IN THE GRANT COURT OF THE CAYMAN ISLANDS

CAUSE NO: 210 OF 2007

8-10-09.

BETWEEN	**ROBERT ROWE** **BERYL ROWE**	**PLAINTIFFS**
AND	**THE PROPRIETORS, STRATA PLAN NO. 83**	**DEFENDANT**

IN CHAMBERS
THE 13TH TO 15TH MAY 2009, 7TH OCTOBER 2009
BEFORE THE HON. CHIEF JUSTICE

Appearances: Mr. Ward Sykes of Appleby, Attorneys for the plaintiffs
Mr. George Giglioli of Giglioli & Co., Attorneys for the defendant

RULING

1. This case concerns the question of liability for the restoration of damages caused by hurricane Ivan in September 2004 to a strata unit. The unit is within the well-known George Town office development called "The Genesis Building".

2. The Plaintiffs are owners of the strata unit and the Defendant Strata Corporation is the registered owner of the building.

3. In this trial the Plaintiffs' claim:

   (i) a declaration that the Defendant failed to insure the internal fit out of the strata unit in breach of its duty to do so imposed by the Strata Titles Registration Law and the Strata Corporation Bye-laws;

   (ii) a declaration that the costs of reinstatement eventually undertaken and expended by the Defendant in the amount of USD73,650.23

(CID60,400.57) arise as a result of the breach of duty to insure and so are not due to the Defendant from the Plaintiff;

(iii) USD38,887.15, being the amount recovered by the Defendant from the Insurers in respect of loss of rent for the Plaintiffs' unit arising from damage by hurricane Ivan, but which the Defendant claims by way of set off against the sum of USD73,659.23 aforesaid;

(iv) interest on the sum of USD38,887.15; and

(v) costs.

4. The following is a summary of the facts and issues in the case.

5. The Genesis Building was developed as an office development. It was constructed as a "shell" to standard specifications, leaving the individual strata owners free to introduce the internal fit out suitable for the particular use of each unit.

6. Prior to the purchase by the Plaintiffs in March 2004, the strata unit in question (Parcel 45H1 located on the ground floor) had been fitted out by the previous owner and rented as an office. The Plaintiffs made no alterations, continuing to rent the unit out as an office with the same fit out as existed when they purchased it. By "fit out" is meant internal finishings to the unit space, including partition walls, doors, ceiling, vents and ducts.

7. The Plaintiffs did not insure the strata unit fit out (nor the unit itself) but claim to have relied upon the Bye-laws for what they perceived was the obligation of the Defendant to insure the building in its entirety, including fit outs; but save for owners' or tenants' chattels such as furnishings and loose carpets.

8. In September 2004 hurricane Ivan caused extensive damage by wind and flooding to the Plaintiffs' strata unit (and to other parts of the Genesis Building); including damage to the fit out.

9. The Defendant oversaw the repairs generally to the Genesis Building. It first notified the Plaintiffs retrospectively that it had commenced work on their unit by letter dated 29th April 2005. This notice, although given after the commencement was an uncontroversial form of notification to all owners of mould remediation work which the Defendant had properly and advisably undertaken for the entire building. Mould had contaminated the internal fit out throughout the building (to a large extent comprising highly susceptible "sheet rock").

10. When it was later made clear to the Plaintiffs that they were expected to cover the costs of repairs of their internal fit out they refused, citing reliance on the Strata Bye-laws as requiring the Defendant to have insured for those costs. The Defendant then stopped the works in their strata unit, but it was later resumed and completed after "without prejudice" discussions and with the understanding that the liability for the costs would have to be settled. That was never achieved and therefore we have this action.

11. The Plaintiffs have not taken issue with the stated costs of the repairs in the amount of USD73,659.23 (CID60,400.57) and for the purposes of this trial the amount is taken as correct.

12. The Plaintiffs' case rests squarely upon the proposition that by operation of the Strata Titles Registration Law (the "STRL") and the Strata Bye-laws, the Defendants were obliged to insure the fit out to their unit. Subsumed within this is

the further proposition that the Defendant, as the strata corporation, had (and still has) an insurable interest in the Plaintiffs' strata unit.

13. The Defence denies both these propositions and asserts to the contrary that the internal fit out of units is not part of the building for insurance purposes.

14. It is acknowledged by the Defendant that the Plaintiffs did not themselves take out insurance. It is also acknowledged that, if not at the moment in time of their purchase of the unit on 4th March 2004, certainly by no later than 5th March 2004; the Plaintiffs would have seen the Bye-laws with its provisions for insurance by the Strata Corporation. The Plaintiffs therefore say that from that time forward, they were entitled to rely upon the Bye-laws in keeping with its terms.

15. The central question thus becomes one of construction: What do the Bye-Laws provide in respect of the obligation to insure?

16. The starting point for construction is with the relevant provisions of the legislation which enables the promulgation of Bye-laws – the STRL itself.

17. Section 6(1)(a), (b) and (d) states:

> *"The duties of a (strata) corporation shall include the following:*
>
> *(a) to insure and keep insured the building to the replacement value thereof against fire, earthquake, hurricane and such other risks as may be prescribed, unless the proprietors by unanimous resolution otherwise determine;*
>
> *(b) to effect such insurance as it may be required by law to effect;*
>
> ...

(d) subject to section 23(2) and (3) and to such conditions as may be prescribed, to apply insurance moneys received by it in respect of damage to the building in rebuilding and reinstating the building so far as it may be lawful to do so."

18. By section 2 of the STRL "Building" means the *"building or buildings shown on the strata plan"*.

19. It is beyond dispute that the strata plan that was registered for the Genesis Building shows the structure described as a "shell" as it was before the internal fit outs to the strata units were effected.

20. However, for the purposes of determining the question at hand, the provisions of the Bye-laws themselves are germaine and section 21(7) of the STRL gives statutory force to the Bye-laws in these terms:

"Bye-laws for the time being in force shall bind every corporation and the proprietors to the same extent as if such bye-laws had respectively been signed and sealed by such corporation and such proprietor and contained covenants on the part of such corporation with each proprietor and on the part of each proprietor with every other proprietor and with such corporation to observe and perform all the bye-laws."

21. Upon first registration in 1986, the strata corporation and its proprietors were governed by the form of bye-laws prescribed in the schedules of the STRL. Those were however amended, as allowed by the STRL, by unanimous consent and replaced later that year by the Bye-laws which have been since and are now in

place. However, it appears that no unanimous resolution of the Proprietors was taken to do away with the Strata Corporation's obligation under section 6(1) (a) of the STRL to insure. On the contrary, the replacement Bye-laws in Bye-law 35(f)(1) provides, of pivotal importance to this dispute; as follows:

> *"[The strata corporation shall] Insure the office development (which for the avoidance of doubt, shall, for this purpose include each and every strata unit for the time being contained therein together with the common property and all erections, buildings, and installations now or hereafter standing or installed thereon or therein but excluding furniture, contents, and personal effects on or in any strata unit) and keep it insured against loss or damage of riot, civil commotions, fire, explosion, storm, hurricane, earthquake, flooding, impact or damage caused by aircraft...and such other risks as it shall from time to time think fit, with such insurance company of repute as it may decide, in an amount or amounts equal to the full replacement value thereof, plus surveyors' architects' and lawyer's fees" (emphasis supplied).*

22. Of immediate note is the juxtaposition of the express inclusion of *"every strata unit and all erections...and installations...therein"* with the express exclusion of *"furniture, contents, and personal effects on or in any strata unit"*. These are provisions which are clearly concerned with what should be the insurance coverage relating to the internal area of strata units.

23. Of immediate note, also; Bye-law 35(f)(2) calls upon the strata corporation to procure occupiers' liability insurance in its own name and in the names of all registered proprietors; consistent only with the general responsibility of the strata corporation to secure insurance coverage for the strata development as a whole.

24. Section 35(g) of the Bye-laws continues in the same vein; providing that the strata corporation shall:

> *"As often as any of the office development is destroyed or damaged by any insured risk, (it) shall rebuild and reinstate the same in accordance with the regulations and planning or development schemes of any competent authority for the time being affecting the same and it is hereby agreed that any moneys received in respect of the insurance provided for shall be applied so far as the same shall extend in so rebuilding and reinstating the office development."*

25. Consistent with section 2 of the STRL, "office development" is defined by section 1(b) of the Bye-laws as "the office buildings and landscaping development in George Town, Commercial, Block OPY Parcel 45 which is the subject of the Strata Plan Number 83 of the office development filed with the Registrar of Lands in accordance with the laws".

26. That meaning would appear to be consistent with the Defendant's position that the office development includes only the "shell" of the Genesis Building and the common areas such as landscaped areas.

27. But it is clear from Bye-law 35(f) when read with Bye-law 1(f) (which gives the meaning of "strata unit") that the Bye-laws are intended to expand the meaning of

the "office development" for the purposes of defining the strata corporation's obligation to insure.

Bye-law 1(f) provides:

> *"The Strata unit means a horizontal or vertical unit in the office building registered or registrable as a separate parcel under the Registered Land Law (Revised) and where the context permits, all other appurtenances to the unit."*

28. Thus, it is the case, and plainly as a matter of interpretation of the Bye-laws, that Bye-laws 35(f) imposes an obligation on the strata corporation to insure not just the shell of the building, but also each strata unit as defined; including the appurtenances to each unit and specifically "*installations now or hereafter standing or installed thereon or therein (excluding furniture, contents, personal effects, ...).*

29. It is equally clear, in my view, that the fit out comes within the meaning of installations *"...standing or installed"* within a strata unit.

30. Mr. Giglioli's argument to the contrary – that such installations relate only to installations which may become attached to and form part of the common property or common walls of the buildings – would ignore the express inclusion of "every strata unit" within the meaning of "office development" as stipulated by Bye-law 35(f).

31. It is moreover, as Mr. Sykes submitted, trite that fittings which are erected as permanent attachments or "installations" to a building with the intention that they are so regarded (as do the fit out in question) become, in law, part of the building.

Indeed, Mr. Giglioli took no issue with this proposition of law. The principle was most recently and authoritatively restated by the House of Lords in ***Eliteston Ltd. v Morris and another*** *[1997] 2 All E.R. 513,* a case which on its facts dealt with the question whether a bungalow had been constructed in such a way as to become a part of the realty on which it had been placed. In terms clearly wide enough to embrace the circumstances of this case; it was held that if a structure could only be enjoyed on site, and could not be removed in whole or in sections to another site, there was a strong inference that the purpose of placing the structure on the original site was that it should form part of the realty of that site and should therefore cease to be a chattel.

32. In his opinion (one of two delivered on behalf of the House), Lord Lloyd restated the principle by adopting a three-fold classification from Woodfall Landlord and Tenant in these terms:

> ***"For my part, I find it better in the present case to avoid the traditional two-fold distinction between chattels and fixtures, and to adopt the three-fold classification set out in Woodfall Landlord and Tenant release 36 (1994) Vol. 1, p12/83, para. 13.131:***
>
> > ***"An object which is brought into land may be classified under one of the three broad heads. It may be (a) a chattel; (b) a fixture; or (c) treated as being part of the land."***

33. In this case, the internal fit out of the strata unit were, as described, "installations" and became fixtures which came to be treated as being part of the land which is the realty comprised of the Genesis Building.

34. As such, the fit out became insurable for the purposes of section 35(f) of the Bye-laws.

35. In light of further arguments on behalf of the Defendant to the effect that the foregoing conclusion would impose an unreasonable and hithertofore unknown obligation upon the Defendant, a consideration of some of the reciprocal obligations clearly placed upon a proprietor by the Bye-laws is instructive. They show that the Bye-laws create a code of mutual obligations which is consistent only with an obligation to procure insurance coverage being placed upon the strata corporation as the body uniquely placed to do so in an effective and consistent manner in respect of all that is comprised within the realty of the development.

36. Bye-law 34(a) requires a proprietor to permit the corporation, at all reasonable times, to have access to his strata unit for the purpose of inspecting, repairing, etc., the common property or for the purpose of ensuring that the Bye-laws are being observed.

37. The proprietor by Bye-law 34(c) must in turn pay to the corporation within 14 days of demand, all contributions *"necessary to establish and maintain a fund for administrative purposes sufficient, in the opinion of the corporation"*, for all its functions, including *"for the payment of insurance premiums."* These provisions in the Bye-laws find primary statutory expression and reinforcement in sections

6(1)(b) and 6(2)(b)(c) and (d) of the STRL itself. (The evidence is that the Plaintiffs pay the significant sum of about $24,000 per annum for strata fees.)

38. From these obligations placed upon the proprietor, it is clear that the Strata would have access to be able to decide for itself what needed to be insured, to appraise its value and to exact the appropriate contribution of funds to secure the coverage.

39. This conclusion is further reinforced by Bye-law 34(d) which, while imposing an obligation upon the proprietor to keep his strata unit in a state of good repair, exempts from that obligation not only reasonable wear and tear but also "damage by fire, storm, tempest or acts of God" – the very insurable risks which are in issue here.

40. And, finally, there is in this regard Bye-law 34(h) which imposes an obligation upon the proprietor "not (to) make any alterations in the strata unit without the approval in writing of the corporation to the plans and specifications thereof and make such alterations only in accordance with such plans and specifications" – further putting paid to the notion that insurance costs could be disproportionately inflated by a proprietor's choice of fit out.

41. There was further evidence directly relevant to this issue.

42. The evidence shows that the Strata Corporation meets its obligation by prorating all its costs relative to the unit entitlement of each strata unit. In the case of this strata unit – 45HI – its area is 1570 square feet or 5.8% of the area of the Genesis Building, giving it a unit entitlement of 5.8% in the common property; in the strata corporation and thus its pro-rated obligations to pay strata fees.

43. In this regard section 4(1) and (2) of the STRL apply. They provide:

"4(1) Every strata plan shall –

...

(d) have endorsed upon it a schedule setting out the unit entitlement of each strata unit indicating as a whole number the proportion of the common property allocated to that strata unit;

...

4(2) The unit entitlement of each strata unit shall, as respects to the proprietor of such strata unit, determine –

(a) the quantum of his share in the relevant corporation; and

(b) the proportion payable by him of contribution levied pursuant to paragraph (b) of section 6(2)".

42. In light of all the provisions of sections 6 (1)(a) and 6(2)(b) of the STRL clearly spelling out the duty of the Strata Corporation to insure, *"the building to the replacement value thereof;"* and the clear intention in the Bye-laws that internal installations shall become part of the Building; the Strata Corporation's concern about disproportionality is plainly misplaced.

43. It is clear from the entire scheme of the STRL and Bye-laws that the level of interior fit outs is something of which the strata corporation may approve or disapprove for the purposes of ensuring that the Bye-laws are observed.

44. In this case the evidence is, moreover, that the Plaintiffs bought the strata unit already fitted out by the original owner and there can be no question but that over

the years from 1986 to 2004, the Strata Corporation would have been on notice of the nature of the internal fit out of the strata unit. Indeed, the evidence is that its agents or employees would have been in and out of the strata unit on many occasions, as they would all the other strata units.

45. It must be acknowledged however, that the unrefuted evidence of Mr. Martyn Bould, the Chairman of the Executive Committee of the Strata Corporation, is that the insurance coverage for the Genesis Building did not include and has never included the internal fit outs of strata units. The insurance company, while curiously enough accepting liability for mould remediation – including the costs of removing the contaminated internal walls, doors and ceilings – did not accept liability for their replacement. So the fact is that the Strata Corporation is out of pocket on the restoration work done for the internal fit out to the Plaintiffs' strata unit. While that is regrettable, the issue for decision now is whether the Strata Corporation had an obligation to insure, and whether the Plaintiffs were entitled to believe the internal fit out to their strata unit was insured; irrespective of any misconceptions on the part of the Strata Corporation in that regard.

Contra Preferentum

46. Even if it is not clear that the Plaintiffs had seen and so had relied upon the Bye-law provisions as to insurance before purchasing their strata unit (as I conclude Mr. Rowe mistakenly said they had) it is clear that they would have relied upon them thereafter for the purposes of deciding what insurance they needed to procure. It is the Plaintiffs' unrefuted evidence that they did not purchase insurance for internal fit out because they relied on the Bye-law provisions.

Having seen the Bye-laws, they therefore saw no need to consult a lawyer here in Cayman to ascertain their meaning and effect.

47. I accept that the meaning which the words of the Bye-laws conveyed to them in this regard was that which the words would convey to a reasonable man against the relevant background of the circumstances under which they came to rely upon the Bye-laws. (See: ***Investors Compensation Scheme Ltd. v West Bromwich Building Society [1998] 1 W.LR. 896, 913*** per Lord Hoffmann.) This is, of course, to be distinguished from the circumstances under which the Plaintiffs entered into the transaction to purchase their strata unit – a transaction to which the strata corporation was itself not privy.

48. However, the Plaintiffs having become owners, were bound by the Bye-laws and so were entitled to place reliance upon them thereafter.

49. To the extent therefore that there is any ambiguity in the Bye-laws (as suggested by Mr. Giglioli; that is: that the word "installations" as used in section 35(f) of the Bye-laws is capable of meaning such installations as might relate to the common property) such ambiguity must be resolved in favour of the Plaintiffs and against the Strata Corporation which is the maker of the instrument containing the Bye-laws: see Chitty on Contracts 29th Edition para. 12-083 to 12-085 citing, inter alia ***John Lee Sons (Grantham) Ltd v Railway Executive [1949] 2 All E.R. 581,583*** per Lord Evershed, MR:

> ***"We are presented with two alternative readings of this document and the reading which one should adopt is to be determined, among other things, by a consideration of the fact that the***

defendants put forward the document. They have put forward a clause which is by no means free from obscurity and have contended...that it has a remarkably, if not extravagantly, wide scope, and I think that the rule contra preferentum should be applied...."

50. The effect of the application of that principle here is that the Plaintiffs should be allowed to rely upon the meaning which the words of the Bye-laws imparted to them, even if the words are ambiguous.

51. That, however, is very much a secondary conclusion. My primary conclusion is that Bye-law 35(f) is unambiguous and clear in providing that for insurance purposes; the office development *"includes each and every strata unit together with the common property and all erections, buildings and installations...installed thereon or therein"* and that, in terms of Bye-law 1(f) strata units include *"all the appurtenances to the unit."*

Insurable interest

52. A further argument of the Defendant is that it could not have insured the Plaintiffs' strata unit fit out because it had no insurable interest in it.

53. This argument is not supported by any views expressed by the Insurer as one might expect (as to which see ***Macaura v Northern Ass. Co. [1925] A.C. 619, 631-632);*** as it seems there was no effort made to insure the fit out to strata units as a separate item of risk. Nor, for that matter, is there any evidence that the Insurers were ever shown the Bye-laws for the purpose of ascertaining what the insurable property or

associated risks might be. Instead, the evidence is that on each anniversary the Strata Corporation would present an updated insurance value for the Building for the Insurers' acceptance and the policy renewed on that basis.

54. This argument that there was no insurable interest, is therefore one raised only by the Defendant (not by the Insurer) and entirely for the purposes of its Defence.

55. It must be noted immediately, that the argument flies in the face of what happened in reality. There were the claims made by the Defendant and paid by the Insurer for mould remediation for the entire building and loss of rent in respect of strata unit 45HI (and no doubt for other units). And, moreover, in respect of mould remediation; to the extent that the fit out had become contaminated and had to be removed, the associated costs were claimed and received. Why then, one might ask rhetorically; would there not have been an insurable interest for the purposes of replacing the contaminated fit out?

56. An adoption of the relevant legal principles as explained in MacGillivray's authoritative text on Insurance suffices, I think, to dispose of this argument. In the 10th Edition, at para. 1-64 it is stated that "an insurable interest in property is created when the assured's legal relationship to the property renders him liable to pay money in the event of it being lost or damaged by an insured peril....A contractual obligation to keep property insured against accidental loss or damage gives the obligor an interest in it" [(citing ***Heckman v Isaac (1862) 6 L.T. 383***; ***Lonsdale & Thompson Ltd. v Black Arrow Group plc [1993] Ch 361, 368***)].

57. I hold that the Strata Corporation had and continues to have – by virtue of the STRL and the Bye-laws – an insurable interest in the fit out of the Plaintiffs' strata unit as, indeed, it does in the fit outs of all strata units within the development.

58. On the basis of the foregoing conclusions, I find for the Plaintiffs on their Statement of Claim.

59. Judgment has already been granted to the Plaintiffs on 22 August 2008 for the sum of US$37,114.26 on the basis of an admission at paragraph 14 of the Defence filed 22 November 2007 which Judgment was stayed pending the determination of the Claim and Counterclaim. Interest is awarded to the Plaintiffs on that stayed judgment at the rate set by the Judgement Debts (rates of interest) Rules from the date of the admission; that is: 22 November 2007.

60. The Counterclaim of the Defendant is dismissed.

61. The Plaintiffs are awarded their costs of this trial to be taxed if not agreed at the standard rate.

Hon. Anthony Smellie
Chief Justice

October 8 2009