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# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Wawanesa Mutual Ins. Co. v. Keiran,*** 2007 BCSC 727

Date: 20070530
Docket: S065775
Registry: Vancouver

Between:

**The Wawanesa Mutual Insurance Company**

Appellant

And:

**Agnes Keiran, Tina Simkus, and Strata Plan KAS 1019**

Respondents

Before: The Honourable Mr. Justice Burnyeat

## Reasons for Judgment

## (In Chambers)

| | |
|---|---|
| Counsel for the Appellant | M.D. Carnello & J. MacDonald |
| Appearing on behalf of the Respondent, Strata Plan KAS 1019 | K. Burko |
| Date and Place of Hearing: | May 11, 2007 Vancouver, B.C. |

[1] The Wawanesa Mutual Insurance Company ("Wawanesa") appeals the August 2, 2006 decision of the Honourable Judge Baird Ellan that Wawanesa as a Third Party must pay to the Claimant, Strata Plan KAS 1019 ("Strata Corporation") the sum of $787.80 with court ordered interest from July 1, 2004 as well as costs of $130.00 to the Strata Corporation and $50.00 to the Defendants, Agnes Keiran and Tina Simkus who own a strata unit within the Strata Plan ("Owners").

BACKGROUND

[2] The Strata Corporation claimed against the Owners for damages which occurred as a result of a burst pipe behind the bedroom wall of the unit of the Owners. The water damage was caused by the failure of a "coupling" within the wall of the unit owned by the Owners. The failure was due to high acid levels in the local water and not to any negligent act or omission of the Owners. There was no common property damage. The cost of the repair of the damage was paid by the Strata Corporation at a cost of $3,787.80. The deductible for the insurance maintained by the Strata Corporation was $10,000.00 and, accordingly, the Strata Corporation was not in a position to recover any of the damages pursued to the insurance coverage it had in place.

[3] The Strata Corporation looked to the Owners for the $3,787.80. $2,500.00 of that amount was covered by the household insurance policy of the Owners maintained with Wawanesa. The $2,500.00 represented the policy limit for coverage in the case of liability of a strata owner for an assessment in respect of any

insurance deductible of the Strata Corporation. The $2,500.00 was paid by Wawanesa directly to the Strata Corporation.

[4] The Strata Corporation sought to recover the balance of $1,287.80 plus costs from the Owners. The same household insurance policy maintained by the Owners with Wawanesa had a $500.00 deductible so that $500.00 out of the $787.80 was to be paid by the Owners and the remainder would be paid by Wawanesa if it could be determined that the Owners were "responsible" for the damage which had occurred.

[5] The issue before the Learned Provincial Court Judge was whether the damage that resulted was the responsibility of the Owners and, if so, to what extent the loss was covered by their own household insurance policy ("Policy").

APPLICABLE PROVISIONS OF THE ***STRATA PROPERTY ACT***, R.S.B.C. 1998, c. 43 ("***Act***")

[6] Section 149(1) of the ***Act*** requires the Strata Corporation to 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." Section 258 of the ***Act*** provides:

> (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.

DECISION OF JUDGE BAIRD ELLAN

[7] The Bylaws of the Strata Plan required that the Strata Corporation was to obtain and maintain insurance on fixtures within strata lots. This provision corresponds with s. 149 of the ***Act*** where fixtures are defined to include floor and wall coverings and electrical and plumbing fixtures. The damages caused to the unit of the Owners was damage to fixtures within the definition of fixtures under the bylaw and under s. 149 of the ***Act***.

[8] At para. 8 of her Decision, [2006] B.C.J. (Q.L.) 1788 (B.C. Prov. Ct.), Her Honour states that the Owners had a duty to repair and maintain so that they were responsible for the loss:

> As I have noted, because the damage occurred within the unit and not to common property, this is a situation where the homeowner had the duty to repair and maintain and is therefore "responsible for the loss", regardless of the absence of fault or negligence on their part. In this sense, the matter may be viewed as if there were no strata corporation involved. Whether the repairs were paid as part of the deductible under the policy, or otherwise, they relate to damage for which in my view, under the *Act* and bylaws, the owner is responsible. There would arguably have been no legal obligation on the strata corporation to pay for the repairs, absent the duty under the bylaws to insure against it.

[9] On the question of whether the Policy covered the loss associated with the deductible claimed by the Strata Corporation, Her Honour noted that the section dealing with "Loss Assessment Coverage" provided: "We will pay up to $2,500 for that part of an assessment made necessary by a deductible in the insurance policy

of the Condominium Corporation." before concluding that the $2,500 was properly paid by Wawanesa.

[10] In dealing with whether the Policy would cover the remaining cost of the damages sought to be recovered by the Strata Corporation from the Owners, Her Honour noted that, under the section headed "Additional Coverages", the Policy stated the following regarding the "Share of Any Special Assessment" made against the Owners:

> (1) the assessment is valid under the Condominium Corporation's governing rules; and
>
> (2) it is made necessary by a direct loss to the collectively owned condominium property caused by an Insured Peril in this policy.

[11] In concluding that Wawanesa should pay to the Strata Corporation on behalf of the Owners the sum of $787.80 with court interest from July 1, 2004, Judge Baird Ellan stated:

> Ms. MacDonald made the submission in argument that assessment by the strata corporation of one owner for the whole of the $10,000 deductible would be onerous, and the intention of the *Act* and bylaws could only reasonably be to have the cost spread among the owners. In the case of an assessment for damage to common property, this would be a reasonable proposition, absent negligence on the part of the owner. This would be a type of damage for which the strata corporation was responsible under the *Act* and bylaws, and it is reasonable that it be spread among the owners and that their personal insurance policies be permitted to limit liability for the uninsured portion of that damage, the deductible.
>
> As noted above, however, this is not an assessment for damage or loss to common property, but for damage in respect of which an owner is personally and primarily responsible. It is not "made necessary" by the strata corporation's deductible, rather by the fact of the owner's primary responsibility for damage to the owner's unit. It

> would therefore be an insured peril, under Coverage C, section (8) "Water escape, rupture, freezing..." of the Wawanesa Policy, rather than "additional coverage" for a deductible assessment.
> (at paras. 15-16)

CASE AUTHORITIES, DISCUSSION AND DECISION

[12] In order to allow the appeal, I must find that Her Honour made an error in principle or that her decision was clearly wrong. I cannot make either finding. The issue that was before Her Honour was whether it could be said that the Owners were "responsible for the loss or damage". It is clear that being responsible is not the same as being negligent: ***Beazer East Inc. v. B.C. (Assistant Regional Waste Manager) et al*** (2000), 84 B.C.L.R. (3d) 88 (B.C.S.C.); and ***Mari v. Strata Plan LMS 2835***, 2007 BCSC 740. *Black's Law Dictionary* defines "responsible" as "liable; legally accountable or answerable". *The New Oxford Dictionary of English* defines "responsible" as "having an obligation to do something or having control over or care for someone", "answerable ... for one's actions", "morally accountable for one's behaviour". Owners of a strata unit are "responsible" for what occurs within their unit. If this was a single family dwelling and damage occurred within the dwelling, the owners of the dwelling would look to their own insurance for coverage but would be responsible for covering the cost of any deductible under that insurance. The situation is no different when the dwelling is within a Strata Plan. Section 258(2) merely allows a Strata Corporation to look to an owner to recover the deductible portion of an insurance claim rather than having the claim generally assessable against all members of the Strata Corporation.

[13] I cannot conclude that Her Honour made an error in principle or that her decision was clearly wrong when she arrived at the conclusion that an owner could be responsible even though there was no negligence.

[14] Unlike legislation which is in effect in other provinces, (for instance, see the decision in ***Reilly v. Freedom Gardens Condominium Assn.***, [2001] A.J. (Q.L.) No. 1703 (Alta. Q.B.)), our Legislature did not use terms such as "legally liable, liable, or negligent". Rather, the choice of the term "responsible" provided the Strata Corporation with the option of allocating to a particular owner the cost of repairing damage which was not covered by the insurance policy which the Strata Corporation is obligated to maintain under s. 149(1) of the ***Act***.

[15] In determining that the Owners were responsible for the loss even though they were not negligent and even though they had not breached any duty to maintain and/or repair, I cannot conclude that Her Honour made an error in principle or that her decision was clearly wrong.

[16] Accordingly, the appeal of Wawanesa is dismissed and the Respondent, Strata Plan KAS 119 is entitled to its costs on a Scale "B" basis.

"The Honourable Mr. Justice Burnyeat"

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