Construction Law

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Considerations in Dealing with the "Typical" Leaky Building Lawsuit

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I. INTRODUCTION

The owners of strata units in "leaking buildings" are in most cases innocent victims about to embark on a very frustrating and expensive voyage to an unpredictable place. The writer hopes that this brief discussion of some of the practical considerations involved in making the trip will result in a less stressful journey and potentially a more satisfactory result.

In the opinion of the writer, the primary ingredients for a successful voyage from the owner's perspective are a strong and reasonable strata council, good communication between the counsel and the owners and having the right consultants and lawyers on board at an early stage.

The nature of the "leaky building" lawsuit is such that the number of parties to a given case are often only limited by the number of solvent or insured parties involved in the design, construction, approval or warrantying of the building. By the time the pleadings are closed it is rare that a party with the financial ability to contribute to a settlement has been overlooked in the Statement of Claim or in Third Party Notices. The nature of these cases makes it very difficult for a party with no liability to extricate itself from the process before trial.

The number of parties involved, the scope of discovery of documents, the scope of Examinations for Discovery and the "kitchen sink" nature of these cases tend to result in trials measured in months rather than days or weeks. Defence costs can be ruinous. The potential for the Court "spreading the liability around" at trial is very real. For example, it is difficult to imagine that the designer of a disastrous leaky building would escape liability entirely at trial. Assuming that the designer is found only 10% liable for the cost of the remedial work, the designer may end up paying a much larger proportion of the claim if the other parties found responsible by the Court are unable to pay.

In "leaky building" litigation a bad settlement is often better than a good defence given that the collective defence costs may very significantly exceed the cost of the remedial work. The writer hopes that some of the considerations set out in this paper will assist defendants in these cases in making a realistic assessment of whether or not an early settlement should be attempted.

II. THE NATURE OF THE STRATA CORPORATION

A. WHAT IS IT?

The strata corporation is a creature of the Strata Property Act. It is not a company, although it may sue or be sued in its own name. It may enter into contracts. It may grant security and borrow money.

The strata corporation has property known as "strata lots". It also has "common property", "common facilities" and "assets".

Each strata lot is owned by the individual shown as the registered owner at the Land Title Office. All of the common property is owned collectively by the owners of the strata lots. Each owner's interest

is shown on a schedule filed as part of the strata plan. The strata corporation does not own the strata lots or the common property.

"Common facilities" are defined as facilities "available for the use of all of the owners". A common facility may be owned by the strata corporation, or by a third party, or by one or more members. It is not clear from the Strata Property Act who owns the "assets" of the strata corporation. It is likely that the strata corporation holds the "assets" in trust for the persons who are from time to time members of the strata corporation.

Sections 170-172 of the Strata Property Act authorizes the strata corporation to sue in some instances "as representative of the owners of the strata lots", and in other instances "on its own behalf" and "on behalf of an owner". It does not have its own cause of action for defects in or damage to strata lots or the common property, because neither of these property elements are owned by the strata corporation.

The strata corporation can have its own cause of action for defects in or damage to property which is owned by the strata corporation (for example a recreation centre or caretaker's suite registered in the name of the strata corporation.

The strata corporation can sue on behalf of one or more owners to recover damages actually suffered by those owners as a result of defects in or damage to strata lots or common property.

In order to sue on behalf of owners for individual strata lot deficiencies, a special resolution is required and the consent of each owner must be obtained. Otherwise, the individual owner may commence his/her own lawsuit to sue for both strata lot deficiencies and their proportionate share of common property deficiencies. The problem with water leakage is that it does not know how to distinguish between common property and individual strata lots.

When suing in a representative capacity, the Strata Corporation's cumulative claim is no greater than the total of all of the individual claims of the strata lot Owners it represents. For example, if suing a developer for breach of its implied warranty for new construction or breach of the Disclosure Statement, only original Purchasers who bought from that Developer may pursue such claims. In the absence of an assignment of those rights, a subsequent Purchaser may not bring a claim against the Developer for breach of the Purchase and Sale Agreement. Therefore, if a Strata Corporation brings an action on behalf of all current owners against a Developer for building leaks on the basis of breach of the Purchase and Sale Agreement, the Strata Corporation may only recover damages on behalf of those Owners who are original Purchasers at the time the action is commenced. For example, if 40% of the strata Owners are subsequent Purchasers, then only 60% of the claim for common property deficiencies may be recovered through the Strata Corporation. Subsequent owners, along with the original owners, may still pursue their total claim against the Developer in negligence, however this is usually a more difficult claim to establish than breach of contract. For claims in contract, each owner must prove the terms of his or her contract with the Developer and establish the actual damages suffered with respect to his or her strata unit or proportionate share of the common property repairs.

In the absence of an agreement to contrary, the fruits of litigation belong to the individual owners on whose behalf the action is brought, and should be apportioned by the Court in accordance with the damages which those owners have actually suffered.

B. POWERS AND DUTIES OF THE STRATA CORPORATION

The strata corporation is responsible for the enforcement of the by-laws, and the control, management and administration of the common property, common facilities and the assets of the strata corporation. The by-laws of the strata corporation are the by-laws set out in the Schedule of Standard Bylaws to the Act, until they have been altered or repealed pursuant to the Act.

A strata corporation must obtain and maintain insurance on the buildings, the common facilities and any insurable improvements owned by the strata corporation, to the full replacement values under section 149 of the Act. As well, the strata corporation must annually review the adequacy of the insurance and pay the premiums on the insurance policies. Further, the strata corporation must keep in a state of good and serviceable repair and properly maintain the common property, common facilities and assets of the strata corporation. Finally, it must comply with notices or orders by competent public or local authorities requiring repairs or work to be done in respect of the land included in the strata plan or the buildings, common facilities or assets of the strata corporation. The strata corporation may carry out repairs or work required by competent public or local authorities on a strata lot, whether authorized by the owners or not. It may also obtain and maintain additional insurance as it sees fit, including liability insurance. It may also revoke privileges or set fines for breach of the by-laws, rules and regulations.

The strata corporation must establish a fund for administrative expenses, sufficient for the control, management and administration of the common property, for the payment of premiums on policies of insurance and for the discharge of other obligations of the corporation. It must also establish a "contingency reserve fund" not exceeding an amount calculated in the manner set by regulation and determine the annual levy for the contingency reserve fund. The strata corporation must hold the fund as a reserve fund to pay unusual or extraordinary future expenses. The strata corporation must determine the amounts to be raised and notify the strata lot owners of the amounts. The amounts must be raised by levying contributions on the owners in proportion to the unit entitlement of their respective strata lots in the manner provided for in the by-laws.

The strata council must not make expenditures out of the contingency reserve fund without a special resolution, unless the strata council considers that the expenditure is necessary to meet an emergency.

A strata corporation may recover from an owner, in Court if necessary, a sum of money owing to the strata corporation.

If an owner defaults in payment of a levy or levies for common expenses, the strata corporation may register in the Land Title Office a certificate showing the amount owing and the legal description of the strata lot of that owner. The strata corporation may apply to a Court that judgment be entered against the defaulting owner in favour of the strata corporation for the amount due. The order

obtained will provide that failing payment to the strata corporation within 30 days of the order, the strata corporation may sell the strata lot at a price and on terms to be approved by the Court.

Pursuant to section 149 the strata corporation must obtain and maintain insurance for the buildings, common facilities and any insurable improvements owned by the strata corporation, to their replacement value, against fire and against other perils as are usually the subject of insurance in respect of similar properties. Despite the terms of the policy, the strata corporation, the owner and tenants from time to time of every strata lot and all persons normally occupying the strata lots are deemed to be named insureds.

In many cases the owners of leaking buildings will sue the parties allegedly responsible and then wait for a settlement or a judgment on the claim before fixing the building. In some cases the reason for taking this course of action is because the amount required to reasonably remedy the problems is too great a financial burden for the owners to bear. In other cases the owners could bear the burden, however prefer to wait if that waiting will avoid the prospect of the owners having to raise the money required for the fix. It is important to note that there may be a serious risk in waiting unless it is absolutely clear that the owner could not possibly raise funds necessary to reasonably mitigate the damage occurring. In the first place the Defendants will rightly suggest that the owners had a duty to take all reasonable steps to mitigate the damage. In the second place, where one owner opposes the decision to wait rather than raise the funds and fix the problem immediately, the other owners and the strata council may very well have some exposure if the owner wishing to remedy the problems goes to Court and asks for a mandatory injunction requiring an immediate fix, alleging that the other owners and the strata council breached their statutory duty to remedy, repair and properly maintain the common property. In the case of Wright v. Strata Plan 205 (1996), 29 BCLR (3d) 343, an owner made this allegation against the strata corporation. At the Supreme Court level the owner was unsuccessful and the Court found that the strata council and the strata corporation did all that was reasonably possible in attempting to carry out the statutory duties set out above. The decision was upheld in the Court of Appeal, however the Court of Appeal noted that there was no pleading by the Plaintiff for breach of a statutory duty. The Court noted that had there been such a pleading, a much higher standard of care than reasonableness might have applied, perhaps even a standard of strict liability or absolute liability.

Given the remarks of the Court of Appeal in the Wright decision, it might be very prudent for strata councils to ensure that everything possible is done to ensure compliance with the obligation to repair set out in the Strata Property Act.

C. THE STRATA COUNCIL

Pursuant to Part 3 of the Act, the owner developer must exercise the powers and duties of the strata council until a council is elected by the owners. That must occur at the first annual general meeting of the owners. That meeting will be called by the owner developer under section 16 of the Act. The council must be elected by and from the owners. The number of persons on council is determined by the Bylaws.

D. POWERS AND DUTIES OF THE STRATA COUNCIL

The strata council must keep, in one location, and must make available on request to an owner, a copy of the Act and of changes in the by-laws, a copy of special or unanimous resolutions, copies of all legal agreements to which the corporation is a party, a register of the members of the council, a register of the strata lot owners, a copy of the annual budget and a copy of all of the Minutes of the annual general meetings and council meetings. Council must keep Minutes of all of its proceedings and Minutes of the general meetings. It must ensure that proper books of account are kept and must prepare proper accounts for presentation at each annual general meeting (see section 35-36).

E. POWERS OF OWNERS

If the strata corporation fails to fulfil an obligation under the Act, the owner of a strata lot, or a registered mortgagee, may apply to the Court for a mandatory injunction requiring the strata corporation to perform the obligation.

An aggrieved owner may insist on arbitration or may apply to the Court to prevent or remedy a matter if the owner alleges that the affairs of the strata corporation are being conducted, or the powers of the corporation or strata council are being exercised, in a manner oppressive to one or more owners, including himself or herself, or that some act of the strata corporation has been done or is threatened, or that some resolution of the owners or a class of owners has been passed or is proposed that is unfairly prejudicial to one or more owners, including himself or herself.

Where an owner believes that a leaking building is not being fixed quickly enough, for example where many of the owners but not all may be able to pay a special assessment to facilitate the fix, that owner might consider applying for a mandatory injunction requiring the strata corporation to fix the building rather than waiting for a settlement or judgment.

F. THE POWER TO RAISE FUNDS FOR CONSULTANTS, LAWYERS AND REMEDIAL WORK

Pursuant to section 128 of the Act, the strata corporation must prepare a budget before every annual general meeting for the following 12 month period. All owners must pay a monthly assessment in accordance with their unit entitlement. The provisions of the Act referred to earlier in this paper create an obligation on the part of the strata corporation and the strata council to budget for and raise the necessary funds to investigate problems, receive advice concerning appropriate solutions and implement those solutions.

G. RESPONSIBILITY OF THE STRATA CORPORATION FOR THE COSTS OF CONSULTANTS, LAWYERS AND REMEDIAL WORK

Pursuant to section 163 of the Act, if the strata corporation does not pay the proper accounts of its consultants, lawyers and contractors, those unpaid parties may obtain a judgment against the strata corporation. That judgment is for all purposes a judgment against the owners of the strata lots

included in the strata plan, in amounts proportionate to their unit entitlements shown on the strata plan, and execution may be made accordingly.

H. COMPENSATION FOR STRATA COUNCIL MEMBERS

The time commitment of strata council members in dealing with "leaking building" problems can be overwhelming, even after the best consultants and lawyers are retained. Someone who is an owner must "take the bull by the horns" on behalf of the other owners. The property manager can be of great assistance, but one or more of the owners must take an active role. To the extent that one or more of the owners may be particularly able and qualified to "take the bull by the horns" it may be wise for council to propose and for the owners to accept a compensation package to ensure that the owners leading the charge are properly paid for the substantial time they will need to devote to the project. It is very conceivable that the owners who "take the bull by the horns" will have great difficulty balancing the demands of their jobs and their duties on council or on the relevant committees of council. Enthusiasm, drive and continuity are important to see the project and the resulting claims against those responsible through to their conclusions.

I. PROPERTY INSURANCE

The strata corporation will have taken out a strata policy. Individual owners will generally have taken out condo policies. Very generally, the strata policies are designed to cover problems with the construction of the entire building. The individual condo policies are designed to cover personal belongings and improvements and betterments made by owners of the units.

Very generally speaking, the strata insurer will usually deny coverage for "leaking building" problems, saying that the policy does not cover loss associated with "faulty design" or "faulty workmanship". The condo insurer will deny on the same basis. Both will say that even consequential damages (for example carpets and furniture damaged by water ingress) are not covered as the root cause is "faulty design" or "faulty workmanship".

J. CONTINGENCY FUND

In many cases the contingency fund referred to above will not be significant due to the fact that the strata corporation is so young. Accordingly, very significant special assessments may have to be made at a time when many owners can least afford them.

K. SPECIAL ASSESSMENTS

To the extent possible the annual budget should include the funds necessary to deal with the "leaking building" problem. This would include the cost of consultants, lawyers and contractors. Where the annual budget is insufficient for this purpose a special assessment will be necessary. Obviously as much notice as possible should be given prior to the meeting to vote on the special assessment. An information package should be provided to the owners, allowing the owners to understand, well

before the meeting, the reason for the special assessment. The timing of the payment or payments should be as reasonable as possible under the circumstances while allowing the strata council to pay the bills as they become due. Owners not paying their assessments are subject to the procedure described earlier. Owners in default of their obligations are not entitled to vote.

L. MINUTES

It is important to take accurate minutes of annual general meetings, extraordinary meetings and the strata council meetings. References to advice sought and received from consultants and lawyers should be included in the Minutes, or in separate Minutes. If the privileged or confidential information is kept in separate Minutes, document production and questions of privilege may more easily be dealt with by counsel in the litigation process. If the references are kept in the main Minutes and are privileged, they can be deleted by counsel for the strata corporation before documents are exchanged in litigation. The Minutes may be relevant to the running of limitation periods, questions of mitigation and many other matters which may be important in the action eventually commenced.

M. MEETINGS OF THE OWNERS

Meetings of the owners should be called as often as necessary to ensure that the owners have all of the information they require and have a forum for venting their frustration. It is often wise to have the lawyer and the consultant in attendance in order to field questions. The owners should be cautioned that some requested information may not be disclosed as it might be prejudicial to the owners in that it may get into the hands of potential defendants. Despite this caution it is generally possible to provide enough information to allow the owners some degree of comfort that matters are being handled properly and that the very significant funds being spent are being spent wisely. It is virtually impossible to keep all of the owners happy. The circumstances of the owners and the personality mix will virtually always result in some dissention and some criticism. That is to be expected. It is generally wise for the strata council and any invited guests to have a meeting prior to an annual general meeting or an extraordinary meeting in order to go over the agenda and to discuss anticipated questions. Especially in meetings involving assessments, owners should be sent, well in advance, enough information to allow them to understand the alternatives.

III. DISCOVERING THE PROBLEM

A. INSPECTION REPORT FROM AN INSPECTION COMPANY

Prospective purchasers are well advised to obtain such an inspection report from a reputable inspection company. Such companies often carry insurance. Such companies can often recognize a "problem building". In some cases it may be that such an inspection report (either on a purchase from the owner/developer or on a resale) may be a harbinger of things to come. The strata council

should encourage all owners to report, to the strata council, all instances of defects discovered by such inspection companies.

B. INSPECTION AND MAINTENANCE PROGRAM

It is obviously prudent to put in place a proper inspection and maintenance program, however it is often not done. As a result many defects which could have been discovered earlier go unrecognized for too long. The result can be dramatic. The cost of remedial work may be significantly greater than if the problem had been nipped in the bud. Potential defendants will deny liability and say that the owners are primarily at fault for not catching the problem at an early stage where it would have been relatively inexpensive to fix. Potential defendants will also say that although the problem appeared small in the first instance, a proper inspection and maintenance program would have revealed its nature and extent much sooner. As a result potential defendants will say that the owners failed to properly mitigate their damages.

C. RECORD KEEPING

Proper records should be kept, recording the inspection and maintenance program on a continuing basis and noting defects and trends.

D. NOTICES TO BE GIVEN/LIMITATION PERIODS

If a problem is discovered and appears to be potentially significant, notice of the problem and a potential claim should be sent to the city/municipality and to any warranty provider. The limitation periods for giving notice to these parties may be very short. A quick letter to these parties, even before the lawyer or consultant is retained, is prudent.

Generally the limitation period for suits against parties other than the city/municipality and any warranty provider is six years pursuant to the Limitation Act. The postponement provisions of the Limitation Act apply to this six year period. Accordingly, the six years runs from the time that reasonable original owners should have been aware of facts giving rise to a cause of action. However, the Homeowner Protection Act would appear to expand the scope of liability for contractors. Actions commenced pursuant to the Homeowner Protection Act are subject to a 10 year limitation period from the date of first occupancy or the date on which the first strata council of the strata corporation is established. The Homeowner Protection Act also prescribes a two year warranty for materials and labour. This warranty effectively doubles the typical warranty period now provided by contractors.

IV. RETAINING AND DEALING WITH THE CONSULTANT AND THE LAWYER

A. SETTING UP A COMMITTEE

Many of the owners will know a consultant or lawyer who will be recommended to the strata council. Most of the recommendations will not turn out to be the right choices. A practical way to proceed is to set up a committee to find the right consultant and the right lawyer.

B. WHICH FIRST

Although opinions would differ on the subject, the writer suggests that where practical the lawyer be retained first. One reason would be to attempt to ensure that any reports received by the lawyer from the consultant may be treated as privileged. Another reason would be to ensure that the requisite notices are given to potential defendants as soon as possible. Another reason would be that the lawyer may be able to assist in the selection of an appropriate consultant. The lawyer will need to work with the consultant and will require a consultant appropriate to address the remedial work <u>and</u> to act as an expert witness at trial.

C. CHOOSING THE CONSULTANT AND LAWYER

There are many lawyers who are capable of acting for the owners of a "leaking building". In selecting the appropriate lawyer, the following steps are suggested:

i) Canvass lawyers who are recognized experts in litigation (and as many as you can who are comfortable in construction litigation cases). Get a list from each of them, suggesting their five top choices for such a case.

ii) Consult publications which include ratings of lawyers or assessments of which lawyers tend to be recommended most often for certain types of cases. Such publications include Martindale & Hubbell and L'Expert.

iii) Consult owners of other "leaking buildings" who may have been through the exercise already.

iv) Select the top candidates and interview them. Ask them how they would approach the case, how they would keep costs down and what their ballpark estimates of legal costs would be. Ask them which similar cases they have handled and how they have turned out. Consider phoning for a reference. All of the lawyers you interview will be more than capable of handling the case. Go with the lawyers you feel most comfortable with.

D. RETAINER AGREEMENTS

Many lawyers will ask for a retainer. There are lawyers who make a living from acting for lawyers in relation to collecting their fees. Some of those experts believe that lawyers are better off <u>without</u>

written retainer agreements. Despite this most lawyers will request a retainer agreement and a retainer. The retainer agreement should be read carefully. In many cases it may be negotiable with respect to the amount of the retainer requested, interest rates on overdue accounts, hourly rates, disbursement charges, etc. Many of the lawyers you will want will require that a substantial retainer be deposited with the law firm.

In general, the lawyers that you might want most if you were fully informed will not want to negotiate much if at all on their fees and disbursements.

E. CONTINGENCY AGREEMENTS

It will be rare for the lawyer you want to agree to a contingency arrangement whereby the lawyer takes, as the fee, a percentage of the proceeds available from a successful lawsuit. The reason is fairly simple. In many "leaking building" cases the risk to the lawyer of obtaining a collectible judgment in an amount sufficient to allow for the recovery of invested time and disbursements is too high. Although a contingency agreement is usually not an option early in the case, the lawyer may be prepared to enter into a contingency agreement at a later date. Such agreements must be approached with caution as the lawyer will generally be in a better position to judge the risk than will the owners.

F. GETTING ESTIMATES

Get your lawyer and consultant to get together and provide you with an estimate of the expenses you will likely incur and when the expenses will likely be incurred. You will need this for budgeting reasons. Press for careful and realistic estimates. Estimates are difficult to give in cases such as these, however the lawyer and consultant should be encouraged to do their best as it makes management of the case much easier for a number of reasons.

G. THE REPORTING PROCESS

Assuming that a litigation committee has been set up, the consultant should generally report to the lawyers with a copy to the litigation or construction committee. The lawyers should report to the litigation committee. Reporting should be as regular as the litigation committee deems appropriate in order to keep the owners properly informed.

H. QUESTIONS OF PRIVILEGE

Correspondence between the lawyers and the owners will generally be privileged if that correspondence relates to the giving or receiving of legal advice. Correspondence between the lawyers and the consultants with respect to preparing expert reports for use at trial will generally be privileged, at least until the expert gives evidence at trial. Communications between the lawyer, the consultants and the owners (for example questions and answers at a general or extraordinary meeting) are privileged, however if an owner passes the information along to a third party (who may ultimately inform a defendant or defendants) the privilege is generally lost. It is important to advise owners that sensitive information may not be transmitted to all of the owners at meetings or otherwise, in order to ensure that the case against the defendants is not unduly compromised.

The question of how much the strata council should tell the owners about communications with the lawyers and consultants is a difficult one. In general, it is better to tell the owners as little as possible, for the greater good.

I. THE CONFIDENCE OF THE OWNERS

One of the critical considerations in ensuring that necessary remedial work is properly carried out and that as much of the cost as possible is passed on to the parties responsible is maintaining the confidence of the owners. Selecting the appropriate lawyers and consultants, obtaining and acting on their opinions, estimates and recommendations and communicating with the owners in a regular and thorough manner are important to maintaining that confidence.

J. THE COST

The cost of consultants and lawyers can run into the hundreds of thousands of dollars depending upon the case. The cost of performing the remedial work can run into the millions. Although it is tempting to do so, it is of critical importance that the magnitude of the potential problem is not understated to the owners and that no judgment is made until the appropriate investigation has been done. It is human nature to be optimistic, however care should be taken to stick to the facts. Over-optimistic initial speculation as to the magnitude of the problem and the potential cost of the remedial work can pose serious problems in the long run as hopes are dashed.

V. TENDERING AND CONSTRUCTION

A. SETTING UP A COMMITTEE

In many cases it is wise to set up a committee to deal with the consultant in arranging the tendering and carrying out the remedial work. Although a good consultant can in many cases keep the committee's work to a minimum, there will be many matters requiring input from the owners through the committee. Such matters include the discovery of additional problems during construction, resulting extra work, cost overruns and unanticipated problems including potential problems with the contractor or contractors. There can be a great deal of work involved for the members of this committee.

B. BUDGETING FOR THE WORK

Prior to the work being carried out, the committee will have obtained a budget from the consultant and or the contractor. Significant time should be spent on budgeting to ensure that there are as few surprises as possible.

C. TENDERING/THE TENDERING PACKAGE

It is in many cases prudent to prepare a tender package and invite tenders. Going through this process often has the advantage of ensuring that the best possible price is obtained. As well it makes it more difficult for potential defendants to argue that more money was spent than necessary. In "leaking building" scenarios it is often difficult to get a lump sum price as there are often surprises for the contractor and the owners once work commences. It is generally desirable to obtain a lump sum price from a reputable and substantial contractor. If a cost plus price is the best a substantial and reputable contractor will do then the owners will have to accept that fact and ensure that the contractor is very efficient and well-supervised.

The remedial work to be done should be described in the clearest of terms by the consultant in order that the budgets prepared are realistic and that as many potential surprises as possible are eliminated.

D. COST REPORTING

Good cost reporting is critical in order to keep tabs on the budget and in order to ensure that the cost of the remedial work for various independent problems is properly tracked. The lawyer, the consultant and the contractor should be involved in setting up the cost reporting system in order that in the litigation, costs can be assigned to various problems for which one or more defendants are allegedly responsible. Good cost reporting will make trial preparation and trial much easier and less expensive.

E. HOLDBACKS

The new Builders Lien Act provides that the builders lien holdback on each draw must be paid into a holdback trust account. Accordingly under the new Builders Lien Act the owner must come up with the full amount of every draw.

F. DOCUMENTARY AND PHOTOGRAPHIC RECORDS

It should be a term of the contract with the consultant or the contractor or construction manager to ensure that evidence which will be necessary in the litigation is properly obtained and preserved. Such evidence can include photographs, videos and physical examples of the results of the leaking (ie. rotten timbers, etc.).

VI. RECOVERING THE COSTS OF CONSTRUCTION, CONSULTANTS AND LAWYERS

A. LITIGATION

Litigation in leaking building cases is very time consuming and very expensive. The results are uncertain. If a judgment is obtained against one or more defendants, those defendants may or may not be able to pay. They may or may not be insured. If they are insured, they may not carry a lot of insurance. Litigation is thus a very risky business. If the matter proceeds to Court it will ultimately decided by a judge who is not an engineer or architect. The matters involved can be very technical. The cases are very difficult for judges. At least 95% of these cases settle. Often the settlements are based in large part on the legal and expert costs which would be involved for all parties in taking the matter to trial.

B. ARBITRATION

Arbitrations in leaking building cases are relatively rare as there are so many parties and often not all will agree to binding arbitration.

C. MEDIATION

Mediation is becoming more and more common in technical and time consuming cases of this sort where the collective legal fees which may be expended can exceed the amount involved. Mediation is non-binding. The parties are free to choose a mediator. If the parties are properly prepared for a mediation and are able to properly assess the risk of proceeding to trial and the magnitude of the legal fees which will likely be expended, mediations can often be successful. In leaking building cases, mediation should virtually always be considered.

The Homeowners Protection Act and its mandatory mediation provisions may get recalcitrant parties to the mediation table, however in order for a mediation to be successful, all parties have to come to

the table with a genuine desire to settle. Unfortunately the Homeowners Protection Act mandatory mediation procedures cannot legislate that desire.

D. TIME FRAME/COSTS/RISKS

If a "leaking building" case proceeds to trial, it will often take three to five years from the time the Writ is issued. There will often be one or two adjournments. Those adjournments will often be necessitated by further parties being joined during the course of the litigation and through new issues arising through the course of the litigation. As well, it is often difficult to proceed to trial until all of the remedial work is done and the true nature of all of the problems and their solutions is known.

VII. POTENTIAL DEFENDANTS

A. DEVELOPER

The developer was responsible for financing and arranging the construction of the building or buildings. The developer will have executed the Purchase and Sale Agreements with all original Purchasers. The Agreements generally include express or implied warranties regarding the quality of the design and construction. In certain cases a Disclosure Statement or a Prospectus will have been issued and the law deems that document to have been relied upon by all original purchasers.

The developer will usually be a corporate entity as opposed an individual or partnership. In many cases developers create a separate limited company for each construction project. This is done in most cases to limit liability. There is nothing legally wrong with incorporating a separate company for each project. Many developers with good reputations do this. The law does not preclude developers from doing this. If the company in question on a particular project breaches its contractual obligations with a purchaser or purchasers, those purchasers will usually be restricted to the assets of that particular company in collecting on a judgment obtained.

B. PRIME CONTRACTOR

The prime contractor contracts directly with the developer to construct the project. The prime contractor will also generally be a corporate entity created solely for that particular project so as to limit liability. A prime contractor will generally provide to the developer an express warranty with respect to the construction. In certain circumstances the agreement between the developer and the prime contractor may include an agreement by the prime contractor that warranties and representations concerning quality and workmanship will apply to the eventual purchasers. The agreement between the developer and the prime contractor may also include a provision that the prime contractor will obtain similar representations and warranties from its subcontractors, all for the benefit of the eventual purchasers.

C. SUBCONTRACTORS AND MATERIAL SUPPLIERS

These trades will generally be hired by the prime contractor. Usually they are not companies incorporated for the particular project. They may provide construction warranties to the prime contractor and or the developer. Those warranties may be assignable to the eventual purchasers (eg. roof and membrane warranties).

D. PRIME CONSULTANTS

The prime consultant generally enters into a contract with a developer unless the contract is a design/build project. In that case the prime consultant will enter into a contract directly with the prime contractor. The prime consultant is typically responsible for the overall design and supervision of the project, including coordination of the consultants. The prime consultant will usually be an architect. There may also be a prime engineering consultant responsible for structural or related elements. The prime consultants and the subconsultants will usually provide letters of professional assurance to the city or municipality. Those letters of assurance assure the city or municipality that the design is appropriate and that the professionals involved will ensure that the construction is carried out in accordance with the design. Prime consultants usually carry professional liability insurance in the range of $250,000 to $1,000,000. The limits seem to be decreasing.

In many "leaking building" cases the failure to properly coordinate the subconsultants and ensure a proper overall design can lead to major problems.

E. SUBCONSULTANTS

Subconsultants are generally hired directly by the developer, although they may enter into subcontract agreements with the prime consultant or general contractor.

F. MUNICIPALITY/CITY

Plan checkers at City Hall review design drawings before issuing building permits. Municipal inspectors review and approve the installation of foundations, drainage, backfill, framing, waterproofing, etc. before issuing occupancy permits.

There are strict limitation periods prescribed by the Municipal Act. Written notice is required within two months of when the damage occurs and legal action must be commenced within six months after the claim arises.

In Vancouver a claim against the City for negligently approving a design or negligently failing to inspect or properly inspect the construction is much more difficult given the applicable legislation.

G. VENDORS AND SUBSEQUENT PURCHASERS

A vendor has a duty to advise a purchaser of any known latent defect prior to selling the property. In the past few years, in order to obtain an MLS listing, the vendor must complete and make available to potential purchasers a Disclosure Statement. The purpose of the Disclosure Statement is to require vendors to advise of any hidden or latent defects in the property to avoid potential legal claims by purchasers against vendors and/or realtors for failure to warn. A Disclosure Statement will not be required in non-MLS listings (ie. private sales or large unit sales in which a single realtor has an exclusive listing).

H. REAL ESTATE AGENTS

Real estate agents traditionally act as the agent for the vendor, who pays the real estate commission. However, the realtor can act as a dual agent and thereby owe duties to the purchaser if assisting in writing up the offer and showing the property to the purchaser. The real estate agent may issue written sales brochures or provide on site sales information to potential purchasers when acting for a developer for an exclusive listing or a large unit development. Both the agent and the developer may attract liability with respect to these brochures.

VIII. POTENTIAL CLAIMS

A. BREACH OF CONTRACT-PURCHASE AND SALE AGREEMENT

Express Warranties

For the sale of a new or renovated units, a developer typically includes a one year warranty on workmanship. There may also be general warranties for workmanship and materials in compliance with building codes and municipal by-laws incorporated into the contract documents. A breach of any of these warranties is actionable by the owner against the developer, provided the current owner was a party to the original Purchase and Sale Agreement (ie. not subsequent a purchaser).

Implied Warranties

With respect to new construction, incomplete at the time of sale, the Supreme Court of Canada in Fraser-Reid v. Droumtsekas, [1980] 1 S.C.R. 720 held that the vendor/developer impliedly warrants to the purchaser that the work completed and yet to be completed will be:

(a) done in a good and workmanlike manner,

(b) the materials used will be suitable for their intended purpose, and

(c) the building will be fit for its intended purpose of "habitation".

If the property sold is not new construction or it was new but "completed" at the time of sale, "Caveat Emptor" (let the buyer beware) applies and the law implies no warranties by the vendor other than those expressly contained within the Purchase and Sale Agreement.

Exclusion/Limitation Clauses

Most Purchase and Sale Agreements contain a "no reps and warranty clause" which states there are no representations and warranties other than those expressly stated in the agreement. As well, if there is a Disclosure Statement, it typically confirms that there are no warranties with respect to the property, express or implied, or that the warranty by the Vendor is limited to the written warranty attached to the agreement. Our Courts have typically read down such clauses because it is the Vendor/Developer who drafts the Purchase and Sale Agreement and any ambiguity will be construed against the drafter. What may be clear to the Vendor in drafting these exclusionary clauses may be ambiguous to the judge looking to do equity between the parties. The Courts have held that only clear and unambiguous language may limit or exclude the Vendor's common law obligations. Exclusions of liability will be construed much more rigorously by the Court than limitations of liability. A good case which deals with the issue of when work is complete and how a Court narrowly construes limitation clauses is Owners, Strata Plan NW2294 v. Oak Tree Construction (1994), 93 B.C.L.R. (2d) 50 (B.C.C.A.). In light of this decision, only the clearest of language will exclude the implied warranty for new construction and most Developers would be wary of including such language in their Disclosure Statements or Purchase and Sale Agreements for fear of alarming potential Purchasers that the development has defects or that the Developer will not stand behind its product.

B. BREACH OF DISCLOSURE STATEMENT

The Real Estate Act provides original Purchasers with a remedy against the Developer for any material misstatement or omission contained in the Prospectus or Disclosure Statement filed with the B.C. Superintendent of Real Estate. Certain types of developments require that a Prospectus or Disclosure Statement be filed with the Real Estate Registrar and be provided to each Purchaser before the Purchaser and Sale Agreement is executed.

The Real Estate Act deems the Purchaser to have received the Disclosure Statement and relied upon its contents even if a copy was not provided nor reviewed before executing the Purchase and Sale Agreement.

The Real Estate Act also provides a similar remedy against all Directors of the Developer who signed the Disclosure Statement, subject to certain exclusions.

Claims against the Developer or its Directors for breach of a Disclosure Statement are only actionable by the original Purchasers where a Prospectus or Disclosure Statement was filed. The claim is not assignable and therefore subsequent Purchasers may not pursue remedies under the Real Estate Act.

C. NEGLIGENT MISREPRESENTATION

An actionable claim exists if a party makes a representation of fact (either orally or in writing), which is untrue, made recklessly or in a negligent fashion, and on which the Purchaser relies to his/her detriment.

Claims may be made against the Developer/Vendor/Realtor if there are misrepresentations contained in sales brochures, ads or the Disclosure Statement which were relied upon by Purchasers and induced them to execute the Sales Agreement.

Claims may also be made against the Vendor and Realtor for failure to warn of latent defects in the property. A party who is aware of latent or hidden deficiencies in a property (eg. ongoing leaks) has an obligation to warn a Purchaser of the defect if it is not apparent to the Purchaser on reasonable inspection.

D. NEGLIGENCE

The property owner may commence an action against the Developer, contractor or subtrades for negligent and deficient work in constructing the property. Similarly, a claim may be made against the prime consultants and subconsultants for negligent design. A claim in negligence exists when the law recognizes that a party owes a duty of care to the property owner, which duty is breached and results in foreseeable damages. Negligence is something more than unfitness for habitation or breaches of contractual terms (eg. the property may be built contrary to the building code but still built within the standard of a reasonable contractor in British Columbia at the time).

Canadian law has long recognized the right to recover losses for injury to property or person caused by negligent acts or omissions. However, the costs incurred to repair defects within property prior to actual damage occurring are known as "pure economic losses". The previous law in Canada did not permit a party to recover pure economic loss in negligence, except in limited circumstances such as "failure to warn" or negligent misrepresentation.

In the 1990's, the law in England developed to restrict recovery for pure economic loss as the Courts determined that recovery on this basis was the equivalent of providing the Plaintiff with a contractual warranty which otherwise did not exist. The English House of Lords has since limited such recovery with respect to building deficiencies absent express written contractual warranties. However, in Canada, the law has evolved in a different direction. Recent decisions of the Supreme Court of Canada in the 1980's and 1990's have expanded the recovery of pure economic loss in negligence. These decisions include Kamloops v. Neilson [1984] 2 S.C.R. 2 - breach of statutory duty by public authority; CNR v. Norsk [1992] 1 S.C.R. 1021; and Winnipeg Condominium No. 36 v. Bird Construction (1995), 18 C.L.R. (2d) 1. The recent decision in Winnipeg Condo has created a significant expansion of the law in negligence whereby owners and occupants may in certain circumstances recover pure economic loss against contractors, architects, engineers or any other party involved in the design and construction of a residential dwelling.

Based upon the Winnipeg Condo decision, owners of leaking buildings may claim in negligence against designers, constructors and inspectors where the negligence of those parties results in a

"real and substantial danger". In Strata Plan VR 1534 v. Regent Development Corp. (1996), B.C.J. No. 6, Vancouver No. C911957, December 28, 1995, Mr. Justice Hutchinson suggested that a dramatic failure such as falling cladding (the danger in the Winnipeg Condo case) was not necessary to meet the test of a "real and substantial danger". In Strata Plan VR 1534, the owners were faced with a fairly standard water damage problem. Water found its way into the walls and caused rot to structural members. Mr. Justice Hutchinson found that unless the structural damage was remedied (obviously necessitating a lot of associated work), the structural integrity of the building would be compromised and a danger would be present.

E. BREACH OF FIDUCIARY DUTY

This is a duty which may be owed by the Vendor/Developer or others to the Purchaser to ensure that the building is constructed properly in accordance with applicable building codes and by-laws.

F. FRAUD

Fraud means an attempt to deceive or to act so recklessly and carelessly that you don't care whether your comments or conduct are accurate.

Fraud, deceit, conspiracy or any allegation of that kind, including wilful conduct, should generally not be alleged at the initial pleading stage because owners can obtain essentially the same legal remedies through claims of breach of contract, negligence, negligent misrepresentation and breach of fiduciary duty.

Very importantly, allegations of fraud may cause the errors and omissions insurer to deny coverage.

It follows that these allegations have no place in pleadings unless there actually has been demonstrable fraud or conspiracy. Not only can it void coverage on the E&O policy, it may also affect the ability to settle.

Failure to prove fraud after alleging it may result in an award of increased legal costs against the owners.

G. CORPORATE VEIL ARGUMENTS

It is sometimes possible to persuade the Court to "lift the corporate veil" and find directors and officers of a company personally liable. Similarly, it can be successfully argued in certain limited circumstances that the parent or holding company of a related company should be liable for the acts of the related company. The Courts are generally slow to accept these arguments. In order to succeed against a director, officer, parent company or holding company the circumstances must generally be unusual.

IX. WHO CAN PAY/INSURANCE CONSIDERATIONS

Typical course of construction and commercial general liability policies available to contractors and subcontractors specifically exclude claims arising from "faulty or defective workmanship and design" and specifically the cost of making good the defective workmanship (the "Own Work Product Exclusion"). Resultant damage may be covered but almost never covered is the cost of making good the failed portion of the work.

For example, if the cause of water damage in a "leaky condo" is found to be related to defective windows manufactured and installed by a subcontractor, the cost of replacing the faulty windows is not covered but the resultant damage to carpets and drywall may be covered.

Perhaps the most important element of insurance coverage, however, relates to the insurer's duty to defend the contractor or subcontractor. Often defence costs make up a significant part of the financial exposure in "leaky condo" litigation. Settlement before trial is often motivated by a desire to avoid the legal costs associated with lengthy trials.

In response to the growth of "leaky condo" litigation, more and more insurers are denying not only coverage but a duty to defend. By denying a duty to defend, insurers avoid being asked to contribute defence costs towards settlement. However, in two recent Supreme Court decisions (Metro-Can Construction Ltd. v. Axa Pacific Insurance Co. (2 February 2000), Vancouver No. C993197 (B.C.S.C.) and Hearnes/Actes v. Commonwealth Insurance (March 9, 2000) Vancouver No. A993191 (B.C.S.C.)) the Courts have compelled the insurers to provide a defence on behalf of the defendants to a Aleaky condo@ lawsuit. Plaintiff's counsel should be careful when drafting pleadings to frame a "leaky condo" case, if possible, so as to trigger the duty to defend and defence counsel should be careful to fully explore and, if necessary, litigate the issue of the duty to defend.

The errors and omissions policies carried by consultants are often problematic in that the limits may be more in the range of $250,000 than in the million dollar plus range. As well, given the number of "cookie cutter" projects in the Lower Mainland, many consultants are facing claims on a number of different projects. In those cases the limits may have been exhausted or may be drastically diluted.

X. TRIAL PREPARATION AND TRIAL

A. CASE MANAGEMENT

In leaking building cases a Case Management Judge will likely be assigned. As well the Trial Judge may be assigned early. The Case Management Judge will often be the judge who hears all interlocutory applications before trial. The Case Management Judge will usually set deadlines for the exchange of documents, the addition of parties, the completion of Examinations for Discovery and the exchange of expert reports. It is important that counsel for the owners attempt to get these deadlines set as soon as possible in order to avoid unnecessary adjournments of the trial.

B. EXCHANGE OF DOCUMENTS

Preparing a proper List of Documents on behalf of the owners can be a very difficult and time consuming job. Often it takes forever to get all of the potentially relevant documents from all of the owners. As well it is necessary to spend a great deal of time in reviewing the various documents for privilege (for example Minutes referring to advice sought and received from counsel). Finally, new documents will be brought into existence as the remedial work proceeds and must be listed in Supplementary Lists of Documents.

C. EXPERT REPORTS

Expert reports should be served by the owners as early as possible in order to give the owners the best chance of settlement and to avoid an adjournment of the trial.

D. SCOTT SCHEDULE

Given that leaking building cases tend to be so difficult to manage, a "Scott Schedule" is often a good idea at as early a stage as possible. A Scott Schedule is essentially a chart breaking down the various problems experienced, the necessary remedial work done, the cost of that work as shown in back-up invoices and the owners' view of the party or parties responsible for the problems. A Scott Schedule will generally be prepared jointly by the owners, the consultant and the lawyer. It can assist greatly in focusing the parties on the issues relevant to them and allowing the parties to assess their risk. At trial a Scott Schedule is very helpful to the Court in understanding the nature of the claims of the owners.

E. EXAMINATIONS FOR DISCOVERY

In a large multi-party case many days of Examination for Discovery may be required. Generally, one or more representatives of the owners will have to be examined. The time required of those owners will be very substantial (a total of weeks or months) in some cases. Accordingly an arrangement should be made at an early stage to make the time available and to ensure that the parties involved are properly compensated.

F. TRIAL

Further time will be required by the owners representatives for trial. Again, arrangements must be made for this well in advance and any necessary compensation must be arranged.

XI. RECOVERY OF LEGAL COSTS OR PAYMENT OF DEFENDANTS' COSTS

Depending upon the outcome of the trial, there will likely be an order obligating one or more of the parties to pay the legal costs of one or more other parties. As a general rule the legal costs payable to a successful party may be roughly equivalent to 50% of the actual legal costs and disbursements incurred by that party. The level of costs awarded is in the discretion of the Court.

In the event that the owners are unsuccessful against one or more of the defendants, an award of costs against the owners may be very substantial (in the hundreds of thousands of dollars) where the case has been lengthy and complex. Each of the owners would be responsible for those costs, in accordance with the unit entitlement.

Where costs are awarded to the owners and against the defendants, those costs will be the responsibility of the defendants in addition to the amount of the judgment for damages for the "leaking building".

XII. RECOVERY ON JUDGMENT OBTAINED

Once Reasons for Judgment are delivered by the Court (this may be several months after the trial concludes) the owners may have a judgment against one or more of the defendants. In that case the judgment will be collectible only if those defendants have assets or insurance sufficient to satisfy the judgment. In many cases the judgment may be obtained against some defendants who have neither the assets or insurance to satisfy the judgment. If the owners have not been found contributorily negligent in causing their own losses, it may be possible to obtain from a given solvent defendant an amount greater than that defendant's proportion of the judgment. However, because there are so many independent problems in many leaking building cases, recovery on this basis can be very complicated.

XIII. APPEALS

Assuming that the owners do obtain judgment against one or more of the defendants, any or all of those defendants may decide to appeal the decision. That process can take another year or two to conclude. The appeal brings with it a further layer of potential risk and expense.

XIV. CONCLUSION

In "leaking building" cases, it is critical to get the right people on the strata council and the necessary committees. It is also critical to hire a good consultant and a good lawyer at an early stage. Constant communication between all of these players is critical. Constant budgeting and costing assessments are critical, as is the communication of those assessments to the owners. Finally, an early resolution of the problem through a mediated settlement should be attempted in order to eliminate the heavy risks and expenses for all parties.

If the matter must proceed to trial, the owners should be made aware that it will be a lengthy, expensive and frustrating experience for all involved.