IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Strata Plan VR 2213 v. Schappert,*
2023 BCSC 2080

Date: 20231127
Docket: S2011212
Registry: Vancouver

Between:

Strata Plan VR 2213

Plaintiff

And

John Schappert

Defendant

Before: The Honourable Mr. Justice Coval

Reasons for Judgment

Counsel for the Plaintiff:	D.W.P. Moriarty
Counsel for the Defendant:	R.D. Irving
Place and Dates of Hearing:	Vancouver, B.C. September 25–26, 2023
Place and Date of Judgment:	Vancouver, B.C. November 27, 2023

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Introduction

[1] In this subrogated claim brought by the insurers of the plaintiff strata corporation, the parties submit a special case under Rule 9-3(1) of the *Supreme Court Civil Rules*.

[2] The claim is another example of difficulties arising between short-term renters and residential strata corporations, this time in the context of a strata's property insurance coverage.

[3] In April 2019, Mr. Schappert spent a few nights in one of the strata's units, pursuant to an Airbnb service agreement with the unit owners as permitted under the strata's bylaws. During his stay, he unintentionally started a kitchen fire that set off the building's sprinkler system. The insurers' subrogated claim against Mr. Schappert is in negligence for the cost of repairing common property damaged by the sprinklers.

[4] The parties' special case seeks determination of two of Mr. Schappert's defences to the claim. It asks whether this subrogated claim is barred by either:

a) the common law "no subrogation" rule; or

b) the covenant to insure and waiver of liability in the strata's bylaws.

[5] On the first question, Mr. Schappert argues that, as a short-term renter, he was an "insured" under the strata's insurance policy, and therefore subrogation against him is prohibited as a matter of insurance law. On the second issue, he submits that the bylaws waive his liability to the strata for damage covered by the insurance that the strata covenanted to obtain.

[6] The insurers respond on the first question that, as a short-term renter, Mr. Schappert was not someone who "normally occupied" the strata unit. Therefore, he was not an "insured" under the strata's insurance policy and the "no subrogation" rule does not apply. On the second question, they say the waiver of liability and covenant to insure extended only to strata lot owners, not short-term renters.

[7] On the first question, I find for Mr. Schappert. The insurers' subrogated claim is barred because Mr. Schappert was an insured under the strata's insurance policy.

[8] On the second question, I find for the insurers. The insurers' subrogated claim is not barred by the strata's covenant to insure, or waiver of liability, because they do not extend to Mr. Schappert.

Agreed Facts

[9] The agreed facts for purposes of the stated case are as follows:

> **The Building**
>
> 1. The plaintiff, Strata Plan VR 2213, represents the owners of the lands and premises of the strata lots of a residential apartment building known as the Carlyle, located at 1060 Alberni Street, Vancouver, British Columbia.
>
> 2. The Carlyle was constructed in or around 1987. It has 21 storeys and 147 residential units.
>
> **The Bylaws**
>
> 3. On December 20, 2001, the strata corporation's bylaws, rules and regulations (the "Bylaws") were repealed and replaced. Included in the new Bylaws were ss. 4.3 and 4.4 which read as follows:
>
> > 4.3 An owner is responsible for any damage caused by occupants, tenants or visitors to the owner's strata lot.
> >
> > 4.4. An owner shall indemnify and save harmless the strata corporation from the expense of any maintenance, repair or replacement rendered necessary to the common property, common assets, limited common property or to any strata lot by the owner's act, omission, negligence or carelessness or by that of an owner's visitors, occupants, guests, employees, agents, tenants or a member of the owner's family, but only to the extent that such expense is not reimbursed from the proceeds received by operation of any insurance policy. In such circumstances, and for the purpose of bylaws 4.1, 4.2 and 4.3, any insurance deductible paid or payable by the strata corporation shall be considered an expense not covered by the proceeds received by the strata corporation as insurance coverage and will be charged to the owner.

4. Prior to May 16, 2018, short-term rentals were occurring at the Carlyle, but were not regulated by the Bylaws.

5. Prior to or on May 16, 2018, the strata council convened a town hall meeting amongst the owners to discuss issues connected with short-term rentals.

6. Following the town hall meeting, on May 16, 2018, the strata council hosted a general meeting. During the meeting, the owners approved amendments to the Bylaws which include rules for short-term rentals at the Carlyle.

7. The Bylaws are in evidence as they read in April 2019.

8. The short-term rental rules permitted ten full-time short-term rentals and five casual full-time rentals.

9. Owners were required to submit an application to secure one of the short-term rental spots.

10. Since May 2018, there have typically been more than ten applications for the full-time short-term rentals. There is a waitlist for these spots.

11. Under the short-term rental rules, the strata corporation charges an owner $50 each time their unit is used as a short-term rental.

12. The collected fees from the short-term rentals are deposited into the strata corporation's general operating account.

13. In the strata's 2018 fiscal year, the total "move in/out" charges totaled $28,100. In the strata's 2019 fiscal year, the total "move-in/out" charges totaled $36,925 (representing approximately 9% of the strata's total annual revenue).

14. In 2019, short-term renters had full access to the amenities at the Carlyle.

15. Owners carrying out short-term rentals were required to deliver to the tenant the current bylaws and rules of the Residential Section and a Notice of Tenant's Responsibilities in Form K.

16. In April 2019, it was a normal and common occurrence for there to be short-term renters occupying the ten short-term full-time rental units.

17. On May 14, 2019, the Bylaws were amended to limit owners to a two-year term on the full-time short-term rental list. The reason for the amendment was to provide a fair opportunity to all owners who wanted to use their units for short-term rentals.

Unit 1406

18. Unit 1406 of the Carlyle was, at all material times, owned by Rebecca Segal Konsolos and Amir Kia Rahmani.

19. Prior to April 2019, Rahmani applied, and was approved, for authorization to use 1406 as a full-time short-term rental.

20. Prior to April 2019, 1406 was listed by Konsolos as a short-term rental on the web-based rental platform Airbnb.

The Fire

21. At all relevant times the defendant, John Schappert, was a resident of Edmonton, Alberta who was on a trip to Vancouver.

22. On or about February 16, 2019, Schappert, via Airbnb, booked Unit 1406 for the period of April 8–13, 2019 (the "Stay").

23. Prior to the Stay, Schappert had never been to the Carlyle and had never seen the strata corporation's Bylaws.

24. Upon Schappert's receipt of the booking confirmation from Airbnb, a legally binding agreement was formed between Schappert and Konsolos.

25. The Airbnb terms of service are in evidence.

26. The terms of Schappert's contract with Konsolos included, *inter alia*, that he was responsible for leaving Unit 1406, including any personal or other property located at Unit 1406, in the condition it was in when he arrived. That he was responsible for both his own acts and omissions and responsible for the acts and omissions of any individuals he invited to, or otherwise provided access to, Unit 1406. And that he would potentially be subject to a claim of damages should damage to Unit 1406 occur.

27. On discovery, Schappert testified that that he did not think he signed the Form K and did not recall receiving a copy of the Bylaws.

28. The Form K as signed by Schappert is in evidence.

29. On April 12, 2019, Schappert and his partner were cooking a meal. There was a grease fire which triggered the Carlyle's fire suppression system. The discharge of water from the sprinklers caused resultant damage to the common property of the Carlyle.

30. Following the fire, Schappert was charged $499 by Airbnb as a security deposit.

The Policy

31. At all material times, the strata corporation had in place a policy of insurance identified as policy no. BFL04VR2213 (the "Insurance Policy"

or the "Policy"). The Policy was a subscription policy, administered by BFL Canada, [including various subscribing insurers to the first-party property coverage].

32. The version of the Policy in force on the date of the fire [is in evidence].

33. The premiums for the Policy were paid with funds from the strata corporation's general operating account.

34. Following the fire, the strata corporation submitted a claim for the resultant damage under the first-party property damage coverage provided by the Policy. Coverage was provided for the costs arising from the resultant damage.

35. Both before and after the fire, the strata council would routinely send out "Owner Reminders". One of the standard reminders read as follows:

> **Homeowner Personal Insurance:** The Strata Corporation's insurance policy does not cover personal belongings/contents, improvements/betterments to a unit, or re-location costs if an owner is required to move out of their unit for good reason. To recover these types of losses, an owner must have personal home owner's insurance. Please be advised that the Strata Corporation's policy only covers common property and the original fixtures and carpets within each strata lot. Owners are encouraged to make sure that the deductible amounts found in their personal policy match the deductible amounts found in the Strata Corporation's policy because if they are responsible for a fire, leak or sewage back-up they will have to pay for the deductible, if nothing else.

The Claim

36. On October 20, 2020, the strata corporation commenced this action against Schappert alleging his negligence caused the fire. The Notice of Civil Claim is in evidence.

37. The within action is a subrogated claim advanced by the insurers to recover amounts paid out under the insurance claim.

38. The strata corporation is not claiming for any uninsured losses in the within action.

[10] During the hearing, both parties submitted that Mr. Schappert was a licensee of Unit 1406 and not a tenant. I agree. Pursuant to the agreed facts, the Airbnb terms of service formed a "legally binding agreement" between Mr. Schappert and

Ms. Konsolos. The terms of service say Mr. Schappert is granted a limited licence to enter, occupy and use the unit, but not the exclusive right of possession, all of which is consistent with a licensee and not a tenant.

Is it in the interests of justice to take jurisdiction?

[11] Under s. 121 of the *Civil Resolution Tribunal Act,* S.B.C. 2012, c. 25, the tribunal has "specialized expertise" regarding the issues in this case, which turn on the interpretation of the *Strata Property Act,* S.B.C. 1998, c. 43, and the strata corporation's Bylaws (ss. 1(3), 16.1(1) and 121).

[12] Section 16.1(1)(b) provides for the dismissal by the court of proceedings within the specialized jurisdiction of the CRT unless "it is not in the interests of justice and fairness for the tribunal to adjudicate the claim".

[13] I agree with the parties that it is in the interests of justice and fairness to proceed by this special case rather than stay the action and have them proceed at the CRT. Section 16.3 of the *CRTA* provides factors to consider when making that decision, for present purposes the relevant ones being:

> **Considerations in the interest of justice and fairness**
>
> **16.3** (1) For the purposes of sections 16.1 (1) and 16.2 (1), when deciding whether it is in the interests of justice and fairness for the tribunal to adjudicate a claim, the court may consider the following:
>
> (a) whether an issue raised by the claim or dispute is of such importance that the claim or dispute would benefit from being adjudicated by that court to establish a precedent;
>
> …
>
> (c) whether an issue raised by the claim or dispute is sufficiently complex to benefit from being adjudicated by that court;
>
> (d) whether all of the parties to the claim or dispute agree that the claim or dispute should not be adjudicated by the tribunal;
>
> …
>
> (f) whether the use of electronic communication tools in the adjudication process of the tribunal would be unfair to a party in a way that cannot be accommodated by the tribunal.

[14] Under (d), both parties request determination by this special case. Under (a) (c), and (f), the issues raised are legally complex and, in my view, of sufficient importance that there is benefit to adjudicating them in-person in this Court.

[15] Another factor in favour of proceeding with the special case is that it will resolve the entire dispute rather than leaving residual issues for the CRT. Counsel advised that, if either of Mr. Schappert's defences succeed, then the case will be dismissed; alternatively, if both fail, he is liable and they have agreed on the amount of damages.

[16] For cases in which jurisdiction has been taken for similar reasons, see *The Owners, Strata Plan VR 855 v. Shawn Oaks Holdings Ltd.*, 2018 BCSC 1162 and *Kunzler v. The Owners, Strata Plan EPS 1433,* 2020 BCSC 576.

Is the claim barred by the "no subrogation" rule?

[17] Mr. Schappert submits that, if he qualifies as an insured under the strata's insurance policy ("Policy"), the claim against him is barred by the common law "no subrogation" rule, whereby an insurer has no subrogation rights against their own insured (*Commonwealth Construction Co. Ltd. v. Imperial Oil Ltd.,* [1978] 1 S.C.R. 317, 1976 CanLII 138 at 321).

[18] Whether or not, as a short-term renter, Mr. Schappert was an "insured" under the Policy turns on whether he was one of "the persons who normally occupy the strata lots" under s. 155(c) of the *SPA*. For the reasons that follow, in my view he was such a person.

"Insureds" include persons who normally occupy the strata lots

[19] Under the property damage section of the Policy (s. 10(q)(iii)), "Insured" includes any person deemed an "insured" in the *SPA*.[1] Thus, the definition of "insured" in *SPA* s. 155 is incorporated into the definition of "Insured" in the Policy.

[1] The parties agreed the reference in the policy to the "Condominium Property Act" should be read to refer to the *SPA*.

[20] Part 9 of the *SPA* deals with insurance. Section 149 requires a strata corporation to obtain and maintain property insurance on common property, common assets, buildings and original fixtures. The policy must cover "major perils", defined in the *Strata Property Regulation*, B.C. Reg. 43/2000, s. 9.1(2), to include "fire" and "water escape".

[21] Section 155 says that the named insureds on a strata corporation's policy must include various categories of persons, including "the persons who normally occupy the strata lots". It says:

> **Named insureds**
>
> **155** Despite the terms of the insurance policy, named insureds in a strata corporation's insurance policy include
>
> (a) the strata corporation,
>
> (b) the owners and tenants from time to time of the strata lots shown on the strata plan, and
>
> (c) the persons who normally occupy the strata lots.
>
> [Emphasis added.]

[22] I turn then to whether Mr. Schappert was among "the persons who normally occupy the strata lots".

"Occupy" means physical occupation

[23] While the *SPA* does not define "occupy", in s. 1.1 it defines "occupant" as "a person, other than an owner or tenant, who occupies a strata lot".

[24] In *HighStreet Accommodations Ltd. v. The Owners, Strata Plan BCS2478*, 2019 BCCA 64*,* the Court of Appeal held that "occupy" and "occupying" in s. 143 refer to *physical* occupation.

[25] *HighStreet* dealt with a residential strata lot in Vancouver with 26 floors of condominiums, townhouses, and common facilities. One of the owners leased their unit to HighStreet, a management company providing corporate short-term housing to clients through licencing arrangements lasting around 60–80 days. Thus, HighStreet was a tenant that did not physically occupy the leased premises.

[26] The strata passed a bylaw restricting short-term rentals. The issue was whether s. 143(1) of the *SPA* protected Highstreet from the bylaw. Section 143(1) provided a grace period before a new rental restriction bylaw applied to a strata lot. The grace period lasted until the later of one year after the bylaw was passed, or one year after a tenant who "is occupying" the strata lot when it was passed, ceased to occupy. Section 143 says:

> 143 (1) Subject to subsection (4), a bylaw that prohibits or limits rentals does not apply to a strata lot until the later of
>
> (a) one year after a tenant who is occupying the strata lot at the time the bylaw is passed ceases to occupy it as a tenant, and
>
> (b) one year after the bylaw is passed.
>
> [Emphasis added.]

[27] Applying the principles of statutory interpretation, the Court of Appeal held that the ordinary meaning of the words, their statutory context, and the legislative intent all supported the interpretation that, although HighStreet was a tenant, it could not rely on s. 143(1)(a) because it did not physically occupy the strata lot when the bylaw was passed.

[28] Regarding the ordinary meaning of "occupy", the Court said:

> [49] … The word "occupy" has a variety of possible meanings according to the context in which it is used. As the court pointed out in *Ottawa Salus Corp.*, "occupy" is commonly used to mean "to physically reside in", "to take up" a place or "to hold" a position or office and "to keep busy; engage; employ". … The fact that the word "occupy" does not require physical presence in all contexts does not mean that it never requires physical presence.

[29] Regarding the objectives of the *SPA*, the Court found the interests of tenants and other occupants largely incidental to the primary purpose of "protecting purchasers of strata properties, balancing the interests of stakeholders and ensuring consistency, fairness and equity among owners of strata lots":

> [42] As noted, the purpose of the *SPA* is to protect purchasers of strata properties, balance the interests of stakeholders and ensure consistency, fairness and equity among owners. After a strata lot is purchased, the primary stakeholders in question are the individual strata lot owners and the collective membership of a strata corporation. Their respective rights and interests are

> the focus of the statutory scheme the *SPA* establishes. Although the interests of tenants and other occupants are impacted, in my view those interests are largely incidental.

[30] Regarding statutory context, the Court found that, if physical occupation were not required, the purpose of s. 143 would be defeated because an individual owner could defeat the collective will of the strata membership by renting a residential unit to a non-resident tenant who would be free for an indefinite period thereafter to ignore duly passed rental restrictions applicable to other strata lots in the development (para. 50).

Does Mr. Schappert fall within "the persons who normally occupy the strata lots"?

[31] Mr. Schappert argues that he was an insured under *SPA* s. 155(c) -- and therefore deemed to be an "Insured" under the Policy -- because Airbnb guests did "normally occupy" the strata units designated for short-term rentals under the Bylaws.

[32] The insurers counter that s. 155(c) "is clearly intended to apply to persons, such as a spouse or children of an owner, who reside in the strata unit but are neither an owner nor pay rent to the strata lot owner." They say that spouses and children "are the types of stakeholders that the legislature intended to be covered", and that Mr. Schappert is not.

[33] Applying the principles of statutory interpretation to this situation, I agree with Mr. Schappert that, in these circumstance of a strata unit where short-term renters like him were authorized to occupy the designated units and commonly did so, he fell within "the persons who normally occupy the strata lots" and was therefore an insured under the Policy.

[34] When considering the grammatical and ordinary sense of the words of 155(c) in their statutory context, two aspects expand the ambit of "normally occupy":

a) Those who "normally occupy" are distinct from "owners" and "tenants".

The *SPA* refers to four types of strata lot users: “owners”, “tenants”, “occupants” and “visitors”. Section 155 includes all of these except “visitors”.

As mentioned above, “occupant” is defined as “a person, other than an owner or tenant, who occupies a strata lot.”

“Visitors” is not defined. In context, it would seem to refer to persons who are present relatively briefly and not pursuant to any commercial arrangement.

b) Those who “normally occupy” are distinct from those who “reside”.

The *SPA* refers to those who “reside” and those who “occupy”.

By including the latter, s. 155(c) extends beyond those who treat the unit as their home or place of residence, to those who use it in a shorter-term, less permanent way.

[35] Cutting the other way, and narrowing the ambit of s. 155(c), is the qualifier “normally”. Not all occupants are insured, but only those who do so “normally”, which by its common dictionary definition means “as a rule”, “usually” or “ordinarily”.

[36] In my view, applying the straightforward meaning of the words in their statutory context to these circumstances, a short-term renter such as Mr. Schappert was among the persons who did normally occupy the strata lots.

[37] As stated in the agreed facts, in April 2019 it was “a normal and common occurrence” for there to be short-term renters occupying the ten designated rental units, including Unit 1406. Additionally, the strata’s Bylaws required the designated units to be rented for short-term use at least every 60 days (Bylaws, s. 1.vii). The Bylaws thus approved and regulated this use and, as also stated in the agreed facts, the strata earned revenue from it. Also, Mr. Schappert did *physically* occupy the premises, pursuant to the Court of Appeal’s analysis of “occupy” in *HighStreet.*

[38] I disagree with the insurers’ position that s. 155(c) only extends as far as “persons such as a spouse or children of an owner, who reside in the strata unit”. If that were the intention, then s. 155(c) would use the term “reside”, as it does in other places, as opposed to “normally occupy”.

[39] In my view, the objectives of the *SPA*, as elucidated in *HighStreet*, are served by this broader approach to the interpretation of those who "normally occupy" the strata units. Section 155 can be understood to encompass a broad group of "insureds" in order to benefit individual strata lot owners and the collective membership of a strata corporation. From that perspective, one of the benefits of the expansion—beyond just owners, tenants, and residents—is to reduce circumstances in which owners and strata corporations are dragged into subrogated proceedings, whether as nominal claimants or as third parties. In this case, for example, one could imagine Mr. Schappert raising defences against the strata, or bringing third party claims against the owner, regarding issues such the lack of fire-safety equipment or the faulty condition of the stove. As insureds, they would not be at risk of personal liability, but would still be embroiled in litigation resulting from a loss which their insurance was intended to protect against. This broad interpretation is therefore consistent with providing strata corporations and their owners the intended protections of s. 155.

[40] The B.C. Law Institute "Report on Insurance Issues for Stratas", March 2019, BCLI Report no. 86 at 43, makes the point that s. 155 is designed to provide "no subrogation" protection for a broad group in order to avoid unwanted costs and litigation:

> How does this complex interplay of rule and exception [of the no-subrogation rule] apply to a strata property, which has its own complicated set of multiple ownership interests? …. [S]imply leaving the matter to be sorted out in accordance with those principles could lead to uncertainty and confusion. It would also impose unnecessary costs and unwanted litigation on the parties to insurance in the strata-property sector.
>
> In order to avoid these problems, the *Strata Property Act* ensures that a broad group of people within a strata property have the benefit of being protected against subrogated claims. It achieves this result by declaring a list of persons to be named insureds. Because they are considered by law to be named insureds, strata corporations, strata-lot owners, tenants, and "the persons who normally occupy the strata lots" are brought within an exception to the law on subrogation.

[41] Though not pursuing this issue in much detail, counsel for the insurers also submitted that Mr. Schappert was not an insured because he lacked an insurable

interest. I agree with Mr. Schappert, however, that he had an insurable interest capable of making him an insured. As a short-term renter with a right to use and occupy the unit, he could be detrimentally impacted by the insured perils (*Kosmopoulos v. Constitution Insurance Co.,* [1987] 1 S.C.R. 2, p. 30).

Can the insurers subrogate against Mr. Schappert even if he is an insured?

[42] The reasoning behind the "no subrogation" rule is explained in *Condominium Corporation No. 9813678 v. Statesman Corporation*, 2007 ABCA 216:

> [49] The most basic policy reason to bar subrogation against one of the insured is that the insurer has contracted to take onto itself the very risk, taking it from the very insured. The policy of insurance is one of indemnity, and so the co-insured should be indemnified against all …losses, including the subrogated claim.

[43] The insurers argue that, even if Mr. Schappert is an insured under s. 10(q)(iii) of the Policy, they may still subrogate against him because the Release and Subrogation clause in the Policy does not extend the no subrogation right to his situation.

[44] That clause says this:

> 22. RELEASE AND SUBROGATION
>
> (1) The insurer, on making a payment or assuming liability under this policy, is subrogated to all rights of recovery of the "Insured" against any person, and may bring an action in the name of the "Insured" to enforce those rights.
>
> …
>
> Except with respect to arson, fraud or vehicle impact, the Insurer agrees with the "Insured" to waive its right of subrogation as to any claim against:
>
> a. the "Condominium Corporation", its Directors and Officers, Property Managers, Agents and Employees.
>
> b. the "Unit" owners and if residents of a "Unit" owner's household, the spouse, the relatives of either and any other person under the age of twenty-one (21) in the care of a "Unit" owner or their spouse.
>
> [Emphasis added]

[45] I agree with Mr. Schappert that, because of the common law no subrogation rule, the insurers cannot subrogate against him as an insured under their Policy without clear language entitling them to do so. In my view, s. 22 does not contain such language.

[46] The insurers provided no authority for avoiding the no subrogation rule in these circumstances or pursuant to wording such as in s. 22. Section 22 does not say that the insurers may subrogate against some of their insureds. Nor, in my view, is that the implication of what it does say. As I read it, it gives the insurer subrogation rights against all "persons" who are not an "insured" and then extends the "no subrogation" rule to additional categories of persons for certainty.

Is the claim barred by the covenant to insure and waiver of liability in the Bylaws?

[47] This issue turns on whether Mr. Schappert can take the benefit of the waiver of liability in the strata's Bylaws for damages covered by the strata's insurance. If the strata could not successfully sue Mr. Schappert because of the waiver, then the insurers cannot do so by a subrogated claim on the strata's behalf.

[48] The waiver in question is in s. 4.4 of the Bylaws. It follows: s. 4.2, which prohibits damage by owners, tenants, occupants, or visitors to the common property and assets that the strata must repair and insure; and, s. 4.3, which makes owners responsible for any damage that same group causes to the owner's own strata lot.

[49] Section 4.4 requires an owner to indemnify the strata for various repair costs caused by their "visitors, occupants, guests, employees, agents, tenants or a member of the owner's family". It goes on to waive the owner's obligation to indemnify for expenses that are reimbursed by insurance.

[50] The sections say:

> **4.2:** A resident[2] or visitor must not cause damage, other than reasonable wear and tear, to the common property, common assets, limited common

[2] The Bylaws' Preamble defines "resident" to include an owner, tenant or occupant

> property or those parts of a strata lot which the strata corporation must repair and maintain under these bylaws of [sic] insure under section 149 of the *Act.*
>
> **4.3:** An owner is responsible for any damage caused by occupants, tenants or visitors to the owner's strata lot.[3]
>
> **4.4:** An owner shall indemnify and save harmless the strata corporation from the expense of any maintenance, repair or replacement rendered necessary to the common property, common assets, repair or replacement rendered necessary to the common property, common assets, limited common property or to any strata lot by the owner's act, omission, negligence or carelessness or by that of an owner's visitors, occupants, guests, employees, agents, tenants or a member of the owner's family, but only to the extent that such expense is not reimbursed from the proceeds received by operation of any insurance policy. In such circumstances, and for the purposes of bylaw 4.1, 4.2 and 4.3, any insurance deductible paid or payable by the strata corporation shall be considered an expense not covered by the proceeds received by the strata corporation as insurance coverage and will be charged to the owner.
>
> [Emphasis added.]

[51] The insurers submit that s. 4.4 waives liability only as against "owners", and so does not apply to Mr. Schappert. They also argue the more general point that, as a non-owner, Mr. Schappert is not entitled to rely on the Bylaws as against the strata.

[52] Mr. Schappert points to the Preamble of the Bylaws which says that they bind, not only the strata and owners, but also "tenants" and "occupants." He further argues that the cost to repair common property in circumstances such as this is precisely what is waived in s. 4.4.

[53] The Preamble says:

> **Preamble**
>
> These bylaws bind the strata corporation and the owners, tenants and occupants to the same extent as if the bylaws had been signed by the strata corporation and each owner, tenant and occupant and contained covenants on the part of the strata corporation with each owner, tenant and occupant and on the part of each owner, tenant and occupant with every other owner, tenant and occupant and with the strata corporation to observe and perform their provisions.
>
> Unless otherwise stated, all terms have the meanings prescribed in the *Strata Property Act,* S.B.C. 1998, c. 43 (the "*Act*"). For the purposes of these

[3] The Bylaws refer to short-term renters as "tenants" (s. 1(iii)).

> bylaws, "resident" means, collectively, an owner, tenant or occupant and, unless the context requires otherwise, includes a non-resident owner of a residential strata lot, and an owner, tenant or occupant of a non-residential strata lot.

[54] Mr. Schappert also relies on the contractual principle that covenants to insure against a certain risk will often lead to the conclusion that the covenanting party has agreed to be responsible for any damages should the risk ensue (*Shivji v. Owners: Condominium Plan No. 012 2336,* 2007 ABQB 572; *Kruger Products Limited v. First Choice Logistics Inc.,* 2013 BCCA 3, para. 55).

Do the Bylaws waive liability against Mr. Schappert?

[55] In my view, Mr. Schappert cannot rely on the strata's waiver of liability in s. 4.4 because, on the clear wording of the clause, the waiver applies only to "owners".

[56] Sections 4.2–4.4 draw clear distinctions between owners, tenants, occupants, and visitors, and the s. 4.4 obligation to indemnify, and waiver for proceeds received from insurance, are expressly limited to owners alone. To extend the waiver to Mr. Schappert would be contrary to the intention of s. 4.4 as expressed in its clear wording in the context of these surrounding clauses.

[57] This analysis is supported by the fact that the "Form K, Notice of Tenant's Responsibilities", signed by Mr. Schappert and Ms. Konsolos for his use of Unit 1406, obliges him to comply with the Bylaws and rules of the strata, without suggesting he can take the benefit of any of the rights therein. It also makes him responsible for any costs incurred by the strata for remedying a contravention of the Bylaws, which would include his contravention of the s. 4.2 obligation not to cause damage to the common property.

Do the Bylaws include a covenant to insure Mr. Schappert?

[58] In my view, the analysis just above also refutes Mr. Schappert's covenant to insure argument.

[59] The inference that a covenant to insure allocates the insured risk to the covenanting party is a matter of contractual interpretation, to be drawn after a reading of the contract as a whole in the factual context of the particular circumstances (*Capital Sewer Servicing Inc. v. Crosslinx Transit Solutions Constructors*, 2022 ONCA 10, para. 26).

[60] When ss. 4.2–4.4 and the Form K are read as a whole, the promise to insure is expressly intended to benefit only the owners, and not tenants, occupants, or visitors. In my view, therefore, the clear intention of the Bylaws is not to allocate to the strata the risk of a short-term renter such as Mr. Schappert causing damage to the common property.

[61] Additional obstacles to Mr. Schappert's argument are the absence of any express covenant to insure by the strata corporation in the Bylaws, and, even if there were such a covenant, Mr. Schappert's Form K indicates that he must comply with the Bylaws but does not indicate that he may rely on any of the benefits in them as against the strata.

Is there an implied intention to extend the waiver?

[62] Mr. Schappert argues that, despite this express language in ss. 4.2-4.4, the implied intention to extend the waiver can be found in the "identity of interest" between the owners and their authorized short-term renters such as himself, based on the principles in *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299, 1992 CanLII 41 and *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.,* [1999] 3 S.C.R. 108, 1999 CanLII 654, as elucidated in *Orange Julius et al v. Surrey et al*, 2000 BCCA 467, paras. 98–118.

[63] *Orange Julius* identifies two factors to assist in the determination of an implied intention to extend contractual protections to unnamed parties (paras. 99–100). The factors are:

> (i) whether there is such an identity of interest as to the performance of the contract, such as for example where the unnamed party is to have primary responsibility for performing the contractual obligations; and
>
> (ii) whether the other contracting party could be taken to know that the services to be provided would be performed by the unnamed party.

[64] Where these factors are met, an extension of the protection will be implied because, if it were not, a plaintiff would be able "to circumvent… the contractual protection" by suing the unnamed party in tort. The unnamed party would then bear the risk that the contracting parties had agreed to be borne by the party providing the waiver, which would avoid the clear meaning of the contract and be "absurd" (*Orange Julius*, paras. 100–101).

[65] In my view, these principles do not apply here because the requisite identity of interest is lacking. A short-term renter like Mr. Schappert does not have "primary responsibility" for performing the owner's obligations to the strata. As a short-term renter, his obligations to the strata are limited and short-lived. In brief, they are not to cause nuisance or damage during his short-term occupancy. He has no responsibility for performing the owner's obligations to the strata, such as paying strata fees, special levies, and fines, or repairing and maintaining the strata lot.

[66] Furthermore, extending the waiver to Mr. Schappert is not required to prevent circumvention of the allocation of risk in the Bylaws. Sections 4.2–4.4 and the Form K are specific about what obligations and risks apply, respectively, to owners, tenants, occupants, and visitors. Allowing the strata to sue tenants, occupants, and visitors for the damage they cause to common property, even if covered by the strata's insurance, does not avoid the clear meaning of s. 4.4, which is to limit the owner's indemnity obligations to the strata if covered by insurance—the owners, of course, being the ones who pay the cost of such insurance in the first place.

[67] Finally, this is not a situation where short-term renters would have no opportunity to protect themselves by insuring against those risks (*Orange Julius,* para. 105). Mr. Schappert's Form K said that he could be subject to claims for the cost of remedying damage to Unit 1406 in contravention of the Bylaws, and the

Airbnb terms of service refer to a guest's liability for damage and potential resort to their own homeowner or renter's insurance policy (ss. 11.2–11.4).

Conclusion

[68] Under *SPA* s. 16.2(1), it is in the interests of justice and fairness for the Court to adjudicate this special case rather than remit it to the CRT.

[69] In answer to the questions raised in the special case:

a) Yes, the strata's claim is barred by the common law "no subrogation" rule; and

b) No, the strata's claim is not barred by the covenant to insure and waiver of liability in the Bylaws.

[70] Mr. Schappert is awarded costs of these proceedings at Scale B, subject to the parties reaching a different agreement or making further submissions on costs.

"Coval J."