IN THE PROVINCIAL COURT OF SASKATCHEWAN
CIVIL DIVISION

Citation: 2010 SKPC 103
Date: July 21, 2010
File: SC #500 of 2008
Location: Saskatoon

Between:

Park Place Condominium Corporation

- and -

Klarissa Komarnicki

Mr. Rod Brown and Mr. Ken Folstad — For the Plaintiff
Ms. Candace Grant — Counsel for the Defendant

JUDGMENT **D.C. SCOTT J.**

Introduction

[1] The defendant Klarissa Komarnicki is registered owner of a condominium unit within a complex governed by the plaintiff Park Place Condominium Corporation ("Corporation"). On December 30, 2006, the defendant's father replaced a bathroom sink within the unit at her request. The water shut-off valve under the sink did not work properly. It took approximately 20 to 30 minutes to locate the building manager to shut off the water at its source. Flooding and water damage resulted to the defendant's unit and the condominium unit directly below.

[2] The plaintiff's insurance covered the cost to repair the damage in the amount of $8,191.59, subject to a deductible of $5,000. The plaintiff sought payment of the deductible from the

defendant's insurer. The defendant's insurer paid $2,176.94, being the portion of the deductible attributed to the damage in the defendant's unit only. The plaintiff seeks damages equivalent to the balance of the deductible along with other costs.

[3] This Court must determine whether the plaintiff is entitled to recover its entire deductible from the unit owner pursuant to *The Condominium Property Act, 1993* ("*Act*") or the Corporation's bylaws.

Issues

1. Is the plaintiff entitled to recover the balance of its insurance deductible from the defendant under the *Act*? Whose "act or omission" caused the damage? Negligence or strict liability standard?

2. Is the plaintiff entitled to recover the balance of its deductible from the defendant under the Corporation's bylaws? Are the bylaws *ultra vires*? Do the bylaws apply to the circumstances of this case?

3. Is the defendant liable to pay a penalty for failure to comply with bylaw 2(e)?

4. Is the plaintiff entitled to other damages claimed?

Analysis

[4] The facts in this matter are straightforward and for the most part, not in dispute. Whether the defendant is liable for the deductible depends upon the interpretation and application of *The Condominium Property Act, 1993* and the Corporation's bylaws. The insurance policy held by the Corporation was not introduced as evidence at trial.

The *Act*

[5] As a general rule, unit owners are responsible for the maintenance and repair of their unit whereas the Corporation is responsible for the maintenance and repair of the common property (s.

35). This applies to any repair required as a result of wear and tear. However, different rules apply with respect to damage caused by major perils such as a fire or flood.

[6] The Corporation maintains an insurance policy which covers both the common property and the unit, excluding contents and improvements. After an event such as a fire or flood, the Corporation's insurer is responsible for repairing the common property and unit, to a base standard, and the unit owner's insurer is responsible for the replacement cost of any improvements made to a unit by the owner and the owner's belongings.

[7] Section 65(1) of the *Act* requires a condominium corporation to place insurance on the units, common property and common facilities of its complex against major perils. The section further provides that a corporation may seek reimbursement for its deductible or the cost of repairs from the unit owner where the 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 a unit.

[8] The *Act* addresses how the deductible under the corporation's master policy is to be paid. The deductible is treated as a common expense of the corporation. The corporation raises funds through monthly common expense contributions paid by owners. The deductible payable by the corporation is paid by all owners, unless the insurance claim arises as a result of an act or omission of a specific owner, in which case, s. 65(1.3) applies.

[9] Section 65 (1.3) provides as follows:

> (1.3) If the owner of a unit, 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 a unit, the amount determined pursuant to subsection (1.4) may be added to the common expenses payable by the owner of that unit.

[10] Section 65 (1.4) provides:

> (1.4) For the purposes of subsection (1.3), the amount is the lesser of:
> (a) the cost of repairing the damage to the unit; and
> (b) the deductible limit of the insurance policy obtained by the corporation.

[11] This Court could find no Saskatchewan judicial interpretation of ss. 65(1.3) & (1.4).

Whose "act or omission"?

[12] According to the *Act*, liability arises only as a result of the act or omission of an "owner or person residing in the owner's unit with the permission or knowledge of the owner". The defendant argues the Court can consider only the acts and omissions of the defendant in determining whether the plaintiff may recover the deductible.

[13] It is this Court's view that the *Act* should not be so narrowly interpreted. Section 65 must mean an act or omission undertaken or "authorized by" the owner or resident. Otherwise, negligent or even deliberate acts of someone other than the owner, but authorized by an owner, causing damage, would not be subject to liability under s. 65.

[14] The Court finds that it can consider not only the defendant's act in delegating the replacement of the bathroom sink to her father, but also her father's actions in doing so.

Negligence or strict liability standard?

[15] The defendant argues that the approach to be followed is that taken in the decision of *Reilly v. Freedom Gardens Condominium Association*, [2001] ABQB 1002. The Alberta legislation is similar to that of Saskatchewan. In *Reilly*, the unit owner's pet had chewed through a pipe which supplied water to the toilet. As a result, water flooded the unit and caused damage. At trial, the condominium corporation was successful in obtaining reimbursement for its insurance deductible from the unit owner. The decision was reversed on appeal. The appellate Court found that the words "act or omission" used in the corporation's by-laws are "usually descriptive of a tort action, and generally indicate negligence" (para. 34). Because the owner maintained control over the dog and had no reason to suspect the dog would do such damage, he was not negligent and therefore not required to reimburse the condominium corporation for the deductible.

[16] The defendant argues this Court ought to take a similar approach, interpreting the words "act or omission" in the statute as importing a negligence standard rather than one of strict liability.

[17] Two British Columbia cases, *Mari* and *Kieran*[1] distinguish the *Reilly* decision because of different statutory wording which requires a unit owner who is "responsible" for damage rather than whose "act or omission" has caused damage to pay the deductible.

[18] The plaintiff relies on the Ontario approach in *Zafir v. York Condominium Corp. No. 632*, [2007] O.J. No. 682 (Ont. S.C.J.). The Ontario legislation[2] is similar though not identical to Saskatchewan's.

[19] In *Zafir* the Court considered what is meant by "act or omission" in the Ontario legislation. In that case, the condominium unit owner went on vacation after turning off the water shut-off valve below the kitchen sink, as required by the condominium corporation. Water leaked into the unit below the plaintiff's and caused damage, which the corporation repaired. The Court held the owner's "act or omission" did not cause the damage. The owner did what she had been required to do and had not been warned that the shut-off valve might leak when it was turned off.

[20] The Court stated that *Reilly* is not authority for the proposition that the words "act or omission" require a negligence standard. Had the legislature so intended, it could have referred to "negligent acts or omissions". Neither are the words "act or omission" indicative of a strict liability standard—if that was the intent, an owner would be responsible for *any* damage arising from its unit, however caused. Rather, the Court in *Zafir* held that whether damage is caused by an "act or omission" of an owner will depend on the facts of the particular case (para. 20).

[21] There may be policy considerations when determining who is responsible for payment of the deductible. In *Stevens v. Simcoe Condominium Corp. No. 60*, [1998] O.J.

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[1] *Strata Plan LMS 2835 v. Mari, [2007] BCSC 740* and *Strata Plan KA 1019 v. Kieran, [2007] BCSC 727* interpret the word "responsible" rather than "act or omission"

[2] S. 105(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. *The Condominium Act*, 1998, S.O. 1998, c. 19.

No. 5843 (Ont. Gen. Div.), where the condominium corporation was entitled to recover the deductible, the Court held as a matter of public policy a scheme which requires the sharing of the deductible among all unit owners deprives the owners as a group of the disciplining effect that a deductible has upon claims (para. 9). It would be unfair to impose liability on all owners for what would ordinarily be insured by an owner of a particular unit if owned as a single family dwelling (*Mari*, para 11).

[22] This Court is inclined to follow the reasoning of the Ontario and British Columbia Courts. The legislature could have expressly stated that the *Act* creates liability for the owners "negligent" acts or omissions, but did not do so. The *Reilly* rationale is based upon a finding that the words "act or omission" are "**usually** descriptive of a tort action" and "**generally** indicate negligence" (emphasis added). *Reilly* is not authority for the proposition that these words require negligence (*Zafir*). And, it may be unfair in some circumstances where an owner causes damage short of negligence, that the deductible becomes added to the common expenses of all owners (*Stevens*; *Mari*; *Keiran*).

[23] Whether an owner ought to be legally responsible for damage caused by their act or omission depends upon the facts of each case.

[24] In this case, the owner's acts or omissions are as follows:

1. The defendant engaged the services of her father to replace the bathroom sink. He was not a licensed plumber, although he had undertaken this type of work in the past.

2. The defendant's father turned the water shut-off valve under the sink and thought it was safe to remove the sink.

3. He did not check the taps on the sink to be certain the water had in fact been turned off. The fixtures were loosened. The water began shooting from the pipe. He thought the shut-off valve was possibly corroded.

4. He attempted to locate the relief manager for assistance, but could not find him for approximately 20 to 30 minutes.

5. No attempt was made by the defendant or her father in advance to determine whether it was safe to shut off the

water within the unit or whether other steps needed to be taken before replacing the sink.

[25] The Corporation's witness Mr. Ken Folstad, president of the Corporation's board of directors, testified that it is necessary for the caretaker to isolate the water to the appropriate section of the condominium property and then shut off the water from the boiler room.

[26] In *Zafir*, the owner who turned off a water valve before leaving on vacation, on instructions from the corporation, was not liable for water damage as the result of a leak because she had not been warned by the corporation to wait to see if a leak developed. The corporation bore the responsibility for informing owners of the procedures to be followed and risks involved in turning off the water valves. The facts in the present case are different from those in *Zafir*. Here, in turning off the water, the defendant was not acting under the direction of the Corporation, but on her own initiative. In doing so, she ought to have made the necessary inquiries beforehand.

[27] The defendant argued that the Corporation should be found contributorily negligent for failing to have available an on-site manager on December 30, 2006. This Court has found that negligence is not the standard to which the parties are to be held. Rather, the unavailability of the on-site manager is one factor to be considered when determining whether it was the owner's act or omission which caused the damage.

[28] The plaintiff's witness Wayne Lees of Colliers, the property manager for the Corporation, testified that he had a working relationship with and supervised the activities of the caretaker or "on-site manager" as he was referred to. During December 2006 and January 2007, there was a full-time on-site manager available, but on December 30, 2006, he had the day off.

[29] The on-site manager has no designated hours of work—he lives in the building, is on call 24 hours per day, 7 days of the week and has every 2nd weekend off. However, even on those days when the on-site manager is on call, he is not expected to remain on the premises at all times. On those weekends when he is off-duty, a relief manager is available but does not live on-site. According to Mr. Lees, in the case of an accidental flood, the on-site manager should do whatever he can to try to isolate the situation and to turn off the building water supply as soon as possible. The purpose of the relief manager is to be available on call if an issue arises and to respond to emergency calls.

[30] In this case, the first response to the emergency call was from the relief manager. It was the opinion of Mr. Lees that responding within 20 to 30 minutes was reasonable.

[31] According to Mr. Lees, the standard practice for the repair of plumbing fixtures is for the resident of the unit to let the on-site manager know in advance they will be doing repairs so the manager can arrange to turn off the water. It was the defendant's failure to notify the manager in advance that caused the damage and not the delay in locating the manager after the fact.

[32] The defendant's failure to ask the on-site or relief manager in advance of the procedure to be followed to shut off the water and her father's failure to ascertain whether the shut off valve worked properly by checking the taps before loosening the fixtures, caused the water damage to her unit and in the unit below. These were acts and omissions within the control of and authorized by the defendant.

[33] Further, applying the *Stevens* rationale, on policy grounds other unit owners should not be responsible for a share of the deductible in these circumstances. Had this damage occurred in a single family dwelling, the owner would be responsible for the deductible.

[34] The Court finds the defendant's failure to inform herself of the procedure to shut off the water and her father's failure to ascertain whether the water had been properly turned off before loosening the fixtures and taps to be acts or omissions causing damage for which the defendant should be held responsible under the *Act*.

Bylaws

[35] This Court will also consider whether the defendant is liable under the Corporation's bylaws.

[36] Section 47 of the *Act* gives the Corporation the authority to pass bylaws in respect of certain itemized matters, which bind the corporation and the unit owners. Unlike Ontario, where the condominium corporation may pass bylaws extending the circumstances under which the deductible may be passed on to a unit owner, in Saskatchewan the bylaws must not be contrary to the legislation.

[37] The applicable bylaws passed by the Corporation provide:

> 34(d) An Owner shall indemnify and save harmless the Corporation from the expenses of any maintenance, repair or replacement rendered necessary to the common property or to any Unit by his or her act or omission **or by that of any member of his family or his or her or their guests, servants, agents, invitees, licensees or tenants**, but only to the extent that such expenses (*sic*) is not met by the proceeds of insurance carried by the Corporation.
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> 35(g) The Corporation shall pay the deductible for any claims regarding any damage to common property or other property of the Corporation, except where the loss arises by the act or omission of an Owner, Tenant or Occupier.
>
> (i) For damage caused by an Owner, the Owner shall pay the insurance deductible for losses claimed where the **Owner, occupier, or tenant, or family member of any of them, or their guests, invitees or licensees cause the loss**. The loss may occur from an act or omission by one or more of these persons.
>
> (ii) The Corporation shall pay the insurance deductible for losses claimed where the Corporation, its officers, the Board of Directors or its Members or the employees or agents of any of them causes the loss. The loss may occur from an act or omission by one or more of these persons. The claim must arise under any insurance policy maintained by the Corporation. In all other cases, the Owner of a Unit shall pay the deductible for claims made regarding damages to the Unit. The Owner must prove the cause of the loss where damage occurs to a Unit. (emphasis added)

Are the bylaws *ultra vires*?

[38] The defendant asserts that the plaintiff is not entitled to recover its deductible by relying upon the provisions of its own bylaws. She argues the bylaws upon which the plaintiff relies are not valid in that they are contrary to and go well beyond the *Act*. Further, section 47, which gives authority to

the Corporation to enact bylaws related to certain subject matter, does not expressly provide for the passing of bylaws related to insurance. Therefore, deference should be given to the statute.

[39] The plaintiff relies on provisions of the *Act* which allow condominium corporations to pass bylaws governing the assessment and collection of common expenses and bylaws respecting the conduct of the affairs of the condominium.

[40] In particular, bylaw 35(g)(i) expands the cause of the loss, for which the owner will be responsible, to acts and omissions by the "owner, occupier, tenant, family members…" whereas s. 65(1.3) of the *Act* makes the owner responsible only for their own acts and omissions an those of a person residing in the owner's unit.

[41] The defendant argues the *Act* provides that liability extends only to the acts or omissions of an owner or other person residing in the unit. The bylaws stand in contrast to this limited liability, and would purport to impose liability on the owner for damage caused by an owner, occupier, tenant, family member, invitee, licensee or guest. Any attempt to interfere with the statutory scheme imposed by the *Act* is necessarily contrary to the *Act*, according to the defendant. The expansion of persons for whom the unit owner may be liable from those set out in the legislation is a marked and substantial departure and therefore contrary to the *Act*.

[42] The plaintiff did not address this issue in its brief other than to argue that the acts or omissions of a family member makes an owner liable under the bylaws, and the owner is bound by the bylaws unless the bylaws contravene the *Act*. It is the Corporation's position that the bylaws do not conflict with the *Act*.

[43] The case of *B.P.Y.A. 1163 Holdings Ltd. v. Strata Plan VR 2192*, [2008] B.C.J. No. 1002 (B.C.S.C.) discusses in detail and cites numerous authorities for the principle that a strata corporation may not enact bylaws inconsistent with its governing legislation. A strata corporation is a creature of statute and does not have powers wider than those provided for in the legislation (para. 82). A bylaw which is inconsistent with the legislation is repugnant and therefore *ultra vires* the strata corporation.

[44] In *Lim v. Strata Plan VR 2654*, [2001] B.C.J. No. 2040 (B.C.S.C.), a bylaw of a strata

corporation which attempted to expand the categories requiring an allocation of common expenses, was void and unenforceable as contrary to British Columbia's Condominium Act.

[45] This Court finds that those same principles apply to a condominium corporation. In this case, the Corporation purported, through the passing of bylaw 35, to extend to other categories of individual whose acts or omissions causing damage may attract responsibility to the owner for the deductible.

[46] Insofar as bylaws 34 and 35 refer to individuals other than the owner or resident of the unit, they are *ultra vires* and inoperable. However, given this Court's finding regarding the interpretation of "owner's act or omission" under the *Act*, I am of the view that under the bylaws the owner's act or omission would extend to acts or omissions by others authorized by the owner.

Do the bylaws apply to the circumstances of this case?

[47] According to the defendant, the framework of bylaw 35 suggests there are separate processes to follow, depending upon the location of the damages. Where the damage is to common property or other property owned by the Corporation, bylaw 35(g)(i) applies. Where the damage is to a unit, bylaw 35(g)(ii) applies.

[48] In this case, the damage was not sustained to common property or other property owned by the Corporation, but rather property of individual units. Therefore, according to the defendant, bylaw 35(g)(i) does not apply to the facts of this case.

[49] The defendant further argues bylaw 35(g)(ii) provides that unless the damage is caused by the Corporation itself, the unit owner is responsible for the deductible with respect to his or her own unit. There is no provision in the bylaws for a unit owner to be liable for the payment of a deductible attributable to another party's unit. The payment made by the defendant's insurer is consistent with this provision, according to the defendant.

[50] With respect, the bylaw is poorly drafted. It does appear to address different circumstances depending upon the location of the damage.

[51] In any event, bylaw 34(d) addresses the circumstances of this case. It provides that an owner shall indemnify the Corporation from any expenses related to the repair of any unit made necessary by his act or omission, to the extent that those costs are not covered by insurance. The amount not covered by insurance is the deductible.

[52] In this case, the defendant's and her father's acts and omissions rendered necessary repair to her unit and the unit below. The defendant is therefore responsible for the expenses not met by the proceeds of insurance.

[53] This Court finds that bylaw 34(d) authorizes the payment by the owner of the deductible in circumstances consistent with those covered by the *Act*.

Penalty for failure to comply with this bylaw 2(e)

[54] The Corporation's bylaw 2(e) states that an owner shall:

> Obtain the written consent of the Board before making mechanical or electrical alternations (*sic*) or repairs additions or alternations (*sic*) to the exterior of his Unit or the building of which his Unit forms a part.

[55] Section 99 of the *Act* allows the Court to impose a penalty of not more than $500 on an owner with respect to the contravention of the Corporation's bylaws, provided that Corporation has passed a bylaw authorizing the Corporation to commence an action under this section.

[56] The Corporation's bylaw 32 states:

> The Corporation is authorized to commence an action pursuant to section 99 of the Act.

[57] It is the Corporation's position that before making changes to the bathroom sink, the defendant ought to have obtained written consent of the board of directors. There was no evidence that was done. The Corporation maintains the defendant contravened bylaw 2(e) and claims the penalty of $500.

[58] Bylaw 2(e) requires an owner to obtain written consent of the board before making mechanical or electrical alterations or repairs, additions or alterations to the exterior of their unit or

the building of which the unit forms a part.

[59] The question is whether the replacement of a bathroom sink, necessitating the water to be shut off, is a mechanical repair or alteration as provided for in bylaw 2(e) requiring the written consent of the board.

[60] The Canadian Oxford Dictionary defines the word “mechanical” as an adjective 1. of or relating to machines or mechanisms; 2. working or produced by machinery; and as a noun 1. the working parts of a machine.

[61] It is the Court’s view that the replacement of the bathroom sink and similar fixtures would not be a “mechanical repair or alteration” requiring consent of the board.

[62] Section 2(j) of Schedule B – “Rules and Regulations” in the bylaws provides:

> (2) An Owner shall not:
>
> (j) use a toilet, sink, tub, drain or other plumbing fixture for a purpose other than that for which it is constructed;

[63] It could not be said that replacement of a bathroom sink is use for a purpose other than that for which it was constructed.

[64] The Court finds that the defendant did not breach or fail to comply with bylaw 2(e). The Corporation is therefore not entitled to payment of a penalty in this regard.

Other damages claimed:

[65] The plaintiff claims $525 as reimbursement of their legal fees for requested clarification of their bylaws. Costs related to legal fees are not allowed under section 31 of *The Small Claims Act*. Therefore, this portion of the plaintiff’s claim is not allowed.

[66] The plaintiff claims administration costs in the amount of $430. These fees relate to the preparation, registration and discharge of the lien against the defendant’s property. This Court has no jurisdiction to address the registration and discharge of a lien against property. Further, other than a statement of charges prepared by the plaintiff, no documentation was presented to substantiate

these costs. Therefore, this portion of the plaintiff's claim is not allowed.

CONCLUSION

[67] This Court has found the defendant's acts and omissions caused the damage to her unit and the unit below according to ss. 65(1.3) and (1.4) of the *Act* and bylaw 34(d). Therefore, the defendant is liable for the lesser of the cost of repair and the deductible limit. The cost of repair was $8,191.59 and the deductible limit is $5,000.

[68] Under bylaw 34(d) the defendant indemnifies the Corporation from the cost of repair to any unit made necessary by her act or omission to the extent the cost of repair is not met by the proceeds of insurance carried by the Corporation—in this case the amount of the deductible of $5,000.

[69] The defendant's insurer paid to the plaintiff $2,176.94 toward the cost of the deductible.

[70] The plaintiff Park Place Condominium Corporation will therefore have judgment against the defendant Klarissa Komarnicki in the amount of $2,823.06, along with pre-judgment interest from March 11, 2008, the date of the plaintiff's demand letter to the defendant, and costs in the amount of $200.

[71] The briefs of law submitted by Mr. Naheed Bardai for the plaintiff and Mr. Kim Anderson for the defendant were of great assistance to the Court.

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D.C. Scott J.