



About Condo

CASE LAW UPDATE, JUNE 2009

Unit Owner's Responsibility for Deductibles, Maintenance and Repair

April 15, 2009: *Xizhen Jenny Chai v. York Condominium Corporation No. 325*, (Ontario Superior Court of Justice, Toronto Small Claims Court, Court File No. SC-08-00066102-0000)

FACTS

The unit owner rented out her residential unit within the condominium. On a particularly cold day, the tenant found the unit too cold for herself and her infant child. Upon inspection, the superintendent found the thermostat turned down to 10 degrees, which corresponds to the "off" position for the thermostat preventing the heating system from heating the unit. The superintendent investigated the valves relating to the heating system for the unit and found it not operating and the related piping "ice cold".

The condominium corporation's plumbers were contacted but did not arrive before the pipe in question cracked and burst. Although the superintendent was able to shut off the water from the roof of the building, the system continued draining about 20 minutes. Water damage ensued to the unit, several other units and the common elements.

The plumbers charged the condominium \$1,305.85 for their services; the corporation submitted this bill to the unit owner as a common expense. In addition, over \$21,000 was charged for repairs resulting from the flood. The corporation demanded that the unit owner pay its \$5,000 deductible. The owner refused to pay, resulting in a lien being registered against the unit. The owner paid and the lien was discharged. Then the owner brought this action against the condominium corporation and its manager citing negligent failure to repair the common elements.

JUDGMENT

The court found in favour of the condominium corporation, dismissing the unit owner's application and granting a costs award of \$790 against the unit owner.

In reaching this conclusion, the court reviewed five questions:

1. What caused the flood within the unit?

2. Are the unit heating system components part of the unit?
3. Who is obliged to maintain or repair the unit?
4. What costs is the unit owner responsible for with respect to the flood starting in her unit but affecting other units and the common elements?
5. Was the superintendent negligent?

What caused the flood within the unit?

The court considered the evidence of experts hired by both the plaintiff unit owner and the defendant condominium corporation. The court favoured the evidence of the latter because it was more consistent with the information contained in the superintendent's and plumber's testimonies. The court determined that cold air entering the unit between un- (or improperly) sealed gaps around the unit's window air conditioner caused the water in the pipe to freeze. This, in combination with the thermostat being in the "off" position so that no hot water was moving through it, caused the pipe to crack and the flood to occur.

Are the unit heating system components part of the unit?

The court reviewed provisions from Schedule C to the declaration of the condominium, noting it contained the usual statements to the effect that:

- a. pipes, conduits and so forth that service the building generally do not form part of the unit even if they are located within the unit boundaries; but
- b. pipes, conduits and so forth that are within the unit boundaries and service only the unit do form part of the unit.

The court stated that all of the relevant components of the heating system for the unit, including the pipe that burst, were located within the unit boundaries and service only the unit. Therefore, it concluded that all of the same were components of the unit.

Who is obliged to maintain or repair the unit?

The court reviewed the relevant provisions of the *Condominium Act, 1998*, (the "Act") which specify that, subject to the declaration, the unit owner is required to maintain the unit and the condominium corporation is required to repair the unit after damage. It was further noted that the declaration amended these obligations so that the unit owner was also responsible to repair the unit after damage.

The court noted that section 90(2) of the Act provides that the obligation to maintain includes the obligation to repair after wear and tear but not to repair after damage.

What costs is the unit owner responsible for?

The court referred to and relied upon provisions in the Act and the declaration and by-laws of the corporation in determining the unit owner's responsibility for:

- a. the condominium's deductible in relation to the repair work resulting from the flood; and
- b. the full cost of the repairs to the owner's unit heating system.

The court noted that the corporation's declaration made the unit owner responsible for any and all damage to the units and common elements "*caused by the failure of the unit owner to ...maintain and repair his [sic.] unit*" except for insured damage to the common elements.

It was further noted that the corporation's by-laws contained a provision pursuant to section 105(3) of the Act which extended the unit owner's obligation to pay the condominium's deductible amount where damage is caused to the owner's unit through an "*act or omission*" of the unit owner. The provision in fact stated that whenever damage occurs to any unit within the condominium on account of an owner's act or omission, "*the Owner of the unit where the cause of the damage originates*" is responsible for the deductible amount.

Although neither the Act nor the by-law extended the unit owner's obligation to circumstances in which common elements were damaged, the court determined that it ought to be treated as if it does. The court stated,

If damage to the common elements is not taken into account...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.

The court also referenced the 2007 case, *Zafir v. York Region Condominium Corporation No. 632*,¹ in which it was determined that the phrase "act or omission" in relation to section 105 of the Act and by-laws made pursuant thereto does not connote "strict liability" such that owner's do not automatically become liable just because they did or did not do something. However, in this case, the court determined the owner to be responsible on account of the omission of failing to "winterize" the box window air conditioner, allowing cold air to blow in resulting in the freezing of the pipe and valve ultimately causing the flood.

In addition, the court found that the unit owner failed to perform regular (at least annual) preventative maintenance on the fixtures (i.e., thermostat and valves) regulating hot water flow through the heating system pipes that might also have avoided the damage. Further, the unit owner did not instruct the tenant with respect to the working of the thermostat. The tenant neither knew where the thermostat was located or how to operate it. Instead, the unit owner simply told the tenant "*not to worry about the heat, for it comes on automatically.*"

Due to the unit owner's obligations under section 105 of the Act and the related by-law of the corporation, the court found the owner responsible for the condominium's deductible (\$5,000) relating to the repair work performed on account of the flood in both the common elements and other units.

¹ See *About Condo* Case Law Update, April 2007.

Due to the unit owner's obligation to maintain the unit, the court found the owner responsible for the total amount of the plumber's visit to the unit (\$1,305.85) which it stated constituted maintenance that the owner ought to have had performed.

The court also confirmed the unit owner's obligation to pay legal fees and interest included under the condominium lien.

The court did not need to order that the unit owner pay these amounts, as they had already been paid by the owner in order to remove the lien.

Was the superintendent negligent?

The unit owner alleged that the superintendent negligently failed to take proper steps that could have avoided or minimized the flood. The court considered whether the corporation was therefore contributorily at fault for the damage that occurred.

It was determined that even though the superintendent:

- a. did not shut off the water valves prior to the flood,
- b. did not remain in the unit until the plumbers arrived, and
- c. did not succeed in shutting off the water valves after the flood;

the superintendent had conducted himself reasonably and conscientiously and exhibited a serious attitude about his duties. The court stated in particular that it was responsible of the superintendent to recognize that the situation required the expertise of a plumber, and that possession of such expertise is not required to meet "*the standard of a superintendent of a high-rise residential building.*" However, the court also noted that the superintendent had thoughtfully provided the unit tenant with the means of contacting him quickly in case other problems arose, and that he possessed sufficient knowledge of the heating system to identify such things as which valve to shut off, the proper tools to employ and the subsequent step of shutting off the building's water when more immediate measures failed. It appeared relevant to the court that the superintendent went about all such tasks speedily.

Conversely, the court's statements appear to chide the unit owner for failing to ensure the tenant had a proper understanding of the unit's heating system, such as something as basic as knowing the location and operation of the unit thermostat.

APPLICATION

A variety of positive points of instruction emerge from this case.

First, it is instructive in respect of the duties and standards of superintendents of condominium (and other) properties as well as of condominium unit owners.

In respect of the latter, the judgment suggests that unit owners who rent their units should ensure that their tenants are fully instructed in the basic operation, and location, of the key components of the unit's systems. Had the owner had a better understanding

of the operation of the thermostat, for example, and known where it was, she might have ensured it was set to the proper temperature and avoided the problem

In addition, unit owners should not be negligent or careless in respect of work and installations done in units. Had the unit owner properly sealed the box window air conditioner, the primary cause of the flood (as determined by the court) would certainly have been avoided.

The court also emphasizes a unit owner's responsibility to perform preventative maintenance, which may include checking unit system components to ensure they are in working order from time to time. The judgment suggests that repair work relating to the deterioration of such items falls within the scope of the obligation to maintain the unit.

With respect to superintendents, the judgment implies that they should have a basic understanding of the building systems, but that they need not be experts. They should be able to assist in addressing emergency situations quickly, but also have sufficient competence to identify problems that require expert attention.

Further, superintendents should be conscientious and attentive to the fact that unit residents might not know how to deal with situations. The fact that the superintendent in question made himself readily available to the tenant and responded to each call with immediacy and serious consideration were clearly commendable.

It may also be considered that such statements with respect to the superintendent can also be applied to the conduct of members of condominium boards. Board members should be competent enough to make reasonable decisions regarding the affairs of the corporation and also enough to know when expert involvement is necessary. Further, being attentive and available to unit owners and occupants to provide assistance relevant to their role would also be an admirable and appropriate quality in a condominium board.

Second, the court demonstrates a reasonable and appropriate way to determine obligations in respect of damage occurring condominium units. That is:

1. Determine the cause of the damage;
2. Determine whether the damage has occurred to the common elements or the unit; and
3. Determine who, pursuant to the Act and condominium governing documents, is responsible for the costs associated with the same.

However, it should be noted that the court's analysis in this regard seems quite basic and does not cover the gamut of what needs to be considered when damage occurs in a condominium.²

For example, the judgment does not present the court's complete analysis of unit boundaries which must have been done. It states that the relevant components of the

² For a more complete discussion of the process and relevant questions to be asked, see our *About Condo* memorandum of June 2007, "What to do when damage occurs".

heating system are within the unit, but does not explain how this is known.

When referencing Schedule C of the declaration, the court demonstrates knowledge only of that provision which distinguishes unit and common element components based on whether they serve the unit or the building generally; however the quoted paragraph also expressly states it is dealing with such components that *lie within the unit boundaries*. Thus, the quoted provision does not address the status of components that lie outside of such boundaries, regardless of whether they serve only the one unit or many units and/or the common elements. The court could only correctly determine whether the components in question qualify as part of the unit by properly considering *both* (i) the unit boundary lines as described in Schedule C and the description and (ii) whether they service only the unit. Although we expect that the court made an accurate assessment in this regard, it is simply not expressed in the judgment that this was done.

The court also does not appear to consider whether the damaged components of the unit are “standard” or “improvements”. There is no mention of a standard unit definition, and one is left to wonder whether the condominium even has one. As a result, the importance of standard unit definitions in relation to repair and insurance obligations is not exemplified by this judgment.

Such “short comings” might be attributed to the simple and straight-forward nature of the facts of this case: perhaps it simply was not necessary for the court to provide a more complete example of the kind of analyses to be undertaken generally. Nevertheless, the analysis provided by the court is a reasonably good example of the process and basic order of questioning that should be followed, which suggests the court was well directed by the parties’ legal counsel in this regard.

Third, this judgment provides encouragement that those by-laws which seek to extend the unit owner’s obligation to pay the condominium’s deductible amount under section 105(2) to cases not only involving the owner’s own unit, but also where other units or the common elements are damaged, will be upheld by the courts.

Technically, this is not what the Act provides and there is no question that the court’s judgment, based upon the presumed appropriateness of enhancing the “*disciplinary rationale of the Legislature for enacting section 105(3)*” pushes the envelope. In particular, the implicit justification for utilizing the condominium’s lien powers to pursue the deductible amount where the damage occurs to other units or the common elements is highly questionable and is likely not the correct circumstance in which a condominium should seek to enforce a lien by power of sale. However, this judgment would provide some basis for so doing.

The fact that this judgment was made only in Small Claims Court limits its authority as precedent in this regard, but the clarity and persuasiveness of the court’s reasons could result in it being relied upon in other cases at more superior levels of court in the future. If the judgment is agreed with in such cases, we may well see these principles and applications of section 105 of the Act becoming more firmly entrenched in Ontario condominium law.

Michael H. Clifton (June 2009)