and knowledge' does not speak to 'an act or omission' of either or both the owner and the resident, but rather to the resident's status - that the resident is there with either the permission of the owner, or with the knowledge of the owner.

[32] Even if that suggested interpretation fails, the defendant urges this Court to interpret the phrase 'act or omission' by importing the word 'negligent' into the subsection such that only negligent acts or omissions which caused damage would operate to allow recovery. It offers some case authority for this proposition. In *Reilly v Freedom Gardens Condominium Association*, 2001 ABQB 1002, [*Reilly*], the Court of Queen's Bench was sitting in appeal of a lower court and was obligated to consider the interpretation of the phrase 'act or omission' as it existed in the **bylaws** of a corporation. The Court concluded, at para 34, that those words, as used in **bylaws**, 'are usually descriptive of a tort action and generally indicate negligence'. The learned Justice concluded that the bylaws did in fact anticipate negligence, but made this determination based on the principle of *contra preferentem*, concluding that because the corporation had drafted the bylaws, and because they could have, if they chose, sought to impose strict liability. Since they did not specifically refer to it, then an ambiguity existed, and the Court should give the words an interpretation that resolve the ambiguity in a manner that is more favourable to the unit owner.

[33] *Reilly* has not been followed in other Canadian courts, including this Court in *Park Place Condominium Corporation v Komarnicki*, 2010 SKPC 103 [*Park Place*]. In fact, *Reilly* was not

followed in a more recent decision of the Alberta Court of Queen's Bench, in *Owners: Condominium Plan No. 7721985 v Breakwell*, 2019 ABQB 674, [*Breakwell*]. I note that *Breakwell* also dealt with the interpretation of **bylaws** as opposed to the interpretation of legislation. However, in that case, the Court concluded, upon consideration of other law throughout Canada, that it is not necessary to import negligence when considering how to interpret the phrase 'act or omission'. In *Breakwell* at para 51 and 52, the Court also disagreed that the principle of *contra preferentum* had any application in the interpretation of a condominium bylaw, citing Dovell J in *Tofin v Spadina Condominium Corp*., 2011 SKQB 219, a decision of our Court of Queen's Bench. I have reviewed *Breakwel*l, and with due respect, it does not assist this Court in its attempt to interpret section 65(6) of the *Act*, since it is dealing with the bylaws of a corporation and not provincial legislation.

[34] In *Park Place,* Judge Scott was presented with the same issue that this Court finds itself faced with. Ultimately, and having reviewed *Reilly*, and other cases, she chose to follow the reasoning enunciated in *Zafir v York Condominium Corp. No. 632*, [2007] 54 RPR (4^{th}) 121 (Ont Sup Ct) [*Zafi*r]. *Zafir* rejected the *Reilly* analysis, to the effect that one *may* import the concept of negligence in interpreting the phrase 'act or omission', but in doing so, the learned trial Judge in *Zafir* seems to have conducted a portion of his analysis in somewhat the same manner that the Judge in *Reilly* did. At paras 18, 19 and 20 he stated:

> [18] I am not persuaded by the plaintiff that the term "act or omission" necessarily requires a finding of negligence. If the drafters of the *Act* and the defendant's bylaws had intended the higher standard of negligence to apply, they could have said so and referred to "negligent acts or omissions".
>
> [19] On the other hand, the language of the *Act* and the bylaws is not strict liability either. Strict liability language would have provided that the owner is responsible for any damage arising from its unit, however caused.
>
> [20] As such, the wording "act or omission" appears to be more favourable to an owner than if strict liability language has been used. In my opinion, whether damage occurs from an act or omission of an owner in any particular case will depend on the facts of the case at hand.

[35] With the greatest respect to the Court in *Zafir*, the same argument could be made with respect to absolute liability, in which event, the words "act or omission" would appear to be even more favourable. In contrast, because the phrase is not preceded by the words "intentional or willful", can it equally be said that the wording "act or omission" appears to be less favourable to an owner? Why is it necessary to import any qualification on the words "act or omission" at all? If, as the Court in *Zafir* has suggested, "whether damage occurs from an act or omission of an owner in any particular case will depend **on the facts of the case**", is it then open to a Court to sometimes import negligence? Sometimes import strict liability? Will it sometimes demand considerations of willfulness or intent? Sometimes absolute liability? Sometimes pure accident?

[36] With utmost respect, many of the decisions rendered by various Courts on this issue have attempted to intermingle interpretive aids and apply them equally among the interpretation of legislation, contracts, and corporate bylaws. In so doing, they have, in my respectful view, not given sufficient consideration to general principles of statutory interpretation and in particular a purposive analysis of the legislation under consideration.

[37] Condominium units, by their general nature, are, more often than not, in closer proximity to each other than are other residential housing units. In consequence, the acts or omissions of individual unit holders may have a much more immediate, and much more significant impact on one's neighbours. A hazard like fire (or water) is much more immediate to a neighbour who has a common wall or roof/floor than a neighbour whose walls are separate and some distance apart - as in a neighbourhood of separated homes. A nuisance, like the escape of noxious fumes has the same effect. A failure to keep one's appliances in a state of good repair leading to potential loss has the same effect. This proximity, in short, exposes one's neighbours not only to a greater risk of harm than might otherwise be the case with freestanding unattached homes, but also a risk of greater harm in the sense that a larger number of one's neighbours may be similarly adversely affected. In that context, how does one minimize these risks? There are two obvious ways of doing this.

[38] One can minimize risk by demanding that each individual unit owner recognize that they must accord to certain standards of behaviour. In the present case, the condominium corporation has done this by way of bylaw. It has mandated, as I have earlier noted, that each unit holder must keep their unit in a state of good repair, and no unit holder is entitled to use their unit in a manner that will cause a 'hazard or a nuisance' to an occupier of another unit. (I take judicial notice that an escape of water from one person's property to another, which is continuous in nature and which unreasonably interferes with the use of enjoyment of another person's property is an actionable nuisance.)

[39] Another way to minimize risk, and a time honoured one, is to buy insurance which will respond to any given peril. Insurance policies, subject to negotiated exclusions, respond to a range of perils, however caused. Put another way, insurance operates to indemnify an insured against certain types of loss, as opposed to indemnification dependent on the moral or legal blameworthiness of the individual that caused the loss to occur. More often than not, a loss arises by virtue of an accident caused, either wholly or in part, by the act or omission of the insured party. Sometimes a loss arises due to the negligence or the intentional act of a third party. In either event the insurance policy will, subject to negotiated exclusions, still respond.

[40] Purposive analysis of legislation is explained by Ruth Sullivan in her text commencing at p 185:

> To achieve a sound interpretation of a legislative text, interpreters must identify and take into account the purpose of the legislation. This includes the purpose of the provision to be interpreted as well as larger units - parts, divisions, and the Act as a whole. Once identified the purpose is relied on to help establish the meaning of the text. It is used as a standard against which the proposed interpretations are tested: an interpretation which promotes the purpose is to be preferred over one that does not, while interpretations that would tend to defeat the purpose are avoided.

[41] It is clear to me that the purpose of the *Act* is, in part, to establish rules which will guide and define the relationships between condominium unit owners and the corporation which oversees the complex having due regard to a complex's somewhat unique arrangement - an arrangement where jointly used common property and the proximity of one's neighbours comes into play. In establishing those rules, PART V of the *Act* is entitled '**Insurance'**. Section 65(2) compels the corporation to obtain and maintain insurance in respect of the corporation itself and the owners of the units. Section 65(8) and (10) grant to the corporation an insurable interest in both the replacement value of any unit in the complex, and the subject matter of the insurance.

[42] The insurance that is purchased may, in accordance with section 65(2)(b), cover any peril that is either specified in the bylaws or otherwise directed by the board. Because the insurance responded in the matter before this Court, I have every reason to conclude that water damage was an included peril.

[43] Insurance will only respond to a loss if the owner of the policy of insurance agrees to pay the deductible. Since the insurance, by operation of the statute, has been purchased for both the corporation and on behalf of the unit owners, unit owners are also beneficiaries under the policy that has been obtained.

[44] If a person suffers a water leak in their basement because they have failed to maintain their water heater, then because water damage is an included peril, their insurance company will respond, and, subject to any particular exclusions, whether they properly maintained it or not. If water escapes from their neighbour's property, and floods their basement, their insurance will respond regardless of a finding of fault against their neighbours. The insurance, generally speaking, responds to the type of peril that was covered and not (again subject to certain possible exclusions) to the moral or legal blameworthiness of their neighbour. An insured's obligation to pay the deductible in order for their insurance to respond is not dependent on whether someone concluded that the cause of the loss was accidental, or because the insured was negligent.

[45] As I read Section 65(6) of the *Act*, it operates to allow a condominium corporation to place upon a unit owner the responsibility to pay the insurance deductible when damage is caused to a unit arising from an act or omission of that particular unit owner. When considered in the context of insurance (the purposive analysis of this Part of the *Act* in relation to the whole of the *Act*) it is apparent that the legislators made a policy decision. That decision was, effectively, to place the burden of paying the insurance deductible on the person (unit owner) that caused the loss, without consideration of whether that unit owner's actions were negligent or otherwise. In doing so, it recognizes that loss may arise through any act or omission, and it would therefore cover off loss that arose by virtue of a private nuisance. This policy decision simply recognizes that as between a completely innocent unit owner that did not cause or contribute to the loss by any act or omission on its part - and a unit owner that did cause the loss through an act or omission - the monetary burden of calling on the insurance should be borne by the latter rather than the former. It recognizes that the cost of the deductible should not be borne *pro rata* as a common expense by all of the unit owners when they did not individually or collectively cause the loss by any act or omission on their part. Because the *Act* has determined the defendant to be a beneficiary under the policy of insurance, the defendant enjoys the benefit of being indemnified by the insurance thereby decreasing its potential greater obligation to pay the entirety of the loss that was sustained by its neighbour which, as in this case, has proven to be a much higher cost. The tradeoff is the corresponding obligation to pay the insurance deductible.

[46] This interpretation does not compel the Court to try to impose any qualifications whatsoever into the meaning of "act or omission'. The Court need only conclude that the loss was **caused by** an 'act or omission' of that unit owner. This interpretation accords to section 2-11 of *The Legislation Act*, SS 2019, c L-10.2 which reads:

> 2-10(1) The words of an Act and regulations authorized pursuant to an Act are to be read in their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature.
>
> (2) Every Act and regulation is to be construed as being remedial and is to be given the fair, large and liberal interpretation that best ensures the attainment of

its objects.

[47] It comports with s 2-10 (1) because: (a) this interpretation is a reasonable consequence when interpreting section 65(6) in the context of insurance; (b) it allows the reader to interpret the subsection in a grammatical and ordinary sense; and (c), it is in harmony with and consistent with the scheme and object of the *Act*, which is to set rules in relation to the proximity of condominium unit owners one to the other, and the risks that may arise thereby.

[48] This interpretation comports with s 2-10(2) in the sense that the interpretation is remedial, offering a fair remedy to those unit holders who should not have to be held accountable for a portion of an insurance deductible which must be paid by virtue of another owner's acts or omissions, while still affording some protection to the unit owner that caused the loss by limiting his exposure to the deductible that must be paid. In addition, it offers a large and liberal interpretation of the words "act or omission" thereby avoiding the necessity of having to attempt to qualify the manner in which those acts or omissions arose. The implications of giving the words a less than large and liberal interpretation become obvious if the facts are slightly changed.

[49] In accepting this interpretation, I would note that it does not, in any way, restrict a unit owner's right to commence an action, or bring a third party into an action, in order to seek full or partial contribution against another party who may also have caused the damage to occur. In short, if the defendant felt that the furnace has been sold to it in a less than adequate condition, or if the furnace technician had negligently serviced the furnace, it was at liberty to seek to recover back, against one or both of them, the money that it had to pay. Nor does interpretation preclude the opportunity for the defendant to purchase additional insurance to offset its potential obligation to pay. Section 65(13) makes provision for this, and I note that the evidence presented to this Court satisfies me that there are insurance products available on the open market which can be purchased by a unit owner in order to respond to the obligation of having to pay for this type of deductible expense.

[50] For these reasons, I conclude that the Court should not attempt to interpret the words ‘act or omission’ as meaning ‘negligent act or omission’.

Conclusion

[51] I conclude that damage was caused to units #301 and #201 when water escaped from an unattached condensate line located in the defendant’s unit #401. I conclude that this loss was caused by the defendant’s failure to ensure that the condensate line was properly attached. While that failure was not a negligent omission, it was nevertheless an omission on the defendant’s part. In consequence, the plaintiff was free, pursuant to section 65(6) of the *Act*, to add the cost of the insurance deductible to the common expenses payable by the defendant. As the defendant has refused to pay that amount, I award the plaintiff $2,500.00 in damages.

[52] The plaintiff has sought prejudgment interest on the amount. Unfortunately, I have no evidence as when this amount become due and payable because I have no idea when it was actually paid. This portion of the claim is dismissed.

[53] The plaintiff has asked for its costs. Having been successful the plaintiff is awarded special (out of pocket costs) in the sum of $125.00 for the costs of filing the action, a subpoena fee, and a witness fee. I award general costs in the amount of 5% of amount claimed in this action, which equates to $125.00. While this Court has jurisdiction to award as much as 10%, I refuse to do so. The law in relation to this section of the *Act* has been uncertain to date. I think it has now been clarified and that clarification operates to the advantage of each of the parties in this lawsuit.

[54] A Certificate of Judgment shall issue against the defendant for the sum of $2,750.00.

Demong, J