

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Basic v. Strata Plan LMS 0304*,
2011 BCCA 231

Date: 20110505
Docket: CA038473

Between:

Zvonko Basic

Appellant
(Plaintiff)

And

Strata Plan LMS 0304

Respondent
(Defendant)

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice Saunders
The Honourable Mr. Justice K. Smith

On appeal from Supreme Court of British Columbia, September 22, 2010
(*Basic v. The Owners*, Strata Plan LMS 0304,

Oral Reasons for Judgment

Appellant appearing In Person:

Counsel for the Respondent:

S.R. Lerner

Place and Date of Hearing:

Vancouver, British Columbia
May 4, 2011

Place and Date of Judgment:

Vancouver, British Columbia
May 5, 2011

[1] **SAUNDERS J.A.:** Mr. Basic appeals from the order of Mr. Justice Sigurdson dismissing his action and ordering him to pay the respondent's costs. Mr. Basic commenced the action to recover damages alleged to have been caused by the Strata Corporation in relation to events in and after 2000. He alleged that the Strata Corporation was negligent in failing to repair and maintain a drain system in the high rise building in which he owns a condominium unit, and that the negligence caused both damage to his property and personal injury to him. The personal injury, he says, is from exposure to toxic mould resulting from water in his locker which caused him allergic reactions and breathing difficulties that persist to this day.

[2] Consideration of this appeal must start, as all appeals do, recalling that the role of this court is not that of a trial court. Rather, our task is to determine whether the judge made an error of law, found facts based on a misapprehension of the evidence, or found facts that are not supported by evidence. Even where there is such an error of fact, we will only interfere with the order if the error of fact is material to the outcome. This standard is established by the Supreme Court of Canada in a series of cases, culminating in *Housen v. Nikolaisen* (2002), 2 S.C.R. 235. That case, and the standard described in it, are referred to frequently by this court, for example in *Lines v. Gordon*, 2009 BCCA 106, 90 B.C.L.R. (4th) 203.

[3] With that framework, I turn to the circumstances of the case. In 1995 Mr. Basic purchased a condominium unit in the Strata Corporation's high rise building located in New Westminster, British Columbia. Along with the condominium unit, Mr. Basic acquired a storage locker located on the fourth floor.

[4] In 1997 and 1999, there were water problems around Mr. Basic's storage locker. The Strata Corporation retained plumbers in those instances to clear the drain in the locker room.

[5] The judge found, as to this early flooding:

[23] ... The problem in a drainpipe near Mr. Basic's locker occurred when there was a water backup through a storm drain.

...

[25] Initially, the problem appeared to be a backup of a drain pipe which the strata corporation dealt with by seeking and receiving assistance from plumbers. Not surprisingly, they initially dealt with the problem by taking a roto-rooter to the drain, which initially appeared to provide the answer.

[6] In 2000, some time prior to September 18, Mr. Basic discovered that the floor and contents of his storage locker, clothing, tools and welding gear, were wet. Mr. Basic spent approximately two days clearing his storage locker and contents. He alleges that during this cleanup, and subsequently, he was exposed to the toxic mould of which he complains.

[7] On September 18, 2000 Mr. Basic reported the flood to the Strata Council. He showed two members of the Strata Council his locker and the wet property. There was a drain near his storage locker, and on September 19 the Strata Council had the drain capped. Nonetheless, problems of water on the floor persisted, and in September 2001 the Strata Corporation retained an engineer to inspect the drainage system. The engineer recommended re-routing the drains to the parkade below. That work was complete in November 2001.

[8] Another flood of Mr. Basic's storage locker occurred in November 2006. The source of that flood was determined to be a leaky pipe inside the locker. That leak was repaired in early 2007.

[9] The judge described these events in these words:

[25] ... When the problem reoccurred in September 2000, steps were taken to cap the drain and relocate the drain line into the lower floor parking area. That appears to have solved the problem, with the exception of two leaking incidents that, on the evidence, were unrelated to the drain problem that appears to have been solved after the 2000 flood.

[10] Mr. Basic testified that after the flood he went to his family doctor because he was sneezing and having cold-like symptoms. Mr. Basic still has shortness of breath and other respiratory discomfort associated. His claim for damages for personal injury arises from these complaints, which he says are caused by toxic mould that is the result of the water problems in and around his storage locker. There was evidence of two types of mould spores found on clothing that Mr. Basic had put, wet,

into a plastic bag and kept until they were tested for mould in October 2001. The samples revealed moulds that can be allergenic, but are not generally known to be harmful to human health.

[11] In the action Mr. Basic contends that the problems with the drains and pipes that caused flooding of his locker, in turn caused the moulds. Further, he complains of the damage to the goods he had stored in the locker, caused, he said, by the errant moisture.

[12] In discussing liability the judge concisely stated the relevant legal test:

[9] Section 72 of the *Strata Property Act*, S.B.C. 1998, c. 43, requires that the strata corporation must repair and maintain common property and common assets. The authorities indicate that the strata corporation, in discharging that obligation, must act reasonably. That the obligation of a strata corporation to repair and maintain is one that must be interpreted with a test of reasonableness; see *John Campbell Law Corp. v. Strata Plan 1350*, 2001 BCSC 1342 at para. 12.

[10] Also, in *Weir v. Strata Plan NW 17*, 2010 BCSC 784, Josephson J. stated at para. 23 that there is little issue regarding the law that the strata corporation has a fundamental duty to repair and maintain its common property, and that in performing that duty the respondent must act reasonably in the circumstances. In that regard he cited *Wright v. Strata Plan No. 205* (1996), 20 B.C.L.R. (3d) 343 (S.C.), aff'd (1998), 43 B.C.L.R. (3d) 1 (C.A.).

[13] The question before the judge on liability was whether Mr. Basic had proved that the Strata Corporation was negligent or had breached its statutory duty of repair to the common property. The judge held against Mr. Basic, finding that the Strata Corporation acted reasonably in discharging its obligation to repair and maintain the common property. He held that the Strata Corporation was not negligent and did not breach its statutory duty in the circumstances. In reaching this conclusion he held:

[24] I find on the evidence that at the time of the incident, it appears that the strata corporation had a regular mode of nightly inspection which covered all areas, including the common property on the fourth floor locker area. I also find that when problems came to the attention of the strata corporation, they acted promptly. I accept the evidence of the witnesses called by the strata corporation as to their procedures and practice.

...

[29] The strata corporation is not an insurer. It has an obligation to act reasonably to discharge its responsibilities. Certainly there was a flood in

2000 that result[ed] in Mr. Basic's clothes in the storage locker becoming wet, but that was not the result of any negligence or breach of duty of the strata corporation.

[14] Mr. Basic's factum was augmented at the hearing of this appeal by a written submission which formed the basis for his oral submission. He contends in his appeal that the judge was wrong in finding that the Strata Corporation acted reasonably, and in finding it was not negligent in responding to the water problems in and near his storage locker. He says the judge made numerous errors in determining what happened at the relevant times. Mr. Basic's most significant complaints relate to his contention that the leaks had been a continuing problem which should have been fixed comprehensively before September 2000, when he says he contracted his medical problems from the moulds. He says, further, that the problems he has identified persist today. In particular, Mr. Basic says that the drain pipe carried sewage, and that the Strata Corporation's response in 2000 of capping the drain was not reasonable because that meant that the foul water which might seep out would stay in a locker room with nowhere to drain out. He says that the solution of cleaning the drains by using a roto-rooter was not a reasonable response and the Strata Corporation should have arranged for a more complete resolution of the drain problem.

[15] Mr. Basic says the judge was wrong in not allowing him to introduce a video recording made in 2006 of the situation in his locker. He says also that the leak of which he complains happened several months before he discovered that his clothing and other property in the locker was wet and that the judge was wrong in saying the leak happened in September or the late summer of 2000. Because the leak had persisted for some time before it was discovered, he says, his clothes were mouldy by the time he identified the problem in September 2000.

[16] Mr. Basic's submissions all relate to the facts as found by the judge. As I explained earlier, this court does not interfere with findings of fact unless the findings are not supported by the evidence, or the judge misapprehended the evidence, in a material way. It is the trial judge who heard the evidence, and is best equipped to

determine what happened, and which evidence should be accepted and which evidence should not be accepted.

[17] I have reviewed portions of the evidence and I conclude there was evidence to support the findings of the judge that the Strata Council acted reasonably. For example, there was evidence as to the roles that members of the Strata Council took in conducting daily inspections of common property, including of the locker room in question, and that no errant water was apparent in the period just before Mr. Basic reported it to the Strata Council on September 18, 2000. There was evidence that there was water on the floor of the fourth floor locker room on two or three occasions before the incident in September 2000 and that plumbers were retained on those instances, for example in 1997 and 1999, to clear the drains of the locker room in question. There was evidence that there were notices posted concerning water issues and advising the owners to raise contents off the floor. There was evidence that in September 2000 steps were taken to cap the drain, and no independent evidence that this response was unreasonable. Further, there was evidence that advice was taken in 2001 from an engineer to address the continuing drainage system problems and that the Strata Corporation implemented the engineer's recommendations within two months of receiving them.

[18] In my view this evidence provides an evidentiary foundation for the trial judge's conclusions that the Strata Corporation took reasonable steps in the circumstances to repair and maintain the common property.

[19] It follows that I do not consider we can interfere with the judge's conclusions on the issue of liability. That being so, the appeal should be dismissed on this ground alone, in my view.

[20] **FINCH C.J.B.C.:** I agree.

[21] **K. SMITH J.A.:** I agree.

[22] **FINCH C.J.B.C.:** The appeal is dismissed.

“The Honourable Madam Justice Saunders”