Claim No: 281309

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Browning v. Halifax Condominium Corporation #6, 2007 NSSM 51

BETWEEN:

CATHERINE BROWNING

Claimant

- and -

HALIFAX CONDOMINIUM CORPORATION #6

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on July 24 and 30, 2007

Decision rendered on September 10, 2007

APPEARANCES

For the Claimant - Kent Noseworthy, counsel

For the Defendant - Dennise Mack, counsel

BY THE COURT:

Introduction

[1] The Defendant, Halifax Condominium Corporation #6, is the statutory entity which was created to operate and manage a high-rise apartment and townhouse complex at 5572 Northridge Rd. in North Halifax (hereafter referred to as “the building”). As the one-digit number indicates, it is one of the older condominium projects in Halifax, dating back several decades to when legislation was passed to allow for this form of property ownership.

[2] The Claimant, Catherine Browning, purchased unit 204 in the building in April 2006. As will be further described, she almost immediately began what she intended to be minor renovations and discovered significant water damage that had been likely going on for years, but which was largely obscured by carpeting, flooring and other structures. For the past sixteen months her apartment has been a virtual construction zone. She has not had the enjoyment of the unit that she had hoped for. And she has had to bear significant financial and personal expense to rectify the damage.

[3] In this lawsuit, the Claimant seeks to hold the Defendant condominium corporation responsible for the damage to the interior of her unit principally upon the theory that the Defendant, as the owner of the common elements, had a legal duty to address the water incursion problem and failed to do so reasonably. There are also arguments made to the effect that the legal documentation underlying the condominium, properly interpreted, places

that responsibility on the condominium corporation quite apart from any possible negligence.

[4] The Defendant denies that it is responsible on the theory that it was simply not negligent in the performance of its duties, and that the legal framework of the condominium squarely places the risk of damage to the interior of a unit on the unit owner.

The Facts

[5] The Claimant is a university professor who described herself as a lifelong renter who had never before owned real estate. When finally ready to take the plunge into home ownership she was attracted to the unit advertised for sale at Convoy Towers East, the subject building at 5572 Northridge Road. She viewed the unit with her real estate agent and was interested. The unit was originally a one-bedroom that had been converted to a 2-bedroom unit by partitioning off the sunroom. The apartment “showed beautifully,” as she put it, and though fairly small at 650 square feet, met her needs and expectations. She put in an offer conditional upon a satisfactory inspection. She hired a qualified residential property inspection company and attended with the inspector on the day of the inspection.

[6] As was required by law, the vendor had completed a property disclosure statement. The statement disclosed that there had been some water damage to the floor as a result of Hurricane Juan in September 2003, but did not give much cause for alarm.

[7] The inspection was non-invasive, as is expected, since a prospective purchaser is in no position to remove structures or do damage in order to unearth possible problems. Nevertheless, it did reveal some issues which, in retrospect, might have been seen as red flags. These included the following:

A. The sliding windows were noted to be sticky and hard to open.

B. There was interior staining noted at or near window sills, which was suggested might be due to windows being left open during rain.

C. There was a stain noted on the carpet below the window.

[8] The Claimant was not deterred by this inspection which was, in the aggregate, quite satisfactory.

The discovery of water

[9] The Claimant testified that although the inspection had noted a bit of water staining on the carpet below the living room window, she was not prepared for what she discovered when she decided to remove that carpet shortly after taking possession. What she found was serious mold and mildew blackening the parquet floor underneath. Concerned about the health implications of mold and mildew, she consulted with a mold removal company which confirmed what it was and gave a quote to remove the flooring and clean up the mold. Rather than pay the $775 quoted, the Claimant and her partner decided to do the work themselves with scrapers and mallets. This took “days and days” of work, and the debris had to be hauled away by a junk remover.

[10] Further consultation with experts revealed that water coming through the exterior wall near the window was the source of the problem. This led to a contractor being hired to remove part of the wall around the window to identify the source of the water. The initial strategy employed was to attempt to apply a waterproofing compound to the wall, followed by drywall to restore the wall to something resembling its original condition. Unfortunately that did not do the trick as water continued to come in when it rained, and the drywall had to be removed to expose the wall for further investigation and remediation.

[11] The Claimant had upon the discovery of the problem immediately reported her difficulties to the condominium corporation which dispatched the property manager and one of its regular contractors to assess and monitor the situation. It so happened that the corporation was already engaged in scheduled repairs to the wall of units (the “riser”) which included the Claimant’s unit. That work, installing flashing, did not entirely solve the problem, and it was not until further work was done by the corporation in March 2007 that the water incursion appears to have been stopped to an acceptable degree. That work involved removal of brick, addition of a vapor barrier and replacement of insulation.

[12] In the meantime the Claimant had to deal with a rotting wood window frame, an incursion of ants, and a deja vu experience of discovering similar problems in the bedroom of the unit. Essentially, no sooner was one part of the unit on the way back to being normal when another part became a construction zone. The exterior problems in the bedroom area appear to be on their way to resolution, hopefully, leaving the Claimant to contend -

even if not with further water problems - with the expense and disruption of restoring that part of her unit.

[13] At trial the Claimant produced a vivid photographic record of the wet and damaged structures that were discovered, and of much of the work done to address the issue.

[14] It should be mentioned here that the previous owner, a gentleman who the Claimant never met and who was not called to the trial to testify, had lived in the unit for about twenty years. The documentary evidence from the corporation minutes of meetings and the testimony of its witnesses made absolutely clear that this individual had never reported any water incursion to the Board or the property manager in all of his years of ownership. So there is no possible way that the Defendant could have known, until made aware by the Claimant, that there was an issue with water incursion specifically into this unit.

[15] There was a great deal of testimony about how water incursion had been a significant problem in this building for a number of years. Typically, the water would leak in around the windows, especially when wind-driven. Some units fared better than others, depending on their orientation. Those units facing into the prevailing winds reported more problems than others.

[16] Building codes and practices have changed since this building was constructed thirty five or more years ago. Back then, there was no requirement for flashing above windows or vapor barriers of the type now in use, and consequently none was incorporated into the design. Had there been such flashing and/or vapor barrier, much of the water that gets behind

the brick facade would likely have been directed away from the windows and fallen to the ground. Without flashing and vapor barriers, there was a greater risk of water getting in through the window framing.

[17] The building's property manager testified, and I accept, that water incursion is a problem common to most high-rise buildings in Halifax, and there is no surefire way to avoid all water incursion all the time. I accept his testimony that no company doing this type of remedial work will even guarantee that water incursion will be stopped as a result of measures taken.

The damage claim

[18] Essentially the claim for damages includes costs that the Claimant has spent on having work done to the interior of the unit, or compensation for the many hours of work that she has done herself. The Claimant has made a decision to do much of the work herself because she did not have the money to pay others to do it. She admitted that she is an amateur and that it takes her much longer than it would a qualified tradesman to achieve the same result. However, for all of the work she did herself she had estimates of how much it would cost to have the work done professionally, and is claiming that same amount.

[19] Counsel for the Defendant argued that the Claimant was attempting to be compensated at the same rate as a professional, but I believe she missed the essential point that the Claimant was using those quotations as a yardstick to value the work achieved, even though it might take her five times as many hours to achieve the same result. I have no difficulty in accepting provisionally that the amount claimed altogether, which by the

time of the trial had been whittled down to an amount less than $12,000.00, is a reasonable estimate of the damage to her unit caused by water incursion. The real question for me to answer is whether she has a reasonable basis to recover this amount from the Defendant.

The Defendant's approach to maintenance

[20] Richard Carrier has had a contract to provide property management services to the Defendant since 1989 and is intimately familiar with the building and its problems. I found him to be truthful and accept his evidence at face value.

[21] The condominium corporation has had to rely on reports from unit owners to advise of any problems affecting the interiors of the units, including water incursion, because there is no other practical way for the corporation to become aware of such things. With this 13-storey high-rise building there has been a lengthy history of reported water problems, more than any other type of problem, which problems have been addressed on a priority basis within the financial means of the corporation.

[22] Over the years, there have been recognizable patterns in the reports of water incursion. The building has a number of "risers" which are referred to by the common unit numbers that are stacked up within them. For example, units 204, 304 up to 1304 would all fall within the "04 riser." This is the riser which contains the Claimant's unit. Historically, the 04 riser had not been the source of as many complaints as several of the other risers. When it was decided to schedule a program of improvements on a riser by

riser basis, the ones with the worst incidence of reported problems received a higher priority.

[23] As might be expected, there have been other maintenance issues which have had to be addressed and which have taxed the resources of the corporation. In recent years there has been a new roof (2002), and more recently extensive repairs to the parking garage, the latter costing in excess of $300,000. That repair exhausted the corporation's reserve fund and was only able to be financed with the assistance of the contractor which performed the work.

[24] I accept the evidence given that the cost to repair the entire building to address all possible water concerns could be a $2,000,000 job, and that there are not the funds available to do it, nor the appetite amongst unit owners to be assessed several tens of thousands of dollars each in a special charge to raise the money. As a result, the corporation has worked within the confines of its budget and has tried to establish reasonable priorities. It is of note that the current balance in the reserve fund is zero.

How and why did the Claimant discover previously unknown water damage?

[25] This is the situation that the Claimant inherited. She did not have any knowledge of this history. Neither the property disclosure statement provided by the prior owner, nor the estoppel certificate provided by the corporation, disclosed any of these facts. In hindsight, there was probably some more due diligence that the Claimant or her agent might have done to learn more about the history of the building, but I am not being critical of

anyone for not having done more. Everyone appears to have done what they were reasonably or minimally required or expected to do.

[26] I have concluded on all of the evidence that the Claimant was extremely unlucky. Her predecessor in the unit had done renovations that appear to have had the effect of concealing water incursion. For example, he had built a frame around the sunken window, creating a place where water could seep and probably not be seen. He had installed carpet that could get wet without leaving obvious standing water. And the parquet flooring was also an addition to the original construction, which allowed water to get trapped underneath. While it is possible that this previous owner was aware of water incursion but chose not to report it, it is equally if not more likely that he was simply unaware of it because it was less obvious. He may also not have been particularly observant. This is all speculation, of course. The only reason offered for why he might have deliberately shied away from reporting the problem, which reporting could only have helped him, was because he had apparently not received board approval for some of his renovations. Perhaps this was an issue that he did not want to open up. We simply do not know.

[27] Whatever the real reason for why the problems had not been reported or revealed, the fact remains that the Claimant exposed the problem because of her decision to start removing the carpet. She opened up the proverbial can of worms, and it just escalated from there.

[28] The original construction consisted of concrete block walls with a layer of plaster on the interior. The windows, which are the putative points of entry for water, were originally recessed units affixed directly to the concrete

block with no wooden frames or sills. While perhaps a bit stark, this construction would not have allowed for much doubt when water was coming through. As I visualized the situation presented in evidence, with the original construction unadorned, the water would have come in and been immediately obvious. It would have been sitting on the floor. A unit owner would have had the ability to mop it up and be dry soon thereafter, with minimal lasting effect.

[29] There was no evidence as to the amounts of water getting in, whether in unit 204 or any other unit. Just as every ship leaks to some extent, buildings are not immune to the elements. It is possible that an owner experiencing small amounts of water might have learned to live with it and not complained. Others might just have accepted it as an incident of living in a Maritime climate. Others such as the previous owner of 204 might simply not have been aware of water because of embellishments to the original construction, and might have been brewing a much more serious problem than they realized.

[30] Given all of these variables, it is difficult to find fault with how the condominium corporation chose to address the problem. Even if the original construction had been deficient, which I am in no position to judge, the corporation and unit owners took it over in good faith and, when problems began to occur some years later, had to find a way to cope with the problem and the expense of rectifying it. I cannot fault the corporation for its response. There is no basis to say that the panic button ought to have been pushed and more urgent and expensive repairs undertaken.

[31] To the extent that the claim rests upon a theory of negligence, I must first find that there is a duty of care owed to the Claimant, and then find that it was breached in the sense that the care actually exercised fell below a reasonable legal standard.

[32] I accept that the Defendant owes a duty of care to unit holders. There are numerous cases which recognize and enforce such a duty, many of them decided in British Columbia and Ontario where condominium ownership is highly developed. The condominium corporation is the owner of the common elements and has unit owners at its mercy, in effect, since individual unit owners cannot and should not repair common elements. As for a standard of care, it must respond reasonably to problems as they arise, and must also be alive to future problems in order to avoid preventable damage. In essence, it must perform repairs as needed, hire competent contractors, and have in place a reasonable program of preventative maintenance. On the other hand, as a fiduciary it must be a careful steward of the unit holders' money, and cannot be expected to spend more than it can reasonably charge to the unit owners or raise through other sources. Unfortunately, condominium corporations have a very limited ability to raise money except by assessing unit holders. Even where funds are borrowed, it still amounts to a deferred tax on all of the residents, present and future.

[33] The evidence at trial did not establish any negligence. I find that the Defendant responded reasonably to all of the water incursion problems, and in particular responded reasonably to address the structural problems that have resulted in water entering and damaging unit 204. I accept that the Claimant's perception is that she had to press the Defendant to take

the steps that it did, and perhaps it is true in this as well as other situations that the squeaky wheel gets the oil, but the fact remains that the response occurred and was reasonable in my estimation.

[34] To summarize, there is no basis to find that anything the Defendant did, or unreasonably failed to do, caused the water damage which the Claimant uncovered or caused her to incur the expense of repairs. The Defendant's ultimate response to the situation was diligent and, it appears, effective.

[35] The Claimant would have liked it done faster, but even had it done so (which I am not saying it reasonably could have done) the Claimant would have been facing the same interior repairs. At best she would have been able to wrap up the construction sooner and been able to enjoy her apartment instead of live for more than a year in a work zone. This delay, if actionable, could only have been compensated by general damages, which are legislatively limited to $100 in this Court.

Other theories of liability

[36] The fact that the Defendant was not negligent in failing to prevent the water damage, or allowing it to occur, or in not repairing it soon enough, does not end the matter. It is the Claimant's theory that the underlying legal relationship places the onus upon the Defendant to pay for any repairs after damage. This requires me to interpret the applicable provisions in the *Condominium Act* and the Declaration. Those that are pertinent are:

The Condominium Act

Maintenance and repairs

35 (1) For the purposes of this Act, the obligation to repair after damage and to maintain are mutually exclusive, and the obligation to repair after damage does not include the repair of improvements made to units after acceptance for registration of the declaration and description.

(2) Subject to Section 36, the corporation shall repair the units and common elements after damage.

(3) The corporation shall maintain the common elements.

(4) Each owner shall maintain that owner's unit.

(5) Notwithstanding subsections (2), (3) and (4), the declaration may provide that

(a) subject to Section 36 [which deals with substantial damage that may dictate deregistration of the condominium], each owner shall repair that owner's unit after damage;

(b) the owners shall maintain the common elements or any part of the common elements; or

(c) the corporation shall maintain the units or any part of the units.

(6) The corporation shall make any repairs that an owner is obligated to make and that the owner does not make within a reasonable time.

(7) An owner shall be deemed to have consented to have repairs done to the owner's unit by the corporation pursuant to this Section. R.S., c. 85, s. 35. (Emphasis mine.)

[37] The regime of the Act clearly is to the effect that *"the corporation shall repair the units and common elements after damage"* unless the Declaration provides that *"each owner shall repair that owner's unit after damage."* This brings me to consider whether the subject Declaration has done just that:

The Declaration

7.01 Maintenance and Repairs of units by the Owner
(a) Subject to the provisions of this Declaration, each Owner shall maintain his unit and shall also repair his unit after damage, including without limiting the generality of the foregoing repair to all improvements made by the Declarant in accordance with the Architectural plans and specifications, notwithstanding that some of such improvements may have been made after the registration of this Declaration all at his own expense, to the intent that such Owner will restore his unit to a state of repair at least equivalent to its condition at the time it was originally completed for sale by the Declarant.

7.02 Repairs of Common Elements by the Corporation
The Corporation shall repair the Common Elements after damage, including the repair and replacement of all exterior doors providing ingress to and egress from all units at its own expense ....

7.03 Maintenance of the Common Elements
The Corporation shall maintain the common elements, save and except for any improvements made by an Owner to the limited common elements appurtenant to his unit.

11.02 The Corporation shall indemnify and save harmless the Owner of each unit from and against any loss, costs, damages, injury or liability whatsoever which may be suffered or incurred by each Owner, his family or any member thereof, any other occupants of his unit or any guests, invitees or licencees of such owner or occupants, resulting from or caused by the negligence or wrongful act or omission of the Corporation, its manager, agents, servants, employees or independent contractors, or for damage done to the unit substantially resulting from the repair or maintenance by the Corporation of the Common Elements, provided that notwithstanding anything herebefore contained, each owner agrees to look solely to the proceeds received from the Insurer or insurers of the public liability and property damage insurance of the Corporation in the event of such loss, costs, damage, injury or liability.

[38] From the language above cited, it is clear that the Declaration has overridden the s.35 of the *Condominium Act*, at least to an extent. The words *"[s]ubject to the provisions of this Declaration, each Owner shall*

maintain his unit and shall also repair his unit after damage" could hardly be clearer.

[39] The Claimant however argues that under this scheme, and the way it has been interpreted by the courts, the corporation is liable to repair her unit.

[40] One theory of liability advanced is that the language places responsibility on the Corporation for damage *"done to the unit substantially resulting from the repair or maintenance by the Corporation of the Common Elements."* The trouble I have with this argument is that the damage which was done to unit 204 did not result from either negligence, as I have found, nor from repair or maintenance to the common elements. This provision appears designed to address the situation where, for example, the corporation decides to remove a window unit (a common element) without creating a temporary barrier, with the result that water gets into the unit and ruins the floor. This is not what happened here. There was no evidence that any of the damage to the Claimant's unit was caused by the remedial work.

[41] Perhaps more pointedly, the Claimant relies on a decision of the former Nova Scotia County Court in *Halifax County Condominium Corp. No. 10 v. Shea* (1982) 56 N.S.R. (2d) 274, a decision of Judge Anderson on appeal from an Adjudicator of the Small Claims Court. In that case the Plaintiff's unit suffered severe damage when a large portion of the building's flat roof was removed, with the unit left exposed to the elements for an entire week. The Small Claims Adjudicator found, which was upheld on appeal, that the effect of the *Condominium Act* and the declaration for that condominium was that the corporation was responsible for damage caused to the unit.

The corporation argued unsuccessfully that its declaration displaced the statutory regime.

[42] While the logic of that decision is admittedly difficult to follow, I do not find that it has any application here. The Declarations are differently worded. The Declaration being interpreted in that case did not have the clear language found here, namely that *"each Owner shall maintain his unit and shall also repair his unit after damage."* What the Declaration in the *Shea* case provided was as follows:

> "Each owner shall maintain his unit as well as all exterior door frames and doors, exterior window frames and windows, and all interior and exterior door panes and window panes of his unit, to a standard acceptable to the Corporation and subject to the provisions of the Declaration, each owner shall repair his unit as well as all frames and windows, and all interior and exterior door panes and window panes of his unit after damage, all at his own expense. The obligation of each owner to repair his unit as well as all exterior door frames and doors, exterior window frames and windows and all interior and exterior door panes and window panes of his unit after damage includes the repair of all improvements made to his unit by the Declarant ..."

[43] The finding in that case by the Adjudicator had been that "the duty of the unit owner to repair after damage was restricted to doors, windows, frames or improvement, but not damage to walls, ceilings, tiles, carpeting or other parts of the unit." On appeal, the finding was upheld on the basis, as I interpret the decision, that the language of the *Condominium Act* which placed the *prima facie* duty on the corporation had not clearly been displaced by the wording of the Declaration.

[44] In my respectful opinion, this case has no direct application to the situation before me. The language of the two Declarations is quite different. The

one that was present in the *Shea* case was ambiguous, while the language in the Declaration before me is clear.

[45] In summary, I find that the Declaration here clearly places the onus on the unit owner to perform repairs *"after damage,"* unless such repair is necessitated by the negligence of the corporation or as a result of *"damage done to the unit substantially resulting from the repair or maintenance by the Corporation of the Common Elements."* As already noted, the damage which the Claimant has incurred has resulted not from any remedial work done by the Corporation, but from water incursion that the remedial work has been designed to address.

[46] During the course of the hearing, the Defendant reversed its position on a few of the repair items which had formed part of the original claim, as it appeared to recognize that some of the repairs were necessitated by the remedial work or were so closely connected to the common element repairs that they ought to be considered part of the remedial effort. Those small components of the claim have essentially been resolved and were not left to me to decide. The balance of the claim is for repairs to the interior of the unit as a result of water damage. I mention this because I believe the Defendant has properly understood and applied the provisions of the Act and the Declaration, even if a bit belatedly in the case of some of the repairs.

[47] In the result, and with no lack of sympathy for the awful experience that the Claimant has had to endure, the action must be dismissed.

Eric K. Slone, Adjudicator