IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Louie v. The Owners of Strata Plan VR-1323,* 2015 BCSC 1832

Date: 20151008
Docket: S102383
Registry: Vancouver

Between:

Angela Louie

Plaintiff

And

The Owners of Strata Plan VR-1323

Defendant

- and -

Docket: S092728
Registry: Vancouver

Between:

Angela Louie

Plaintiff

And

Aviva Insurance Company of Canada, Aviva, Compagnie D'Assurance Du Canada, Axa Pacific Insurance Company, And in French, Axa Pacifique Compagnie D'Assurance, St. Paul Fire & Marine Insurance Company, and XL Insurance Company Limited

Defendants

Before: The Honourable Mr. Justice Greyell

Reasons for Judgment

Counsel for the Plaintiff:	R. Shore
Counsel for the Defendant, The Owners of Strata Plan VR-1323:	G. Trotter
Counsel for the Defendants, In Action No. S092728:	T. Darby
Place and Date of Trial/Hearing:	Vancouver, B.C. April 27 - May 1, 2015 and May 4 - 8, 2015
Place and Date of Judgment:	Vancouver, B.C. October 8, 2015

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[1] Ms. Louie seeks damages against the strata corporation, The Owners of Strata Plan VR-1323 (the "Strata"), and the defendant insurance companies arising from a fire in her strata unit on April 17, 2008. The fire was the result of the operation of an illegal drug laboratory operated by her tenant, a Mr. Tweedly (the "Tenant").

[2] The Strata denies responsibility for the cost of remediating the damage caused by the fire and counterclaims for the costs incurred in the investigation and remediation of the fire and seeks a declaration the plaintiff is liable to indemnify the Strata for any future expenses for the "investigation, remediation, repair or reconstruction of the common property of the Strata, to the Strata Lot of the plaintiff or to the Strata Lot of any other owner related in any way either to the Fire and/or to the drug residue which originated in the Unit".

[3] The claims against the defendant XL Insurance Company Limited ("XL"), the holders of the insurance policy covering the contents of Ms. Louie's Unit were dismissed by consent during the trial.

[4] The remaining defendant insurers ("Strata Insurers") hold the Strata's insurance policy and say the plaintiff has not proven she has a claim against them pursuant to the terms of their policy with the Strata. These defendants say any damage to the Unit was below the deductible of their policy and in any event Ms. Louie has not mitigated her loss.

Introduction

[5] Ms. Louie owns strata unit 908 (the "Unit") in a 71-unit residential development located at 855 Burrard Street in Vancouver.

[6] Ms. Louie and her husband, Mr. Lee, purchased the Unit and lived in it from 1994 to 1998 after which they rented the Unit to various tenants.

[7] Ms. Louie, while the owner of the Unit, at all times relied on Mr. Lee to make decisions on all matters concerning the Unit. The plaintiff agrees the decisions

Mr. Lee made concerning issues in this action are binding on her. While Mr. Lee is not the plaintiff in this case, his testimony and evidence are imputed to the plaintiff.

The Fire

[8] On April 17, 2008, there was a fire in the Unit caused by a clandestine methamphetamine/ecstasy laboratory operated by the Tenant.

[9] The fire and smoke/fume contaminants resulting from the fire caused significant damage to the Unit and disruption to other strata unit holders. The building was evacuated while police, fire and a Hazmat team evaluated the extent of the damage.

[10] A "Not Safe to Occupy" notice was placed on the Unit and on April 22, 2008 the City of Vancouver issued a notice the Unit was not to be inhabited until a coordinated special inspection had been conducted. Prior to the inspection, Ms. Louie was required to obtain the services of an environmental consultant to inspect the Unit and submit a report confirming there was no residual contamination and/or health issues associated with the use of the Unit.

[11] The damage caused by the fire had not, to the date of the trial, been remedied.

[12] The Unit has remained unrepaired and unoccupied because of a disagreement between the plaintiff (Mr. Lee), the insurers, and the Strata as to who should pay for the remediation work, or at least, for the first $50,000 of such work (the $50,000 being the deductible under the Strata insurance policy).

[13] At all material times, Vancouver Condominium Services ("VCS") managed the affairs of the Strata.

Issues

[14] The issues raised by the parties generally are:

1. Did the fire of April 17, 2008 cause damage to the common property, to limited common property, or solely to the Unit?

2. Was the Strata obligated under the *Strata Property Act*, S.B.C. 1998, c. 43 [*SPA*] to commence remediation and pay for the first $50,000 damage to the Unit? Did the Strata have the right to demand the plaintiff pay the amount of the deductible under the Strata insurance?

3. What sum, if any, is Ms. Louie entitled to recover in damages? Have the defendants established she failed to mitigate her loss?

4. Have the defendant Strata Insurers caused Ms. Louie damage by failing to provide insurance coverage?

5. What amount, if any, is the Strata entitled to recover under its counterclaim against Ms. Louie?

Background

Insurance Coverage

[15] To place the issues in context, it is useful to commence with an outline of the insurance coverage in place between Ms. Louie, her insurer, and the Strata and its insurers.

The Plaintiff's Unit Insurance

[16] The insurance policy between Ms. Louie and XL (the "XL policy") excluded loss or damage to buildings, structures or personal property "used in whole or in part for the … processing [or] manufacture … [of] marijuana or any other substance falling within the Schedules of the Controlled Drugs and Substances Act." The substances used in the drug lab fell within the Schedules of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

[17] As stated, the claim against XL was dismissed by consent at the beginning of the trial.

The Strata's Insurance

[18] The defendants, Aviva Insurance Company of Canada, Axa Pacific Insurance Company and St. Paul Fire & Marine Insurance Company, were the insurance companies underwriting the policy ("Strata Insurers").

[19] The Strata's insurance policy was an "all risks" policy insuring "all common property, individual strata units and individual dwelling units comprising all structures" of the Strata.

[20] The Strata policy excluded losses arising from criminal activity:

> Losses arising out of the growing, manufacturing, processing, storing or distribution of any drug, narcotic or illegal substances or items of any kind, the possession of which constitutes a criminal offence subject to a deductible of $50,000.

[21] The $50,000 deductible was in the Strata policy effective for the period December 31, 2007 to December 31, 2008.

[22] The Strata policy also excluded loss or damage caused to personal property under the control of an owner or tenant and the removal of the "contents" of a unit including personal property occasioned by loss or damage to the unit. The Strata policy also excluded "cost of expense" arising out of the "clean-up, removal, …or remediation resulting from any actual … release or escape of pollutants …" Pollutants was defined as including any gaseous irritant including odour, vapour, fumes or chemicals.

[23] Vancouver Condominium Services Ltd ("VCS"), the company providing condominium management services to the Strata for a number of years, had arranged for the Strata insurance through an insurance agent, BFL Canada Insurance Services Inc. ("BFL"). VCS and BFL had had an ongoing relationship for a number of years. The strata council had relied on VCS, who managed the Strata property, to arrange the Strata insurance. The policy had been in effect, with changes from time to time, for a number of years prior to the fire.

[24] As required under s. 154 of the *SPA* and its bylaws, the Strata included a report on insurance coverage on the agenda for its AGMs and included the "endorsement" describing in general terms the coverage limits for each item of risk and the deductible.

[25] The plaintiff challenges the reasonableness of the $50,000 deductible. Mr. Lee also says he did not receive reasonable notice of such deductible.

The Lease with the Tenant

[26] The Unit is situated on two floors. The entry is on the ninth floor with a bathroom, bedroom and enclosed balcony on the first floor with the kitchen and living room on the second floor.

[27] The lease with the Tenant was made December 29, 2003 and had a term from January 1, 2004 to December 31, 2004. The tenancy continued on a month-to-month basis thereafter. The lease provided the Tenant was to pay for all utilities and was to keep the Unit in good repair.

[28] The lease provided the Tenant would pay for all damage to the Unit caused by his wilful or negligent act or omission. The lease provided the owner with the right to enter and inspect the premises, after giving proper notice, on a periodic basis to determine whether the Tenant was maintaining the premises repairs.

[29] Mr. Lee testified he entered into the Unit "maybe six times" over the course of the tenancy. He did so when he happened to be in the building or when the Tenant was in arrears of rent. On another occasion he attended with a plumber to fix a dripping faucet. He testified he had no complaints from the Strata or others concerning the Tenant.

[30] While Mr. Lee infrequently attended the Strata's annual general meetings ("AGMs"), he was generally knowledgeable about Strata issues. He read and retained the Minutes of each AGM. As stated, Ms. Louie left matters related to the Unit to Mr. Lee.

[31] Mr. Lee acknowledged he had received a Memorandum from VCS in October 2004 advising of an incident in one of the rented units on the 7th floor of the Strata where the police had dismantled a "meth lab". The Memorandum noted that "meth labs" and "grow ops" in condominiums were increasing significantly in number and that insurance companies considered such operations "at the highest risk generating causes of fire and/or water damages". The Memorandum read:

> …
>
> Apart from the concerns about "who pays the deductible" we must be concerned about the larger issues. Would an insurance underwriter impose greater deductibles on claims arising from grow-ops, meth labs and so on? What would be the chances that the coverage would be denied entirely?
>
> …

[32] The Memorandum also reminded owners many insurance policies expressly exclude coverage for damage resulting from such illegal operations. Further, owners were reminded By-law 11 permitted the Strata to enter a strata lot and that owners may be required:

> to pay all costs incurred by the strata corporation in connection with the investigation and removal of such illegal activity, including, without limitation, any increases to insurance, disposal costs and the costs to repair damage to any strata lot or common property including limited common property.

[33] As the provisions of the *SPA* are central to determining the respective responsibilities of Ms. Louie and the Strata, I will turn next to the relevant provisions of the legislation.

The Relevant Provisions of the *SPA*

[34] The *SPA* provides that "the strata corporation is responsible for managing and maintaining the common property and common assets of the strata corporation for the benefit of the owners" (s. 3) and "must repair and maintain common property and common assets" (s. 72(1)).

[35] "Common property" is defined in s. 1(1) of the *SPA*:

> (a) that part of the land and buildings shown on a strata plan that is not part of a strata lot, and

> (b) pipes, wires, cables, chutes, ducts and other facilities for the passage or provision of water, sewage, drainage, gas, oil, electricity, telephone, radio, television, garbage, heating and cooling systems, or other similar services, if they are located
>
> (i) within a floor, wall or ceiling that forms a boundary
>
> (A) between a strata lot and another strata lot,
>
> (B) between a strata lot and the common property, or
>
> (C) between a strata lot or common property and another parcel of land, or
>
> (ii) wholly or partially within a strata lot, if they are capable of being and intended to be used in connection with the enjoyment of another strata lot or the common property;
>
> [Emphasis added.]

[36] Section 68 defines strata lot boundaries:

> **68** (1) Unless otherwise shown on the strata plan, if a strata lot is separated from another strata lot, the common property or another parcel of land by a wall, floor or ceiling, the boundary of the strata lot is midway between the surface of the structural portion of the wall, floor or ceiling that faces the strata lot and the surface of the structural portion of the wall, floor or ceiling that faces the other strata lot, the common property or the other parcel of land.
>
> [Emphasis added.]

[37] The *SPA* requires the Strata to obtain and maintain property insurance:

> **149** (1) The strata corporation must obtain and maintain property insurance on
>
> (a) common property,
>
> (b) common assets,
>
> (c) buildings shown on the strata plan, and
>
> (d) fixtures built or installed on a strata lot, if the fixtures are built or installed by the owner developer as part of the original construction on the strata lot.

[38] Under s. 154 the Strata is required to review its insurance annually and to report on insurance coverage at each annual general meeting.

[39] "Fixtures" are defined in the *Strata Property Regulation*, B.C. Reg. 43/2000, as:

> items attached to a building, including the floor and wall coverings and electrical and plumbing fixtures, but does not include, if they can be removed without damage to the building, refrigerators, stoves, dishwashers, microwaves, washers, dryers or other items.

[40] Section 155 of the *SPA* provides that the named insured's in a Strata's insurance policy include the strata corporation, the owners and tenants of the strata lots, and the persons who normally occupy such strata lots.

[41] Because the parties have a different interpretation of s. 158 of the *SPA* I will set out the provisions in full:

> **Insurance deductible**
>
> **158** (1) Subject to the regulations, the payment of an insurance deductible in respect of a claim on the strata corporation's insurance is a common expense to be contributed to by means of strata fees calculated in accordance with section 99 (2) or 100 (1).
>
> (2) Subsection (1) does not limit the capacity of the strata corporation to sue an owner in order to recover the deductible portion of an insurance claim if the owner is responsible for the loss or damage that gave rise to the claim.
>
> (3) Despite any other section of this Act or the regulations, strata corporation approval is not required for a special levy or for an expenditure from the contingency reserve fund to cover an insurance deductible required to be paid by the strata corporation to repair or replace damaged property, unless the strata corporation has decided not to repair or replace under section 159.

[42] Ms. Louie argues this section obligated the Strata to authorize the repairs, to pay any amount up to the deductible under the policy, and then seek recovery of the cost of such repairs as a common expense from all owners. The Strata argues the section does not require it to pay any amount of the deductible, but is permissive only. That is, it has the discretion whether to pay any amount within the deductible and then may seek to recover the amount it pays from the owner. The Strata says Ms. Louie was responsible to undertake remediation for repairs within the deductible amount.

[43] In support of its position the Strata relies on s. 133(1) of the *SPA* and the Strata's Bylaws:

> **133** (1) The strata corporation may do what is reasonably necessary to remedy a contravention of its bylaws or rules, including
>
> (a) doing work on or to a strata lot, the common property or common assets, and,
>
> (b) removing objects from the common property or common assets.
>
> (2) The strata corporation may require that the reasonable costs of remedying the contravention be paid by the person who may be fined for the contravention under section 130.

The Bylaws of the Strata

[44] The *SPA* requires each strata corporation to have bylaws providing "for the control, management, maintenance, use and enjoyment of the strata lots, common property and common assets" and for the administration of the Strata (s. 119).

[45] The *SPA* provides management of the affairs of a strata corporation is vested in its elected strata council (s. 26).

[46] For the purposes of this case, the relevant portions of the defendant Strata's bylaws provide:

> 3.1 An owner must repair and maintain the owner's strata lot, except for repair and maintenance that is the responsibility of the strata corporation under these bylaws. *(Feb. 13/2003)*
>
> …
>
> 4.1 A resident or visitor must not use a strata lot, the common property or common assets in a way that
>
> (a) causes a nuisance or hazard to another person, (Feb*. 13/2003)*
>
> (b) …
>
> (c) unreasonably interferes with the rights of other persons to use and enjoy the common property, common assets or another strata lot, *(Feb. 13/2003)*
>
> (d) is illegal, or *(Feb. 13/2003)*
>
> (e) is contrary to a purpose for which the strata lot or common property is intended as shown expressly or by necessary implication on or by the strata plan. *(Feb. 13/2003)*
>
> 4.2 A resident or visitor must not cause damage, other than reasonable wear and tear, to the common property, common assets or those parts of a strata lot which the strata corporation must repair and maintain under these bylaws or insure under section 149 of the Act. *(Feb. 13/2003)*
>
> [Emphasis added.]

[47] The provisions of Bylaw 4.4 are particularly relevant to the position taken by the Strata:

> 4.4 An owner shall indemnify and save harmless the strata corporation from the expense of any maintenance, repair or replacement rendered necessary to the common property, limited common property, common assets or to any strata lot by the owner's act, omission, negligence or carelessness or by that of an owner's visitors, occupants, guests, employees, agents, tenants, or a member of the owner's family, but only to the extent that such expense is not reimbursed from the proceeds received by operation of any insurance policy. In such circumstances, and for the purposes of bylaws 4.1, 4.2 and 4.3, any insurance deductible paid or payable by the strata corporation shall be considered an expense not covered by the proceeds received by the strata corporation as insurance coverage and will be charged to the owner. *(Feb. 13/2003)*
>
> [Emphasis added.]

[48] Bylaw 12.1 mirrors the *SPA* but elaborates on the Strata's obligations to repair and maintain common assets and common property. Bylaw 12.1(d) sets out the Strata's obligations to repair and maintain a strata lot, restricting such duty to repair and maintain to the following:

> **Powers and Duties of Strata Corporation**
>
> **12. Repair and maintenance of property by strata corporation**
>
> 12.1 The strata corporation must repair and maintain all of the following:
>
> (a) common assets of the strata corporation; *(Feb. 13/2003)*
>
> (b) common property that has not been designated as limited common property; *(Feb. 13/2003)*
>
> …
>
> (d) a strata lot, but the duty to repair and maintain it is restricted to *(Feb. 13/2003)*
>
> (iii) the structure of a building, *(Feb. 13/2003)*
>
> (iv) the exterior of a building, *(Feb. 13/2003)*
>
> (v) patios, chimneys, stairs, balconies and other things attached to the exterior of a building, *(Feb. 13/2003)*
>
> (vi) doors, windows, skylights on the exterior of a building or that front on common property, and *(Feb. 13/2003)*
>
> (vii) fences, railings and similar structures that enclose patios, balconies and yards. *(Feb. 13/2003)*

Chronology of Events Subsequent to the Fire

[49] On April 22, 2008, Mr. Donay, an independent insurance adjuster who represented the Strata Insurers, issued a "preliminary" report to the insurers recommending the insurers maintain a reserve of $90,000 to cover the repairs to the Unit (exclusive of the deductible of $50,000).

[50] On May 13, 2008, Pacific Environmental Consulting and Occupational Hygiene Services ("Pacific"), who Mr. Donay engaged to conduct an investigation and sampling of the contamination which had occurred to the Unit, provided its Report. Of the seven samples taken, two fell within acceptance levels with the major contamination showing in samples taken from inside the exhaust duct above the kitchen stove, the living room T.V. stand and from a washroom counter soap box.

[51] Mr. Donay forwarded the results to Mr. Lee on May 15, 2008 with the following comment:

> Mr. Lee I attach the hyg[i]enist's in[i]tial findings. We are awaiting for her remediation recommendations which may require contents to be disposed of by a Haz mat contractor. Regardless of how contents must be removed the cost will not be borne by the strata insurers. If you tena[n]t is not prepared to take care of then the responsibility falls onto yourself. Is the tena[n]t around. I will have further details for you next week.
>
> [Emphasis added.]

[52] On May 16, 2008, Pacific sent its Report and recommendations to Edenvale Restoration Ltd ("Edenvale") and Mr. Donay. The report contained 17 recommendations to remediate the Unit including:

- removal and disposal of items such as the kitchen appliances, cabinets, counters, drywall, flooring and carpets,
- cleaning of the remaining drywall in the suite,
- removal of all porous and semi-porous contents on the first floor and cleaning of nonporous materials,
- inspection of the plumbing system for corrosion and removal of all P-traps,

- removal and disposal of all contents on the second floor.

[53] The Report noted the work was to be carried out by "an experienced and reputable contractor familiar with hazardous materials remediation work procedures" and was to be followed by a "visual inspection and clearance sampling … to ensure that the suite is safe for occupancy by unprotected individuals".

[54] One of the recommendations concerning ducting has led to the major contention between the parties:

> …
>
> 10) all ducting associated with the stove exhaust fan should be removed, properly disposed of and replaced. If the ducting connects with ducting from another suite, all of the ducting, including that going to the other suite should be removed and replaced;
>
> …
>
> [Emphasis added.]

[55] On May 21, 2008, Mr. Donay sent Mr. Lee an email advising him it was his responsibility to remove all contents from the Unit:

> I attach the consultants report. You or your tena[n]t are responsible to remove the contents. It seems the upstairs contents are a bigger concern and may have to be removed by a Hazmat type contractor. Please remove and then call me to discuss.
>
> [Emphasis added.]

[56] On May 23, 2008, Mr. Donay sent Mr. Lee a copy of an email addressed "Gentlemen" advising he had spoken to a hygienist who had confirmed "all contents need to be removed and disposed of in a Hazmat manner". He wrote:

> This is Mr. Lee's responsibility as unit owner. Once done the strata insurers can undertake removal and disposal cabinets, carpets, etc, as outlined in the report. Mr. Lee I tried calling you … but # not in service. Strata insurers will engage Dan Sorge to handle their demo, Mr. Lee you may wish to speak with him about the costs to remove contents.

[57] Mr. Lee responded on May 23rd that he was "attempting to reach the tenant to arrange removal of his things-maybe he is not in jail yet".

[58] On May 26, 2008, after reviewing the Pacific Report, Mr. Doney revised his estimate of the amount of the insurance reserve to $50,000 (exclusive of the deductible). He recommended the contents of the Unit be removed at the owner's or tenant's expense, that demolition scope and costs be determined, that once demolition was completed further air sampling be conducted and then final repair scope and cost be determined.

[59] At its May 27, 2008 council meeting the Strata considered the Pacific Report and, on the recommendation of VCS, engaged Edenvale to prepare an estimate of the cost of remediation work to the Unit. Edenvale had experience in hazardous materials remediation work and the requirements of the City of Vancouver.

[60] Edenvale's estimates, issued by a related company, First Onsite Restoration ("Onsite"), were in the aggregate amount of $48,866 inclusive of an amount to remove contents deemed contaminated. The content removal estimate was $13,523; the repair estimate was $35,343. The estimates did not include any amount which might be required for the removal and replacing of the exhaust ducting or inspection of the plumbing system or steam cleaning the common hallway.

[61] On June 10, 2008, Mr. Donay sent VCS a proof of loss form "[i]n accordance with the Insurance Act of B.C." Mr. Donay advised he was waiting estimates for remediation from Onsite and advised VCS the insurers were questioning whether they would provide coverage for the loss.

[62] On June 11, 2008, Mr. Lee was advised by XL it was denying coverage under its policy because the damage to the Unit was caused by a clandestine drug laboratory and such damage was specifically excluded from coverage under its policy with Ms. Louie.

[63] The Strata council next met June 24, 2008. After considering the Onsite estimate, the Strata instructed VCS to send Ms. Louie a letter including a copy of the Pacific Report and Onsite estimate. The letter of June 25, 2008 requested her to have the scope of work outlined in the Pacific Report completed:

> The strata council is asking you to have the scope of work outline in the Pacific Report completed as soon as possible by an experienced and reputable contractor familiar with hazardous material removal and remediation work procedures, in compliance with the City of Vancouver legal requirements.
>
> Upon completion, council is asking you to submit via the management company, a copy of the coordinated Special Inspection Report, which must be carried out by the District Building, Plumbing, Electrical and Property inspectors as per the April 22, 2008 City of Vancouver's letter sent to you by W.M. Johnston, P.Eng - City Building Inspector and Chief Building Official stating that [t]he unit [is] safe for occupancy and there are no health issues associated with its use as a clandestine meth lab.

[64] On June 25, 2008 at Mr. Lee's request, Mr. Donay sent him a copy of the Strata insurance policy and declaration page noting that the Strata Insurers were "presently reviewing whether the loss is covered."

[65] On July 10, 2008 by email, Mr. Lee inquired of Mr. Donay whether the insurers had made a decision about coverage as it had "been quite some time" and the policy "only consists of about 35 pages".

[66] Mr. Donay responded he was still waiting instructions. He asked Mr. Lee if he had arranged for the removal of the Tenant's contents.

[67] By mid-July 2008, the Strata Insurers decided they would cover the loss subject to the $50,000 deductible and other excluded terms of the policy, notably those provisions concerning the removal of the contents of the Unit. A work order was authorized and sent to VCS. The work order was subject to Mr. Lee removing the contents of the Unit.

[68] On July 17, 2008, Mr. Lee responded to Mr. Donay's July 10 email concerning removal of the Tenant's contents. He said he "didn't for[e]see a problem with removal of contents", that he was getting another quote. He noted there was no quote or allowance for the removal of exhaust ducting and that this may be a significant amount, especially if the ducting was common with other units.

[69] Mr. Donay responded July 18:

> The strata insurers will be providing coverage. Arrangements being made to do demo once contents removed. Your comments re the scope of work are duly noted, [y]ou should concentrate on your responsibility of safely removing the contents. Every time you contact me you complain at the length of time that has passed and no action, what about you, you told me 2 months ago that you were having the contents removed. You need to get on with it. Advise me when this will be done.
>
> [Emphasis added.]

[70] Mr. Lee had made efforts to contact the Tenant during the period following the fire. Mr. Lee testified he spoke with the Tenant by telephone after the fire and that the Tenant told him he knew nothing about the fire but was concerned about recovering his belongings. Mr. Lee said he pressed the Tenant to pay for the damage which he told the Tenant would be in the range of between $60,000-$70,000, that the Tenant said he would think about it and speak to his lawyer. Mr. Lee did not hear back from him.

[71] At its July 29, 2008 meeting, the Strata council voted to send a letter to Ms. Louie asking her to provide the council with the $50,000 deductible amount or a payment plan for paying the amount.

[72] The letter, dated July 30, 2008, read:

> …
>
> Following an in-depth review and analysis, the strata council concluded that the cause of the incident which triggered the damages and the subsequent insurance claim is the owner's responsibility and therefore, is asking you to submit in writing, via the management company, at your earliest convenience but hopefully, in due time to be reviewed at their next meeting, on August 26th a payment plan for the above-mentioned deductible.
>
> …

[73] On July 30, 2008, Onsite was requested by Mr. Donay to contact VCS to advise the Strata it was prepared to proceed with the repairs outlined in the Pacific Report but not with the removal of the contents. Mr. Sorge, the project manager who wrote the letter, asked if the owner/occupant had removed the contents from the Unit. Mr. Sorge indicated he had not heard from Ms. Louie or Mr. Lee.

[74] On August 27, 2008, VCS wrote to Ms. Louie sending her a copy of the Edenvale invoice in the amount of $3,557 for its inspection report noting the cause of the damage was the owner's responsibility.

[75] On September 25, 2008, Ms. Louie's counsel wrote to VCS responding to its letters of June 25, July 30 and August 27, 2008, advising them his clients would not be paying for the remediation to the Unit. Counsel also advised it was his client's position the Strata was "responsible for authorizing the repairs and paying the insurance deductible".

[76] On October 5, 2008, Mr. Donay advised VCS the insurers had determined, based on the Onsite estimate, that the loss was less than the $50,000 deductible, and that they had closed the claim file. Mr. Donay again provided VCS with a blank Proof of Loss form "in accordance with the Insurance Act of British Columbia."

[77] Neither Mr. Lee nor Ms. Louie were provided with a proof of loss claim form by Mr. Donay or by VCS on behalf of the Strata.

[78] It is clear that by the end of July 2008, at the latest, the plaintiff, the Strata and its insurers had drawn lines in the sand as to their respective positions. The Strata Insurers and the Strata took the position Ms. Louie was responsible for the removal of the contents from the Unit and for the first $50,000 of the damage caused by the fire. The Strata would not proceed with remediation steps until it had been paid the $50,000 up front. Mr. Lee was of the view the fire and contaminants could well have affected common property and that the Strata, under the *SPA*, and the Strata Insurers, under the policy, had the responsibility to remediate such damage.

Ms. Louie's Action against Mr. Tweedly

[79] On April 9, 2009, Ms. Louie commenced an action against the Tenant in this court claiming for the "damage suffered in its strata unit" as a result of the fire.

[80] The Tenant did not file an appearance and Ms. Louie took default judgment against him with damages to be assessed on September 2, 2009. The plaintiff has not taken steps to proceed with that assessment.

The Claims

Ms. Louie's Action against the Strata Insurers

[81] Ms. Louie commenced an action against the Strata Insurers on April 9, 2009 asserting damages for failure to compensate her for damage to the structure and fixtures in her unit as a result of the fire. The Strata Insurers defended by denying they issued a policy of insurance to the plaintiff, in the alternative arguing she failed to make a claim or provide a proof of loss as a condition precedent to recovery and in the further alternative that any loss she suffered was less than the deductible. Finally, the Strata Insurers claimed that any loss, if found, was not caused by an act or omission on the part of the Strata Insurers and the plaintiff failed to mitigate such loss.

Ms. Louie's Action against the Strata

[82] Ms. Louie commenced this action on April 8, 2010 claiming damages against the Strata asserting it was "obliged to rectify the damage caused to the Unit by the fire." Ms. Louie claimed that the Strata breached the *SPA* by refusing and/or neglecting to repair the damages to fixtures of the structure of the Unit. In the alternative, Ms. Louie claimed that the Strata failed to adequately insure the Strata. The plaintiff sought damages for loss of value, loss of capacity to sell, and loss of rental income in relation to the Unit.

[83] The Strata defended the action arguing it was not obligated to repair because the fire caused no damage to the structure of the Unit or to the common assets or property and that the plaintiff failed or neglected to comply with her obligations to repair and maintain the Unit. In the alternative, the defendant Strata claimed the plaintiff's loss was caused by the negligence of the plaintiff or her tenant. The Strata also claimed in the alternative that the plaintiff had failed to mitigate her loss by failing to proceed with the repairs to her Unit, alternatively by failing to pay the

applicable insurance deductible to have the Unit repaired or by failing to promptly bring a petition to the court for declarations under s. 160 of the *SPA*. In addition, in its amended response to civil claim, the defendant Strata says the plaintiff has been dilatory in its prosecution of this case. The Strata also counterclaimed for the cost it has incurred to investigate the loss and for any ducting remediation required.

The Trial Proceedings

[84] The two actions were ordered to be heard together. The parties agreed the evidence of all witnesses and the documents filed as exhibits could be relied on by any party in either action.

[85] On November 14, 2012, Mr. Lee swore an affidavit particularizing the damages the plaintiff had or would have incurred as a result of the fire:

1.	City of Vancouver - attendance at fire scene to inspect	$2,352
2.	Interest on late payment to City of Vancouver	$2,916
3.	Hazco	$13,040.48
4.	Locksmith	$250.95
5.	Canadian Subsurface Investigations	$1,102.50
6.	Illustrations	$225.00
7.	Remediation supplies	$448.31
8.	City of Vancouver microfilm copies of plans	$108.80
9.	"Further duct work in the event that it becomes necessary"	$30,000
	Total:	**$50,444.04**

[86] In addition, Ms. Louie claimed for lost rental income. The parties agree that subject to the court's finding as to liability and mitigation, the plaintiff's potential loss of rental income would approximate $125,000 to the date of trial. Ms. Louie also

asserted the agent representing the Strata Insurers did not act in good faith because he knew the estimates would very likely well exceed the quoted amounts.

[87] Mr. Donay agreed in cross-examination he was aware the Onsite estimate of repair could be significantly higher, particularly if the ducting had to be removed.

[88] I have earlier set out the Onsite remediation estimate which excluded repair to the ducting.

Evidence Relating to the Unit's Ducting

[89] This location of the ducts became a significant issue because of the provisions of the *SPA* concerning "common property" and the cost and method of remediating the ducting.

[90] Mechanical drawings of the Strata showing the location of the ducting were not available to the parties at the time. What was known was that the kitchen exhaust fan vented into ducts in the ceiling of the Unit. What was not known was whether the ducts joined with ducting from other strata units before venting to the exterior of the building or what was involved in the venting had to be removed or if such removal was even possible.

[91] I will turn to review the evidence at trial relating to the location of the ducting.

[92] The mechanical plans relating to the Strata were not produced until after the commencement of the trial. The plans had been inadvertently overlooked (including by Mr. Lee) but were introduced as a trial exhibit. To the extent the plans are accurate and were not deviated from during construction (about which there was no evidence) they show the ducting does not join with ducting of any other strata unit.

[93] Pacific re-examined the Unit on July 8, 2014 to determine if conditions had changed since its initial investigation. Pacific reviewed the recommendation that the ducts required removal and replacement and found that doing so may be impossible as the ducts may be encased in the concrete ceiling subfloor slab and not easily

assessable for removal. Pacific recommended the services of a contractor to effectively clean the ducting or the insertion of a sleeve within the original duct.

[94] Mr. Edward Thomson of B.C. Air Duct and Furnace Cleaning provided Onsite with a quotation for cleaning the ducting in August, 2014. Mr. Thomson, who had been in the business of cleaning ducts for 21 years and had done some 50 drug-related duct cleaning jobs, testified the cost of cleaning the Unit's ducts would be approximately $5,775. He had not been in the Unit but based his quote on photographs of the Unit taken by Onsite. His estimate did not include related testing.

[95] Mr. Lee, being concerned about where the ducting went, investigated the location of the ducting in late 2014 by cutting two holes in the drywall where he could view two ducts running parallel to the plenum in a north-south direction but could not see if other ducting joined the ducting from the Unit. He agreed if the ducting needed to be replaced it could be run in a dropped ceiling area in the living room but that it would "look awful".

[96] Mr. Lee engaged Canadian Subsurface Investigations Inc. to carry out a Ground Penetrating Radar survey to try to determine the location of the kitchen ducting. The report which was produced suggested the stove ventilation duct "continues running towards into the next door's unit". The report, however, is inconclusive and recommends a camera inspection to confirm whether this is the case. That investigation was never done.

[97] XTR Building Services performed two smoke tests on the Unit. The first test produced unreliable results. XTR performed the second test on March 13, 2015 at the request of the Strata with Mr. Lee in attendance and concluded from visual observations taken of where smoke exited ducting that "the ducting of 908 is not connected with the other neighbouring units".

The Strata and its Insurance Obligations

[98] Bylaw 35.1(j) requires the Strata to report on insurance coverage in accordance with s. 154 of the *SPA* at its AGMs.

[99] I find the Strata complied with the provisions of the *SPA* and its bylaws. The Notice of each AGM contained a summary page relating to the strata insurance then in effect which included the amount of the coverage, what was covered, and a description of the deductibles applicable to each area of damage (i.e. water damage, earthquake damage, etc.).

[100] On the Notice of the AGM held December 11, 2007, that is, in the year immediately preceding the loss, while the attached summary page did not list any deductible for criminal offenses in the "deductible" column of the summary, the summary did state in an adjacent column under "Insuring Agreement":

> Losses arising out of the growing, manufacturing, processing, storing or distribution of any drug, narcotic or illegal substances or items of any kind, the possession of which constitutes a criminal offence subject to a deductible of $50,000.

[101] I do not accept the plaintiff's argument the policy was insufficiently clear or that the Strata did not reasonably bring to Mr. Lee's attention the fact there was a $50,000 deductible in place.

[102] Mr. Lee was an experienced businessman. He graduated from university with a degree in commerce. He had worked in construction and as a real estate broker. He manages approximately ten other residential rental units in the Vancouver area including three in the Strata premises on behalf of a number of friends and clients who do not live in Vancouver. He had lived in the strata complex from 1988 to 1994.

[103] Mr. Lee (and hence Ms. Louie) must be taken to have been fully aware of the provisions of the *SPA*, the Strata's bylaws and the contents of the Strata's Minutes of its AGMs. If he was not aware of the contents of the strata insurance policy I find he chose not be aware of it through wilful blindness. He testified in cross examination he had kept copies of the Minutes of the Strata AGMs from the last 25 years. He agreed while he received Notices of the AGMs he only attended two such meetings after 2005.

[104] Mr. Louie testified in cross-examination he really did not pay much attention to the terms of the insurance policy he had with XL which excluded coverage for the operation of illegal drug laboratories. It is clear from his evidence he had not considered or even knew about the $50,000 deductible or lack of coverage for removal of his tenant's belongings.

[105] Mr. Lee acknowledged receiving the Memorandum from VCS of October 28, 2004 concerning the operation of a drug laboratory in a suite in the building and the risks such an event posed to an owner. He must be taken to have been aware of such risks. He testified he had not been upstairs in the Unit since June 2007.

[106] I also do not accept the plaintiff's position that VCS did not properly represent the Strata or its owners in recommending the Strata enter into the Strata insurance coverage with the defendant insurers. While different policies with different insurers may have been available in the market, there is no evidence the insurance in place with the Strata was not in the best interests of the Strata owners including the plaintiff. VCS recommended an insurer who it dealt with on a number of strata properties it managed. A number of those policies also contained the same deductible amount of $50,000 for damage caused by the operation of illegal drug laboratories. I find there is no substance to the plaintiff's argument on this issue.

[107] Mr. Lee had ample opportunity to review the Strata's insurance policy in place prior to the date of the loss as Ms. Louie had been an owner for a number of years. It was her obligation as the owner of the Unit to be aware of the contents of the Strata policy and of changes made from time to time. It was typical for the Strata not only to raise the issue of insurance at its AGMs, but also to caution its members to read or obtain a copy of the policy and to review it and to caution owners that they should carry sufficient insurance to cover contents loss. The October 28, 2004 Memorandum to all Owners referred to above is one example of such communication.

[108] Mr. Lee agreed in cross-examination he was aware of and had read the Strata insurance policy when it was forwarded to him by Mr. Donay but that he had only focused on certain parts of the policy.

Negligence and Bad Faith

[109] Mr. Lee suggested in evidence that VCS was negligent and did not act in the best interests of the Strata when it arranged the Strata insurance with a $50,000 deductible. I find there is no evidentiary basis to support such an argument. The plaintiff argued there was "bad faith" by VCS as it earned a fee by way of an inducement from a broker to place the insurance with certain insurers rather than "shop around" for a better deal.

[110] Mr. Lee testified he was aware of insurance policies in effect at other strata corporations in or around the Vancouver downtown area which contained a deductible for coverage for illegal drug activity with a significantly lower deductible amount than $50,000. However, Ms. Rena Hamilton, an insurance broker, who had worked in the industry for many years testified that many strata insurance policies contained deductible amounts of $50,000 for damage arising from the operation of illegal drug activities or in situations where there had been a previous incident of an illegal drug operation or where the number of rental units exceeded 50% of all units.

[111] I dismiss the plaintiff's argument VCS acted in bad faith for several reasons. First, there is no evidence other than Mr. Lee's self-serving statement to support it. The only evidence supporting the plaintiff's theory, apart from Mr. Lee's self-serving unsupported evidence other policies existed with a deductible under $50,000 is that on the one occasion when the Strata discovered VCS received a financial benefit from the firm it used to place the insurance, the council took the position that benefit should accrue to the Strata, not to VCS. There is no evidence such a practice continued. Second and more importantly, the plaintiff has not pled the Strata or its agent, VCS, acted in a bad faith manner. Lastly, there is evidence other strata corporations had insurance in place with a deductible of $50,000 in the event of loss

arising from an illegal drug operation. That is, the type of insurance in place with the defendant Strata was not uncommon.

Discussion and Findings on the Issues

1. Did the fire of April 17, 2008 cause damage to the common property, limited common property, or solely to the Unit?

[112] Section 72 of the *SPA* provides the Strata is responsible for the repair and maintenance of common property and common assets but may make the owner of a lot responsible for repair and maintenance or limited common property if the owner has the right to use the common property.

[113] As noted, the definition of common property includes ducting "if … located within a … ceiling that forms a boundary" between two strata lots or if such ducting is "wholly or partially within a strata lot, if they are capable of being used and intended to be used in connection with the enjoyment of another strata lot…" (s. 1(1)).

[114] The bylaws of the Strata provide an owner must repair and maintain the owner's strata lot including limited common property except for property that is the responsibility of the Strata (s. 3.1).

[115] Bylaw 12.1 sets out the obligations of the Strata to repair common assets, common property "not [] designated as limited common property" and a restricted list of the limited common property the Strata must repair and maintain. The Strata's duty to repair and maintain a strata lot is restricted to the structure of a building, the exterior of a building, patios, chimneys, stairs, balconies and other things attached to the exterior of a building, doors, windows and skylights on the exterior of a building or that front on the common property, fences, railings and similar structures that enclose patios, balconies, and yards.

[116] One of the difficulties faced by the parties in the present case is that, as matters developed, it was initially recommended the ducting be replaced. However, no one knew where the ducting was located in the ceiling. No one knew if the ducting joined ducting from another strata lot before exiting or exhausting from the

building. During the spring and summer of 2008 no one had access to the mechanical drawings of the building which would assist them in determining the location of the ducting. Mr. Lee made several holes in the ceiling and ducting to try to determine, without success, where the ducting led and how difficult it would be to remediate.

[117] Mr. Lee became concerned after receiving the Pacific Report in May 2010 that all the ducting would have to be removed including that attached to other units. That work would involve a structural engineer to determine how and where to replace the ducts. He testified he suspected it would not be possible to cut out ducts which were "between rebar" and that the remediation work would involve a substantial and costly amount of structural change.

[118] In my view the best evidence supports a conclusion the ducting was limited common property - that is common property designated for the exclusive use of Ms. Louie's Unit.

[119] The responsibility for the repair and maintenance of such property falls to the owner under s. 3 of the Bylaws as such repair and maintenance is not listed as a responsibility of the Strata under s. 12.1 of the Bylaws. An owner is also responsible for damage and repair to his or her Unit.

[120] Accordingly, I find Ms. Louie was responsible to remediate the damage to the ducting as well as all damage to the interior of the Unit. In cross-examination, Mr. Lee said it did not occur to him he could have hired his own contractor and paid the first $50,000 of repairs or that he could have paid the $50,000 to the Strata. In essence, Mr. Lee denies he is responsible for paying anything. He testified it was "fixed in my mind" the cost would exceed the deductible "early on".

[121] I find from the evidence Mr. Lee knew the XL policy excluded coverage for the damage caused by the illegal drug laboratory. He testified in cross-examination Ms. Louie only sued them because of the counterclaim filed by XL. I do not accept this explanation. I further find that Ms. Louie knew (or ought to have known) the Strata

Insurers' policy contained a deductible of $50,000 and exclusion for removal of the Tenant's belongings. The deductible was applicable because the damage was caused by the illegal drug operation. Mr. Lee knew this. It formed the basis of the lawsuit against the Tenant.

2. Was the Strata obligated under the SPA to commence remediation and pay for the first $50,000 damage to the Unit? Did the Strata have the right to demand the plaintiff pay the amount of the deductible under the Strata insurance?

[122] The plaintiff argues s. 158 of the *SPA* imposed an obligation on the Strata to pay for the amount of the deductible and then to seek recovery of the amount paid as a common expense from all strata unit owners.

[123] I do not read the section as imposing such an obligation. In my view, the section does not impose a mandatory obligation on a strata corporation to pay an insurance deductible in every event of a claim under such a policy. Clearly there are situations where there may be damage to common property or limited common property which a strata corporation will be required to repair for the benefit of all or a number of owners and which may be subject to an insurance deductible. In such a situation, the strata corporation would want to proceed with repair. That, in my view, is the situation the section addresses. That is not what happened in this case where the damage was caused by the unlawful conduct of a tenant of one owner and, apart from damage to the carpet in the hallway, the damage occurred to the plaintiff's Unit only.

[124] My interpretation of s. 158 of the *SPA* is supported by the language of s. 160 of the *SPA* which provides a remedy to an owner to apply to court for an order for directions in the event the "strata corporation decides not to repair or replace the damaged property…" (emphasis added). The Strata is clearly given an option to repair or not to repair depending on the circumstances.

[125] This interpretation is also fortified by the wording of s. 133 of the *SPA* which provides the Strata "may do what is reasonably necessary to remedy a

contravention of its bylaws or rules", including "doing work on or to a strata lot, the common property or common assets…" (emphasis added).

[126] The above interpretation is also consistent with this court's decisions concerning the rationale underlying the *SPA*: *Mari v. Strata Plan LMS 2835*, 2007 BCSC 740 at paras. 11-12.

[127] I accept the interpretation of s. 158 argued by the Strata. In my view s. 158 does not require the Strata to pay the amount of the deductible.

[128] The plaintiff relies on the words "required to be paid" in s. 158(3). The words of that section must be read in context with the whole of the section: "required to be paid … to repair or replace damaged property."

[129] In this case the damage clearly was caused by Ms. Louie's tenant and occurred to her Unit. I find that the Strata did not breach the *SPA* by not paying the deductible and by not commencing work on the Unit in this case.

[130] I conclude the Strata had the right to insist Ms. Louie pay for remediation up to the amount of the deductible and that given what was known at the time about the cost of remediation the demand for payment of the full $50,000 was a reasonable one.

3. What sum, if any, is Ms. Louie entitled to recover in damages from the Defendants? Have the defendants established she failed to mitigate her loss?

Against the Strata

[131] From my analysis of the provisions of the *SPA* and the Bylaws of the Strata I have concluded Ms. Louie's claim against the Strata must be dismissed.

Against the Strata Insurers

[132] As noted, Ms. Louie is a named insured under the Strata insurance policy. The Strata insurers agreed to cover the loss subject to the exclusions under the policy and the deductible.

[133] The first question then is whether the evidence established that the loss exceeds the deductible.

What is the Amount of the Plaintiff's Loss?

[134] The principle underlying an award of damages, once causation is established is to award "that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation": see Harvey McGregor, *McGregor on Damages*, 19th ed., (London: Sweet and Maxwell, 2014) at para. 2-002.

[135] The burden of proving both the fact and the quantum of damages rests with the plaintiff: *McGregor* at para. 50-001.

[136] Ms. Louie claims $30,000 for "[f]urther duct work in the event that it becomes necessary". The amount she claims for ducting is an entirely speculative amount.

[137] The quote provided to Mr. Wong by Mr. Kong Phat in 2014 for remediation work, excluding the removal of contents and the City of Vancouver and Hazmat charges, when reduced to 2008 dollars is roughly in the area of $30,000.

[138] But there were other options available to Ms. Louie. It is quite possible the ducting could have been remediated by cleaning. Mr. Ed Thompson of B.C. Air Duct testified how such cleaning would occur and the cost of the same. Mr. Thompson's quote of August 2014 for cleaning the ducting vents and fans was $5,775. The amount would presumably have been less had the work been done in a timely way in 2008.

[139] I find it is also possible in the event the ducting had to be replaced, that such ducting could have been placed in a new bulkhead built from the stove to an exterior wall running against a wall. Mr. Lee dismissed this idea for aesthetic reasons. The defendant Strata Insurers have established this option was a viable one and one

which should have been given serious consideration by Ms. Louie. There was evidence a sleeve could have been placed inside the exiting ducting.

[140] Items such as the City of Vancouver and Hazco charges should be removed from the damages claim against the Strata Insurers as these were for expenses incurred for loss or damage not covered under the policy.

[141] The interest expense item should be removed as Mr. Lee chose not to pay the amount owning to the City. This amount is clearly an avoidable loss.

[142] I assess Ms. Louie's proven damages, subject to her claim for loss of rental income and to mitigation, at $24,000.

Ms. Louie Fails to Mitigate her Loss?

[143] The law is clear that one who claims damages must take all reasonable steps to mitigate that damage. In *McGregor* at para. 9-004 the author discussed the principle of avoiding loss from the consequences of a wrongful act. The author stated:

> The first and most important rule is that the claimant must take all reasonable steps to mitigate the loss to him consequent upon the defendant's wrong and cannot recover damages for any such loss which he could thus have avoided but has failed, through unreasonable action or inaction, to avoid. Put shortly, the claimant cannot recover for avoidable loss.

[144] The onus is on the defendant to show Ms. Louie could have mitigated her loss by taking reasonable steps to so.

[145] The parties have agreed Ms. Louie's loss of rental income, subject to a determination of the issue of mitigation, is $125.000. The loss extends from the 2009 to 2015. No amount is claimed for 2008.

[146] In my view Ms. Louie is not entitled to any amount for loss of rent. There were a number of remedies open to the plaintiff to have mitigated her loss all of which have been outlined above, to repeat, include proceeding with the remediation, (during which process greater certainty would have resulted concerning location of

the ducting and alternatives for remediation); paying the deductible amount to the Strata, or applying to the court for a determination of her responsibilities. Mr. Lee testified the remediation would have taken up to six months.

[147] The gross monthly rent received by the plaintiff in 2009 was $1,391 per month.

[148] As stated earlier, it is clear from the evidence that very early after the fire Mr. Lee concluded he was not going to incur any expense in remediating the Unit. He refused time and time again to take proactive steps to remove the Tenant's contents from the Unit notwithstanding Mr. Donay's repeated requests to do so. Perhaps he harboured the unrealistic hope the Tenant would pay him the monies he requested from him.

[149] Whatever his motivation, he chose not to remove the contents, a step which was required before any remediation work could commence.

[150] Knowing the damage to the Unit was not covered by the XL insurance and the deductible applicable to the Strata policy, Ms. Louie, in my view, had an obligation to take all reasonable steps to mitigate her loss. Those steps included undertaking remedial work on the Unit to bring it back into the condition it was in prior to the fire and removing the contamination resulting therefrom in order to enable Mr. Lee to re-rent the Unit and earn the income for which Ms. Louie claims she lost.

[151] Rather than do this, Ms. Louie adopted the position the loss was that of the Strata and/or covered by the Strata insurance. Mr. Lee refused to take steps to remove the Tenant's property when requested and did not comply with the Strata's requirement to present a payment plan for the deductible. Mr. Lee unreasonably refused to accept the deducible applied to him as opposed to all strata unit owners notwithstanding that the repair cost was to Ms. Louie's Unit, not to common property.

[152] The plaintiff argued a person is not required to spend his/her own funds to mitigate their loss. In my view this argument has no support in the law. The legal

principle is as set out in *McGregor* at para. 9-082 where the author, after summarizing the legal authorities, wrote "a claimant need not risk his money too far" referring to *Tucker v. Linger* (1882) 21 Ch. D. 18 at para. 9-045 which held a claimant may have to spend money in mitigation to effect repairs.

[153] The loss that is the subject of this claim occurred in April 2008. The plaintiff has had years to mitigate her loss but has chosen to leave the Unit in a damaged condition. In my view this conduct falls well short of her legal obligation to take reasonable steps to avoid her losses.

[154] The question is: what would a reasonable person in Ms. Louie's position have done to mitigate her loss? Mr. Lee estimated the work could have been done within six months. In my view a reasonable person in Ms. Louie's position would have begun remediation work at least by mid-July 2008 after the initial cost estimates were in. I find that such remediation work would have taken at the outside between four and six months.

4. Have the defendant Strata Insurers caused Ms. Louie damage by failing to provide insurance coverage?

[155] Ms. Louie's net rental income loss would amount to nine months x $1,400 per month less 5% for repair, maintenance and other contingencies or the amount of $12,000.

[156] When added to the amount of damages determined for remediation Ms. Louie's claim is less that the deductible amount under the Strata insurance and hence she has no claim under that policy or against the Strata Insurers for damages.

[157] "Deductible" is defined at p. 268 in Barbara Billingsley, *General Principles of Canadian Insurance Law*, 1st ed., (Markham, Ont.: LexisNexis Canada, 2008), as "the portion of a loss which the insured agrees to bear before the insurer's obligation to pay arises".

[158] I dismiss Ms. Louie's claims against both the Strata and the defendant Strata insurers.

[159] In view of my findings it is unnecessary to consider the issues raised by the defendants of res judicata, abuse of process and waiver.

5. What amount, if any, is the Strata entitled to recover under its counterclaim against Ms. Louie?

[160] The Strata filed a counterclaim seeking recovery of costs incurred by the Strata to investigate and remedy damage caused by the fire. The Strata relies on ss. 133, 158(2) of the *SPA* and ss. 4.3 and 4.4 of the Bylaws. Under s. 4.3 of the Bylaws an owner is responsible for "any damage caused by occupants, tenants or visitors to the owner's strata lot".

[161] The damage must relate to "common property, common assets or those parts of a strata lot which the strata corporation must repair and maintain under the bylaws or insure under section 149 of the *Act*" (s. 4.2 of Bylaws).

[162] The Strata claims for $3,557.79 which it paid for the Pacific Report for the investigation and remediation of damage caused by the fire in the plaintiff's Unit and $735 to pay a Siemens Building Technologies account to access the transaction report for the Strata's access control system as a result of the fire.

[163] I grant the Strata judgement against the plaintiff in these amounts.

[164] In addition the Strata seeks the following declaration:

> The plaintiff is liable to indemnify the Strata for any future expenditures for the investigation, repair or reconstruction of the common property of the Strata Corporation, the Strata Lot of the plaintiff, or the Strata Lot of any other owner related in any way either to the Fire and/or to the drug residue which originated in the Unit. These sums include but are not limited to any expenditure for the Kitchen Ducting Remediation.

[165] I am not prepared to grant the Strata's claim for a declaration for indemnification for "any future expenditures" for the investigation, remediation, repair or reconstruction of the common property of the Strata, the plaintiff's Unit, or the strata lot of any other owner related to the fire or to the drug residue originating from the Unit for several reasons. In my view this claim for relief is overly broad. If there is/was damage to common property or to other strata lots such damage would surely

have been known by the time of trial and dealt with at trial. These are matters the Strata should have investigated in the some eight years between the fire and the trial.

[166] With the issue of these reasons presumably Ms. Louie will proceed to repair her Unit. If she does not the Strata can take such proceedings as may be available to it under the *SPA.*

"Greyell J."