Provincial Court Civil of Alberta

Citation: Phillips v. Condominium Plan 9512639, 2010 ABPC 33

Date: 20100129
Docket: P0890104394
Registry: Calgary

Between:

Margit Annette Phillips

Plaintiff

- and -

Owners of Condominium Plan 9512639

Defendant

Reasons for Judgment of the Honourable Judge B.K. O'Ferrall

Introduction:

[1] This is a claim by a condominium unit owner against her condominium corporation for damages to the interior of her unit due to a leaky roof. The allegation is that the condominium corporation breached its duty to properly maintain the property of the condominium corporation.

Issue:

[2] At issue in this case was the enforceability of an alleged agreement among the shareholders or unit owners of the condominium corporation to refrain from seeking compensation from their condominium corporation in the event of a loss as a result of the corporation's failure to discharge its statutory and contractual duty to properly maintain property of the condominium corporation and/or the common property.

[3] The *Condominium Property Act*, R.S.A. 2000 c. C-22, imposes a duty on condominium corporations to keep in a state of good and serviceable repair and properly maintain the real and personal property of the corporation and the common property. A similar duty was imposed by the condominium's bylaws in this case. The question which arose was whether the owners of the units in the condominium could relieve the condominium corporation of that duty or of the consequences of failing to discharge the duty. And if the answer to that question was yes, did they do so in this case?

Facts:

[4] The Plaintiff was a unit owner in a 54-unit condominium in Cedarbrae in Southwest Calgary consisting of approximately 24 two-story units and 20 bungalow style townhouses. The condominium, which was constructed roughly between 1996 and 1998, had had all sorts of structural defects right from the get-go, including on-going problems with leaky roofs and basements. The problems were such that in 2001 the condominium corporation sued the developer, the builder and, the roofing contractor, among others. The suit was settled with a substantial payment being made to the condominium corporation. But notwithstanding that payment, which apparently was a compromised amount, the condominium corporation found itself in financial difficulty because of these construction deficiencies. As a consequence, a rather loose, imprecise and poorly-papered arrangement was made in July of 2005 whereby individual unit owners who experienced losses as a result of some of the aforementioned deficiencies would bear their own internal restoration costs.

The Forbearance Arrangement:

[5] The rationale for this arrangement, as it was explained to me, was that many of the unit owners had limited incomes and would not be able to afford a substantial assessment or the increase in condominium fees which would be required if the condominium corporation were to repair every known or suspected defect in the condominium's roofs and other structures. So the arrangement was to have the owners bear the cost of repairing internal damage to their units caused by defects in the condominium's building envelope.

[6] The arrangement was effected by the passage of a resolution at a meeting of the board of directors of the condominium corporation in July of 2005. I was not provided with a copy of this resolution. Nor does it appear that the resolution led to a corresponding amendment to the condominium's bylaws, at least not prior to the Plaintiff suffering her loss.

[7] The Plaintiff was not a unit owner at the time this arrangement was entered into. She purchased her unit in 2006 and later served on the condominium's board of directors; but there was no evidence that she, as a new owner, subscribed to this arrangement. In fact, the Plaintiff questioned whether the arrangement was anything more than a one-off arrangement following the 2005 floods where the Provincial Government compensated homeowners directly for their water damage restoration costs. The evidence of the current chairman of the condominium's board, Zdenek ("Danny") Posadka, whom I found to be credible, was that it was not a one-off arrangement and I accepted that evidence. The arrangement was a bona fide response to potentially crippling condo fees, a serious reserve fund deficit, and a desire not to lose neighbours (fellow condo unit owners) who could not afford big assessments or large condo fee increases.

Enforceability of the Forbearance Arrangement:

[8] The question to be decided was whether the arrangement was enforceable. That is, could it operate to prevent the Plaintiff's claim? If so, did it?

[9] My view is that, in the circumstances of this case, the arrangement was not enforceable and could not operate to defeat the Plaintiff's claim. I question (without deciding) whether such an arrangement would even be enforceable if it had been incorporated in the condominium bylaws. Admittedly, Section 32(2) of the *Condominium Property Act* states that the owners of units are bound by the condominium's bylaws; but Section 32(7) states that if there is a conflict between the bylaws and the Act, the Act prevails. And Section 37(2) of the *Act* imposes a duty on the condominium corporation to maintain the condominium's property and the common property. Section 67 provides that non-compliance with the Act by the condominium corporation can result in court-ordered remedies, including an award of compensation to persons who suffer loss due to the "improper conduct" of the condominium corporation. So *quaere* whether a condominium bylaw which takes away a unit owner's right to seek compensation from his or her condominium corporation contravenes the Act?

[10] But the arrangement in this case was not contained in the condominium's bylaws. In fact, it conflicted with the condominium's bylaws. Section 9, of condominium by laws, under the "Duties of the Corporation", stated:

> "*In addition to the duties of the Corporation set forth in the Act, the Corporation itself or through its agent shall"*
>
> > *(k) maintain and keep in a state of good repair, as may be required as a result of reasonable wear and tear or otherwise, the following:*
> >
> > > *(i) all outside surfaces of the buildings, including without limiting the generality of the foregoing,....roofing materials and exterior of roofs...."*

[11] Now it may be argued that the forbearance arrangement did not conflict with the bylaws. The condominium corporation was still discharging its duty to maintain and repair in the sense that it attended to the repair of any structural defect which manifested itself. The only thing the arrangement precluded was a claim for compensation for damages within the unit which were suffered as a result of a structural defect. In my view, there are problems with this argument. Repairing defects as they manifest themselves may discharge the condominium corporation from its duty to repair; but it does not discharge it from its duty to maintain. The effect of the arrangement is to relieve the condo corporation of the consequences of a breach of its duty to maintain and thereby relieve the condo corporation of its duty to maintain.

[12] But more importantly, there was no evidence in this case that each and every condo owner agreed to the arrangement. For example, there was no mechanism whereby new owners were asked

to subscribe to the arrangement and certainly the Plaintiff did not subscribe to it. I therefore do not see how the condominium corporation can rely on the July, 2005 board resolution.

The Condominium Corporation's Due Diligence:

[13] But that doesn't end the matter. The Plaintiff-unit owner must still show negligence or a lack of due diligence on the condominium corporation's part. That is, this court must determine whether the Defendant condominium corporation breached its duty to maintain the roof over the Plaintiff's unit.

[14] In a negligence or breach of contract action, the plaintiff has the onus of proving negligence or a breach. But when a plaintiff, such as the Plaintiff-unit owner in this case, adduces *prima facie* evidence of a breach of the duty to maintain (i.e., the leaking roof) and of a loss arising from that alleged breach, the onus shifts to the Defendant condominium corporation to show that it had some sort of reasonable inspection and maintenance program in place such that the disrepair which occurred could not reasonably have been predicted, prevented or avoided.

[15] Condominium corporations are not insurers. Nor are they subject to strict liability: *John Campbell Low Corp v. Strata Plan 1350* (2001) 46 R.P.R. (3rd) 96 (B.C.S.C.- Melnick, J.). To quote the editorial comment of James Davidson L.L.B. in the Spring 2003 Canadian Condominium Institute Review Bulletin, entitled "Condo Cases in Canada":

> "*Condominium Corporations are not 'guarantors' of the common elements. In other words, Condominium Corporations do not guarantee that the common elements will at all times be in satisfactory condition. The obligation upon the Condominium Corporation is to take responsible steps to repair and maintain the common elements. Such reasonable steps could include appropriate periodic inspections, scheduled periodic maintenance, attendance to problems with reasonable haste once those problems are brought to the corporation's attention, hiring experts to assist, where appropriate, and then following the advice of those experts with reasonable haste."*

[16] Both the *Condominium Property Act* and the condominium corporation's bylaws employ terms such as "*maintain"*and "*keep in a state of good repair"*. So, clearly the Act and the bylaws impose a duty to maintain; and in my view the duty to maintain requires more than simply performing necessary repairs. While there can be no breach of a duty to repair until there has been disrepair, the duty to maintain or to keep in a state of repair may be breached before there is such disrepair. Depending upon the nature of the system, facility or fixture required to be maintained, a duty to maintain may imply a positive obligation to inspect, to test, to service, to clean, to lubricate, or some other form of preventative maintenance. And when a condominium unit holder suffers a loss as a result of the condominium property falling into disrepair, there is an onus on the condominium corporation to adduce evidence of such due diligence. That is, where the

condominium corporation has a contractual and/or a statutory duty to maintain, disrepair is *prima facie* evidence of a breach of the duty to maintain. Disrepair is not definitive proof of a breach of that duty. The mere fact that the roof in this case leaked is not conclusive proof of a breach of the duty to maintain; but it does shift the onus to the condominium corporation to demonstrate due diligence.

[17] What constitutes due diligence is subject to a test of reasonableness as Gray, J. found in *Taychuck v. Strata Plan LMS 744* (2002) 7 R.P.R. (4th) 302 (B.C.S.C.).

[18] The Plaintiff's loss occurred in July of 2008. The due diligence evidence of the Defendant condominium corporation consisted of a roof condition report by a roofing inspector which it commissioned in 2004, a reserve fund study by a professional engineer which it commissioned in 2005, and a minor repair to the Plaintiff's roof which it arranged to have done in 2005 (prior to the Plaintiff the unit).

[19] I have reviewed the roof condition report which was dated May 25, 2004. It involved an inspection of the roofs of all units. However, it was heavily qualified. For example, it expressly did not comment on the structural integrity of the roofs. Nor did it comment on the ventilation of the roofing system. It was restricted to *"the water proofing integrate of the building roofing system*". As best I understand, that meant the inspection and report was limited to the roof membrane system (i.e., the shingles, the flashings and some of the larger penetrations of the membrane, like the chimneys, vents, etc.). It was the roof membrane system which ultimately failed in this case.

[20] The purpose of the roof condition report was to determine the condition of the roofing system and to prepare recommendations relative to future expectations of performance, as well as to identify required maintenance items. All units were inspected to identify any anomalies in the application of the shingles or the penetrations through the roofing.

[21] The roofing inspector's observations, insofar as they are relevant to this case, were as follows:

> "*Generally the shingles are well installed with roofing nails, four per shingle. The exposure and overhangs are in accordance with industry standards. The self-sealing strip appears to have activated over the warm months and is performing properly. The bottom layer of shingles is not adhered to the starter course.*
>
> *The shingles appear to be lying flat only some random slight curling was observed. At this time this should not cause any adverse effects. This situation should be monitored from time to time in the ensuing years. The only other concern observed with the shingles is the cracking of the granule layer of asphalt on the shingles at random locations. The manufacturer has indicated that this is not a problem with these shingles and that it is common for this to occur. The*

> *manufacturer has indicated this anomaly will not affect the shingle warranty.*
>
> *The ice dam protection installed does not comply with the Alberta Building Code.*
>
> *The penetrations are properly installed with the exception of some of the chimney caps over the stucco chimney chase. The metal cap flashing on Unit 60 does not fit properly over the stucco on the side, this will allow water to enter behind the stucco. Water behind the stucco will result in damage to the stucco from freeze thaw cycles.*
>
> *The eaves troughs appear to be functioning properly. The residents were not interviewed to determine if any problems have been observed."*

[22] Having made the foregoing observations, the roofing inspector's recommendations were as follows:

> "*The sealing of the bottom row of shingles is not a cost effective repair at this time. The issue of the improper ice dam would be expensive to repair now and the cost would dictate that this expense is not justified as there appears to be no leakage into the units at the outside walls from water back.*
>
> *The issue of shingle surface cracking should be monitored and if required in the future contact the manufacturer to comment on the situation.*
>
> *A new chimney chase cap should be installed on Unit 60 to replace the undersize existing cap.*
>
> *There is no requirement for preventative maintenance at this time. The asphalt shingles will continue to perform, we do not anticipate the requirement for replacement for many years."*

[23] A year later, in 2005, the condominium corporation commissioned a reserve fund study. Reserve fund studies are required by the Condominium Property Regulation (Alta. Reg. 168/200, with amendments up to 151/2006). The purpose of the reserve fund study is to provide an estimate of the funds the condominium corporation should have on hand for replacement of significant components of the condominium's property requiring future replacement or refurbishment. The Defendant condominium's roof system was one such component. The engineering consultants whom the condominium corporation retained to do the study, having viewed the condition of the complex, had these observations to make about the condition of the condominium's roofs:

"*2.2 Roof System*

> *The roof system consists of asphalt shingles. Our review indicates that the asphalt shingles are in good condition. A review of the information provided indicates that minor repairs were completed to the asphalt shingle roofing assemblies in or around 2000. The extent of the repairs performed could not be determined. Properly installed asphalt shingles normally have a lifespan of between 15 and 30 years depending on the type of shingles installed. Information provided indicates that the shingles utilized at this site are 25 year IKO Renaissance asphalt shingles, therefore, we have allotted for replacement in 17 years' time at an estimated cost of $352,000.00 inclusive of GST."*

[24] Now the Plaintiff argues that since the condominium's roofs were known to have been constructed poorly, greater due diligence was required than that which was demonstrated. For evidence of that knowledge, she pointed to a Statement of Claim filed in the Court of Queen's Bench by the condominium owners in February of 2001 against the roofing contractor which constructed the condominium's roofs. The relevant allegations in the Statement of Claim were as follows:

"*20....*

> *(a) the roofing on homes in Cedarview Mews was not designed for, specified to have, nor constructed to have an ice dam or eave protection under the asphalt shingles extending from the edge of each roof a minimum of 900 mm up the roof slope to a line not less than 300mm, inside the inner face of the exterior wall, is in contravention of the Alberta Building Code 1990, is not designed and constructed in accordance with good design and construction practices and is not in accordance with high standards of construction;*
>
> *(b) the roof spaces or attics above insulated ceilings are not ventilated with at least one half of the venting at the ridge of the roof of each home in Cedarview Mews, are in contravention of the Alberta Building Code 1990, are not designed and constructed with good design and construction practices and are not in accordance with high standards of construction;*

> *(c) the eavestroughing on each home is neither sloped sufficiently nor equipped with sufficient downspouts, is in contravention of the Alberta Building Code 1990, is not designed and constructed in accordance with good design and construction practices and is not in accordance with high standards of construction;*

[25] The evidence disclosed that this lawsuit against the builder, the roofer and others was settled by the payment of $70,000.00 to the condominium corporation. Neither the Plaintiff, nor the Defendant, could tell me how much, if any, of this $70,000.00 was used to correct some or all of the roofing deficiencies. However, I have inferred that little was done to correct the alleged deficiencies because the same deficiencies alleged in the Statement of Claim were noted in the 2004 roofing inspection report and the 2005 reserve fund study. This failure to rectify known deficiencies might be regarded as evidence of a lack of due diligence, except for the fact that even the roofing inspectors did not recommend that the condominium corporation take immediate action on these deficiencies.

[26] Furthermore, the failure to rectify the identified deficiencies did not give rise to the Plaintiff's loss. Following the flooding of her unit, Mr. Posadka, who was not only the chairman of the condominium corporation's board but also was the condominium's sometimes handyman, went up on the Plaintiff's roof and observed that several nails on the roof had penetrated through to the attic. When he caulked those nails, the leaking stopped. I am not satisfied that this was something that even the roofing inspector ought to have noticed during their 2004 inspection. The roofing inspector did not purport to inspect all penetrations of the roof. But quite apart from what the roofing inspector ought or ought not to have observed, by commissioning such inspections and then having a professional engineer later opine on the condition of the roofs in the statutorily-required 5-year reserve fund study, the condominium corporation exercised reasonable due diligence.

[27] It is also significant that even the Plaintiff, when she was on the condo board, took no steps to have the Board attend to the immediate rectification of the identified roofing deficiencies. Her failure to do so was as understandable as the board's failure because the deficiencies did not appear to be a cause for immediate concern or call for immediate action.

Judgment:

[28] I would therefore dismiss the Plaintiff's claim again the condominium corporation. I am however not inclined to award costs in favour of the Defendant condominium board. Success was divided. The condo board arrangement whereby unit owners would bear their own internal costs upon which the board relied for its defence was found to be ineffective. On the other hand, I found that the condo board did not fail in its duty to exercise due diligence in maintaining the condominium so as to try to avoid disrepair and consequential damage.

Heard on the 22nd day of May, 2009.
Dated at the City of Calgary, Alberta this 29th day of January, 2010.

B.K. O'Ferrall
A Judge of the Provincial Court of Alberta

Appearances:

Margit Phillips

the Plaintiff

Danny Posadka
for the Defendant