

Citation: ☼



Date: ☼  
File No: 16-55432  
Registry: Vancouver

**IN THE PROVINCIAL COURT OF BRITISH COLUMBIA  
(SMALL CLAIMS COURT)**

BETWEEN:

**636894 B.C. LTD.**

CLAIMANT

AND:

**THE OWNERS, STRATA PLAN LMS 2995**

DEFENDANT

**REASONS FOR JUDGMENT  
OF THE  
HONOURABLE JUDGE W. LEE**

Appearing for the Claimant:

K. Moller

Counsel for the Defendant:

A. Koralewicz

Place of Hearing:

Vancouver, B.C.

Dates of Hearing:

February 9, 10, 15, 2017

Date of Judgment:

April 4, 2017

## INTRODUCTION

[1] This claim deals with a flood that occurred on November 12, 2015 at the Marina Pointe strata complex in Vancouver BC, resulting in damage to a unit located at 317-1018 Cambie Street ("the Property"). A large exterior planter abuts onto the exterior wall of the Property. After a heavy rainfall, the planter overflowed with water which entered the Property, causing the damage.

[2] At issue are the following questions:

1. Was the Defendant negligent in the repair and maintenance of the exterior planter located adjacent to the Property contrary to section 72(1) of the *Strata Property Act* [SBC 1998] c. 43, leading to the damage to the Property?
2. Was there any intentional damage to the Property caused by the Defendant or its agents during the course of repair work carried on at the Property?

[3] The Claimant seeks the following, the amounts of which the Strata Corporation does not dispute:

Cost of replacing floor	\$20,065.37
Cost of painting	\$750.00
Lost cost contribution	\$1,400.00
Moving and storage	\$3,689.90

[4] The "lost cost contribution" is effectively a rent of \$700.00 a month that the occupant of the Property Lars Eric Dahlberg pays to the Claimant as a contribution to the costs of the Property. As Mr. Dahlberg moved out of the property for approximately two months during the repairs the Claimant did not require Mr. Dahlberg to pay this sum and now claims the lost payments totaling \$1,400.00.

[5] The Claimant has waived any claim to amounts over \$25,000.00.

## **BACKGROUND**

[6] The Claimant 636894 B.C. Ltd. is the registered owner of the Property.

[7] The Defendant, The Owners, Strata Plan LMS 2995, is the strata corporation for Marina Pointe and owns the common property (the "Strata Corporation").

[8] Lars Eric Dahlberg is a part owner of 636894 B.C. Ltd. and resided in the Property since 2003.

[9] Kim Moller is a retired lawyer and the President and part owner of 636894 B.C. Ltd.

[10] Rancho Management Services (B.C.) Ltd. ("Rancho Management") is the strata management company for Marina Pointe.

[11] Platinum Pro-Claim Restoration ("Platinum Pro-Claim") dealt with the interior repair work relating to the flood.

[12] Cristian Ciurel is the building supervisor for Marina Pointe and is employed by Rancho Management.

[13] Dan Cathcart is the strata agent for the Strata Corporation and is employed by Rancho Management.

[14] Barry Ferguson is the President of the Strata Council for the Strata Corporation.

## THE EVIDENCE OF THE CLAIMANT

[15] The Property is located on the 3<sup>rd</sup> floor of the Marina Pointe strata complex and faces onto an exterior courtyard. A large concrete planter is located in the courtyard and abuts directly to the exterior wall of the Property. The planter is full of greenery and a tree.

[16] Approximately 10 years earlier, Mr. Dahlberg replaced the original floor of the Property with a new hardwood floor at a cost of about \$10,000.00. During the trial, the term "betterment" was used as a reference to this replacement flooring.

[17] At about 11:00PM on November 12, 2015, Mr. Dahlberg realized that the floor of his bedroom was wet with water. He moved furniture away and tried without success to dry the floor with towels. After a few hours the water spread to his living room and then further into the Property.

[18] The next morning Mr. Dahlberg met with Cristian Ciurel, the building supervisor employed with Rancho Management. They went by the exterior of the Property and saw that water was overflowing from the adjoining planter.

[19] Platinum Pro-Claim attended on site on November 13, 2015 at the request of Mr. Ciurel. They were asked to bring water extractors, dehumidifiers and fans and to organize Mr. Dahlberg's belongings for storage. Mr. Ciurel also contacted Pioneer Plumbing to investigate why the planter was full of water and not draining.

[20] Mr. Dahlberg signed a form for Platinum Pro-Claim called a "Customer Communication/Work Authorization Contract". The form authorized Platinum Pro-Claim

to:

“...enter my property, furnish materials, supply all equipment and perform all labor necessary to preserve and protect my property from further damage, and to perform all restoration procedures necessary to repair and restore the flooring, furniture, structure and other furnishings.”

[21] The form had a number of check boxes to indicate other terms that could form part of the authorization but none of these were selected. This included a provision that Mr. Dahlberg would be responsible “for any and all costs, charges, deductible or depreciation not covered by insurance.”

[22] Hector Saddul is the Senior Project Manager for Platinum Pro-Claim. He arrived at the Property later that same day. Mr. Dahlberg understood in speaking with Mr. Saddul that the Strata Corporation would be paying for all costs in relation to the flood.

[23] Mr. Dahlberg also spoke to Dan Cathcart, the Strata Agent for Rancho Management. There was some discussion about insurance coverage and the fact that the Strata Corporation had a \$25,000.00 deductible for water damage claims. The possibility arose that the Strata Corporation may not file an insurance claim if the damage costs were less than the \$25,000.00 deductible.

[24] On November 14, 2015 Mr. Dahlberg sent an email to Platinum Pro-Claim asking that the moving of his possessions be delayed until the insurance coverage issues were resolved. The email makes a reference to Alicia Young who was employed by Platinum Pro-Claim to move Mr. Dahlberg’s belongings out of the Property. Mr. Dahlberg’s email stated:

"I've spoken to both Dan Cathcart and Christine Molson who is the insurance agent for Strata. Late on a Friday neither Dan nor Christine is able to confirm what will be covered by the Strata insurance, and what my final expenses might be. At this point, it would appear that replacing my floor is not covered by insurance as it is not the original flooring.

Under the circumstances, I think we should have Alicia hold off coming tomorrow for the content packing and re-assess the situation after I've heard back from Dan and Christine. Hope you can reach Alicia in time."

[25] In an email dated November 18, 2015, Karla Uemoto of Platinum Pro-Claim updated Mr. Dahlberg about the drying process at the Property and stated that the next steps for Platinum Pro-Claim were:

- Remove affected flooring to ensure no trapped moisture underneath.
- Cut out drywall, remove wet insulation to allow proper drying of the structure.
- Remove affected baseboards to access base of walls to allow proper drying.
- Leave the equipment running until confirmed everything is dry.

[26] This email suggests that the drywall in the Property had not yet been removed.

[27] On November 19, 2015, the Strata Corporation insurers advised that the anticipated repairs costs were less than the \$25,000.00 deductible and so no insurance claim was being pursued by the Strata Corporation. The insurers also advised that there was no insurance coverage for betterments. This was a reference to the flooring installed by Mr. Dahlberg.

[28] On November 21, 2015, Mr. Dahlberg retained Edgemont Moving & Storage to move and store his possessions.

[29] By letter dated November 23, 2015, Dan Cathcart of Rancho Management advised Mr. Dahlberg that the Strata Corporation will "be responsible for the resultant damage to your strata lot and the managing agent and/or insurance adjuster will be making arrangements for the repairs to your strata lot." The letter then went on to say the Strata Corporation will be responsible for the repair of the damaged common property "as well as resultant damage to strata lots owned by individual owners. The Strata Corporation will be responsible for: Site prep, drywall, paint, trim, and final clean."

[30] Mr. Dahlberg was asked to contact his personal insurer for any claims in relation to his personal belongings, furnishings, additional living expenses and other items. However neither Mr. Dahlberg nor the Claimant carried personal insurance for the Property or the contents.

[31] At this time, Mr. Moller became more actively involved in the dealings with the Strata Corporation. On November 26, 2015 he sent Dan Cathcart a letter asking if the Strata Corporation will pay for removal and replacement of the existing flooring, repainting the entire Property, the moving and storage of the Property contents and Mr. Dahlberg's reasonable living expenses while he moved out to allow the repairs to occur.

[32] By email dated November 27, 2015, Mr. Cathcart advised Mr. Moller and Mr. Dahlberg that the Strata Corporation would not be responsible for the flooring costs as the floor was not an original fixture. Mr. Cathcart said that all affected areas will be painted at Strata Corporation expense but that betterments, as well as moving, storage and living expenses, were the responsibility of the Property owner.

[33] There were further discussions which did not resolve the dispute.

[34] At some point, Platinum Pro-Claim determined that it need only remove 50-60% of the existing flooring. The Claimant wanted all the flooring to be replaced though citing concerns that the new flooring would not match the old flooring. The parties disputed liability for the flooring costs. In an effort to move forward and have the flooring work done, the parties came to an agreement that the issue for liability of the costs would be resolved at a later date. Mr. Dahlberg sent an email to Platinum Pro-Claim on November 30, 2015 stating:

"To move forward and get back into the unit as soon as possible, we think it makes sense to engage PPC to complete the flooring and painting work to be done beyond the current remediation and repair work you are doing for the Strata Corporation. We will pay PPC directly for this work. Matters related to payment and allocation with the Strata Corporation will be resolved at a later time and would not involve PPC."

[35] The email went on to ask Platinum Pro-Claim to confirm the rates to be charged as Mr. Dahlberg understood it would be the same rate as charged to Rancho Management. The email is copied to Marcel of PC Flooring and asks for a quotation for the flooring work based on the rate being charged to Rancho Management.

[36] Although this email was sent out under the name of Mr. Dahlberg, Mr. Moller confirms that he actually wrote it.

[37] In commenting about this letter, Mr. Cathcart did not agree that the Claimant was only to be liable for the flooring costs from that point onwards. He maintained throughout that the flooring in the Property was a betterment and not original flooring and therefore was the sole responsibility of the Claimant owner.

[38] In an email dated December 2, 2015, Mr. Moller requested from Mr. Cathcart



particulars of any drainage issues relating to the common property adjacent to the Property or adjacent to any other units on the third floor of 1018 Cambie Street over the last 13 years.

[39] On December 3, 2015, Mr. Dahlberg sent an email to PC Flooring to place his order for flooring. The total cost of the flooring was \$20,065.37 as shown by an invoice issued to Mr. Dahlberg by PC Flooring dated December 4, 2015. The invoice covered the costs for the removal and replacement of all flooring in the Property.

[40] Mr. Dahlberg said that on December 7, 2015 he spoke to Barry Ferguson, the president of the Strata Council. He states that Mr. Ferguson told him that there was a history of drainage issues with units adjoining courtyards with planters. According to Mr. Dahlberg, Mr. Ferguson said that the planters should not have been built alongside the units.

[41] Platinum Pro-Claim was only painting the portion of the interior wall directly affected by the flood. Mr. Dahlberg cited concerns about having the colour of the newly painted wall match the colour of the other walls. He retained Vlad Zubenko to paint the walls and ceilings of the Property other than those areas painted by Platinum Pro-Claim and certain smaller areas such as bathrooms. In an email dated December 7, 2015 to Mr. Zubenko, Mr. Dahlberg confirms that the costs for the painting will be \$1,500.00 and that he is paying a deposit of \$750.00. Some issues arose about the quality of the painting work and the evidence was not clear on whether the full \$1,500.00 was paid. The Claimant is only seeking \$750.00 for the painting costs.

[42] Mr. Dahlberg said that in the 13 years he has lived at the Property he has not

had any water issues with the adjoining planter, nor has he had any issues with water entering the Property.

**THE REPORT OF EBI ENGINEER BUILDING INSPECTIONS LTD. DATED  
NOVEMBER 30, 2016**

[43] The EBI report was written by Matt Foxall, a professional engineer. His opinion is based on a review of photographs taken at the Property. He never attended at the Property.

[44] Mr. Foxall said that the photographs show calcium deposits at the base of the concrete wall. This is the wall that is hidden behind the drywall. Mr. Foxall states:

“These white deposits are the result of leaching of the calcium salts contained in the concrete after wetting. These stains are likely the result of one or more prior incidents of water entering the suite.”

[45] He goes on to conclude:

“In summary, while I can’t say with certainty, it seems apparent that the flooding of the subject suite was caused by poor drainage in the adjacent planter and that incidences of water incursion into the suite had occurred in one or more occasions in the past.”

[46] Mr. Foxall does not state whether the calcium deposits could have been caused only by the November 15, 2016 flood.

[47] The calcium deposits were evident on a concrete wall that could only be seen when the drywall was removed. No witness, including the unit occupant Mr. Dahlberg, ever noticed any previous water incursion into the unit.

[48] Hector Saddul was asked to comment on the report of the calcium deposits. Mr.

Saddul thought that the calcium deposits could have been formed if the drywall in that particular location was not removed right away. His recollection is that the drywall was not removed the day that he first attended. This is consistent with the email from Karla Uemoto of Platinum Pro-Claim to Mr. Dahlberg dated November 18, 2015. This email is dated six days after the flood and indicated that one of the next steps in the drying process for the Property was the removal of drywall and affected baseboards.

[49] In my view, this report is of limited value. Mr. Foxall did not attend on site to view the unit, the walls or the planter. He admits that he cannot say with certainty what the cause of the flooding was. This is not surprising given that he only had six photographs to work with.

**THE EVIDENCE OF CRISTIAN CIUREL, BUILDING SUPERVISOR FOR RANCHO MANagements SERVICES (B.C.) LTD.**

[50] Mr. Ciurel supervises the operations at the entire Marina Pointe complex. He has been employed by Rancho Management for nine years.

[51] On the night of November 12, 2015, Mr. Ciurel was at his home in Burnaby. He recalls seeing heavy rains that night which he described as coming down in sheets.

[52] When he attended at the Property the next day with Mr. Dahlberg he saw that the planter outside the property was full of water.

[53] Mr. Ciurel said that in his nine years of employment he has never seen a planter filled with water. He said he was also not aware of any prior problems with water entering the Property.

[54] Following the December 12, 2015 flood, Mr. Ciurel arranged for an additional drainage pipe to be installed in the planter.

[55] When asked about any previous drainage issues with the planter, Mr. Ciurel recalls that sometime between two to four years ago, an additional drainage pipe was installed in the planter because water was pooling in it. Mr. Ciurel said that there had been no further drainage issues with the planter until the flooding that occurred on December 12, 2015.

[56] Mr. Ciurel was shown an invoice issued by Pioneer Plumbing & Heating Inc. on August 19, 2014. The invoice said the job location was "1008/1009 (outside area near playground)". The description of the work done was:

Dismantle section of rain water drain, found pipe to be completely blocked.  
Cleared drain. Dug up section above and installed new perforated pipe  
and drain stones.

[57] Mr. Ciurel did not think this invoice related to the planter by the Property. The invoice refers to a different street address than the Property and there was no evidence that a playground was near the Property.

[58] Mr. Ciurel described the inspection process undertaken at Marina Pointe. He said that twice a day on a daily basis he and his staff would inspect the planters to see if there are any issues with pooling water. He said that he and his staff would go to a high point in the complex to look over planters. If any problems were seen, the strata council would be advised and a plumber would be contacted.

[59] There is no formal written policy respecting this inspection process. It seemed

clear that this process was essentially a twice daily walk around through Marina Pointe to look for any problems.

[60] Mr. Ciurel was asked to comment on a report dated November 30, 2016 prepared by Matt Foxall, a professional engineer with EBI Engineer Building Inspections Ltd. The report made reference to possible water entry into the Property. Mr. Ciurel said that he was not aware of any prior water entry into the Property.

[61] Mr. Ciurel said that the Strata Corporation has performed hydro flushing, augering and camera scoping of pipes to look for blockages. This has been done in various locations but not on the pipes in the planter by the Property. Mr. Ciurel said that the practice is that if a planter drain is working fine they will not flush, auger or perform a camera scope to look for blockages. They would only consider this work if a drainage problem was identified.

[62] Mr. Ciurel said that he does not deal with any legal or financial matters and leaves that for the strata agent Dan Cathcart. He denies that he would ever tell Mr. Dahlberg that the Strata Corporation would be responsible for all costs since this is not his area of responsibility. In Mr. Ciurel's email of November 13, 2015 which was sent to various parties including Mr. Dahlberg, he advises Mr. Dahlberg to discuss any "legal stuff" with Dan Cathcart.

**THE EVIDENCE OF BARRY FERGUSON, PRESIDENT OF THE STRATA COUNCIL FOR THE OWNERS, STRATA PLAN LMS 2995**

[63] Mr. Ferguson has been the Strata Council President for the past 15 years and has been on Strata Council since 1999. He describes the Marina Pointe complex as

one of the largest free-standing strata complexes in Vancouver, comprised of three buildings, 530 residential units and five commercial units.

[64] Mr. Ferguson said that as Strata Council President he deals mainly with maintenance issues.

[65] Mr. Ferguson learned of the flood two to three days afterwards and he then went to visit the site. He thinks this may have been his only visit there. He recalls seeing Mr. Dahlberg but does not think he spoke to him.

[66] Mr. Ferguson said that some two to three years earlier there was water pooling in this particular planter and the Strata Corporation called in plumbers to improve the drainage. He said that since that time there have been no water issues with the planter until the flood on December 12, 2015.

[67] Mr. Ferguson confirmed that the Strata Corporation insurance deductible for water damage is \$25,000.00 and if an owner suffers damages less than \$25,000.00 the owner would be responsible for those costs. It is for this reason, he says, that the Bylaws require an owner to carry insurance to cover any perils not covered by the Strata Corporation insurance.

[68] The provision in the Bylaws that Mr. Ferguson refers to is found at clause 33(19). I will discuss the Bylaws later in my decision.

[69] Mr. Ferguson said that in the year 2010, the Strata Corporation spent about \$1.5 million on building envelope work as a pro-active means to prevent water issues. He said this demonstrates the efforts the Strata Corporation takes to prevent water

problems.

[70] Mr. Ferguson was asked about the 2012 Depreciation Report for Marina Pointe. I will be discussing this report in more detail later in my reasons. Mr. Ferguson was asked to comment on a specific recommendation made in the Depreciation Report which stated:

“Augering and hydroflushing of drain lines, including in-camera scoping survey, as required.”

[71] Mr. Ferguson focused on the reference to “as required” and said that augering and hydro flushing is done if a drainage problem is identified.

[72] Mr. Ferguson said that the Strata Corporation has an annual budget of \$2.7 million of which \$900,000 a year is spent on drainage maintenance, including augering and flushing of drain pipes. He noted that the Depreciation Report said to budget \$5,000 a year for this and he feels that the Strata Corporation spends this sum in a month.

[73] Mr. Ferguson said the design of the planter beds has worked for the past 20 years. He said that trees in the planters have never caused any issues in those 20 years and that their landscape company has never advised him of potential problems.

[74] The position of the Strata Corporation is that if planter drainage is working then there is no need to do anything. The Strata Corporation does auger and flush other drain lines on a regular basis, but not the planter drains. Mr. Ferguson was clear that the Strata Corporation will only auger and flush planter drains when a drainage issue is identified. Mr. Ferguson said that this policy was based on their experience dealing with

drainage in the Marina Pointe complex and the costs that would be incurred to auger and flush all drains and pipes at Marina Pointe, including planter drains, on a regular basis.

[75] Mr. Ferguson confirmed that there is no written inspection policy involving the drain pipes or how to deal with storm water.

[76] Mr. Ferguson is not aware of any prior water entry into the Property.

[77] Mr. Ferguson was referred to an invoice issued by Pioneer Plumbing & Heating Inc. dated April 1, 2015 which referred to a job location at "1009 Expo" and where Pioneer Plumbing was required to:

"Install new pressure gauge on fire system  
Unblock planter drain  
Install drain rock and dirt cloth to prevent further blockages"

[78] The invoice contains a recommendation as follows:

"Should be done with other planters before another problem starts"

[79] Mr. Ferguson was not aware of this recommendation. He said that the Strata Corporation has not installed drain rocks and dirt clothes at all planters and that the Strata Corporation has to consider the costs of doing so for areas where no problems exist.

#### **THE EVIDENCE OF HECTOR SADDUL, SENIOR PROJECT MANAGER FOR PLATINUM PRO-CLAIM RESTORATION**

[80] Hector Saddul is the senior project manager for Platinum Pro-Claim. He has



done work for the Strata Corporation for over 10 years now.

[81] He said he has a vague recollection of the events following the flood. It was clear when he gave his testimony that he was not certain of when events occurred and it was my impression that much of his evidence was with respect to what he thought likely occurred.

[82] Mr. Saddul said that after a flood occurs, the usual procedure is to first pack the contents out, then cut into the drywall and remove any baseboards and glued down flooring.

[83] He recalls attending the Property on November 13, 2015 and seeing water inside the unit. He later saw water in the planter adjoining the Property but said that his work only involved the interior of the unit and not the exterior.

[84] He said the Authorization Form signed by Mr. Dahlburg allows Platinum Pro-Claim to deal with owner contents.

[85] Mr. Saddul recalls that the initial assessment of Platinum Pro-Claim was that all flooring in the Property had to be removed to permit Platinum Pro-Claim to investigate the extent of the water damage underneath the flooring and to permit drying to occur to prevent further damage. Upon further investigation they determined that only 50-60% of the flooring had to be removed.

[86] Mr. Saddul reviewed the Platinum Pro-Claim timesheets and confirmed that they were working on units 316 and 317 at the same time, and that the time sheets refer to both units. I will discuss these timesheets in further detail later.

[87] Mr. Saddul confirms that the costs of the floor removal were billed to Mr. Dahlburg only. He said that if there was no agreement that Mr. Dahlburg would pay the flooring costs, he thinks that the Strata Corporation would have been billed these costs.

**THE EVIDENCE OF DAN CATHCART, STRATA AGENT FOR RANCHO MANAGEMENT SERVICES (B.C.) LTD.**

[88] Mr. Cathcart started working for Rancho Management on January 1, 2015 and became the strata agent for the Strata Corporation in July 2015. He was the strata agent at the time of the flood.

[89] As a strata agent, his duties include managing the Strata Corporation, corresponding with owners, attending strata meetings, managing the finances and budgets, attending the annual general meeting of the owners, and preparing the minutes and the bylaws. Mr. Cathcart says he works for the owners, and that he acts as a middle man between the owners and the strata council which makes the decisions.

[90] Mr. Cathcart recalls that November 12, 2015 was a day of heavy rain because it was his sister's birthday. He learned of the flood on November 13, 2015 after receiving emails from Cristian Ciurel and Mr. Dahlburg advising him of the flood. Mr. Cathcart said he went to view the planter but did not enter unit 317.

[91] Mr. Cathcart thinks that he spoke to Mr. Dahlberg the following Monday and that he may have explained to Mr. Dahlburg about the strata insurance deductible. Mr. Cathcart said that he needed to hear from Platinum Pro-Claim about why the flood occurred, what repair work was required and to see the pictures of the damage. He said he normally would not comment on a matter until he received the Platinum Pro-

Claim report. Mr. Cathcart does not think he told Mr. Dahlberg that his living expenses would be covered during the repairs but also concedes that he may have said this if the Strata Corporation filed a claim on its insurance.

[92] Mr. Cathcart also does not recall telling Mr. Dahlburg that the Strata Corporation would pay for the repairs to the Property. Mr. Cathcart knew the flooring was damaged and had to be dried out to see if it required replacement.

[93] Mr. Cathcart said that Platinum Pro-Claim was the project manager for the repair and replacement work at the Property. He relied upon Platinum Pro-Claim to determine the extent of the work required and to decide whether the entire floor or only a portion of it had to be removed.

[94] Mr. Cathcart maintains that because the floor in the Property was a betterment and not original flooring, the Claimant as owner was responsible for the costs for repair and replacement. His letter to the Claimant dated November 23, 2015, which I referred to above when describing the evidence of the Claimant, stated that the Strata Corporation would only be responsible for damage to the common property and any "resultant damage to strata lots owned by individual owners". This included: "Site prep, drywall, paint, trim, and final clean". At no time did Mr. Cathcart acknowledge that the Strata Corporation was liable to pay for the costs of the floor in the Property.

### **THE PLANTER NEAR LA TERRAZZA RESTAURANT**

[95] A part of the Marina Pointe complex is La Terrazza Restaurant. Mr. Dahlberg identified a large planter located near the restaurant that had a border of drainage rocks

along the edge of the planter. This planter also abuts against a strata unit in the same manner as the planter beside the Property. Mr. Dahlberg says he was told by the unit owner that the drain rocks were put in due to drainage issues. However this owner was not present at the hearing to give evidence and thus this information is hearsay. In a Small Claims Court matter, I do have discretion to allow hearsay evidence and I have done so although I place little weight on this evidence.

[96] Mr. Ciurel was also asked about the planter near La Terrazza restaurant. His recollection is that a unit owner had complained about mud splashing onto his windows when it rained. Mr. Ciurel recalled that upon the recommendation of the Strata Corporation's gardeners, Paraspace Landscape, the Strata Corporation placed a strip of rocks along the border of the planter to prevent splashing of mud.

[97] Mr. Ferguson was asked about the installation of drainage rocks by the planter near La Terrazza restaurant. Mr. Ferguson's recollection is that he was told by Cristian Ciurel that the owner of the unit near the planter put the rocks into the planter without permission to stop mud from splashing onto his windows. This is a hearsay statement that the source of the information, Mr. Ciurel, contradicts.

[98] Mr. Cathcart said he is not aware of any work done to the planter near La Terrazza restaurant. He has never seen an invoice issued to the Strata Corporation for this.

[99] What I can draw from this evidence is only that there may have been a drainage issue with this particular planter and that the issue was resolved. There is no indication that this planter ever flooded.

## THE MARINA POINTE DEPRECIATION REPORT

[100] A Depreciation Report for the Marina Pointe complex dated December 10, 2012 was placed into evidence. A depreciation report is required pursuant to s. 94 of the **Strata Property Act**. The purpose of the report is to provide an estimate for the repair and replacement for major items in the Strata Corporation and the expected life of those items. The depreciation report must include certain information prescribed by the **Strata Property Regulations**, B.C. Reg. 43/2000, including a summary of repairs and maintenance work for common expenses for certain listed items that usually occur less often than once a year or that do not usually occur.

[101] Page 11 of the Depreciation Report provides a list of key major maintenance activities and asset renewal projects broken down into three categories: Major Maintenance, Asset Renewal projects (Primarily Condition-Based) and Asset Renewal projects (Primarily Time-Based).

[102] Under the heading "Major Maintenance", one of the listed items reads:

Augering and hydroflushing of drain lines, including in-camera scoping survey, as required.

[103] At page 17 of the report, there is reference to "Mech 17-Storm Drainage Collection", with a description "Roof drains, trench drains, catch basins and associated piping systems for rainwater runoff".

[104] Further on in the Depreciation Report is a section titled "Major Maintenance Costing" and under the heading "Mech 17-Storm Drainage Collection", there is a reference to "Augering and hydroflushing of drain lines, including in-camera scoping

survey, as required”.

[105] Under the heading “Frequency” it states 5 years. Under the heading “Next Event” it states 2019. Under the heading “Unit Cost” it states \$5,000.00.

[106] None of the authors of the report were called to explain the report. My interpretation of the report is that the authors were recommending the augering, hydroflushing and in-camera scoping of the drain lines every five years starting in the year 2019.

[107] Also placed into evidence was a memorandum dated June 1, 2016 to the Strata Corporation owners from the strata council. The memorandum states that the strata council does not endorse the Depreciation Report. The memorandum asks owners to refer to page 11 of the Depreciation Report and states:

Please look at page 11 of the RDH report at Groups 1, 2 and 3. Everything that is mentioned is covered in our annual budget and maintained on a yearly basis. Our annual budget reflects over 15 years learning what we have to maintain on a yearly basis.

[108] Further on, the memorandum states:

It should be noted that all building drainage systems have been monitored and modified as necessary over the years. We have a yearly schedule where drainage systems that are problematic are routinely cleaned to ensure proper operation.

[109] I am mindful that these comments are not proof of the facts stated.

#### **THE WORK OF PLATINUM PRO-CLAIM**

[110] The timesheets for Platinum Pro-Claim were put into evidence to provide a

record of hours worked by employees of Platinum Pro-Claim. A notation on the Timesheets states "Both files - Timesheet data" and this refers to record of time worked at two different units, that being the Property and the neighboring unit 316. As such we cannot be certain which timesheet entry relates to the Property.

[111] The flood occurred on November 12, 2015. The timesheet entries start on November 13, 2015, and then continue on November 14, 15 and 16, 2015. The descriptions of the entries include:

Contents: Pack Out

Flood: Extraction

Flood: Demolition

Contents: Process or List

Contents: Shuffle or Pack

Flood: Equipment Setup

[112] The next entries are November 24, 25, 26, 27 and 30, 2015. Most of the work is referred to as "Flood: Demolition", with some references to "Site Inspection".

[113] November 30, 2015 is when Mr. Dahlberg made the proposal for the Claimant to be responsible for further repair costs.

[114] There are then time entries for November 30 and then December 1, 2, 3 and 4, 2015.

[115] December 4, 2015 is when the deposit of \$10,000.00 was paid to PPC Flooring and there are then further time entries on December 4, 7, 8, 9, 10, 11, 14, 23, 28, 29, 30, 31 and then January 6 and 7 and February 18 and 19.

[116] The descriptions of the work done now refer to:

Constr: Drywall

Constr: Paint

Flooring: Delivery

Constr: Finish

Constr: Paint

Constr: Baseboard

[117] We know from looking at the timesheets that there was a gap in time from November 16 to November 24, 2015. We know that work was done before and after the discussions about the Claimant being responsible for new flooring costs. What we do not know is whether the work was being done to unit 316 or 317 or both.

## **DOCUMENTS EXCHANGE**

[118] There is no doubt that Mr. Moller was requesting production of documents from the Strata Corporation, which requests were made in a number of emails. The Strata Corporation and Mr. Cathcart were only able to supply a few invoices. Mr. Cathcart said the documents provided were all the ones he could find.

[119] The record from the Settlement Conference held September 14, 2016 before The Honourable Judge St. Pierre does not indicate any orders were made for exchange of documents. The ***Small Claims Court Rules*** also do not require the disclosure of documents to the extent found in the ***Supreme Court Civil Rules***. In light of this, I am not prepared to draw any negative inference from a failure to produce documents, whether by the Defendant or Rancho Management.



## THE STRATA BYLAWS

[120] The original floor of the Property is common property. The Strata Corporation and an owner may agree to the installation of new flooring. This is demonstrated by clause 63 of the Bylaws which deals with the installation of hardwood floors by an owner. Mr. Dahlberg has stated in his evidence that approximately 10 years ago he installed new hardwood flooring in the Property.

[121] Clause 6(4) of the Bylaws for the Strata Corporation states that the Strata may require as a condition of any changes to the common property an agreement that the owner is responsible for all future maintenance and repair of the improvement. A written agreement as contemplated by clause 6(4)(d) was not put into evidence but no issue was made of this. I have accepted that that Mr. Dahlberg was responsible for the future maintenance and repair of the new floor under the Bylaws, other than any damage that may have been the responsibility of another party.

[122] Clause 7 of the Bylaws requires that an owner, tenant, occupier or visitor allow a person authorized by the Strata Corporation to enter the strata lot in an emergency, without notice, to ensure safety or prevent significant loss or damage. The Strata Corporation representative may also enter the lot upon providing 48 hours' notice to inspect, repair and maintain common property, common assets and any portion of a strata lot that the Strata Corporation has the responsibility to maintain or repair under the Bylaws or s.149 of the *Strata Property Act*.

[123] Section 149 of the *Strata Property Act* refers to common property, common assets, the buildings shown in the strata plan and fixtures built or installed on a strata

lot, if the fixtures are built or installed by the owner developer as part of the original construction on the strata lot.

[124] The ***Strata Property Act*** does not make the Strata Corporation responsible for the repair or maintenance of the new flooring installed by Mr. Dahlberg.

[125] Clause 6 (4)(d)(iv) of the Bylaws makes an owner responsible to maintain and repair any alterations to the common property, which would include the new flooring.

[126] Clause 33 (19) of the Bylaws requires an owner to maintain insurance for, among other things, any improvements and betterments to the owner's strata lot. This would include the new flooring. An owner must also obtain insurance to cover any perils that are not covered by the Strata Corporation's insurance.

[127] The Strata Corporation's insurance has a \$25,000.00 deductible in the case of a water damage claim.

[128] Effectively the Bylaws require that the owner 636894 BC Ltd. have personal insurance to cover any claims up to the \$25,000.00 deductible in case of water damage and to have coverage for the floor which was not an original fixture. The owner 636894 BC Ltd. did not have the required insurance coverage.

## **ANALYSIS**

**Was the Defendant negligent in the repair and maintenance of the exterior planter located adjacent to the Property contrary to section 72(1) of the *Strata Property Act* [SBC 1998] c. 43, leading to the damage to the Property?**

[129] Section 72 of the ***Strata Property Act*** sets out the relevant duties and

responsibilities placed upon a strata corporation. The section states:

Repair of property

72 (1) Subject to subsection (2), the strata corporation must repair and maintain common property and common assets.

(2) The strata corporation may, by bylaw, make an owner responsible for the repair and maintenance of:

- (a) limited common property that the owner has a right to use, or
- (b) common property other than limited common property only if identified in the regulations and subject to prescribed restrictions.

(3) The strata corporation may, by bylaw, take responsibility for the repair and maintenance of specified portions of a strata lot.

[130] Section 72 is discussed in the decision **Basic v. Strata Plan LMS 0304**, 2011

BCCA 231 (CanLII), where the Court of Appeal stated:

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

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

[10] Also, in **Weir v. Strata Plan NW 17**, 2010 BCSC 784 (CanLII), Josephson J. stated at para. 23 that there is little issue regarding the law that the strata corporation has a fundamental duty to repair and maintain its common property, and that in performing that duty the respondent must act reasonably in the circumstances. In that regard he cited **Wright v. Strata Plan No. 205 (1996)**, 1996 CanLII 2460 (BC SC), 20 B.C.L.R. (3d) 343 (S.C.), aff'd (1998), 1998 CanLII 5823 (BC CA), 43 B.C.L.R. (3d) 1 (C.A.).

...

[13] The question before the judge on liability was whether Mr. Basic had proved that the Strata Corporation was negligent or had breached its statutory duty of repair to the common property. The judge held against Mr. Basic, finding that the Strata Corporation acted reasonably in

discharging its obligation to repair and maintain the common property. He held that the Strata Corporation was not negligent and did not breach its statutory duty in the circumstances. In reaching this conclusion he held:

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

...

[29] The strata corporation is not an insurer. It has an obligation to act reasonably to discharge its responsibilities. Certainly there was a flood in 2000 that result[ed] in Mr. Basic's clothes in the storage locker becoming wet, but that was not the result of any negligence or breach of duty of the strata corporation.

[131] In *Wright v. Strata Plan No. 205* (1996), 1996 CanLII 2460 (BCSC), 20 B.C.L.R. (3d) 343, [1996] B.C.J. No. 381, (BCSC), aff'd (1998), 1998 CanLII 5823 (BCCA), 43 B.C.L.R. (3d) 1 (BCCA), the Court stated that the obligation of the Strata Corporation to repair and maintain is one that must be interpreted with a test of reasonableness.

[132] The Court went on to say of the defendant Strata Corporation:

"[30] The defendants are not insurers. Their business, through the Strata Council, is to do all that can reasonably be done in the way of carrying out their statutory duty: and therein lies the test to be applied to their actions. Should it turn out that those they hire to carry out work fail to do so effectively, the defendants cannot be held responsible for such as long as they acted reasonably in the circumstances: and in this instance I have to say that the defendants did just that. They cannot be found to have been negligent."

[133] The question before me then is whether the Strata Corporation acted reasonably in carrying out its duty to maintain and repair the common property and assets. The factors that I have considered include the following:

1. As established by the caselaw, the Strata Corporation is not an insurer.
2. The Strata Corporation had a schedule where the Marina Pointe complex was inspected twice a day each day. I find this inspection schedule to be reasonable. The fact that this schedule was never set out in writing is not important. There is no evidence to suggest that this schedule was not followed.
3. The Strata Corporation's policy is to maintain or repair planter drains only if problems are identified. For other drains in the Marina Pointe complex, there is regular augering and flushing. The Strata Corporation has taken this position based on its experience in the maintenance of the complex and taking into account the costs that regular augering and flushing of the planter drains would incur. The Strata Corporation is entitled to take into consideration the costs involved with the additional maintenance of regularly and augering planter drains: see *Weir v. Owners, Strata Plan NW 17*, 2010 BCSC 784 at paragraph 29.
4. My reading of the Marina Pointe Depreciation Report is that regular augering and hydroflushing was to occur every five years starting in 2019. This indicates then that there was no need for immediate action to be taken.
5. Regular flushing and augering of the planter drains may be a best solution for preventing problems in future. However, the Strata Corporation is entitled to choose a solution that takes into consideration the costs of alternative approaches. As stated in *Weir v. Owners, Strata Plan NW 17*, supra, at paragraph 28: "Choosing a 'good' solution rather than the 'best' solution does not render the approach unreasonable such that judicial intervention is warranted".
6. Testimony was given that there was only one prior incident where water pooled in the planter by the Property which resulted in the Strata Corporation taking action to install further drainage. No new issues arose until the severe rainfall just prior to the flooding of the planter. There were no warning signs evident that the planter would flood and thus nothing to prompt earlier action on the part of the Strata Corporation.
7. Mr. Dahlberg lived in the Property for some 13 years with no instances of water entry and so there was nothing to alert the Strata Corporation to take action. The evidence of calcification noted in the EBI report could only be seen after the drywall was removed following the flood and so the Strata Corporation could not have been aware of this before the flood. I also have doubts that the calcification is evidence of a pre-existing water problem because it appears the drywall was not removed until a few days after the flood and this can, according to Hector Saddul, lead to the calcification.

8. There has been evidence by way of invoices showing the repair of drainage issues in other planters. There is no evidence of a prior occurrence where a planter flooded and water entered a suite. It appears the flood that damaged the Property was an isolated incident, and so again there was nothing to alert the Strata Corporation to take action.

[134] For the reasons I have set out above, I conclude that the Strata Corporation acted reasonably in the manner that it maintained and repaired the planter drains and accordingly was not negligent in carrying out its duties under sec. 72 of the **Strata Property Act**.

**Was there any intentional damage to the Property caused by the Defendant or its agents during the course of repair work carried on at the Property?**

[135] The Strata Corporation relied on Platinum Pro-Claim to determine the work necessary to investigate the damage caused by the flood and to prevent further damage to the common property. This necessitated tearing up 50-60% of the flooring installed by Mr. Dahlberg to access the floor structure underneath and to permit drying.

[136] Mr. Dahlberg was concerned that any replacement of the removed flooring would not match up with the remaining flooring, and so he wanted the entire floor to be replaced. To that end the proposal set out in his November 30, 2015 email was arrived at.

[137] The Strata Bylaws make clear that any improvements or betterment in the Property were owner responsibility.

[138] Clause 7 of the Bylaws allows the Strata Corporation to enter the Property to attend to emergency repair work and to prevent significant loss or damage, as well as to

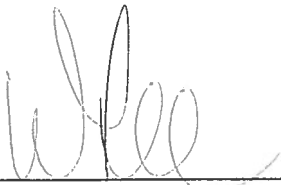
inspect, repair and maintain common property or common assets.

[139] No evidence was presented to show that the work of Platinum Pro-Claim performed prior to the November 30, 2015 email was excessive or unnecessary.

[140] The Strata Corporation, through Platinum Pro-Claim, removed part of the flooring in the Property to investigate the extent of the water damage to the common property underneath the floor and to permit drying. I am satisfied this was done pursuant to the Strata Corporation's duties and responsibilities pursuant to the Bylaws and the **Strata Property Act**. There is no evidence of any intentional damage to the Property caused by the Defendant or its agents beyond the work that the Defendant was entitled to do.

#### SUMMARY

[141] The claim of 636894 BC Ltd. is dismissed. I order that 636894 BC Ltd. pay to The Owners, Strata Plan LMS 2995 the sum of \$50.00 representing the filing fee for their Reply.



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The Honourable W. Lee  
Provincial Court Judge