Court of King's Bench of Alberta

Citation: Condominium Corporation No 0840294 v Oakley, 2023 ABKB 668

Date: 20231124
Dockets: 2003 11210, 2003 11823,
2003 12017, 2003 11884, 2003 12113
Registry: Edmonton

Docket: 2003 11210

Between:

Condominium Corporation No. 0840294

Plaintiff/Respondent

- and –

Lillian Oakley, Arlene Hyatt and Jane Doe

Defendants/Appellants

Docket: 2003 11823

Between:

Victoria Newman, Mark Selzier, Charman Balaski, Barbara Guenette, Marcel Luzon, Herbert Henley, Wai-Man Lau, Audrey Mahrebeski, Myundja Jan, Martin Johnson, Steven Ferguson, Susan Volney, Connie Webb, David Rowe, Cynthia Patel, Johanna Peters, Marian Shennan, Lynne Durpe and Scott Comeau

Plaintiffs

- and -

Arlene Hyatt, Lillian Oakley and John Doe

Defendants

Docket: 2003 12017

Between:

**Mayfield Management Group Ltd., BQP Management Ltd.,
LA Katrina Solidium, Leah McCrudden and Cameron Haugrud**

Plaintiffs

- and -

Lillian Oakley and Arlene Hyatt

Defendants

Docket: 2003 11884

Between:

**Chad Phillip, Cheryl McEwan, Gloria Barke, Michelle Caoutte,
Michelle Davis and Myles Kraft**

Plaintiffs

- and -

Lillian Oakley, Arlene Hyatt and John Doe

Defendants

Docket: 2003 12113

Between:

Sandra Luchyshin

Plaintiff

- and –

Lillian Oakley and Arlene Hyatt

Defendant

Memorandum of Decision
of the
Honourable Justice L.K. Harris

I. Introduction

[1] On July 29, 2018, a fire broke out at the Monticello, a four-story residential condominium located at 11511 – 27th Avenue in Edmonton. The fire caused significant damage throughout the entire building, as well as damage to an adjacent building named Blue Quill Pointe. Several separate actions were brought against two individuals, Arlene Hyatt and Lillian Oakley (the "Defendants"), alleging that the Defendants were responsible for causing the fire.

[2] The Defendants are a mother (Ms. Oakley) and her adult daughter (Ms. Hyatt). Ms. Oakley leased unit 413 within the Monticello from the unit's owner. Ms. Hyatt was staying with Ms. Oakley at the time of the fire.

[3] The individual Plaintiffs are either owners or lessors of units within the Monticello at the time of the fire. There are two corporate Plaintiffs, the first being Condominium Corporation No. 0840294 ("084"), and the second being the owner/manager of the neighboring apartment building. The total amount of damages claimed between the various Actions amounts to millions of dollars.

[4] An issue has arisen between the parties about whether 084 has standing to bring a claim for damage to the Monticello. The parties have also raised an issue as to whether the individual Plaintiffs are bound by a waiver of subrogation clause contained within Rules and Regulations issued by the Monticello Residents Association.

[5] The Defendants have brought an application to have these issues determined on an interlocutory basis.

II. Background

[6] The Monticello is a conversion condominium property, having previously been an apartment building. The Monticello is one of two buildings located on a single parcel of land, the second building being Blue Quill Pointe. In 2008, the land was converted to a bare land condominium, with the Monticello designated as Unit 1and Blue Quill Pointe designated as Unit 2. The plan also designated two strips of common property running adjacent to the bordering municipal avenues. 084 was the condominium corporation established in relation to the bare land condominium plan, governed by Bare Land Bylaws (the "Bylaws") registered at Land Titles.

[7] In 2010, the Monticello was redivided pursuant to Condominium Plan 1022901. The redivision created no further common property; however, a unit possessing title to the land, hallways, roof and foyer of the Monticello was designated as Unit 3.

[8] The owners of units within the Monticello remained members of 084, but the Bylaws mandated the formation of an owners' association for the purpose of "holding title to and

managing on behalf of the Owners…any common property units…" of the Monticello. Accordingly, the Monticello Residents Association ("MRA"), was registered on August 25, 2010, under Part 9 of the Alberta *Companies Act*, RSA 2000, c C-21 and became subject to registered Articles of Association (the "Articles"). The Articles permitted the issuance of Rules and Regulations governing the Monticello. The developer issued a "Monticello brochure" with Rules and Regulations attached as a schedule, which was not registered at Land Titles (the "Rules and Regulations").

[9] The Articles required every owner of a single-family unit in the Monticello to be a member of the MRA. The Articles also required members to comply at all times with the "Rules". "Rules" is defined under s 2(m) as "the rules and regulations relating to the use of the Monticello Amenities, initially in the form of Schedule E to the Monticello Brochure...".

[10] The developer, as the original owner of the units in the Monticello, then transferred title to Unit 3 to the MRA.

[11] Accordingly, the management of the Monticello was accomplished by creating a hybrid scheme involving a condominium corporation (084), which delegated management of the Monticello to the MRA.

[12] The Rules and Regulations include provisions addressing insurance, requiring the MRA to obtain insurance on all units, common property and insurable property belonging to it, and stating that its provisions shall not restrict the right of owners to obtain their own insurance in respect of the ownership, use or occupation of their unit or personal liability "as permitted by the Act or as otherwise permitted by law". The insurance provisions go on to require a waiver of subrogation.

[13] The MRA failed to file annual returns and was struck from the corporate registry on February 2, 2014. After it was struck, however, there continued to be some activity, consisting of the registration of a Notice of Change of Address and the inclusion of the MRA as a named insured under a policy of insurance insuring the Monticello. At the time of the fire, the MRA had not been revived.

[14] On August 20, 2021, just over three years after the fire, 084 applied for and was granted a Court Order declaring that title to Unit 3 had escheated to the Crown following the dissolution of the MRA and directing the Registrar of Land Titles to transfer title to 084.

[15] Title to Unit 3 was transferred to 084 on November 30, 2021, well after the fire and well after 084 issued its Statement of Claim against the Defendants.

III. The Application

[16] The Defendants filed an application on December 9, 2022, seeking the following relief:

> "Declarations that:
>
> 1. The plaintiff, Condominium Corporation No. 0840294, lacks standing to issue suit for damage caused to any unit which it did not own on July 29, 2018; but that it may maintain an amended claim for damages, if any, to the common property as shown on the Condominium Plan, as at the date of the fire, being the two strips of land as [were] not comprised in a unit shown in a Condominium Plan along 28 Ave and 27 Ave.

2. Additionally, or in the alternative, the plaintiff, Condominium Corporation No. 0840294 (or the entity representing the Redivision Owners of the Monticello) as well as the individual plaintiff unit owners and tenants of the Monticello are bound by the waiver of subrogation clause within the Rules and Regulations of the Monticello Schedules by express or implied term of contract.

3. The Plaintiff, Condominium Corporation No. 0840294 (or the entity representing the Redivision Owners of the Monticello), as well as the individual plaintiff unit owners and tenants of the Monticello, are bound in equity by the waiver of subrogation clause within the Rules and Regulations of the Monticello Schedules due to its actions and those of other agents of the Monticello Board of Directors that demonstrate ongoing reliance upon and recognition of the Monticello Residents Association as well as the schedules that make up the Monticello Brochure."

4. Costs of the application.

IV. General Principles

[17] As the ownership and management structure of the Monticello is somewhat complex, it is helpful to first review some general principles relating to condominiums.

[18] Condominiums are statutory creations and derive their authority from their governing legislation. The *Condominium Property Act*, RSA 2000, c C-22 ("*CPA*") creates a statutory regime regulating the unique property law issues associated with condominiums. It allows private ownership of individual units and shared ownership of common property. Common property is owned by the unit holders as tenants in common and is managed by a condominium corporation: see *CPA*, s 6(2).

[19] A condominium corporation only has the powers given to it by the *CPA*: ***Condominium Plan No 8222909 v Francis***, 2003 ABCA 234 at paras 26-27, leave to appeal to SCC refused, 30001 (September 29, 2003); ***Condominium Plan No 992 5205 v Carrington Developments Ltd***, 2004 ABCA 243 at para 9.

[20] The condominium corporation is the body authorized to act on behalf of the group of owners in relation to certain matters and is the vehicle for managing the property. In ***2475813 Nova Scotia Ltd v Rodgers***, 2001 NSCA 12 at para 3, Cromwell JA, as he then was, states:

> The condominium may be seen, therefore, as a vehicle for holding land which combines the advantages of individual ownership with those of multi-unit development: Oosterhoff and Rayner at s. 3802. In a sense, the unit owners make up a democratic society in which each has many of the rights associated with sole ownership of real property, but in which, having regard to their co-ownership with the others, some of those rights are subordinated to the will of the majority: see Robert J. Owens et al. (eds), Corpus Juris Secundum (1996), *Estates* § 195, Vol. 31, p. 260.
>
> As Oosterhoff and Rayner wisely observed, the success of a condominium depends in large measure on an equitable balance being struck between the independence of the individual owners and the interdependence of them all in a

> co-operative community. It follows, they note, that common features of all condominiums are the need for balance and the possibility of tension between individual and collective interests: at s. 3802.

[21] Condominium corporations also have ancillary powers to properly, effectively and fairly run their condominium where such powers are required to carry out the provisions of the *CPA*: ***Maciejko v Condominium Plan No 9821495***, 2012 ABQB 607 at para 32 [***Maciejko***]. A condominium corporation must have such powers to properly run its business affairs: ***Maciejko*** at para 33, citing ***Condominium Plan No 8210034 v King***, 2012 ABQB 127.

[22] The *CPA* outlines how and when a condominium corporation is created, starting at s 25:

> 25(1) On the registration of a condominium plan, there is constituted a corporation under the name "Condominium Corporation No. _____" and the number to be specified is the number given to the plan on registration.
>
> (2) A corporation consists of all those persons
>
> (a) who are owners of units in the parcel to which the condominium plan applies, or
>
> (b) who are entitled to the parcel when the condominium arrangement is terminated pursuant to section 60 or 61.
>
> (3) Without limiting the powers of the corporation under this or any other Act, a corporation may
>
> (a) sue for and in respect of any damage or injury to the common property caused by any person, whether an owner or not, and
>
> (b) be sued in respect of any matter connected with the parcel for which the owners are jointly liable.
>
> (4) Nothing in this Act shall be construed so as to prohibit a corporation from acting by means of agents or its employees.
>
> (5) The *Companies Act* and the *Business Corporations Act* do not apply to a corporation.

[23] Condominium corporations are created upon the registration of the condominium plan: see ***Condominium Corporation No 9813678 v Statesman Corporation***, 2008 ABQB 495 at para 56. Section 28 of the *CPA* goes on to provide for the constitution of a board of directors of the corporation.

[24] In this case, 084 was created upon the registration of the bare land condominium plan relating to the bare land condominium upon which the Monticello and Blue Quill Pointe were located.

[25] The initial bylaws of a condominium corporation are those set out in the *Condominium Property Regulation,* Alta Reg 168/2000, Schedule 4 [*Regulation*], which were previously set out in Appendix 1 of the *CPA*. The condominium corporation may amend or replace those bylaws, but the bylaws must "provide for the control, management and administration of the units, the real and personal property of the corporation and the common property and managed

property": *CPA*, s 32(1). In this case, 084 did replace the initial bylaws with its own bylaws titled "Blue Quill Pointe/The Monticello Bylaws of Condominium Corporation No. 0840294".

[26] Section 37 of the *CPA* also places statutory duties upon a condominium corporation, the relevant portions of which state:

> 37(1) A corporation is responsible for the enforcement of its bylaws and the control, management and administration of its real and personal property, the common property and managed property.
>
> (2) Without restricting the generality of subsection (1), the duties of a corporation include the following:
>
> > (a) to keep in a state of good and serviceable repair and properly maintain the real and personal property of the corporation, the common property and managed property
> >
> > ...

[27] Section 47 of the *CPA* requires a condominium corporation to place insurance. Section 61 of the *Regulation* sets out the perils the condominium corporation must insure against. Section 61(2) applies to bare land units and states:

> 61(2) Notwithstanding subsection (1), in respect of a bare land unit, a corporation is, unless the by-laws provide otherwise, required to place and maintain insurance against only those perils referred to in subsection (1)
>
> > (a) to which the bare land unit may be at risk, or
> >
> > (b) to which the property for which the corporation is responsible may be at risk.

[28] Section 61.1(2)(c) and (d) specifically compels a condominium corporation to place and maintain insurance for the replacement value of non-residential units.

[29] Section 20 of the *CPA* governs a redivision of a condominium unit, which was done in the case of the Monticello in 2010:

> 20(1) Any owner or owners may, with the approval of the municipal authority, redivide the owner's or owners' units by registering a condominium plan relating to the unit or units so redivided in the manner provided by this Act for the registration of condominium plans.
>
> …
>
> (3) Except as provided in this section, the provisions of this Act relating to condominium plans apply with all necessary modifications to a redivision of units.
>
> (4) Notwithstanding section 25, the owners of units in a condominium plan of redivision are not a corporation, but are, on the date of registration of the condominium plan of redivision, members of the corporation formed on registration of the original condominium plan.
>
> (5) On registration of a condominium plan of redivision, units comprised in it are subject to the burden and have the benefit of any easements affecting those units

> in the original condominium plan that are included in the condominium plan of redivision.
>
> (6) The schedule endorsed on a condominium plan of redivision, as required by section 8(1)(j), shall apportion among the units the unit factor or factors for the unit or units in the original condominium plan that are included in the redivision.
>
> (7) Before registering a proposed condominium plan of redivision, the Registrar shall amend the original condominium plan in the manner prescribed by the regulations.
>
> (8) On registration of a condominium plan of redivision, the land comprised in it shall not be dealt with by reference to units in the original condominium plan.
>
> …
>
> [Emphasis added]

[30] Despite the declaration in s 25 of the *CPA* that upon the registration of a condominium plan a corporation is constituted, in the case of a redivided condominium, such as the Monticello, no new corporation is constituted. Instead, the owners of the redivided units become members of the original corporation. In this case, upon the registration of Condominium Plan 1022901 redividing the Monticello, owners of units within the Monticello became members of 084, subject to the 084 Bylaws.

[31] The issues raised by the parties must be considered in the context of these special principles and the statutory regime.

V. Does 084 Have Standing to Issue a Claim Against the Defendants?

[32] 084's claim against the Defendants is based in negligence and claims damages of $12,000,000 for "property loss, building reconstruction costs and debris removal". While the Amended Statement of Claim does not specifically state that the damages were incurred by Unit 3, presumably 084's claim includes a claim for damages to Unit 3 as that unit is comprised of the land, hallways, roof and foyer of the Monticello. While the Defendants do not take issue with any claim for damages to the common property of 084 (the two strips of land), they do take issue with any claim for damages to Unit 3.

a. Does 084 Have a General Interest in Unit 3?

[33] The Defendants argue that because title to Unit 3 had been transferred to the MRA in 2010 and then escheated to the Crown upon the MRA's dissolution, 084 had no interest in Unit 3 at the time of the fire and, therefore, does not have standing to bring a claim for damages to Unit 3 arising from the fire. They say that a plaintiff must suffer a loss or injury to have standing to bring an action, and, as 084 did not own Unit 3, it suffered no damages. Only the owner of Unit 3 at the time of the fire has standing to bring an action.

[34] On the other hand, 084 argues that it does have standing to issue a claim for damages to Unit 3. Its argument is summarized as follows:

- It had equitable or de facto ownership in Unit 3 based upon its control, management, maintenance, and repair of the common property within the

Monticello, which it had a statutory duty to perform under the *CPA* and the *Regulation*; and,

- It had an insurable interest in Unit 3 and the common property of the Monticello under s 47(1) of the *CPA*.

[35] Quite apart from the issue of establishing the elements of negligence, the question of a plaintiff's standing to bring a claim has to do with whether the plaintiff is a person in a position to be making that claim or the legal entitlement of a plaintiff to invoke the jurisdiction of the Court. In ***Canada (AG) v Downtown Eastside Sex Workers United Against Violence Society***, 2012 SCC 45 at para 1, the Supreme Court explained:

> The law of standing answers the question of who is entitled to bring a case to court for a decision. Of course it would be intolerable if everyone had standing to sue for everything, no matter how limited a personal stake they had in the matter. Limitations on standing are necessary in order to ensure that courts do not become hopelessly overburdened with marginal or redundant cases, to screen out the mere "busybody" litigant, to ensure that courts have the benefit of contending points of view of those most directly affected and to ensure that courts play their proper role within our democratic system of government: *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, at p. 631.

[36] I acknowledge that this case considers the issue of public standing as opposed to private standing; however, the above comment, in my view, applies equally to both as illustrating the dangers of granting standing to those who do not have a direct interest.

[37] Standing to bring a claim for damage to property is typically brought by the owner of such property. Legal ownership of Unit 3 clearly was not vested in 084 at the time of the fire, and so does not assist 084 in this case.

[38] The issue therefore is whether 084 possesses some other interest in Unit 3 which would grant it standing to sue the Defendants. 084 cites two cases in support of its argument: ***Warraich v Chaudhry***, 2019 ONSC 2656 and ***Thorne v Prets***, [2001] OJ No 5582.

[39] Neither ***Warrich*** nor ***Thorne*** assist 084 in establishing that it has standing to sue the Defendants. Both cases are factually distinct from this case, because neither of these decisions involve a consideration of whether the interest of a condominium corporation in real property, in the context of the *CPA*, constitutes an interest that gives it standing to sue for damages to that property.

[40] I have concluded for the following reasons that 084 does not have standing to sue the Defendants based upon a general interest in Unit 3.

[41] 084 attempted to delegate its obligations to control, manage and administer the Monticello to the MRA, including by transferring title to Unit 3, through the Bylaws' requirement that the MRA be constituted upon redivision of the Monticello.

[42] A condominium corporation does possess the authority to delegate certain responsibilities. This is reflected in s 25(4) of the *CPA*, which permits a corporation to act by means of agents or employees and can be in keeping with a condominium corporation's ancillary powers to do what is necessary to carry out their duties under the *CPA*.

[43] Delegation of certain responsibilities can only go so far, however, in the absence of express authority to do so in the *CPA*. The ultimate responsibility for the control, management, and administration, including the placement of insurance, remains with the condominium corporation, the members of whom are the unit owners. In this case, the owners of units in the Monticello remained members of 084, even when they became members of the MRA, which further supports 084's interest in managing the Monticello. There is nothing within the *CPA* or the *Regulation* which suggests that a condominium corporation can avoid its management obligations or its obligations to its members entirely through delegation, even if it is done responsibly and reasonably, and in the interests of the unit owners. To interpret the common law ancillary powers of a condominium corporation in such a way would not promote the objects of the *CPA* and would permit a developer, through the Bylaws, to avoid its responsibilities under the *CPA*. Ancillary powers cannot undermine the clear statutory provisions. Ultimately, as we see in this case, permitting this could weaken the type of control over operations necessary for the protection of the interests of the unit owners.

[44] The question therefore is whether 084's obligations to manage and administer under the *CPA* can support an interest giving it standing to sue. Even though the CPA makes it clear that 084 holds management and administration duties, it does not explicitly provide that these duties grant a standing to sue, nor is there anything explicit in the *CPA* or the *Regulations* that provides a condominium corporation with an interest in common property or a unit which may be comprised of common property that grounds a general standing to sue.

[45] I would also conclude that 084's insurable interest does not necessarily give rise to standing. An insurable interest means that 084 has "some relation to, or concern in the subject of the insurance, which relation or concern by the happening of the perils insured against may be so affected as to produce a damage, detriment, or prejudice" to it: see ***Duri Homes Ltd v Quest Coatings Ltd,*** 2023 ABCA 276 at para 39 [***Duri Homes***]. However, an insurable interest is broader than a legal interest that gives standing because it allows insurance but does not necessarily allow an entity to sue on the interest.

b. Does 084 Have Authority Under the *CPA* to Sue for Damages to Unit 3?

[46] In my view, however, s 25(3)(a) of the *CPA* is a complete answer to the issue of standing and gives 084 the authority to sue for damages to Unit 3.

[47] The Defendants argue that 084 had no authority to sue for damage to Unit 3 under the *CPA*. Section 25(3)(a) of the *CPA* only provides authority to sue for damage or injury to common property, not for damage to a unit registered to it. The Defendants argue that Unit 3 is not designated as common property on the condominium plan and, therefore, 084 has no authority to sue for damages to Unit 3.

[48] 084 argues that Unit 3 does constitute common property notwithstanding its designation as a unit and, therefore, it has authority under s 25(3)(a) of the *CPA* to sue.

[49] Section 25(3)(a) of the *CPA* provides authority to a condominium corporation to sue or be sued for and in respect of any damage or injury to the common property caused by any person, whether an owner or not. In ***Condominium Plan Number 752-1207 v Terrace Corp (Construction)***, 1983 ABCA 126, the Court of Appeal explained that a condominium corporation is the proper party to an action to preserve the common property even though it does not have legal title to the property, because it is the statutory manager of the property (see also

Condominium Corp No 0522151 (cob Somerset Condominium) v JV Somerset Development Inc, 2022 ABCA 193 at para 15).

[50] "Common Property" is defined in the *CPA* as "so much of the parcel as is not comprised in a unit shown in a condominium plan but does not include land shown on the condominium plan that has been provided for the purposes of roads, public utilities, and reserve land under Part 17 of the *Municipal Government Act*": s 1(1)(f). A "unit" is defined as, "in the case of a building, a space that is situated within a building and described as a unit in a condominium plan by reference to floors, walls and ceilings within the building": *CPA*, s 1(1)(y)(i).

[51] In ***Condominium Plan No 86-S-36901 v Remai Construction (1981) Inc***, 1991 CanLII 7984 (SKCA) [***Remai Construction***], the Court held that a condominium corporation had status to sue the developer over a unit which it claimed formed part of the common property even though title to the unit remained with the developer. The Court recognized at para 35:

> …it is quite impractical for anyone but the corporation to sue in respect of common property of a condominium since all owners of units hold the common property as tenants in common. That is why s. 16(3)(a) is in the Act. It must be interpreted with that purpose in mind. And that compels the conclusion that the legislators intended the subsection to authorize action by the corporation in the circumstances such as exist in this case, notwithstanding that the corporation was not owner of the common property.

[52] The Court recognized that granting the condominium corporation standing to sue required interpretation of legislation in a way that promoted its underlying purpose of the protection of the interest of unit owners.

[53] In substance, the Court in ***Remai Construction*** and the cases cited therein, namely ***Frontenac Condominium Corp No 1 v Macciocchi & Sons Ltd***, 1975 CanLII 499, 11 OR (2d) 649 (CA) and ***York Condominium Corp No 167 v Newrey Holdings Ltd***, 1981 CanLII 1932, 32 OR (2d) 458 (CA), held that the nature of the registration did not conclusively determine whether property was common property or not after considering whether caretaker's suites, registered as units, were common property. If the evidence establishes a common intention between the developer and the purchasers that the unit in issue was common property, the fact that it is registered as a unit instead of common property is irrelevant for the purposes of establishing the condominium corporation's right to sue.

[54] In this case, the management of the Monticello was structured differently from the structure considered in ***Remai Construction***, because of the transfer of title to Unit 3 to the MRA. Further, in ***Remai Construction***, the condominium corporation was not suing for damages to the unit, but rather, to have title transferred from the developer to it. As such, the case is somewhat factually different. The Saskatchewan legislation discussed in ***Remai*** also employs a somewhat different definition of a unit from that used in the *CPA*. ***Remai Construction*** remains important however for the principle that the governing legislation must be interpreted in a way that supports the underlying goal of upholding the interests of the owners.

[55] In this case, under the condominium plan, Unit 3 includes the land, hallways, roof and foyer of the Monticello. Quite simply, this does not meet the definition of unit under the *CPA*, since it includes parts of the Monticello that are not a space situated within a building. On its

face, this makes Unit 3 part of the "common property", even if it is described as a unit in the condominium plan.

[56] This interpretation is supported by the purpose of the *CPA*, which sets out a management structure that balances individual property ownership with common property ownership. It would be contrary to the purpose of the *Act* to interpret "unit" as including the structural elements of a building, along with shared parts of the building such as the walls and the hallways. This is clearly common property that is meant to be shared by the owners of the individual units according to the management structure set out in the *CPA*.

[57] There is also no doubt that the property registered as Unit 3 was at all times intended by the owners and the developer to be common property. The areas contained within Unit 3 were used and often described as common property, and included areas typically understood to be common property, including the hallways, land, roof, and foyer of the Monticello. The Plaintiff's litigation representative testified that she believed the areas within Unit 3 were common areas, a reasonable belief given the nature of the areas within Unit 3.

[58] Furthermore, the Bylaws, the Articles, and the Rules and Regulations all make it clear that Unit 3 was intended to be used as common property. The Bylaws say that, upon redivision, the owner's association must be registered for the purpose of "holding title to and managing on behalf of the Owners of the Redivided Units any common property units that may exist created by or within the Plan of Redivision." The Articles give all members access to and use of Unit 3 in common with all other members. Finally, the Rules and Regulations define "Common property" to mean "Unit 3 and so much of the parcel as is not comprised in any unit shown on the Condominium Plan". It is clear that Unit 3 was intended to be common property.

[59] I therefore conclude that 084 has standing and authority to sue the Defendants for damages done to common property, including that property which comprises Unit 3, pursuant to the authority granted to it under s 25(3)(a) of the *CPA*.

VI. Are the Claims Barred by a Waiver of Subrogation?

[60] The various claims brought against the Defendants are largely subrogated claims pursuant to s 546(1) of the *Insurance Act*, RSA 2000, c I-3. That section provides:

> 546(1) Subject to section 570(6), an insurer that makes any payment or assumes liability or making any payment under a contract is subrogated to all rights of recovery of the insured against any person and may bring an action in the name of the insured to enforce those rights.

[61] The MRA Rules and Regulations contain a waiver of subrogation clause, the relevant portions of which are as follows:

> 40. Insurance
>
> > (a) The Board on behalf of the Corporation shall obtain and maintain at all times, to the extent obtainable, insurance on all Units, (including bathroom and kitchen fixtures initially installed therein, but excluding furnishings, improvements, appliances or other property brought into, installed or stored by Owners in units or on the Common Property, the insuring of which shall be the

responsibility of the Owners), and all the insurable Common property and all insurable property both real and personal of any nature whatsoever of the Corporation so as to cover the full replacement cost thereof without deduction for depreciation, and without restricting the generality of the foregoing such insurance shall provide and include the following:

> (i) coverage for fire, extended perils and other perils as from time to time the Board shall deem advisable;
>
> (ii) coverage to the full replacement cost of all buildings and other fixed improvements…
>
> (iii) coverage for such other risks or causes as the Board may determine or as may be determined by Special resolution of the Corporation;

…

(b) Subject to the provisions of the Act, which shall govern in all circumstances, insurance proceeds realized under any policy of insurance obtained or maintained by the Corporation...shall be paid as follows…

…

(c) Nothing in this paragraph 40 shall restrict the right of Owners to obtain and maintain insurance of any kind in respect of the ownership or use or occupation of their Unit or their personal liability as permitted by the Act or as otherwise permitted by law.

(d) All fire and extended peril policies must insure the interest of the Corporation and the Owners from time to time as their respective interests may appear, with standard Mortgagee endorsements attached, and shall also contain the following provisions:

> (i) waivers of subrogation against the Corporation, its managers, agents, employees, and servants and owners, and any member of the household or guests or any Owner or occupant of a Unit, except for arson and fraud…

…

(k) The foregoing insurance is the only insurance required by the Corporation, and any other insurance the owner deems necessary or desirable may be obtained and maintained by the Owner.

[62] The Defendants argue that s 40 of the Rules and Regulations must be interpreted in a way such that it prohibits the insurers of 084 and any owners or tenants from bringing subrogated claims against them.

[63] The Rules and Regulations are attached as a schedule to the "Monticello brochure", which, as noted above, was not filed at Land Titles. The Rules and Regulations, however, are referred to and defined in s 2(m) of the MRA Articles:

> "Rules" means the rules and regulations relating to the use of the Monticello Amenities, initially in the form of Schedule E to the Monticello brochure, as such rules and regulations may be amended from time to time in accordance with the terms of these Articles.

[64] Under the *Companies Act*, s 29(1), the articles of a company bind the company and its members to the same extent as if they had been signed and sealed by each member. However, in this case, the MRA was struck from the register prior to the date of the current insurance policy and prior to the date of the fire. So, the Articles were not binding on the MRA or the unit owners under the provisions of the *Companies Act* during the relevant time period.

[65] The MRA was set up to function as the manager of the Monticello, and I have already discussed how 084 effectively delegated its responsibilities for managing and administering the Monticello to the MRA. The question is whether the MRA could adopt bylaws on behalf of 084 by issuing the Rules and Regulations.

[66] The *CPA* sets out requirements for how a condominium corporation can amend its existing bylaws. Under s 32 of the *CPA*:

> (3) Any bylaw may be amended, repealed or replaced by a special resolution.
>
> (4) An amendment, repeal or replacement of a bylaw does not take effect until
>
> (a) the corporation files a copy of it with the Registrar, and
>
> (b) the Registrar has made a memorandum of the filing on the condominium plan.

[67] In this case, the Bylaws required the owners of the redivided units to form an owner's association for the purpose of holding title to and managing any common property unit. The Bylaws require the powers of the board to be similar to those of a condominium board. However, the Bylaws are otherwise silent on the management of the owner's association.

[68] In my view, the Bylaws do not adopt the Rules and Regulations. There is no reference to the Rules and Regulations in the Bylaws. Moreover, the Rules and Regulations did not exist at the time, so the Bylaws could not incorporate them. Any reference to Rules and Regulations that were not yet written would functionally act as an amendment to the Bylaws.

[69] I further conclude that the Rules and Regulations could not have amended the Bylaws, directly or otherwise, because they do not meet the requirements in s 32 of the *CPA*. The Rules and Regulations were not adopted by special resolution of 084, and they were not filed with Land Titles. The *CPA* sets out specific requirements for how condominium bylaws can be amended, and in this case those requirements were not met. Even if the MRA was acting in place of 084, it could not do something under the *CPA* that 084 would not have been able to do.

[70] I conclude that the Rules and Regulations were not binding on 084 or the unit owners, under either the *Companies Act* or the *CPA*, so the waiver of subrogation clause does not bar them from bringing subrogated claims against the Defendants.

a. Does the Waiver of Subrogation Provision Bar all Claims Against the Defendants?

[71] Even if I am wrong about whether the Rules and Regulations were binding on 084 and the unit owners, I find that the waiver of subrogation clause does not apply to the individual unit owners.

[72] While the Bylaws, Articles, and Rules and Regulations are not statutory enactments, I have concluded that the basic rules of statutory interpretation ought to be employed when assessing their meaning, and rely upon ***Owners: Condominium Plan No 7721985 v Breakwell***, 2019 ABQB 674 at paras 51 – 53 for this point:

> However, in considering the interpretive approach to be taken, I agree with Dovell J in ***Tofin v Spadina Condominium Corp***, 2011 SKQB 219 (***Tofin***) that the Corporation's By-laws must be interpreted as by-laws, not as contractual terms:
>
> > 40 . . . [t]he Court has concluded that principles of contract interpretation have no place within the scope of the within application, being the interpretation of a condominium by-law. This process is not analogous to the interpretation of a contract. The owners of condominiums within a condominium corporation are not in the same position as the parties to a specific contract.
> >
> > 41 Although s. 44(3) of the Act makes reference to the by-laws of a corporation binding the corporation and the owners to the same extent as if the by-laws had been signed and sealed by the corporation and by each owner, the resultant relationship is not the same as that of individual parties who had agreed to the terms of the contract. Notwithstanding some of the owners of a condominium corporation not being in agreement with certain provisions of the by-laws, those same owners are bound to comply with all of the provisions of the by-laws eventually enacted by that condominium corporation.
>
> The Court in ***Tofin*** specifically endorses the decision of our Provincial Court in ***Wilson v Condominium Corp No 021 1057***, 2010 ABPC 150, where, in considering the power to imply terms into a condominium by-law, the Court held at paragraph 23:
>
> > In my view, principles of contract interpretation dealing with ascertaining the intention of the parties to a contract and implying terms to give effect to that intention have no application to the interpretation of the rights and obligations created by by-laws promulgated under the requirements imposed by legislation. By-laws are not negotiated as between the condominium corporation and unit owners and I [*sic*] my view the court should not be reading provisions into the by-laws at the instance of either of the parties.
>
> There is a unilateralism and absence of bargaining to condominium by-laws that diminishes their contractual nature.

[73] Although I acknowledge that the Rules and Regulations are not bylaws, they are incorporated by reference into the MRA Articles of Incorporation, and they fulfill the same objectives – the governance of the Monticello. As such, I conclude that the Rules and Regulations must also be interpreted in accordance with the basic rules of statutory interpretation.

[74] In my view, s 40(d)(i), the waiver of subrogation provision, must be interpreted as referring only to policies of insurance obtained by the MRA, and not to any other policies of insurance obtained by individual owners or tenants.

[75] The section begins with a direction to the Board to obtain insurance. In my view, that direction clearly is defining the scope and nature of the section, that is, insurance to be obtained by the Board, not insurance obtained by the Owners. The provision goes on to address what type of insurance must be obtained by the Board. It then concludes in s 40(k) by saying in part that this insurance is the only insurance required by the Corporation.

[76] Section 40(d), the waiver of subrogation provision, also specifically refers to "fire and extended peril policies", tying back to the wording contained in s 40(a)(i) requiring the Board to obtain insurance.

[77] Section 40(c) confirms that the owners' rights to obtain their own insurance is in no way restricted by its provisions. In my view, this provision, as well as the phrase, "any other insurance the owner deems necessary or desirable may be obtained and maintained by the Owner" simply confirms that the owners maintain the right to obtain their own insurance regardless of what else s 40 might say. While it would have been clearer if s 40(c) was placed at the end of s 40 instead of in the middle, in my view, the waiver of insurance provision in s 40(d) is not referring to any insurance obtained by the Owners.

[78] The waiver of subrogation requirement applies only to policies obtained by the Corporation, and not to any separate policies obtained by owners or tenants. As such, the claims commenced by owners or tenants against the Defendants are not barred by this provision.

b. Does the Waiver of Subrogation Provision Bar 084's Claim?

[79] In case I am wrong about whether the Rules and Regulations were binding on 084 and the unit owners, I find that the waiver of subrogation clause does apply to 084.

[80] 084 argues that its claim should not be barred by the waiver of subrogation provision. It argues:

- it was given insufficient notice of the provision as the MRA did not comply with its statutory notice obligations under s 32.1(4) of the *CPA*. As 084 was not made aware of the waiver of subrogation clause, the clause is unenforceable;
- the waiver of subrogation clause is prohibited by the *Insurance Act*; and
- the clause is ambiguous as it does not explicitly refer to guests of tenants as being protected.

[81] In my view, 084's arguments do not have merit.

[82] First, 084's argument about the notice requirements in s 32.1(4) is misplaced, since s 32.1 does not apply to the Rules and Regulations. That section states:

> 32.1(1) Subject to the regulations, the board may, by resolution, make, amend or repeal rules respecting procedures used in the administration of the corporation or the real and personal property of the corporation, the common property and managed property.
>
> (2) The rules must be reasonable and consistent with this Act, the regulations and the bylaws.
>
> (3) The rules must not restrict the uses of units.
>
> (4) Subject to the regulations, the board must inform owners and tenants of any rules made, amended or repealed.
>
> (5) If a rule or a proposed rule is inconsistent with this Act, the regulations or the bylaws, this Act, the regulations or the bylaws, as the case may be, prevail.

[83] On its face, s 32.1 allows a board to make rules for procedures used in the administration of the corporation and the property owned and managed by the corporation. There has been no judicial consideration of this provision to date. However, the specific wording of the section was introduced by an amendment in the Legislature for the stated purpose of distinguishing between bylaws and rules, on the understanding that rules are for smaller, nonessential matters: *Alberta Hansard*, 28th Leg, 3d Sess, No 14a (9 December 2014) at 470. In my view, this accords with the wording of the provision, which refers to procedures for administration of the corporation and its property. It also aligns with the fact that there are more significant procedural requirements for amending condominium bylaws under s 32 as opposed to making or amending rules under s 32.1.

[84] In this case, the Rules and Regulations deal with matters well beyond the procedural rules that are permitted under s 32.1. In substance, they are akin to condominium bylaws. So, the Rules and Regulations could not have been made under s 32.1 and as such are not subject to the notice requirements set out in that provision.

[85] The parties did not address the temporal application of s 32.1. However, I note there could be an issue about the effective date of this section, given that it did not come into force until the *Condominium Property Amendment Act, 2014*, SA 2014, c 10, s 23 was proclaimed on January 1, 2020. As the parties did not argue this issue, I will not decide if the provision applies retroactively.

[86] Regardless of whether the Rules and Regulations were made under s 32.1, as I noted above, 084 effectively delegated management responsibilities to the MRA, although such delegation does not enable 084 to avoid its management and administration responsibilities entirely. 084 held ultimate responsibility for those obligations, and so to the extent that 084 ought to have been "informed" of the Rules and Regulations, that duty resided with 084 as the entity ultimately responsible. 084 is not in a position to now complain that it was not informed as a result of its own failure to comply with its management obligations under the provisions of the *CPA*.

[87] Next, 084 relies upon ***Naffouj v DE Wilson Management Co,*** 1991 CanLII 7075, 5 OR (3d) 424 (ONSCSM) as authority for the proposition that the waiver of subrogation clause is inconsistent with the *Insurance Act* providing for subrogation and as such is void and unenforceable.

[88] Section 546(1) states:

> 546(1) Subject to section 570(6), an insurer that makes any payment or assumes liability for making any payment under a contract is subrogated to all rights of recovery of the insured against any person and may bring an action in the name of the insured to enforce those rights.

[89] Section 515 prohibits an insurer from making a contract that is inconsistent with the *Insurance Act*.

[90] The nature of subrogation is explained by Feth J in ***Booth v Christensen***, 2019 ABQB 878 starting at para 98:

> The term "subrogation" in ordinary language means "to substitute": ***Bow Helicopters Ltd v Bell Helicopter Textron***, 1981 ABCA 146 at para 23 [***Bow Helicopters***]. Judson J speaking on behalf of the Supreme Court of Canada in ***Ledingham v Ontario (Hospital Services Commission)***, [1975] 1 SCR 332, 46 DLR (3d) 699 adopted (at para 10) the ordinary meaning of "subrogation" as outlined by Chancellor Boyd in ***National Fire Insurance Co v McLaren*** (1886), 12 OR 682 (Ont CH) at 687:
>
> > The doctrine of subrogation is a creature of equity not founded on contract, but arising out of the relations of the parties. In cases of insurance where a third party is liable to make good the loss, the right of subrogation depends upon and is regulated by the broad underlying principle of securing full indemnity to the insured, on the one hand, and on the other of holding him accountable as trustee for any advantage he may obtain over and above compensation for his loss. Being an equitable right, it partakes of all the ordinary incidents of such rights, one of which is that in administering relief the Court will regard not so much the form as the substance of the transaction. The primary consideration is to see that the insured gets full compensation for the property destroyed and the expenses incurred in making good his loss. The next thing is to see that he holds any surplus for the benefit of the insurance company.
>
> The Alberta Court of Appeal in ***Bow Helicopters*** explained (at para 23):
>
> > ... An insurer, to recover a loss by way of subrogation, must be able to place itself in the position of the insured. It follows, then, that the insurer is only entitled to make such claims, in the name of the insured, as could have been made by that insured...

[91] ***Naffoui*** is a case from a lower Ontario Court and as such is not binding upon this Court. 084 has provided no authority from Alberta interpreting the Alberta legislation in a similar way.

[92] To the contrary, in ***Condominium Corp No 9813678 v Statesman Corp***, 2007 ABCA 216 at para 10, leave to appeal to SCC refused, 32254 (January 31, 2008) [***Statesman***], the Alberta Court of Appeal held that an insurer can give up its right to subrogation in a clause in the insurance policy, citing ***Commonwealth Construction Company v Imperial Oil***, [1978] 1 SCR 317 at 327.

[93] Additionally, there are numerous examples of waiver of subrogation provisions being used and relied upon in Alberta jurisprudence. As an example, see our Court of Appeal decision in ***Bow Helicopters Ltd v Bell Helicopter Textron***, 1981 ABCA 146, and more recently, ***Duri Homes***. No issue of unenforceability was raised in those cases. I note that while s 546(1) of the *Insurance Act* grants an insurer a right of subrogation nowhere does the *Insurance Act* explicitly forbid waivers of the right to subrogation. I conclude that it remains open to parties to require such waivers if they deem it prudent.

[94] Section 546(1) clearly states that the insurer is subrogated to all rights of recovery of the insured. In this case, if I am wrong and the Rules and Regulations apply to 084, then 084 has no claim against the Defendants because of the requirement in s 40(d) of the Rules and Regulations: see ***Statesman*** at para 71. This would leave the insurer without a remedy against the Defendants.

[95] Finally, 084 argues that by not explicitly including guests of tenants as a protected category it remains open to 084 to issue a claim against Ms. Hyatt. I disagree with 084 that the waiver of subrogation clause is ambiguous and does not refer to guests of tenants.

[96] The waiver of subrogation clause does refer to "any member of the household" or "guests" or "occupant of a Unit". In my view, Ms. Hyatt falls into any of those three categories.

[97] In summary, if I am incorrect and the Rules and Regulations do bind the parties, 084 is bound by the waiver of subrogation provision in the Rules and Regulations and as such its claim against the Defendants is barred.

VII. Are 084 and the Unit Owners Bound in Equity by the Waiver of Subrogation?

[98] The Defendants argue that 084 and the individual unit owners are bound in equity to the waiver of subrogation clause. They argue that the board of the MRA relied on the Rules and Regulations, and therefore 084 and the unit owners should be bound by the waiver of subrogation.

[99] The Defendants rely on the decision in ***Hill v Nova Scotia (AG)***, 1997 CanLII 401, [1997] 1 SCR 69. However, that case dealt with the application of the doctrine of partial performance in the context of an unwritten agreement to transfer a property interest and the requirements of the *Public Highways Act*, RSNS 1954, c 235, which reflected the *Statute of Frauds*, 1677 (Eng). The doctrine of partial performance deals with the specific injustice of applying the *Statute of Frauds* to frustrate a partially performed oral contract for a property interest, and it is not applicable to this case: see also ***Haan v Haan***, 2015 ABCA 395 at para 9ff.

[100] The Defendants did not articulate any other basis for their argument that 084 and the individual unit owners are bound in equity, except to argue that the MRA operated as if the Rules and Regulations were in place. There are different forms of estoppel, and without knowing which one the Defendants intend to claim, it is difficult to determine if the requirements have been met.

[101] With that in mind, I nevertheless conclude that the Defendants are not entitled to equitable relief in this instance. Arguably, all forms of estoppel require the party claiming the benefit of the doctrine to show that they relied on a common understanding or a representation by another party to their detriment: ***Trial Lawyers Association of British Columbia v Royal & Sun Alliance Insurance Company of Canada***, 2021 SCC 47 at para 51; see also Bruce MacDougall, *Estoppel*, 2d ed (Toronto: LexisNexis Canada, 2019) at 33-36. It is because of that detrimental reliance that estoppel prevents the other party from resiling from the common

understanding or the representation. In other words, "[e]stoppel is the general legal term for the doctrines whose basic effect is to hold a person to his or her word": MacDougall at 2. In this case, the Defendants have not articulated any way in which they relied on the waiver of subrogation clause to their detriment, so they are not entitled to rely on the doctrine of estoppel.

[102] I conclude that 084 and the individual unit owners are not bound in equity by the waiver of subrogation clause in the Rules and Regulations.

VIII. Conclusions

[103] I therefore issue the following declarations:

1. 084 has standing to issue a claim against the Defendants for damage to Unit 3 and the common property of the Monticello;

2. The waiver of subrogation clause within the Rules and Regulation does not apply to either 084 or the individual unit owners; and

3. 084 and the individual unit owners are not bound in equity by the waiver of subrogation clause in the Rules and Regulations.

[104] If the parties cannot agree on costs, they are at liberty to make written submissions to me on costs within 30 days.

Heard on the 13th day of January, 2023.
Dated at the City of Edmonton, Alberta this 24th day of November, 2023.

L.K. Harris
J.C.K.B.A.

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