



FEATURES THIS MONTH

- **Annual Fire Alarm Testing**
- **Sale of Strata Lot After Registration of s. 116 Lien**
- **Insurance Summary**
- **Case Law Update**

1. ANNUAL FIRE ALARM TESTING - Who, How, When, Why?



All strata councils are strongly encouraged to instigate an annual inspection of fire detection and suppression systems, both on common property and within individual strata lots. Most councils follow this advice. The minimal inconvenience and out-of-pocket cost resulting from such inspections are nothing compared to the various financial and personal costs that can come from a fire that is detected and suppressed too late. It's a "no brainer" that this is a very small price to pay for the peace of mind it can provide.

As all councils know, section 72 of the *Strata Property Act* (the "Act") makes the repair and maintenance of "common property" the responsibility of the strata corporation, subject only to limited exceptions, such as where an owner has been made responsible by bylaw for the repair and maintenance of limited common property which the owner has a right to use. "Common property" is defined in section 1(1) of the Act to include:

"pipes, wires, cables, chutes, ducts and other facilities for the passage or provision of water, sewage, drainage, gas, oil, electricity, telephone, radio, television, garbage, heating and cooling systems, or other similar services, if they are located

(i) within a floor, wall or ceiling that forms a boundary

(A) between a strata lot and another strata lot,

(B) between a strata lot and the common property, or

(C) between a strata lot or common property and another parcel of land, or

(ii) wholly or partially within a strata lot, if they are capable of being and intended to be used in connection with the enjoyment of another strata lot or the common property."

It is therefore obviously the strata corporation's responsibility to pay for inspections where they relate to fire detection and suppression systems and facilities on "common property". In our



experience, it is also customary for the strata corporation to pay for related inspections within individual strata lots. We make no comment and express no opinion as to the extent to which such inspections relate strictly speaking to "common property", but in any case this practice makes good sense in a condominium community, where a fire of any consequence in one unit will necessarily adversely affect common property as well as other strata lots. It is clearly in the best interests of the strata corporation as a whole and of each of its owners to minimize the risk of damage and danger resulting from fire.

A practical problem invariably arises in this situation, however, as there always seem to be some residents who do not comply with council's request to make their units available for inspection at the designated time. Whether this is the result of an innocent mistake or a deliberate decision on the part of the resident or owner is of no consequence if the failure to inspect subsequently results in a fire. Council must in any case continue to press such persons to participate sooner or later. To do so council may ultimately have to rely on a bylaw, such as 7(1)(b) of the Schedule of Standard Bylaws in the Act, that entitles "a person authorized by the strata corporation to enter a strata lot at a reasonable time, on 48 hours' written notice, to inspect, repair or maintain common property..." In practice, this can be much easier said than done, but it may be your last resort.

In such situations councils typically want to charge the individual owner for the cost of having the inspection company make a special trip to inspect their unit, since it is necessitated solely by the action or inaction of the resident of that unit. That is an understandable response, but is it appropriate? We think not, unless at a minimum your bylaws clearly say so, and even then we have our doubts. If it is the responsibility of the strata corporation to do and pay for the testing in the first place, then that does not change from day to day or week to week. Even if it is not the strata corporation's legal and technical responsibility, but it still makes good practical sense, then that too should not change over time. In fact, where an owner or resident repeatedly fails to reply to, or to cooperate with, such a request, there may be all the more reason to want to ensure that the test is conducted and to see that it is done as soon as possible - the unit may be uninhabited and poorly maintained, there may be a "grow op" in the unit, etc.

A consistent and diligent application of strata corporation policies and procedures related to maintenance issues is always the best approach. Do not let the relatively minimal financial cost of having your fire inspection company make multiple trips prevent you from making the right



decision in respect of personal safety and compliance with section 72 of the *Act*, as outlined above.

This article does not purport to offer a legal opinion. Readers are advised to obtain legal counsel. This article is published by Vancouver Condominium Services Ltd. and is copyrighted. Reprinting without written consent from VCS would violate the copyright.

2. SALE OF STRATA LOT AFTER REGISTRATION OF SECTION 116 LIEN



Many of our readers are already aware of the case of *The Owners, Strata Plan VR 1008 v. Richard Oldaker and the Bank of Montreal*, a decision of the Supreme Court of British Columbia rendered in January of this year. In that case Mr. Justice Crawford concluded that an application by the strata corporation to the court to foreclose on a strata lot that has had a s. 116 lien registered against it, does not need to be approved by a 3/4 vote resolution.

Section 116 (1) provides that:

"The strata corporation may register a lien against an owner's strata lot by registering in the land title office a Certificate of Lien in the prescribed form if the owner fails to pay the strata corporation any of the following with respect to the strata lot:

- (a) strata fees;
- (b) a special levy;
- (c) a reimbursement of the cost of work referred to in section 85;
- (d) the strata lot's share of a judgement against the strata corporation."

Prior to this case, stratas had proceeded on the assumption that s. 171(2) of the *Strata Property Act* (the "Act") applied. That section reads:

"Before the strata corporation sues under this section, the suit must be authorized by a resolution passed by a 3/4 vote at an annual or special general meeting."

(Parenthetically, an amendment to the *Act* that came into effect on December 2, 2003 in the form of a new section 173.1, changes the timing and legal effect of such 3/4 vote resolutions, but not the general requirement that such a resolution ultimately be obtained.)

Enforcement of a s. 116 lien by means of foreclosure sale, on the other hand, is dealt with by s. 117(1), which reads:



"After the strata corporation has registered a Certificate of Lien against a strata lot, the strata corporation may apply to the Supreme Court for an order for the sale of the strata lot."

After reviewing some earlier decisions and analyzing the Act, Crawford J. concluded that "the legislation provides two methods for a Strata Corporation to deal with a recalcitrant owner in terms of collecting monies, namely a debt action or a lien procedure" (i.e., under s. 171 or s. 117). He went on to say that, "in my view, in Part 6 of the Act there is a provision for a separate summary process primarily for the collection of strata fees, special levies, cost of works or an owner's share of the Judgement against the Corporation (where fees or levies have been voted on, the costs of works is ordered and the judgement litigated). In my opinion there is no need for a 3/4 vote of the unit owners to authorize suit under s. 171." (Please note that Part 6 of the Act is the Part in which sections 116 and 117 are found.) He also pointed out that in another case the Court held that an application to Court for the appointment of an Administrator under s. 174 of the Act is independent of s. 171, and therefore does not require a 3/4 vote either.

Commentary - notwithstanding this decision, VCS is recommending that 3/4 vote resolutions still be put to owners before applying to the Supreme Court to foreclose on an owner whose strata lot has a s.116 lien registered against it. There are three reasons for this. Firstly, this decision has been appealed, and may therefore be overturned. Secondly, we feel that a decision to forcibly sell an owner's home to recover a debt is a serious and drastic remedy that should be carefully considered by the owners, rather than decided upon simply by a majority of council members. And finally, it is likely that a 3/4 vote resolution will in any case be required to authorize raising and/or spending the money that will be needed to hire a lawyer to take the matter to Court, so why not deal with both issues as part of the same resolution and at the same time? Nevertheless, if any strata council disagrees with this approach in any given instance, and prefers to act on the strength of the Oldaker decision, VCS will of course follow your instructions.



3. INSURANCE PROGRAM EXPLANATIONS

Prepared by Stewarts Insurance Service Ltd.

Stewarts Insurance Services Ltd., a member firm of BFL Canada, International Insurance Brokers, has provided VCS with the following explanatory notes concerning the insurance program they have assisted VCS in placing for the vast majority of the strata corporations we provide management services to. The section references are those found in the Insuring Agreement portion of the Certificate of Insurance. The policies from which these notes are extracted, are lengthy, technical and complicated legal documents. Copies can be reviewed at our offices or delivered to Council members on request.

Section 1 - Property

A. All Property

All Risks

The policy covers All Risks subject to numerous exclusions that are mentioned in the document. In other words every risk is covered unless it is shown as an exclusion. In addition the policy also has numerous extensions of coverage.

Stated Amount Co-Insurance Clause

This clause prevents a penalty from applying in the event of underinsurance in a partial loss. It is a requirement however that a recent appraisal must be on file.

Increased Amount Bylaws

This allows for the additional costs of rebuilding to meet City bylaws that might exceed the present building structure.

Replacement Cost

This removes the requirement of depreciation and allows for a new building or repairs to be done subject to various conditions.

Sewer Back-Up

This clause allows for damage arising from the backing up of drains and sewers.



Water Damage

This relates to any damage on the premises arising from water.

Earthquake Damage

Earthquake coverage is included with the deductible applying to each building that is damaged and not the total Insured Value.

Flood Damage

This covers the rising of, or breaking out of a body of water whether man made or natural.

Lock & Key

This extension covers the actual cost of replacing locks and keys where they have been stolen, damaged or disappeared.

Additional Automatic Extensions

New Construction up to 15% of the insured value limit - \$100,000

Extra Expense - \$1,000

Assessment - \$1,000

Personal property of employees - \$250

Legal Fees - \$1,000

Removal of Debris

Fire Department Expenses - 10% of insured value

Inflation Guard - The value of the buildings are increased automatically during the insured period by the building construction index provided an appraisal is on file.

B. Business Interruption (Gross Rents)

This section covers the loss of rents and is typically taken out when a strata corporation actually owns units that it derives rental from or where there is an income flow arising from any operations for example regular renting out of a hall or community facility.

Section II - Crime

A. Employee Dishonesty (Form A)

This covers the loss of money or property where there has been dishonesty or a theft by an employee of the strata.



B. Inside/Outside Robbery

This covers the loss of money or property where there has been a theft or robbery by someone other than an employee.

Section III - Commercial General Liability

This section will pay on behalf of the Strata all sums which the Strata becomes legally obligated to pay as damages that have arisen from third party bodily injury or property damage caused by an accident with respect to the Strata's location covered by the policy.

This section has the following extensions

Non-owned automobile

Personal injury

Occurrence Property damage

Blanket Contractual

Voluntary Medical payments

\$2,500 any one person

\$25,000 any one accident

Section IV - Umbrella Liability

This section provides additional coverage over the limit of the Commercial General Liability section above.

Section V - Condominium Director's & Officer's Liability

This section will pay on behalf of the Strata all sums which the strata becomes legally obligated to pay as damages that have arisen from a wrongful act on the part of the strata directors and officers with a claim being made during the period of insurance.

Section VI - Property Manager's Errors & Omissions Liability

This section will pay on behalf of the strata property managers acting in the course and scope of their duties as the Strata Corporation's agent all sums which they become legally obligated to pay as damages that have arisen from a wrongful act on their part and or the Strata directors and officers with a claim being made during the period of insurance.



Section VII - Blanket Glass

This covers all damaged glass, mirrored glass or lettering and artwork.

Section VIII - Boiler & Machinery

This section extends the coverage to include any loss or damage to or arising from any boilers, pressure vessels or machinery that uses mechanical or electrical power such as air conditioning, elevators, fire panels, etc.

Section IX - Pollution Liability

The coverage provides for clean up costs for on site pollution conditions discovered at the insured location that were unexpected together with any third party legal liability that arises.

Section X - Volunteer Accident

This section provides accident benefits for injury or death arising from an accident where a volunteer is affected.

Stewarts Insurance Services asks you to note that these Notes are in a simplistic form and are subject to the terms and conditions of the policy wordings and are no substitute for the actual wording.

QUESTIONS regarding the above should be directed to Bradley Potter of Stewarts Insurance Services Ltd., 1000 - 1111 West Hastings Street, Vancouver, V6E 2J3

Tel: 604-669-9600; Fax: 604-683-9316

This article does not purport to offer a legal opinion. Readers are advised to obtain legal counsel. This article is published by Vancouver Condominium Services Ltd. and is copyrighted. Reprinting without written consent from VCS would violate the copyright.

4. CASE LAW UPDATE

Provided by Jamie Bleay, LL.B.



Wilfert et al v. Ward et al, Supreme Court of British Columbia,
March 3, 2004

In this recent decision, the Petitioners sought a declaration that all of the owners of strata lots in a strata corporation, which consisted of townhouse and apartment style strata lots, contribute toward the cost to repair and remediate the building envelope of the apartment style building. There had been some water damage prior to the coming into force of the *Strata Property Act* (the "Act"). Prior to the adoption of the *Act*, the strata corporation's bylaws provided that contributions toward common expenses would be apportioned based on the type of strata lot. Under the *Act*, contributions toward common expenses were to be apportioned pursuant to the formula set out in section 99(2) of the *Act* unless the contribution related only to the **operating fund**, the contribution benefited only one type of strata lot and the strata corporation had a bylaw that identified the types of strata lots. The strata corporation in question did have a bylaw that identified types of strata lots for the purpose of allocating contributions toward the operating fund.

Mr. Justice Melvin reviewed several of the earlier court cases dealing with the transition between the *Condominium Act* and the *Act*. Applying the reasoning of Mr. Justice Bauman in *The Owners, Strata Plan LMS 1537 v. Alvarez*, he stated that "any right or obligation that may have existed prior to the effective date of the **Strata Property Act** ceased to exist on that date." He went on to state that "despite the condition of the apartment style strata lots and the extent of the knowledge of the strata owners, the **Strata Property Act** applies and not the **Condominium Act**".

Mr. Justice Melvin then proceeded to examine whether the anticipated remediation expenses of the apartment style strata lots came within the definition of "operating fund" as expenses that occurred either once a year or more often than once a year. Mr. Justice Melvin found that remediation expenses of approximately \$2,400,000.00 did not occur once a year or more often than once a year and as such, they did not fall into the category of "operating fund". It followed that the remediation expenses did not relate to and benefit only one type of strata lot and as such, the owners of all strata lots were required to contribute toward the repair and remediation

costs to repair the building envelope of the apartment style strata lots. Mr. Justice Melvin concluded by saying that “the solution for members of a strata corporation who wish all expenses apportioned by type is to act pursuant to s. 191 *et seq* of the **Strata Property Act** to establish separate sections, each with an operating and contingency reserve fund. This course has not been followed in the case at bar.”

Commentary: Prior to this decision, strata corporations that had ongoing building repair expenditures would often categorize a sizeable remediation expense as an expense that occurred once a year or more often than once a year in order to include the remediation expense in the annual budget. By doing so, strata corporations avoided the problems associated with obtaining a ¾ vote to raise the remediation expenses. This decision strongly suggests that this practice is no longer feasible. Strata corporations will either have to raise the remediation expenses by way of a special levy approved by a ¾ vote of the owners at an annual or special general meeting OR, if the strata corporations want to apportion contributions to the operating fund, the contingency reserve fund and for special levies, they can establish sections pursuant to section 191 of the Act and identify the strata lot types in their bylaws.

Jamie Bleay was called to the Bar in B.C. in 1987 and now practices law with the Access Law Group, located at 1700 - 1185 West Georgia Street, Vancouver, V6E 4E6. A large part of his law practice is devoted to strata corporation related legal matters. He is currently the B.C. representative on the board of directors of the Canadian Condominium Institute. He can be reached by telephone at 604-801-6029.