

IN THE SUPERIOR COURT OF JUSTICE
TORONTO SMALL CLAIMS COURT
SC-08-00066102-0000

BETWEEN:

Xizhen Jenny Chai

(Plaintiff)

-And-

York Condominium Corporation No. 325

and

GPM Property Management Inc.

(Defendants)

Appearances:

Plaintiff in person

Alyssa Minsky and Benjamin J. Rutherford, counsel for the defendants

Hearing Dates: December 14/08, January 23/09 and April 6/09

M. O. Mungovan D.J.:

I. Cause of Action

[1] The plaintiff, Xizhen Jenny Chai, who owns unit number 204, York Condominium Plan No. 325, brings this action against York Condominium Corporation No. 325 (hereinafter referred to as "YCC" or the "Corporation") and its property manager, GPM Property Management Inc. (hereinafter referred to as "GPM"). As regards the defendant, YCC, the unit-owner, Ms. Chai, seeks damages against the Corporation for breach of its statutory duties to maintain, and repair, the heating system that exists in her unit, since it is allegedly part of the common elements. Sections 90 and 91 of the

Condominium Act, 1998¹, c. 19 and section (1) (Repairs and Maintenance of Units) of Article VI (Maintenance And Repairs) of the Declaration² encompass these obligations. In addition, Ms. Chai seeks to hold YCC liable for the alleged negligence of their superintendent on the ground of vicarious liability.

[2] With respect to the defendant, GPM, Ms. Chai does not plead a distinct cause of action against this Company. However, it was responsible for registering a lien on title covering the Corporation's expenses incurred as a result of the flood that occurred in unit 204.

II. The Issues

[3] The questions to be decided in these proceedings are the following:

1. What caused the plaintiff's unit to flood?
2. Does the unit encompass the heating system, consisting of the copper water pipe, the electronic zone control valve, the mechanical valve, the thermostat and the thermometer, all of which are physically located inside the unit?
3. Whose obligation is it to maintain or repair a unit?
4. What costs was the plaintiff responsible for as a result of the flooding that started inside her unit, and travelled outside it to other units and to parts of the common elements?
5. Was the superintendent negligent when he visited the unit before, and after, the flood?

III. The Facts

¹ S.O. 1998, c. 19

² Exhibit 9

[4] Ms. Chai has owned unit 204, comprising part of York Condominium Plan No. 325, since 2002. In 2006 she rented it to Sun, Hongyu (hereinafter "Ms. Sun" or the "tenant") for one year beginning on May 15, 2006 and ending on May 14, 2007.

[5] At around 8:30 on the morning of February 5th, 2007 Ms. Sun found that the air temperature in her unit was too cold for her and her baby. Accordingly, she proceeded down to the ground floor to seek help. She found a telephone number for "Emergency Service", and dialed it. The Emergency Service contacted the superintendent to the condominium building, Ziggy Grendys.

[6] Mr. Grendys testified that he ran to the unit. It was a very cold day, with the minimum temperature being - 16.8 degrees C³. That morning he had checked the weather channel, which reported - 40 degrees C as a result of the wind-chill. He found the unit cold with the temperature inside the unit being approximately 15 degrees centigrade. He immediately looked at the thermostat in the living room, and found that it was turned down to 10, which is the "Off" position for this particular thermostat. Accordingly, there was no heat coming from the heating system. That means that the electronic zone control valve or simply, the electronic valve, which is connected to the thermostat to control the flow of hot water through the copper water pipe, must have been closed shut.

[7] The unit had to have been heated only by the surrounding units, and that was not sufficient for the tenant and her baby on that particular day. Mr. Grendys then turned the thermostat to its maximum position, namely, 30, but according to him, nothing happened, meaning that the thermostat failed to open the electronic valve. He continued to turn the thermostat up

³ Exhibit 4 (immediately following the 4-page expert's report)

and down but that had no effect on this valve. He opened up this electronic valve and found that it was not "spinning". He also felt the copper pipe, and found it to be "ice cold".

[8] The heating system in this high-rise building depends on hot water circulating through copper pipes to radiators, which give off heat. The thermostat sends an electric signal to an electric valve which opens and closes, depending on where one places the thermostat lever. When the thermostat shows more than 10, the hot water begins to flow through the pipe connected to the radiator. On the morning of February 5th, 2007 no hot water was flowing through the pipes, to which radiators in unit 204 were connected, and hence, the radiators were transmitting no heat.

[9] Mr. Grendys immediately called the plumbers, MGS Mechanical Services Ltd., to attend at unit 204. They were already on their way to the condominium for a job given to them at an earlier date. At about 8.35 a.m. Mr. Grendys then left the unit, and returned to removing the snow from one of the sidewalks in the condominium complex.

[10] Fifteen minutes later at about 8.50 a.m. he received a telephone call from Ms. Sun. She reported water flowing through unit 204. Mr. Grendys rushed to the unit. He observed the water pouring out of a burst or ruptured water pipe in the living room just below the air conditioner, which was located in the window (commonly referred to as a "window box air conditioner" for there was no central air conditioning in this building). There was also much steam in this condominium unit, caused by the hot water pouring out of the fractured water pipe, and coming into contact with the much colder air in the unit. The steam was so dense that Mr. Grendys could hardly see his hand six inches away from his face.

[11] He turned the thermostat back to 10 but that did not cause the electronic valve to shut off the flow of hot water through the water pipe. He then decided to close the mechanical valve which was in the "open" position. If he could close that valve, that would stop the flow of water through the pipes located in the unit. However, he was unable to do so, even with "channel logs" commonly used by plumbers. The mechanical valve (also referred to as the "mechanical isolation valve") had seized.

[12] The need for the plumbers was now even more pressing. Mr. Grendys telephoned them a second time, and found that they were still on their way to the condominium. In the meantime, he went to the roof of the condominium building, where he was able to shut off the hot water to the *whole building*. It would take twenty to thirty minutes for the water to drain from the system, whereupon the flooding in unit 204 would come to an end.

[13] The plumbers did finally arrive. They replaced the broken three-quarter inch copper water pipe, the mechanical valve and the electronic valve. Eventually, the radiators started to heat the unit. With the help of Mr. Grendys and his assistant and a commercial outfit called Gulfstar Contracting the water was finally removed from unit 204.

[14] The flood of water from the broken copper pipe in unit 204 did not stop at that unit. It affected many other areas in the building: the 2nd floor common hallway, the neighbouring units on the 2nd floor, namely, #s 201, 202, 203 and 205, the back hallway, the stairwell to the basement, area under these stairs, basement hallway corridor, mechanical room, and management office.

[15] MGS Mechanical Services Ltd. (the plumbers) submitted an invoice to YCC in the amount of \$1,305.85. It was charged back to "suite 204" as a common expense for that unit.⁴

[16] Gulfstar Contracting, who rid the condominium building, including unit 204, of the flood water, charged \$13,525.69 for their services. They sent an invoice to YCC for the \$5,000.00 deductible in accordance with the Corporation's insurance policy protecting the unit-owners and YCC. That was also charged back to unit 204 as a common expense for that unit.⁵ In addition, Gulfstar sent another invoice to the insurer, Ing Canada, for the balance of their charges, namely, \$8,525.69⁶.

[17] Ms. Chai refused to pay for, inter alia, MGS' plumbing bill and Gulfstar's clean-up bill. YCC's solicitors registered a notice of lien on unit 204's title pursuant to section 85(1) of the Condominium Act, 1998. Later, Ms. Chai paid the amount of the lien to YCC. YCC then discharged the lien.

IV. Analysis

Issue #1: What caused the plaintiff's unit to flood?

[18] The parties' respective experts put forward their respective theories to explain why the copper water pipe burst in unit 204. The defendants' expert, Mike Panahi, who is a professional engineer, and is employed by Pancon Engineering Limited, provided a report to the defendants in an attempt to explain how the flood occurred in unit 204. He stated that the thermostat was in the "Off" position for about 24 hours prior to the bursting of the water pipe. He further stated that "by having the thermostat in off position

⁴ Exhibit 1, tab 1, 2nd page

⁵ *ibid.* tab 2 (probably part of tab 3, but the sticker is missing)

⁶ Exhibit 11, 2nd page

0[degrees]C)⁷, there is no flow of water in the system as control valve closed the flow electronically and due to cold draft entering the suite through the openings around the air condition unit just above the radiator, the water froze and caused the copper pipe to crack and consequently burst"⁸.

[19] The plaintiff's expert, Dr. Jiang, Zongchuan, is a licensed Professional Engineer in Ontario, and currently works "as a Mechanical Engineer for heating and cooling system in Allcan Engineering Ltd".⁹ In his report, marked as exhibit 3, he explained why the air conditioner in the living room, installed about one meter above the radiator, was *not* the reason for the pipe freezing and cracking: "it has been sealed¹⁰ for stopping air flowing through the gaps of installation".¹¹ He attributed the pipe freezing and cracking to a defective zone valve motor¹². Consequently, "no hot water could get through the Zone Valve, then no heat was supplied in the unit"¹³. Therefore, when the temperature inside unit 204 dropped to below zero, "ice formed and the heating pipe cracked"¹⁴. Dr. Jiang ended by expressing the opinion that the flood would have been avoided or minimized if the "maintenance

⁷ At trial Mr. Panahi corrected his report, which had stated that the "Off" position for unit 204's thermostat was 0, when in fact it was 10. He made that mistake, because Ms. Chai, the owner of unit 204, would not let his staff gain access to the unit. However, the proper method for entering the opponent's premises is by way of a court order issued either at the settlement conference or on a motion, where such matters as the entitlement to enter premises belonging to the other side and time of entry can be settled. Based on Mr. Panahi's evidence, I find that, when the thermostat in unit 204 read 10, all hot water ceased to flow through the copper water pipe.

⁸ Exhibit 4, p. 4, Conclusion, 2nd. paragraph

⁹ Exhibit 3, p. 2, Section I

¹⁰ In his testimony Dr. Jiang stated that the sealant was silicon.

¹¹ Exhibit 3, p. 2, Section II, para. 2

¹² The defendant's expert, Mr. Panahi, P. Eng., described the "zone valve motor" as the "electronic zone control valve". See his report in exhibit 4, p. 2. I have used the words "electronic valve" to describe this valve.

¹³ Exhibit 3, p. 2, Section II, para. 3

¹⁴ Ibid. p. 3, Section III

technicians [had] shut off the water properly before or after the pipe cracked"¹⁵.

[20] Accordingly, while Dr. Jiang blamed a *defective electronic valve* for the freezing of the water in the copper water pipe¹⁶ which resulted in it bursting or cracking with consequent flooding in unit 204, Mr. Panahi blamed the flooding on two other things, viz. first, a thermostat that read 10 degrees centigrade, thus cutting off the hot water supply to the copper water pipe, and secondly, the cold draught through the openings in the air conditioner, resulting in the formation of ice and the consequent bursting of the pipe.

[21] However, both theories, intended to explain the cause of the flooding in unit 204, are open to question. With respect to Dr. Jiang's explanation of what happened, he makes the assumption that the air temperature in the unit could reach 0 degrees centigrade, in which case stagnant water in the copper pipe would freeze with resultant cracking of that pipe. However, the evidence is that the temperature in the unit on the day in question was about 15 degrees centigrade. Moreover, the superintendent, Mr. Grendys, expressed the view that even with the thermostat in the "off" position, the apartment would still be heated by the surrounding apartments, as indeed it was at the time he visited the apartment on February 5th, 2007. In addition, Dr. Jiang inspected unit 204 on July 7th, 2008 for the purpose of forming his expert opinion as to the cause of the flooding that occurred on February 5th, 2007. He observed that gaps around the perimeter of the box air conditioner were sealed with silicon. However, I query whether that was the situation at the time of the incident in question one year and six months previously. For Mr. Grendys testified that on February 5th, 2007 he felt with his hand cold air

¹⁵ Ibid.

¹⁶ In his testimony Dr. Jiang explained further how the water in the water pipe froze, viz. cold air from the balcony doors entered the unit with the result that the stagnant water froze.

entering from around the perimeter of the air conditioner, and MGS Mechanical Services Ltd., who were the plumbers, wrote on their invoice that "AK¹⁷ window unit was (sic.) note¹⁸ sealed. Cold air was blowing down (sic.) on to heating line and froze ¾ " copper line causing a split in line".¹⁹

[22] As regards Mr. Panahi's expert opinion, it was the cold draught emanating from the gaps around the window air conditioner that was the problem, for that cold stream of air froze the water in the copper pipe that was 2.5 feet below the leaky air conditioner. The superintendent, Mr. Grendys, found the room temperature to be at 15 degrees centigrade, and also said the pipe was "ice cold". The plumbers (MGS Mechanical Services Ltd.) support Mr. Panahi's theory, and they were, after all, at the unit on the morning in question.

[23] On balance I prefer Mr. Panahi's theory as supported by the plumber and the superintendent. I accept the fact that both the plumber from MGS Mechanical and the superintendent, Mr. Grendys, could feel a cold draught coming from the window box air conditioner. With that evidence Mr. Panahi concluded that, with the thermostat at the "off " position for about 24 hours prior to the bursting of the water pipe, no hot water was flowing through that water pipe, which was the source of heat for unit 204. Freezing of the stagnant water took place, and that cracked the water pipe resulting in the flood.

[24] The next question in these proceedings is whether or not the heating system, which was physically present in unit 204, falls within the boundaries of unit 204. The answer to that question is important to the outcome of this

¹⁷ AK is short for air conditioner.

¹⁸ The "note" in "note sealed" is clearly a typographical error. The plumber meant "not sealed".

¹⁹ Exhibit 1, tab 8

action, because, if the units in this condominium complex do include the heating system, then the unit-owner is responsible for its maintenance and repair. For the answer to this question concerning the boundaries of the unit, I must turn to the Declaration which comprises the condominium's constitution.

Issue #2: Does unit 204 encompass the heating system, consisting of the copper water pipe, the electronic valve, the mechanical valve, the thermostat and the thermometer, all of which are physically located inside the unit?

[25] The answer to that question can be found in Schedule "C"²⁰ of the Declaration for York Condominium Plan No. 325. This Schedule describes the vertical and horizontal boundaries of the unit, followed by a section that lists exceptions in these terms:

"Notwithstanding the foregoing, the unit shall **not** include: [Emphasis is added.]

(b) such pipes, wires, cables, conduits, ducts, flues, shafts, public utility lines and other horizontal or vertical service facilities which are used for the distribution of power, water, drainage and other services within the building and are within the boundaries of the unit; but the unit shall include the fixtures, outlets and other facilities with respect to such service facilities which are within the boundaries of the unit and which service the unit only, and all doors leading out of the unit and windows." [Italics are added.]

[26] The copper water pipe, shown in exhibit 6, serves unit 204 only. It is connected to the main water supply pipe which carries hot water down from the boilers situate in the roof. It is in a sense a tributary running off of the main water pipe that services the whole building. Since this tributary-like water pipe services unit 204 only, unlike the main water supply pipe which carries

²⁰ Exhibit 8

water from the boilers situate in the roof for the benefit of all unit-owners, it clearly fits within the definition of what a unit comprises. Accordingly, I find that this copper water pipe forms part of the unit 204.

[27] The two valves controlling the flow of water through the copper water pipe are the electronic valve and the mechanical valve. They are fixtures connected to that water pipe that constitutes part of the unit, and therefore, are themselves part of the unit.

[28] The thermostat and the thermometer are also fixtures that relate to the correct functioning of the heating system by means of the copper water pipe and the electronic valve. They, therefore, also fall within the definition of what constitutes the unit.

Issue #3: Whose obligation is it to maintain or repair a unit?

[29] The Condominium Act, 1998 and the Declaration for York Condominium Plan No. 325 will answer this question. First, as regards *maintenance*, the Condominium Act, 1998 provides that the Condominium Corporation is required to *maintain* the common elements, while each owner must maintain her or his own unit.²¹ In addition, the Act expands the notion of maintenance to include repair after normal wear and tear but *not* after damage.²²

[30] Secondly, with respect to *repairs*, the Act imposes an obligation on the Corporation to repair both the units and the common elements *after damage*, subject to the Declaration.²³ For the "declaration may alter the obligation to maintain or to *repair after damage* as set out in this Act by

²¹ s. 90(1)

²² s. 90(2)

²³ s. 89(1)

providing that, (a) ... each owner shall repair the owner's unit *after damage*"²⁴. [Italics are added.]

[31] The Declaration for this Condominium does alter the Corporation's statutory obligation to repair the *unit after damage*. Article VI, entitled "MAINTENANCE AND REPAIRS", provides in Section (1) for "Repairs and Maintenance of Units by Owners". It states that "[e]ach owner shall maintain his unit, and subject to the provisions of this declaration, each owner shall repair his unit *after damage*, all at his own expense".²⁵ [Italics are added.]

Issue #4: What costs was the plaintiff responsible for as a result of the flooding in her unit and other parts of the building?

[32] Section (1) of Article VI of the Declaration (Maintenance And Repairs) also imposes on the unit-owner responsibility "for all *damages* to any and all other units and to the common elements, which are caused by the failure of the owner to so maintain and repair his unit, save and except for any such damages to the *common elements* for which the cost of repairing the same may be recovered under any policy or policies of insurance held by the corporation".

[33] Accordingly, read by itself, Ms. Chai would be responsible for Gulfstar's entire bill in respect of her unit and the other units, damaged by the flood caused by the broken copper water pipe in unit 204. As far as the common elements are concerned, for instance, the common hallways on the 2nd and 1st floors, her liability for costs would depend on the wording of the Corporation's policy of insurance. In each case the Court must be satisfied that the damages were "caused by the failure of the owner to so maintain and repair his unit".

²⁴ s. 91(a)

²⁵ Exhibit 9

[34] However, Article VI, section (1) of the Declaration must be read subject to section 105 of the Condominium Act, 1998. YCC used section 105 to charge Ms. Chai for the \$5,000 deductible in relation to the clean-up done by Gulfstar.

Deductible

105. (1) Subject to subsection (2) and (3), if an insurance policy obtained by the corporation in accordance with this Act contains a deductible clause that limits the amount payable by the insurer, the portion of a loss that is excluded from coverage shall be a common expense. 1998, c. 19, s. 105 (1).

Owner's responsibility

(2) If an owner, a lessee of an owner 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 the owner's unit, the amount that is the lesser of the cost of repairing the damage and the deductible limit of the insurance policy obtained by the corporation shall be added to the common expenses payable for the owner's unit. 1998, c. 19, s. 105 (2).

Same, by-law

(3) The corporation may pass a by-law to extend the circumstances in subsection (2) under which an amount shall be added to the common expenses payable for an owner's unit if the damage to the unit was not caused by an act or omission of the corporation or its directors, officers, agents or employees. 1998, c. 19, s. 105 (3).

[35] Hence, subsection (2) allows the Condominium Corporation to add to the common expenses for unit 204 the cost of repairing the damages to the unit up to the amount of the deductible, namely, \$5,000, provided that the unit-owner damaged her unit "through an act or omission". In addition, subsection (3) allows the Corporation to "extend the circumstances in subsection (2)" by by-law, provided the damage to the unit was not caused by an act or omission of the corporation or its directors, officers, agents or employees. The Legislature enacted subsection 2 (and no doubt subsection 3) "to make owners more responsible for activities undertaken within their respective units"²⁶.

[36] YCC did indeed "extend the circumstances in subsection (2)" by enacting a by-law which included damage to *other units*. So the unit-owner,

²⁶ "Condominiums in Ontario: A Practical Analysis of the New Legislation", Harry Herskowitz and Mark F. Freedman, Law Society of Upper Canada, 2001, p. 378

who damages other units, is liable for the cost of repairs, once again up to the deductible.

[37] The by-law is referred to as By-Law NO. 13. Section 1 of Article XI is the relevant part. It provides as follows:

Insurance Deductible

1. Pursuant to subsections 105(2) and (3), where damage occurs in or to a unit in the Corporation, (excluding damage to the Owner's improvements and personal belongings), and the damage is not caused by an act or omission of the Corporation, the Owner of the unit where the cause of the damage originates, shall be responsible for the lesser of the amount of the deductible contained in the Corporation's insurance policy or the cost to repair the damage. The amount for which the unit Owner is responsible shall form part of the contributions to the common expenses payable for the particular unit.

[38] This by-law does expressly extend subsection (2) of section 105 to cover the situation where a unit-owner causes damage to other units regardless of whether or not his or her own unit is damaged. However, it does not directly address the case where a unit-owner damages the *common elements*, as happened in our case. Subsection (3) of section 105 of the Condominium Act, 1998 as well does not specifically refer to damage done to common elements.

[39] However, to confine the statutory subsection and the by-law to "other units", thereby excluding the "common elements", would be an unduly restrictive construction. It would result in unfairness to other unit-owners in situations where the damage to the owner's unit is minimal (a fraction of the deductible), but the damage which he has done to the common elements exceeds the deductible. If damage to the common elements is not taken into account in the formula, viz. the lesser of the cost of repairing the damage and the deductible, the damage attributable to the common elements would fall into the common expenses resulting in all unit-owners having to share these costs. The disciplinary rationale of the Legislature for enacting section 105(3) would not be enhanced.

[40] Now, section 105 (2) and (3) require that, before an owner can become responsible for the lesser of, on the one hand, the aggregate cost of repairing the damage to the owner's unit, other units and the common elements, and, on the other hand, the amount of the deductible contained in the Corporation's insurance policy, that owner must have caused the damage through "an act or omission". In **Zafir v. York Region Condominium Corp. No. 632**²⁷ Conway J. dealt with the meaning of that phrase. He held that it can connote "negligence" but not "strict liability". "Strict liability language would have provided that the owner is responsible for any damage arising from its unit, however caused."²⁸ He concluded that "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"²⁹.

[41] Ms. Chai is guilty of an "omission". I found earlier that on the balance of probability she failed to "winterize" her box window air conditioner. Both the plumber from MGS Mechanical Services and the superintendent, Mr. Grendys, found a cold draught emanating from the perimeter of the air conditioner. Mr. Panahi, the defendants' expert witness, expressed the opinion that the cold draft caused the water in the copper water pipe to freeze, thus cracking the pipe. In failing to ensure that her air conditioner would not allow cold draughts to enter her unit during the wintertime, Ms. Chai contravened both the Condominium Act, 1998 and the Declaration for YCC. Section 90 of the Act provides that each owner must maintain her or his own unit. Moreover, the Declaration in section (1) of Article VI requires that each unit-owner "maintain his unit".

[42] Furthermore, I find that Ms. Chai did not do regular preventative maintenance of the fixtures that regulated the flow of hot water through the copper water pipe, resulting in heat emitting from the radiator. By "fixtures" I mean the thermostat, the electronic valve and the mechanical valve. All of these were involved in the flood. I would have thought that a prudent home-owner (and an owner of a condominium unit or suite is

²⁷ [2007] O.J. No. 682 (Superior Court of Justice)

²⁸ *ibid.* at para. #19

²⁹ *ibid.* at para. #20

indeed a "home-owner") would have had these checked on an annual basis. After all, "maintenance", in my opinion, does imply "preventative maintenance".

[43] Finally, Ms. Chai left her tenant, Ms. Sun, without any instructions as to how to work the thermostat. In fact, Ms. Sun did not know where the thermostat was. It was in the "Off" position at the time of the occurrence in question. It could very well have been in that position from the beginning of the tenancy.

[44] Ms. Sun testified that Ms. Chai told her not to worry about the heat, for it comes on automatically. If Ms. Sun had known where the thermostat was and then how to operate it, it is possible, indeed probable, that the problem with the electronic valve would have been discovered at a time when there would have been no mishap like the flood that occurred. The failure to instruct properly her tenant with respect to the thermostat constitutes another example of an omission within the meaning of that phrase, "act or omission".

[45] As regards the damages to Ms. Chai's own unit, and to the other units and common elements affected by the flood originating in unit 204, by virtue of section 105(3) of the Condominium Act, 1998, Ms. Chai is responsible for the lesser of the aggregate cost of rectifying the damage, namely, \$13,525.69 (cost of Gulfstar's services) and the insurance deductible (\$5,000.00). The deductible, accordingly, becomes her responsibility. Ms. Chai has already paid that deductible to YCC, which had been secured by the lien registered against the title to her unit.

[46] With respect to the plumbers, MGS Mechanical Services Ltd., whom the superintendent called to take care of the flood, they replaced certain components of the hot water heating system in unit 204. They submitted a bill for \$1,305.85. Ms. Chai did reimburse the Corporation who had paid for

that work. YCC was entitled to the reimbursement, since the repairs, which the plumbers performed, constituted "maintenance", which is the unit-owner's responsibility.

[47] Ms. Chai, in order to stop any proceedings for the sale of her unit, paid YCC not only the cost of the plumbers' services and the insurance deductible but also YCC's legal fees relating to the lien, and interest on the amounts outstanding. Section 85(1) of the Condominium Act, 1998 justifies the collection of the legal fees, and Article IX, section (7) justifies interest charged by the Corporation with respect to the deductible and the plumbers' bill.

Issue #5: Was the superintendent negligent when he visited the unit before, and after, the flood?

[48] There was a question raised in this litigation by the plaintiff and her expert, Dr. Jiang, concerning the competence of the superintendent, Mr. Grendys. Dr. Jiang in his report states: "There are two manual valves located in two ends of the heating pipes, one is in the left corner of Bed room and the other is in the right corner of Den next to Zone Valve. The water in heating pipes can be shut off by these two manual valves within the unit. The *maintenance technician* should shut off the two manual valves to stop water."³⁰ [Emphasis is added.] In the following Section III of his report, which encompasses his conclusion, he states: "If the *maintenance technicians* shut off the water properly before or after the pipe cracked, the flood would be avoided or minimized." [Emphasis is added.]

[49] Inquiry into possible negligence of the Corporation's superintendent is relevant, because, if found to exist, then, we have a case of contributory

³⁰ Exhibit 3, Section II, para. #4 [last page of report]

negligence on the part of an employee of the Corporation, for which the Corporation would be vicariously liable.

[50] During his first visit to unit 204 Mr. Grendys never thought about turning off the water to the unit. The risk of the water pipe bursting did not occur to him. He did not know, or even suspect, that the copper water pipe might have contained ice. He knew that the electric valve, which regulated the flow of hot water through the water pipe, thus giving rise to heat through the radiators, did not respond to the thermostat. He was puzzled as to why that was happening. He, however, did know that the problem required the expertise of a plumber. Hence, he telephoned MGS Mechanical Services Ltd. for their assistance.

[51] He was concerned for the tenant's baby, because the unit was cold for a baby. He gave the tenant, Ms. Sun, his cellular telephone number in case she needed further help. After all, he could not understand why she had the thermostat at 10 degrees C, which was the "off" position.

[52] I find that Mr. Grendys was not negligent during his first visit vis-à-vis the owner of the unit or her tenant. It would be different if he were a plumber. But he was not one; he was a superintendent, who struck me as one who took his position as superintendent very seriously indeed. I find that the turning off of the mechanical valve on this first visit was really within the purview of a plumber. Moreover, no evidence was led to demonstrate that Mr. Grendys fell below the standard of a superintendent of a high-rise residential building.

[53] There is also the contention that Mr. Grendys should have known enough to stay in unit 204 until the plumber arrived. I find that he was acting reasonably when he left the unit under the circumstances enumerated in

these Reasons. After all, he did leave his cell phone number with the tenant, and was literally "just around the corner".

[54] However, Mr. Grendys paid a second visit to unit 204. Fifteen minutes later he received a call from the tenant, Ms. Sun. She told him that there was a flood in the unit. He raced to the unit. This time he tried to close one of the mechanical valves, but was unable to do so. Seeing that the flood was quite serious, he went to his work-shop to retrieve "channel logs" used by plumbers to turn valves. However, he still could not turn the valve. So he raced up to the boiler room at the top of the condominium building, and shut off the water to the whole building. It took twenty to thirty minutes for the water to drain. In the meantime, he had returned to start the process of getting rid of the water by way of a "wet-vac". As well, he contacted Gulfstar Contracting, a commercial firm, who brought industrial "wet-vacs" to the unit.

[55] Once again, I do not find anything amiss in what he did in his capacity as superintendent. I think that he acted both reasonably and conscientiously during this second visit. Remember the situation was extremely worrisome; Mr. Grendys had a serious flood on his hands. The tenant knew nothing about the function of the thermostat. She had never touched it. Moreover, a baby was involved. Mr. Grendys telephoned the plumbers a number of times to obtain updates as to where they actually were, and to impress upon them the urgency of the situation.

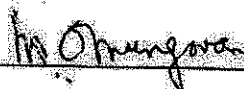
[56] The second mechanical valve did not control the flow of water into the unit, but rather it controlled the flow of water out of the unit. If the second valve had been closed by Mr. Grendys, it could have exacerbated the problem by cutting off drainage of the hot water into the return pipe at the side of the unit. Therefore, Mr. Grendys was correct in concentrating on the valve which controlled the flow of water into the unit.

[57] I, therefore, find on the evidence no negligent behavior on the part of Mr. Grendys, and, therefore, YCC has no vicarious liability in respect of the actions of its superintendent.

V. Disposition

[58] This action shall be dismissed with costs to the defendants in the amount of **\$790.00**, components of which are the following": a) \$40 for filing the Defence [Rule 19.01 (1)]; and b) \$750.00 as a counsel fee [Rule 19.04(1) and (2) and sec. 29 of the Courts of Justice Act, R.S.O. 1990, c. C.43, as am.].

Dated at Toronto this 15th day of April, 2009



M. O. Mungovan DJ