Court of King's Bench of Alberta

Citation: Soni v Condominium Corporation No 072 7129 (Spirit Ridge), 2025 ABKB 140

Date: 20250307
Docket: 2303 18931
Registry: Edmonton

Between:

Sandeep Soni

Applicant

- and -

Condominium Corporation No 072 7129 (o/a Spirit Ridge)

Respondent

Memorandum of Decision
of
Applications Judge B.W. Summers

Introduction

[1] In this Special Chambers application I must consider what remedy a condominium corporation may have for a claim for damages that exceeds the insurance deductible paid by the unit owner's insurer.

Basic Facts

[2] The Respondent ("Condo Corp") discovered a water leak that emanated from the shower in the unit ("Unit") owned by the Applicant ("Owner"). The Owner was not the occupant of the Unit, but rather the Owner's brother Jayant Soni ("Jayant") was the occupant.

[3] The water leak caused damage from the Owner's third floor Unit down to the basement. Condo Corp effected repairs at a cost of $83,813.76.

[4] The Owner's insurer paid to Condo Corp the $50,000 deductible pursuant to the policy of insurance carried by the Owner pursuant to the *Condominium Property Regulation ("CPA Regulation").*

[5] Condo Corp levied a chargeback against the Unit for the remaining balance, interest and costs in the total amount of $37,813.76 ("Chargeback") and registered a caveat ("Caveat") against the title to the Unit.

[6] When the Owner wanted to sell the Unit, Condo Corp refused to provide a clear estoppel certificate. The Owner paid the Chargeback to Condo Corp, under protest. The Caveat was discharged, the clear estoppel certificate provided and sale of the Unit closed.

[7] These are just the basic facts of this case. Further facts (by and large not in dispute, but not completely undisputed) will be discussed in this Memorandum of Decision where appropriate.

Owner's Application

[8] The Owner commenced this action by filing an Originating Application on October 18, 2023 seeking the following relief:

(a) Declaring Condo Corp has engaged in improper conduct pursuant to s 67 of the *Condominium Property Act* ("*CPA*");

(b) Judgment for $37,813.76 plus interest;

(c) General damages in the amount of $10,000;

(d) Punitive damages in the amount of $10,000; and

(e) Costs on a solicitor-and-own-client full indemnity basis.

Condo Corp's Action

[9] On February 5, 2024 Condo Corp commenced a separate action against the Owner asserting negligence ("Negligence Action"). A Statement of Defence was filed on behalf of the Owner on March 18, 2024.

[10] On April 3, 2024 Applications Judge Birkett refused an application to consolidate this action and the Negligence Action. No further steps have been taken in the Negligence Action.

Respective positions of the Parties

Position of the Owner

[11] The arguments made on behalf of the Owner, both in its Brief and oral submissions, may be distilled to the following:

(a) The scheme of the *CPA, CPA Regulation* and the bylaws of the Condo Corp ("Bylaws") is such that the only amount that may claimed against the Owner, *as a "contribution" under the CPA,* is the insurance deductible of $50,000;

(b) Condo Corp did not pursue an insurance claim under its own policy, which is for the benefit of all unit owners, and as such the Owner should not be liable in this case;

(c) Condo Corp did not (and does not) have a judgment against the Owner and consequently when it filed the Caveat and refused to provide a clear estoppel certificate to the Owner it improperly availed itself of what amounts to a prejudgment remedy. Condo Corp's remedy against the Owner is *in personam* only, dependent upon the outcome of the Negligence Action; and

(d) There is conflicting evidence on the issue of whether there was negligence on the part of Jayant and consequently I cannot conclude that the Owner is liable to Condo Corp for negligence.

Position of Condo Corp

[12] The arguments made on behalf of Condo Corp, again distilled from its Brief and oral submissions made on its behalf are as follows:

(a) There is very strong evidence of negligence on the part of Jayant (and by extension the Owner) as the water leak may have been in existence as much as a year; and there was very extensive mould and a smell of mustiness in the Unit. This negligence is a breach of the Bylaws regarding maintenance of a unit;

(b) The water leak was a slow leak over an extensive period of time and this is not a peril that Condo Corp was required to insure against and in fact Condo Corp's insurance policy did not cover such a peril, so making a claim on Condo Corp's policy would have been fruitless; and

(c) Condo Corp was entitled to levy the Chargeback against the Owner's Unit as an unpaid assessment which constitutes a *contribution* under the *CPA.*

Discussion of the Issues

Could Condo Corp assess the Chargeback against the Unit as a "Contribution"?

[13] "Contribution" is defined under the *CPA* in clause (g.1) of sub s 1(1) as an amount levied under s 39.

[14] Section 39 of the *CPA* provides:

39(1) A board may by resolution

> (a) determine from time to time the amounts to be raised for the purposes of the operating account and the reserve fund and may raise those amounts by levying contributions on the owners at regular intervals
>
> (i) in proportion to the unit factors of the owners' respective units, or
>
> (ii) subject to the regulations, and if provided for in the bylaws, on a basis other than in proportion to the unit factors of the owners' respective units;
>
> (b) determine from time to time amounts to be raised by special levy and raise those amounts in accordance with section 39.1.
>
> (2) A contribution shall not include any amount for the purpose of collecting from an individual owner
>
> (a) monetary sanction under a bylaw made under section 35(1),
>
> (b), (c) repealed 2013 cS-19.3 s3.

[15] The amount claimed by Condo Corp is not a "monetary sanction" and consequently the exclusion under s 39(2)(a) has no application.

[16] Section 39.1 of the *CPA* deals with special levies and has no application to this case.

[17] Section 39.2 of the *CPA* deals with enforcement. The relevant subsections of that section are:

> 39.2(1) A contribution levied as provided in section 39(1)(a) is due and payable on the passing of a resolution by the board to that effect and in accordance with the terms of the resolution, and a contribution levied under section 39(1)(b) is due and payable in accordance with a resolution of the board passed under section 39(1).
>
> (2) A contribution referred to in subsection (1), and any interest charged under section 40, may be recovered by an action for debt by the corporation
>
> (a) from a person who was an owner at the time when the resolution of the board was passed, and
>
> (b) from a person who was an owner at the time when the action was instituted,
>
> both jointly and severally.
>
> ...
>
> (6) A corporation may file a caveat against the certificate of title to an owner's unit for the amount of a contribution levied on the owner and interest payable but unpaid by the owner.
>
> (7) On the filing of the caveat under subsection (6), the corporation has a charge against the unit equal to the unpaid contributions and any interest owing.

> (8) On and from the date of filing of the caveat, a charge under subsection (7) has the same priority as a mortgage under the *Land Titles Act* and may be enforced in the same manner as a mortgage.
>
> (10) If a corporation has filed a caveat under this section, the corporation shall withdraw the caveat on the payment to it of the amount of the charge.
>
> (11) Notwithstanding subsection (8), if
>
> (a) a corporation has filed a caveat under this section,
>
> (b) subsequent to the caveat's being filed another person gains title to the unit pursuant to
>
> (i) a foreclosure action,
>
> (ii) an action for specific performance, or
>
> (iii) a tax recovery proceeding under the *Municipal Government Act*,
>
> and
>
> (c) an amount remains owing to the corporation with respect to the contribution and interest for which the caveat was filed,
>
> the caveat remains registered against the certificate of title of the unit until the amount owing is paid to the corporation.

[18] Pursuant to this legislation, a contribution may be recovered as in *in rem* charge against a condominium unit by filing a caveat against that unit. That caveat gives the condominium corporation an effective priority for payment because subsection 39.2(11) of the *CPA* provides that the caveat does not get discharged in a foreclosure or a tax sale, unless the contribution is paid.

[19] In the case of ***Condominium Plan No 912 3701 (Liberton Village Condominium Corporation) v Herbert,*** 2024 ABKB 362 ***("Liberton")*** I had to consider whether the claim by the condominium corporation for costs of repairing a wall damaged by a unit owner constituted a contribution for which a caveat could be filed under s 39 of the *CPA*. I concluded that such a claim could be a contribution, although there was a lack of evidence as to the correct amount. My reason for this decision was based upon the fact that the Alberta legislature had enacted, but did not bring into force, s 39(2)(b) of the *CPA*. Subsection 39(2) of the *CPA* listed those things that could not constitute a contribution. Clause (b) was "costs incurred by the corporation as a result of damages caused by an act or omission of an owner, tenant or occupant". Since the legislature specifically chose to not make that an exclusion, I reasoned that the legislature's intent was that "damages caused by an act or omission of an owner, tenant or occupant" may be a contribution.

[20] My analysis with respect to the statutory interpretation on that issue is found in paragraphs 35-52 of the ***Liberton*** decision.

[21] Counsel in this case are the same counsel as in the ***Liberton*** case.

[22] Counsel for the parties advised that my decision in ***Liberton*** had not been appealed and the case had been settled following my decision.

[23] I asked counsel for the Owner whether he thought my decision on this point in ***Liberton*** had been wrongly decided. He said that he thought that it was correctly decided, but that this case at bar is distinguishable from ***Liberton***. He said that because Condo Corp's claim in this case relates to insurable interests, the reading of all relevant portions of the *CPA* and the *CPA Regulation* leads to the conclusion that Condo Corp's claim for the Chargeback does not meet the definition of contribution within the meaning of the legislation.

[24] A key provision that must be considered is *CPA Regulation* 62.4, as follows:

> 62.4(1) A corporation may pay an insurance deductible in an insurance claim and recover the amount of the deductible from an owner in accordance with this section.
>
> (2) Subject to subsections (3) and (5), an owner, on demand by the corporation, is absolutely liable to the corporation for the amount of the deductible in the corporation's insurance claim for damage that originates in or from the owner's unit or an exclusive possession area assigned to the owner.
>
> (3) Despite any bylaw to the contrary, a corporation must not require an owner to pay an amount greater than $50 000 as a deductible in the corporation's insurance claim.
>
> (4) A corporation may recover an amount under subsection (2) from an owner by
>
> (a) an action in debt, or
>
> (b) levying a contribution under section 39(1) of the Act, if permitted by the bylaws.
>
> (5) An owner is not liable to a corporation for the amount of the deductible in the corporation's insurance claim where the claim arose from
>
> (a) a defect in the construction of the unit or exclusive possession area assigned to the owner,
>
> (b) damage attributable to an act or omission of the corporation, a member of the board, officer, employee or agent of the corporation, or any combination of them, or
>
> (c) normal structural deterioration of the common property, the managed property or the real property of the corporation, other than property that the owner was responsible to repair or maintain.
>
> (6) Nothing in this section shall be construed in a manner to affect a civil action or other remedy at law of an owner or a corporation against a person who is responsible for damage to property, including damage to property caused through wilfulness or negligence.

[25] Several things should be noted from this section of the *CPA Regulation.* Firstly, the owner of the unit from where the damage originates is absolutely liable for the deductible. Negligence on the part of the owner, or some other cause of action need not be shown for the deductible to be owing. Secondly, the deductible is recoverable from the owner, either in a debt action, or as a contribution under s 39(1) of the *CPA*, if permitted by the bylaws. Thirdly, the

section does nothing to limit a civil action or other remedy at law against the person responsible for damage to the property, including damage caused by wilfulness and negligence.

[26] The Owner suggests that the intent of section 62.4 of the *CPA Regulation*, and in particular clause (b) of subsection (4), is to put the deductible on a different level than any other amount that a condominium corporation may seek to recover with respect to a claim for damage.

[27] The Owner argues that Condo Corp's insurance obligations under the *CPA* are also relevant to determining legislative intent with respect to this issue. Under s 47(1) of the *CPA* condominium corporations have an obligation to insure against certain perils, including water damage caused by flood or sewer back-up or the sudden and accidental escape of water or steam from plumbing, heating, sprinkler or air conditioning system or a domestic appliance located within the insured building.

[28] The Owner states that he is entitled to the benefit of this insurance and there is no right of subrogation against him with respect to an insured peril. In questioning, a representative of Condo Corp advised that an application was not made under its policy because it wanted to avoid an increase in premiums.

[29] Counsel for Condo Corp argued that the real reason Condo Corp did not make a claim under its insurance policy is because the slow leak of water that occurred is not an insured peril under its policy. Condo Corp's insurance insured for water damage caused by a flood, which was defined as an event that "occurs within any 168 consecutive hours".

[30] I find that the water leak that occurred here was not an insured peril. Although no expert evidence was provided on the issue, there is no evidence that what occurred was anything other than a slow leak. The extent of the mould in this case could only have developed over a lengthy period of time. The Owner cannot rely upon a defense that the damage was caused by an insured peril and he is entitled to claim the benefit of that insurance.

[31] A further argument of note made by counsel for the Owner is that if this Court finds that any claim over and above the deductible amount may still constitute a contribution under s 39(1)(a) of the *CPA* (and therefore may be caveated) this is akin to granting a prejudgment remedy for a damage claim allowing a condominium corporation the equivalent of an attachment order under the *Civil Enforcement Act* and that if the legislature did not specifically legislate this, I should not be reading that into the legislation.

[32] Finally, counsel for the Owner says that if this Court finds that a condominium corporation's claim for damages against an owner may be a contribution that may be caveated, it in effect makes the condominium corporation judge and jury to such claims.

[33] Pursuant to s 39(1)(a) of the *CPA* Condo Corp was entitled to levy a contribution "on a basis other than in proportion to the unit factors of the owners' respective units" if provided for in the Bylaws. Do the Bylaws allow Condo Corp to levy such a contribution?

[34] Relevant provisions of the Bylaws include the following:

> 4.1 The Corporation has all the powers it requires in order to carry out its duties including, but not limited to:
>
> ...

(j) Do such other things as are necessary to accomplish the things the Corporation is permitted or required to do by the Act or these Bylaws.

27.1.1 Occupants shall:

...

(e) Keep the interior of the dwelling in a good state of repair;

...

28.1 Except with written consent of the Board, Occupants shall not:

(a) Use an Apartment Home or the Common Property in a way that unreasonably interferes with the use and enjoyment of other occupants;

(b) Use an Apartment Home or the Common Property in a manner (or for a purpose) that is illegal or that is likely to cause a nuisance or hazard to other occupants;

40.1 The Corporation has the right to recover from an Owner, by an action for debt;

(a) the unpaid amount of any assessment, together with interest and the actual costs incurred by the Corporation in recovering the unpaid assessment;

(b) any costs incurred by the Corporation in performing the Owner's duties as outlined in the Act or these by-law;

(c) any other amount which an Owner owes the Corporation.

40.2 The Corporation also has a charge against the estate of the defaulting Owner, for any amounts that the Corporation has the right to recover under these by-laws. The Charge shall be deemed to be an interest in land, and the Corporation may register a caveat in that regard against the title to the defaulting Owner's unit. The Corporation shall not be obliged to discharge the caveat until all arrears, including interest and enforcement costs have been paid.

[35] The Owner argues that the charge under s 40.2 of the Bylaws is not allowed until Condo Corp obtained judgment in the Negligence Action and filed a writ of enforcement pursuant to s 36(8) of the *CPA*, which states:

(8) A caveat in respect of a monetary sanction or other debt to a corporation, other than a contribution under section 39, may be registered against the certificate of title of a unit only pursuant to a writ of enforcement.

[36] The Owner states that this provision demonstrates a legislative intent to only allow a condominium corporation to register a caveat for a claim other than a contribution until it has obtained a writ of enforcement.

[37] Justice Graesser did not consider this statutory provision when he stated the following in ***Tutt v The Owners: Condominium Plan No. 7822572,*** 2020 ABQB 213:

> [57] There is nothing to prevent parties from agreeing that debts and other obligations may be secured against someone's interest in land. Borrowers routinely sign charging agreements securing debts unrelated to the acquisition, maintenance and improvement of the land itself. Such agreements are capable of supporting caveats, as the charging agreement (if validly made) creates an interest in the lands charged.
>
> [58] The bylaws bind all owners as if they had entered into the bylaws as a contract with the condominium corporation. In this case, the Owner's bylaws allow for costs to be recovered against a defaulting owner on a full indemnity basis, and that such costs constitute a charge against the owner's interest in the unit. No priority for costs is recoverable under the *Condominium Property Act* or the caveat contemplated in section 39. However, where claims are stated in the bylaws to be a charge against the owner's unit, those claims are at law caveatable as they constitute an interest in land.
>
> [59] That may have the unfortunate result of requiring two caveats: one under the *Condominium Property Act* provisions and the other under the bylaws. If a condominium corporation filed one caveat securing both claims, it would be required under section 39.2(10) to discharge the caveat if the contribution portion of the total has been paid, even if the remaining claims had not.

[38] In my view, the rights given to Condo Corp under Bylaw 40.2 should not be considered as something distinct and apart from its rights under s 39(1)(a) of the *CPA.* As I have opined previously, that section of the *CPA* allows a condominium corporation to claim that "damages caused by an act or omission of an owner, tenant or occupant" give rise to a charge (called a contribution) "if provided for in the bylaws". Bylaw 40.2 is providing for that charge. But pursuant to Bylaw 40.2 the act or omission of the owner, tenant or occupant must also be a breach of the Bylaws to give rise to that charge.

[39] Although a resolution should be passed, failure to do so does not invalidate the registration of the Caveat: ***Condominium Corporation No 311443 v Goertz,*** 2016 ABCA 362**.**

[40] With respect to the argument made by counsel for the Owner that this amounts to a prejudgment remedy, I simply state that is the effect the legislature has given to a contribution. But I also note that it is not final. If a claim for a contribution is wrong, or in an excessive amount, the owner of that unit may challenge that claim.

[41] At this stage, I must consider whether the Owner has breached the Bylaws.

[42] In my view the evidence establishes that the Bylaws were breached. Both Board member Russell Zadimersky and plumber Corey Salloway testified that there was a musty smell (also described as "musky") when they entered the bathroom to find the source of the water leak. Mr. Salloway said that smell in the bathroom meant to him there could be water damage behind the walls. Mr. Zadimersky associated that musty smell with black mould. He testified that "there was black – there was some black along the door frame and just to the edge of the tub and in around the corner, towards the closet". That is why he asked to look in the closet and move the pile of clothes on the floor of the closet. Photos have been put into evidence showing the extent of the water damage and "considerable amount of mold in the closet".

[43] Bylaw 27.1 has been breached as the Unit has not been kept in a good state of repair. Bylaw 28.1 has been breached as Jayant's use of the Unit created a nuisance and a hazard to other unit owners in the condominium complex.

[44] I want to make it clear that I am not saying that every water leak in a condominium unit amounts to not keeping the unit in a good state of repair. It is a question of fact in each case as to the extent of the water leak. In this case where: witnesses refer to the smell of mustiness upon entry; the obvious thought that this means water damage; there being visible black mould leading to the closet; and a considerable amount of mould behind clothes piled in a closet amounts to breach of the Bylaw requiring a unit to be kept in good repair and the Bylaw against the creation of a nuisance or hazard.

[45] Although I do not need to deal with it, I also conclude that the Owner would be liable in negligence. Despite Jayant's denial, the evidence seems quite clear that the water leak was caused by Jayant loosening the tub drain and not tightening it as was required. Furthermore, allowing black mould and drywall rot to the extent occurring here, is also negligent.

[46] Finally, I wish to state that I do not think that this result upsets or disturbs the fine balance between what should be the responsibility of an individual unit owner and the responsibility of all the unit owners (as represented by the condominium corporation). The cost of repair to common property caused by a breach of bylaws by an individual owner should not be the responsibility of all the unit owners, but should be the responsibility of the unit owner responsible for the damage; and an *in rem* charge protecting the collective is warranted if the bylaws so provide.

Conclusion

[47] The Owner's application for a declaration that Condo Corp is liable for damages for improper conduct is dismissed.

Heard on the 14th day of February, 2025.
Dated at the City of Edmonton, Alberta this 7th day of March, 2025.

B.W. Summers
A.J.C.K.B.A.

Appearances:

Robert Noce KC and Michael Gibson
Miller Thomson LLP
for the Applicant

Jose A Delgado
Bishop & McKenzie LLP
for the Respondent