



Leaking Balcony Enclosures- Who is Responsible?

By Denise Lash on March 22, 2011

In Kelowna B.C., Lloyd Guenther, who purchased a condo with his wife in 2003, was so frustrated with the Strata Council's inaction in addressing water leaks on the owners enclosed balconies and the building envelope issues which he felt were caused by the enclosures, that he applied to the Supreme Court of B.C. to have an administrator appointed.

All but one of the 41 units in this three-storey building, had enclosed balconies that had been constructed in the 80's. It was when roof repairs were carried out in 1998, that complaints about water problems on the balconies first started.

The Strata Council had carried out various investigations of the building envelope and took the position that the owners were responsible for any leaking caused by their balcony enclosures. They concluded that no further investigations needed to be done on the building envelope.



The court held that since no by-law was enacted which would shift the responsibility of maintenance and repairs of the balcony enclosures to the owners (specific to B.C. legislation), it found that the Strata Council was, therefore, responsible for the leaks caused to the enclosed balconies.

Justice Barrow in determining whether the Strata Council breached its duty to properly address the building envelope issue, set out the following factors that he considered to be key in determining whether the Strata Council had acted "reasonably" :

- likelihood of the need to repair
- cost of further investigation
- gravity of harm sought to be avoided or mitigated by investigating or remedying any discovered problems

Based on the steps that the Strata Council had taken, the court did not find that the Strata Council had breached its duty.



The court also found that there was no need to appoint an administrator as the parties would now know their respective responsibilities.

In Ontario, balcony enclosures, are usually part of a unit owner's exclusive use common element and are considered alterations to the common elements that require a Section 98 indemnity agreement. Section 98 requires that these agreements be registered on title. The purpose of having these agreements in place is so that maintenance and repair responsibilities are clearly defined, that insurance obligations are specified, ensuring construction guidelines are in place and dealing with indemnification should damage occur. Where owners have constructed balcony enclosures prior to the date that Section 98 agreements were required (May 2001), boards of directors are still taking steps to get Section 98 agreements signed in order to avoid disputes down the road should the alteration require maintenance, repairs, or further changes. It is recommended that condominium corporations proceed in this manner to avoid costly disputes and lawsuits.

It is unfortunate that this matter ended up before the courts at substantial costs to the owners. Although the lawsuit may have resulted in clarification as to the responsibilities for maintenance and repairs, the period of time from when the conflict arose to the decision date, impacted on all the residents, many who were seniors living on fixed incomes and who were troubled by the threat of increased maintenance fees and special assessments.

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