Claim No: 407991

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Halifax Condominium Corporation #92 v. Abbott, 2012 NSSM 64

BETWEEN:

HALIFAX CONDOMINIUM CORPORATION #92

Claimant

- and -

BARRY ABBOTT and JOANNE ABBOTT

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on November 20, 2012

Decision rendered on December 3, 2012

APPEARANCES

For the Claimant	Don Shewfelt, counsel
For the Defendants	Melissa MacAdam, counsel

BY THE COURT:

[1] This is a claim by Halifax Condominium Corporation #92, (hereafter the "Corporation") against the owners of one of the units therein, for damages caused by the failure of a water tank with resulting leakage into the unit below.

[2] The Defendants are the owners of unit 204 in the condo building at 64 Cumberland Dr., in Dartmouth, Nova Scotia. The Defendants do not reside in their unit, but rather it is leased to tenants.

[3] On the evening in question, which was sometime in March 2012, an alarm began to sound in unit 104. The occupants were not home at the time, but arrived shortly thereafter and together with the superintendent for the building came in to see water coming from the ceiling into several rooms. By a process of deduction, it was concluded that the water had to be coming from unit 204 which was directly above unit 104.

[4] This was confirmed shortly thereafter when the tenants residing in unit 204 also returned home. The water supply to the tank was immediately turned off so that the flooding was at least limited.

[5] Damage to unit 104 was substantial. While I will get into further detail below, suffice it to say that the cost of repair was in excess of $9,000.

[6] In the days that followed the flooding, the owners of units 104 and 204 as well as the Corporation all reported the matter to their various insurers. Adjusters were deployed and meetings were held. The insurer for unit 104,

namely the unit that suffered the damage, determined that there was no coverage. The Corporation itself did not have coverage because it only has the ability to insure the common elements, and the common elements did not receive any damage. That left the insurer for unit 204, which took the position that it was not responsible either.

[7] After about a month with no one taking responsibility, the Corporation took it upon itself to contract for repairs. It did so under the authority of both the *Condominium Act* and a term of the Condominium Declaration. Its position is that these provisions obligated it to take this action, and entitle it to seek indemnity from the owner of the unit that was responsible for the damage having been caused.

[8] The relevant sections of the Condominium Act are as follows:

> 30 (1) Each owner is bound by and shall comply with this Act, the declaration and the by-laws.
>
> 31 (1) The corporation ...
>
> (e) has the right to recover from any owner
>
> (iii) any sum of money expended by it for repairs done by it pursuant to subsection (6) of Section 35 for the owner;
>
> 35 (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.
>
> 38 (1) Where a duty imposed by this Act, the declaration or the by-laws is not performed, the corporation, any owner, or any person having an encumbrance against a unit and common interest may apply to the Court for an order directing the performance of the duty.

(2) The Court may by order direct performance of the duty, and may include in the order any provisions that the Court considers appropriate in the circumstances including ....

(b) the payment of costs.

[9] The relevant portions of the Condominium Declaration are as follows:

7.01 (a) each owner shall maintain his unit, and, subject to the provisions of this Declaration, each owner shall repair his unit after damage, all at his own expense. The obligation of each owner to repair his unit after damage, includes the repair of all improvements made to his unit by the declarant in accordance with the architectural plans and specifications of the declarant, notwithstanding that some of such improvements may have been made after acceptance for registration of this declaration and the description so that his unit is restored to a state of repair at least equivalent to that at the time his unit was originally completed for sale by the declarant;

(b) Each owner shall be responsible for all damage to any and all other units and to the common elements, which are caused by the failure of the owner to so maintain and repair his unit, save and except for any such damage to the common elements for which the cost of preparing same may be recovered under any policy or policies of insurance held by the corporation;

(c) The Corporation shall make any repairs that an owner is obligated to make and which are not made within a reasonable time; and in such an event and owner shall be deemed to have consented to having such repairs made by the Corporation; and such owner shall reimburse the Corporation in full for the cost of such repairs, including any legal or collection costs incurred by the Corporation in order to collect the costs of such repairs, and all sums of money shall bear interest at such rate (not exceeding 2% above the prime rate charged by the corporations bankers.)

[10] There are several other facts that are relevant to my consideration. According to the tenant who resides in unit 204, the owners of his unit replaced the leaking hot water tank immediately after this incident. The tenant did not know how old the hot water tank was. To the best of his knowledge, it had never been formally (or even informally) inspected in the approximately three years of his occupancy. Nor had it ever leaked before. The owners of unit 204, the Defendants, did not testify at the trial.

[11] All this is relevant to the question of whether or not the owners of unit 204 were negligent. The argument is made on behalf of the Claimant that the lack of inspections over three years could amount to negligence. Counsel for the Claimant also argued that I may draw an inference from the failure of the owners to testify, to the effect that their evidence would not have been helpful to their case.

[12] These arguments are made because counsel for the Claimant recognizes that the language of the Declaration can be read as requiring an element of fault. In particular, the words “failure of the owner to so maintain and repair his unit” could be read as requiring some degree of fault for the hot water tank failing, namely something that the Defendants did, or did not do, which fell below a reasonable standard of care.

[13] The position of the Defendants is that they were not negligent, and in the absence of negligence there is no basis for attaching responsibility to them for what happened with their hot water tank.

[14] I was supplied with authorities by Defendant's counsel, addressing the question of what constitutes negligence. In the case of *Wm. Chafe v. Murphy* 2001 NLCA 18, a decision of the Court of Appeal of Newfoundland and Labrador, at paragraph 31, the court stated:

> 31 A finding of negligence must be based on a failure to take reasonable care and therefore relates to the actual or constructive knowledge of the alleged tortfeasor prior to the fire. Reasonable care, the established standard in negligence is an objective standard - it is the care that would have been taken in the circumstances by a person of ordinary intelligence and prudence. A reasonable person will conduct himself or herself so must prevent the creation of reasonably foreseeable risks of harm. *Resurface Corp. v. Hanke* 2007 S.C.C. 7 The measure of what is reasonable depends on the facts of each case, including the likelihood of unknown or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. [citing *Ryan v Victoria (City)* [1999] 1 S.C.R. 201

[15] In the *Ryan* case itself, at paragraph 28, the following is stated:

> 28 Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of unknown or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.

Was there negligence?

[16] In my view, it is a stretch to conclude that the failure of the Defendants to have their hot water tank inspected for at least the three years previous to the leak, breaches any objective standard of care. It is far from certain that such

inspections, even had they been made, would have disclosed that the tank was ready to start leaking. For all we know, whatever part rusted out or failed might not have been visible to an inspector.

[17] As for the inference I might draw from the failure of the Defendants to testify, while I may infer that the evidence would not have helped them, that does not supply actual evidence implicating them in a breach of a standard of care. For example, I may be able to conclude that the tank was likely not "brand-new" - because I expect I would have heard testimony to this effect, had it been the case - but I cannot (solely on the basis of the Defendants' failure to testify) find that it was either so old or so neglected as to amount to actionable negligence.

Other basis for liability

[18] Having said this, I do believe the Claimant is entitled to succeed on a different premise, and one that does not require a near-fictional, if not outright disingenuous finding of negligence.

[19] The provisions in the Declaration referred to above contemplate both maintaining and repairing the unit. One could imagine many instances where a need to repair arises without any fault, but the consequential damage arises from the failure to make a timely repair. What is timely in one instance may be different from what is timely in a different scenario. In the case at hand, the damage was caused not *per se* by a failure to maintain, but by the owners' failure to repair the leaking water tank before water could escape in considerable quantities from the unit and cause harm to other units. The most basic repair that would have satisfied the obligation would have been to turn off the water

immediately upon it leaking. The more durable repair was its eventual replacement, but the harm was caused when the water started leaking and nothing was done to repair it for a period of time. In my view, a failure to repair is not a negligence standard but rather a strict liability standard. Either you do the repair or you do not do the repair. If damage is caused, which is traceable to a failure to repair, then in my view liability attaches.

[20] I recognize that it might be seen to be placing an onerous burden on someone to catch a leaking water tank the minute it happens. One is not home at all times. One may not be in that room paying attention to what the water tank is doing. Nevertheless, the language of the Declaration appears to import responsibility without requiring an inquiry as to negligence. This makes a lot of common sense, as the purpose of these provisions is to delineate whose responsibility it is and who should protect themselves by way of insurance against these liabilities.

[21] It is difficult to believe that the drafters of the Condominium Declaration would have left it virtually to chance whether or not a unit owner might have to take responsibility for damage done in a situation such as this. The element of chance would come down to whether or not someone, namely the owner of the unit receiving the damage, or the Corporation, could prove fault, and moreover do so in a situation of some disadvantage because the evidence of such fault might be uniquely within the knowledge of the (allegedly) guilty party. In my view, the more reasonable interpretation is that the standard is objective: did the "failure of the owner to… repair his [hot water tank]" cause damage either to another unit or to the common elements? When that question is asked, the answer is "yes."

[22] In the result, the owners of unit 204, namely the Defendants in this case are responsible for the damage which has been repaired at a total cost of $9,687.47 including HST. The Defendants did not question the need for the repairs nor the reasonableness of the amount expended, so I do not need to elaborate further. On the face of it, the expenses were necessary and reasonably incurred.

[23] There are other amounts which the Corporation seeks. It asks for interest on the outstanding bill at the rate of prime + 2%, as well as costs including $1,000 for legal fees. It bases the claim for legal fees on the language both in the *Condominium Act* as well as in the Declaration, both quoted above.

[24] I do not believe the language in the *Condominium Act*, which includes the words “the payment of costs” in section 38 (2), is of any assistance, because it is clearly referring to what “the court” may do, and the court is a defined term in the Act which refers to the Supreme Court.

[25] The language in the Declaration is more promising because it refers to “any legal or collection costs” incurred to recover the money that the Corporation expends in the situation such as this. This is similar to the type of situation that arises where there are contractual terms obligating a party to pay solicitor and client costs, such as in a commercial lease.

[26] I had occasion in a previous case to consider whether such a contractual term overrode the prohibition in s.15(2) of the *Small Claims Court Forms and Procedures Regulations*, which states:

> 15 (2) No agent or barrister fees of any kind shall be awarded to either party.

[27] In that case of *Homburg L.P. Management Inc. v. Lappin* 2009 CarswellNS 418; 2009 NSSM 26, I stated the following:

> **Solicitor and client costs**
>
> 19 The landlord has advanced a claim for some of its legal costs incurred in pursuing this claim. This requires me to consider the impact, if any, of s.15(2) of the Small Claims Court Forms and Procedures Regulations, which state:
>
> > 15 (2) No agent or barrister fees of any kind shall be awarded to either party.
>
> 20 The Claimant points to two separate provisions in the lease which would allow such a claim. They are:
>
> > ***10. Enforcement and Collection***
> >
> > The Tenant will pay and indemnify the Landlord, without limitation, for and against all charges (including legal fees on a solicitor and its own client basis, and disbursements) lawfully incurred in enforcing payment of any amounts owing under this Lease (including without limiting, rent and damages arising from an alleged breach of covenant or condition of this lease) or in obtaining possession of the Premises after default of the Tenant or upon expiration or earlier termination of this Lease, or in enforcing any covenant, provision or Agreement of the Tenant herein contained.
> >
> > 41(d) if the Landlord brings an action against the Tenant for recovery of the Premises or for Rent or damages arising from an alleged breach of a covenant or condition in this lease to be complied with by the tenant, the Tenant will pay to the Landlord all expenses incurred by the Landlord in the action including fees and expenses on a solicitor and his own client basis.
> >
> > (Emphasis added)

> 21 Section 15(2) of the regulation reflects a very clear policy by the Legislature that to allow Adjudicators to award legal costs relating to representation in court would undermine the ability of this court to perform its assigned function. While I do not purport to know exhaustively what that policy is, it is quite obvious that it would raise the financial stakes in every case, and possibly force more litigants to hire lawyers to compete on an equal footing. It would change the character of the court.
>
> 22 I note that there are Small Claims Courts in some provinces, such as Quebec, which forbid lawyers from appearing altogether. While Nova Scotia has not gone that far, it has made it clear that parties who wish to use lawyers in this court must do so at their own expense without a hope to recoup that cost from the other party.
>
> 23 The fact that there are no costs awarded for the effort of preparing for and attending at trial does not necessarily mean that a legal expense incurred prior to trial cannot become the subject of a claim.
>
> 24 In the case here, before a claim was even contemplated, the landlord incurred legal expenses. In evidence are a number of invoices from Mr. O'Hara, who was retained to respond to the fact that the tenant had vacated prematurely. There is one account dated June 5, 2008 for $280.24 and another dated June 30, 2008 for $146.05, which do not include any time spent preparing a claim for issuance. All of the accounts thereafter relate to the drafting, issuance and service of the claim, and preparation for the hearing.
>
> 25 I believe that regulation 15(2) stands firmly in the way of my allowing any lawyer's expenses that begin with the drafting of the claim for issuance in this court. The pre-litigation expenses totalling $426.29 stand on a different footing. The landlord is contractually entitled to be reimbursed for those expenses on a solicitor and client basis. These relatively small amounts appear reasonable and I would not disturb them.

[28] I therefore make the distinction in this case between the legal expenses incurred by the Corporation prior to the drafting and issuance of this claim, and those expenses incurred thereafter. As I and other adjudicators have noted, this is a policy decision made by the Legislature not to allow adjudicators to award such costs. I acknowledge Mr. Shewfelt’s comment that it would be a shame if Claimants such as the Corporation felt obliged to sue for small amounts in the

Supreme Court, in order to protect their right to legal costs. For better or worse, this is a calculation that litigants have to make and the trade-off of legal costs in favor of simplicity of procedure and timeliness of hearing is one that many will continue to make.

[29] Unfortunately, counsel for the Corporation did not provide any evidence such as his bills, which would have permitted me to determine what, if any, legal expense was incurred prior to the drafting of the claim. He asked for a global amount of $1000, which would have included the evening spent in court, much of which is simply not allowable.

[30] Although I do not have any evidence of the time spent by counsel prior to making the decision to use the small Claims Court, I am satisfied that there would have been some and I will estimate this amount at the relatively nominal amount of $250.

[31] I have no difficulty with the claim for filing fees of $182.94, process serving in the amount of $86.25, and $80.94 for the cost of copying documents which was backed up by an invoice from Staples.

[32] As for prejudgment interest, I believe the court is entitled to respect the interest rate set out in the Declaration, and the 5% is only marginally greater than the 4% rate which presumptively applies to proceedings in Small Claims Court. I accept the calculation by counsel of $242.18.

[33] There will accordingly be judgment for the amounts set out below:

Cost of repairs	$9,687.47
prejudgment interest	$242.18
Legal costs	$250.00
Cost of issuing the claim	$182.94
Cost of copies	$80.94
Cost of serving the claim	$86.25
Total	$10,529.78

Eric K. Slone, Adjudicator