voice from the... strata-SPHERE®

www.stratasphere.com Fall 1999

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Litigation and the "Leaky Condo"

The Leaky Condo: Proving Responsibility

Allan R. Tryon, Litigation Lawyer
CREASE, HARMAN & COMPANY

Every strata corporation wants to know - "Do we have any chance to recover the costs of repair?" This can be a difficult question. The best answer I can give is to explain who is potentially liable and the basis for that liability.

The entitlement of one person to sue another depends, to a very large extent, on the nature of the relationship between the persons. The importance of the relationship is most obvious when the suit is based in contract. Those who buy directly from the owner/developer will ordinarily be able to make a claim in contract against the owner/developer.

Original purchasers may also buy as a result of reliance upon representations of professionals. During construction, signs are usually posted on the construction cladding by various professionals. The architectural firm may post a sign touting the development as "Another award winning design by the AB Architectural Group." Also, contractors, suppliers and sub-contractors signs usually figure prominently on the cladding. Everyone wants to take advantage of the opportunity to advertise themselves by association with the project. Original owners can legitimately claim being persuaded to buy a unit due to reliance on the involvement of the firms instrumental in the creation of the condominium. Subsequent buyers usually cannot make this claim. Arguably, original purchasers from the owner/developer have an advantage over subsequent purchasers in litigation claims.

How then in the absence of a direct contractual relationship or reliance on representations from project professionals, can the strata corporation, acting on behalf of unit owners, hold the contractor and other professionals responsible? What makes an architect or engineer liable to a second or third owner? The answer is the law of negligence. Negligence is a wrong done to the unit owner in the absence of a contract. In other words, the court decides whether the loss suffered by one person ought to be borne by another. In the leaky condo context, the question facing the courts is who should bear the loss or responsibility for the cost to fix the leaking condominium. A host of principles have emerged to assist the court in deciding who bears the responsibility. I will describe the position of the professional in light of these principles (e.g. architect, engineer, project manager). The situation of others involved in the construction of a condominium (e.g. the contractor, sub-contractors, material suppliers) is similar.

The professional owes a duty to take reasonable care in relation to the design or construction of the condominium building. A professional will be liable for a breach of this duty to subsequent owners who suffer compensable damages. While easy to state, the application of the principles to a particular case can be difficult. Every instance of negligence does not necessarily cause harm. Further, doing something which causes harm is not necessarily negligent.

Currently, the law supporting compensable damages appears to be limited to repairs necessary to correct conditions which pose a substantial danger to the health and safety of persons or their property. Many conditions caused by the negligence of a contractor or professional may not present a substantial danger

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Allan R. Tryon, Partner, Crease, Harman & Company, Victoria. Mr. Tryon was called to the B.C. Bar in 1978. His practice is confined to civil litigation with emphasis on construction law, commercial law and insurance defence. Mr. Tryon represents several strata corporations involved in leaky condos.

Voice from the Strata-sphere

Voice from the Strata-sphere
is published semi-annually by

Strata-sphere
Condominium Services Inc.

630 Terminal Avenue North,
Nanaimo, B.C. V9S 4K2
Tel: 1-888-298-7999
(250) 753-0353
Fax: (250) 741-1441

E-mail: strata@nanaimo.ark.com
Web Page: www.stratasphere.com

Editor: Cora D. Wilson
Assistant Editor: April T. Mawhinney

SUBSCRIPTIONS AVAILABLE

1-888-298-7999
(250) 753-0353
Fax: (250) 741-1441

EMail strata@nanaimo.ark.com
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The Leaky Condo: Proving Responsibility

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to the health and safety of persons or their property. For example, repairing stucco which has been rendered unsightly by discolouration is not considered dangerous. The condition may seriously affect the value of the condominium units, resulting in the owners suffering damages but the cost of the repair likely would not be recoverable, even if discolouration was caused by professional negligence. Dangerousness must be proved and cannot be assumed.

In a recent British Columbia case (Privest Properties Ltd. v. Foundation Co. of Canada (1997)) the failure to prove dangerousness, to the satisfaction of the court, was fatal to the plaintiff's case. The plaintiffs owned a building which had been constructed in the 1970's. Recent renovations revealed an asbestos-containing fire proofing compound in the building. The Workers' Compensation Board closed the affected area and required the building owner to remove the fire proofing compound. The owner sued the architect, the contractor, the installer of the fire proofing agent and the manufacturer and supplier of the agent. The owner relied on the actions of the Workers' Compensation Board for the inference that the fire proofing agent was dangerous to persons. The owner's case was dismissed because the owner did not prove that the levels of exposure to asbestos fibers materially increased the risk to persons of contracting any asbestos related disease.

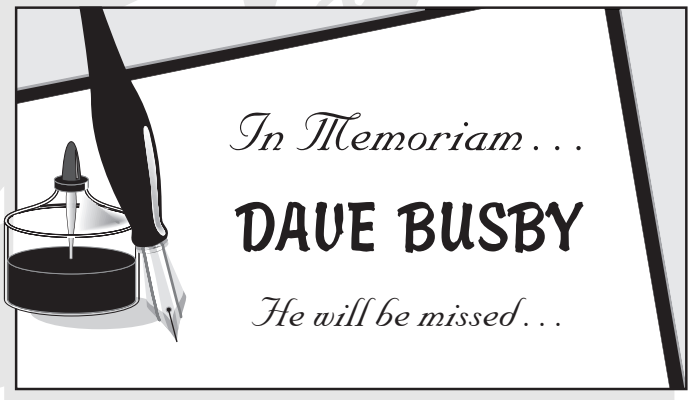
The case just described can be contrasted with an Ontario case (Gauvin v. Ontario (Ministry of Environment) (1995)) in which dangerousness was inferred because the condition did not satisfy the minimum standards required by Ontario government regulations. The Ministry of Environment was held responsible for the costs of repairing a faulty septic system. The Ministry of Environment approved the sewage system and inspected the installation. The health risks associated with sewage waste were sufficiently obvious for the court to infer a dangerous condition simply because the system was not constructed according to the prescribed standards. The court did not require the homeowner to show that the escape of untreated sewage was unsafe or dangerous. The danger of minimal asbestos levels and the dangers associated with owning a leaky condo will usually be less obvious.

One danger associated with the leaky condo problem which is often encountered is the risk from structural failure. In a recent Saskatchewan case (Regina School Division No. 4 v. Ramsay (1998)) the court found a contractor liable for faulty foundation construction 25 years after the building was constructed. The Saskatchewan court noted that any failure in the foundation of a major public building has implications in the area of safety. Therefore, a dangerous condition was inferred from the fact of foundation failure.

In every case care must be taken to determine who is responsible for the leaks occurring. Not everyone involved in the design or construction is liable. In one B.C. case (Strata Plan VR. 1534 v. Regent Development Corp. (1996)), the roofer had installed waterproof membranes for the patios. Leakage from the patios into the adjoining suites rotted the walls. Although the contractor and the bricklayer were found responsible, the case was dismissed against the roofer as the strata corporation did not prove the membrane had failed.

The described cases underscore the principle that those who fail to take reasonable care in the design or construction of a condominium can be held responsible, even years later. However, the cases also show that even in circumstances where responsibility appears clear, the facts must be thoroughly investigated and understood and the case must be carefully presented or, the claim may fail.

Given the complexity and the costs associated with the recovery process, one of the strata corporation's goals is to maximize its probability of success. Proper selection of a qualified and experienced leaky condo litigation team is an important step towards achieving this goal.



Message from the President

Cora D. Wilson, Editor

Most people are shocked and horrified by the magnitude of the "Leaky Condo" crisis. We suggested in the past that we were seeing the 'tip of the ice berg.' However, everyone said it tongue in cheek - not really believing it! Time reveals all truths. It appears as though the problem may be worse than we ever imagined. Not only are stucco wood framed face sealed strata complexes affected, but now we are seeing concrete high rise buildings suffering premature failures. Single family homes are not exempt.

Something went wrong and people are demanding solutions. The Government is responding - but many say it is not enough. The collapse of the New Home Warranty Program sent leaky condo owners reeling. The cost to repair is a titanic burden on all involved - especially the weak, the elderly, the new buyers and the vulnerable. Many are experiencing difficulty coping with the emotional stress associated with the retrofit and the recovery process. We know it is difficult, but we must persevere.

We must all work together to obtain a resolution – the Government, the professionals, the private sector, the Associations and the strata corporation community.

Strata-sphere will contribute towards a solution by donating $5.00 from every participant in the Fall 1999 Strata-sphere Conferences to the local Association. Hopefully, these and other funds may be used to hire a professional lobbyist to address Leaky Condo issues with the government.

Settle the "Leaky Condo" Dispute

Cora D. Wilson, Lawyer
C.D. WILSON & ASSOCIATES

Negotiating a successful settlement in the "Leaky Condo" arena is an Art. Negotiations must be carefully planned and implemented to be successful. Contingencies must be reviewed and the channels of communication with Third Parties must always be open.

The stage must be set for settlements. This means that a process must be put in place and tenaciously adhered to by the strata corporation and the legal team. What is this process? The following should be considered:

The potential defendants include the owner/developer, architect, engineers, municipality, contractor, subtrades and others (the "Third Parties"). They may have access to insurance coverage for legal defences and are usually represented by knowledgeable and experienced lawyers. The playing field needs to be levelled to ensure that the strata corporation stands a reasonable chance of success in the negotiating process. The Third Parties know the game and the strategies. The strata corporation must ensure that its legal team is equally adept. This is done by hiring a qualified legal team experienced in "Leaky Condo" issues.

Approval of some special resolutions by the strata corporation is then required to:

(a) commence Litigation under section 15 of the *Condominium Act;*

(b) authorize a legal fund for litigation expenditures; and,

(c) grant settlement authority to the strata council.

A psychological benefit is derived not only from having the right team, but also from having the right tools. These tools include proper power and authority being conferred upon the strata corporation to pursue litigation and settlement.

If the strata council does not have sufficient authority and flexibility, then it will be required to call an extraordinary general meeting ("EGM") to seek approval. A three week delay for EGM approval could result in an offer becoming cold and dying on the table.

Legal strategies must be kept confidential. Negotiations are usually sensitive. If the legal strategy of the strata corporation is revealed to the Third Parties, it could prove fatal. As a result, unit owners understandably may not have access to this type of information.

Third Parties need to know that the strata corporation is serious, otherwise they may wait out the limitation periods or play a wait and see game. However, if they are forced to make expenditures of time and money to deal with legal claims, then the stakes are perceived differently.

Given the complexity of the issues, the length of the hearings and the potential costs, everyone should be motivated to resolve leaky condo issues. In fact it is presumed that most of these cases settle as evidenced by the magnitude of the actions and the lack of case law in this area.

Cora D. Wilson, Condominium Lawyer & Educator, C.D. WILSON & ASSOCIATES, Nanaimo. Ms. Wilson has represented condominium interests for over a decade. She currently represents Strata Corporations from Victoria to Port Alice. She is a regular lecturer on Condo issues at Malaspina University College, Editor of "Voice from the Strata-sphere," Publisher through Strata-sphere, of the first ever Vancouver Island Condominium Directory and frequent lecturer and chair of numerous Strata-sphere conferences.

An investigation should be conducted as soon as possible to determine the identity of the third parties and the potential claims against each party. The strengths and weaknesses of the case should be analyzed. Corporate searches and real estate searches should be done to determine the identity of the directors and whether the Third Parties have any assets. It is pointless to pursue a Third Party who cannot pay (ie. a corporate owner/developer holding a shell company devoid of assets).

The bargaining power of the strata corporation should be carefully reviewed. Does the owner/developer hold remaining lands or unsold units? There is more bargaining power available to the strata corporation if the owner/developer is marketing and selling units. Once the assets are gone, its motivation to resolve disputes diminishes accordingly. How active is the owner/developer in the real estate market? The more projects it has ongoing, the more incentive it will have to maintain a strong reputation in the community. What is the track record of the owner/developer? Does the owner/developer have an experienced team of contractors and subtrades to carry out remedial work? These are all questions which should be addressed as soon as possible once legal expenditures are approved.

The channels of communication should be opened as early as practically possible. The preliminary building envelope report should be released to Third Parties for their review, comment, input and criticism. If Third Parties believe that they are part of the solution, then the earlier they are involved in the process the more likely that an expeditious resolution can be achieved. Strata corporations must not be lulled into believing that settlement will be quick. This may be false hope resulting in frustration and lack of confidence in the process and the team.

Negotiations have a higher probability of success where there is mutual respect among the professional teams. Strata corporations should consider retaining an expert as soon as practically possible, including a building envelope specialist, engineer, architect or other necessary specialist. This is generally not the same person(s) who perform the remedial work. Litigation Reports address different issues as compared to Deficiency and Remedial Reports. Some regard Leaky Condo issues as a war of the experts. Failure to retain a proper and experienced expert could prove fatal to the case.

Negotiations provide flexibility. They may include an offer to contribute money and/or resources, to perform the remedial work or a combination.

If Third Parties are involved in performing the remedial work, strict rules must be established so that Homeowner Protection Office Funding, Strata Corporation Funding, warranties and ethical and professional obligations of the building envelope specialist are not compromised. A well drafted settlement agreement is a necessity. These types of settlements should be subject to legal review as they can be fraught with pitfalls. However, done properly they can prove beneficial for all parties.

Early resolution and reasonable compromise by all concerned may be the best solution in leaky condo disputes.

Mediating Construction Disputes

Sharon Kelly, President
SHARON KELLY CONSULTING SERVICES

Until recently, when a strata corporation initiated court action against a contractor, or any sub-trades, the case was heard in the Supreme Court of B.C. New legislation provides another option that parties in a construction dispute can utilize. Under regulations enacted through the Homeowner Protection Office, any party in a residential construction action can initiate mediation by delivering a Notice to Mediate in Form 1 to every other party in the action plus the Dispute Resolution Office. This Notice to Mediate can be delivered at any time after action has been commenced up to 180 days before the date set for the trial.

Once a party initiates the mediation process by serving the Notice, the parties must appoint a mediator. So, in essence, this regulation is providing for mandatory mediation. When the parties can't agree on choosing a mediator, the Dispute Resolution Office provides a process for selection of a mediator from the provincial roster.

Once a mediator is appointed, the regulations provide that a pre-mediation conference be held within 60 days unless all parties waive this requirement in writing. At this conference various preliminary matters are addressed such as the issues to be dealt with in the mediation, disclosure and exchange of documents, provision for any expert reports, scheduling, time limits and having the parties provide a Statement of Facts and Issues to the mediator before the mediation.

The concept of mediation provides a process for a neutral mediator to facilitate a negotiated settlement that is mutually acceptable to the parties. Part of the premise of mediation is that the parties will come to the table and disclose the relevant facts relating to the issues in dispute. In the regulations, there is provision for each participant to provide the mediator with a Statement of Facts and Issues that sets out the facts on which the participants intend to rely and the matters in issue in the action. This disclosure is similar to the process utilized in arbitration.

Sharon Kelly, experienced mediator, arbitrator and President of Sharon Kelly Consulting Services Inc.. Ms. Kelly has an extensive background in property management and has taught courses at various colleges and private institutions. She is a member of the B.C. Arbitration and Mediation Institute and holds the designation "Chartered Arbitrator." She has experience in mediating construction disputes and currently serves on the Board of Directors of The Mediation Development Association of B.C. She is also listed on the B.C. Mediator Roster Society.

Other conditions that apply in the mediation include that a person must not and can't be compelled to disclose in any subsequent proceedings the content of any documents made for the mediation or any offer or admission made by a participant in the mediation session. This confidentiality provision assists the mediator in having the parties participate fully in the mediation session.

Since this Notice to Mediate is new, it will take time to evaluate the effectiveness and usage of the regulation. However, a similar provincial process for motor vehicle insurance disputes has been very successful. Mediation of construction disputes has already claimed success with the Small Claims Court Practicum Program. This program will be available in the Nanaimo Small Claims Court in a similar format to that currently offered in Vancouver and Surrey.

The Debate About

Maintenance Programs for Building Envelopes

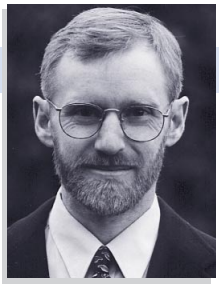
Gerry Fanaken, President
VANCOUVER CONDOMINIUM SERVICES LTD.

The leaky condo crisis in British Columbia has given rise to a very defensive construction/development industry and while there may be many, many causes for the crisis, a lot of blame tends to be put on this group, rightly or wrongly. One of the consistent defences raised by this industry is that, if buildings had been "properly maintained," the leaks would never have occurred in the first place. This defence is used not only in litigation, but also at the outset of discussions between strata councils and their developers. As a result, the strata councils often turn to their property management companies and ask why those companies did not initiate maintenance programs which would have avoided the leaky condo syndrome. It is an effective move by the construction/development industry to essentially divide and conquer. Many strata councils, when faced with this challenge, become confused and lose focus with respect to their need to remediate their properties and to seek compensation from their developer. This is exactly what the developers want.

There are a number of very valid responses to the defence raised by the developers and they are as follows:

1. Developers rarely provide details of a proper maintenance program at the outset of a strata corporation. If developers had provided details of such maintenance programs there might have been a strong obligation on the strata councils and the property managers to have followed the instructions. The analogy to this is the automobile industry where the manufacturers provide very substantial, detailed handbooks and guides for maintenance of vehicles. No such similar documentation is found in the strata construction industry. It is only now, well after the fact, that developers are suggesting that maintenance programs would have been appropriate.
2. The current legislation governing condominiums (i.e. The Condominium Act of B.C.) makes no provision for developers to turn over building plans, blueprints, "as built" drawings, etc. The proposed new legislation (i.e. The Strata Property Act in 2000) does address this issue and will require developers to provide this documentation. In the past, strata councils and/or their management companies have had considerable difficulty in obtaining these documents. The "pulling teeth" metaphor is appropriate. If councils and management agents had received the documentation, a maintenance program might have been more obvious.
3. The concept of a maintenance program is in itself one of questionable value. While it is always difficult to suggest that a maintenance program is not of any value, it should be remembered that the leaky condo crisis is not an issue of maintenance as such. There are many, many factors that have given rise to the crisis and all the maintenance in the world would not have eliminated these leak problems. In some cases maintenance programs have actually accelerated the damage. A common advice of consultants over the past decade has been to coat the building with an elastomeric paint ... a sort of "scotch-guarding" process to seal the building and protect it from the elements. It now turns out that such a sealing program is not advisable. Industry experts are generally unconvinced that maintenance programs alone would have avoided this crisis.
4. The expression "maintenance program" is undefined. What exactly is a maintenance program and who is it that would establish the criteria? A maintenance program could consist of simply attending to leaks when they occur, which is generally what has happened over the past decade; or it can involve detailed annual programs requiring thousands of dollars to recaulk windows and joints and provide inspection services by qualified engineers. These costs are substantial and are not provided for in strata corporation budgets. Developers' budgets are usually woefully inadequate for even basic requirements and owners invariably experience huge increases after the first year in regular operating expenses let alone in extra costs for a "maintenance program." Indeed, owners too are constantly attempting to keep their budgets to a minimum so that their maintenance fees do not escalate. Any attempts by a strata council and/or a property manager to build in a sizeable amount of money for maintenance programs would have been rejected.
5. Developers are responsible for providing the first budget to a strata corporation when the strata corporation is built. No developers have ever provided the type of funding within those budgets to provide for the maintenance programs which they now claim vital to the good health of the property. If the developers felt so strongly about maintenance programs, it raises the question why they did not provide for the funding of such programs when they initiated the first budgets.
6. There is no statutory requirement (which is perhaps unfortunate) that strata corporations provide for such detailed maintenance programs in the annual budget. The new Strata Property Act touches on this issue but, even given the leaky condo crisis, the Act does not make long range planning and reserve requirements a mandatory provision; it is still left as an option.

Gerry Fanaken, Author, Educator and President of Vancouver Condominium Services Inc., Vancouver. Mr. Fanaken has been actively involved in the administration of strata corporations for over 25 years. His company currently manages 225 residential strata corporations which represents approximately 13,000 individual condominiums units.



Property Management & Leaky Condos

Redefine the Job!

Ian Stuart, Property Manager
NEWPORT REALTY PROPERTY MANAGEMENT

While managing the affairs of a "Leaky condo" the role of the property manager can require some redefinition by both the management company and the strata council. Most strata councils and owners in buildings that employ property managers come to view the manager as a problem solving, budget mined, para legal professional capable of either providing a fix (or three quotes!) for almost anything. The property manager is in the forefront of the leaky condo process working closely with both owners, strata councils and the building professionals. The scope of most leaky condo problems require a team approach with the property manger taking the lead role in providing the information and support necessary for the strata council to assemble the building remediation team.

Often this is the first time a strata council has engaged such a wide scope of professional services and it requires some guidance in dealing with both the logistics and the terms of the various contracts. The property manager often finds that acting as a translator with Black's Law dictionary in one hand and the Building Code in the other at council meetings becomes a primary function. While interested in finding out what is wrong with the building and how to fix the building envelope, often strata councils and owners will debate the need and the costs of such an approach. The property manager needs to remind owners and strata councils of the folly of the quick fix by the developer/builder and /or the wait and see trap. No one wants to admit to owning a leaky condo and denial is often a problem in the early stages.

Getting the building remediation team picked and working can be a time consuming process with owners often after results and answers in a manner similar to having a small repair done. This is not a small problem and requires careful consideration of the suitability of all the professional involved. Setting realistic time frames early in the process can often provide owners with the assurance that something is happening.

Strata councils can quickly become sidetracked by this leaky condo issue and allow the normal affairs of the building to suffer. Often whole meetings can be corrupted by an ill informed owner or two going off on a tangent. Set out a clear agenda, provide background information to all council members/owners before the meeting and stick to the agenda. The property manager needs to assist the strata council in keeping the two processes separate, with the day to day decisions and affairs being not based on the leak issues primarily but based on needs and requirements of all owners and the building.

Regular contractors and building support people need to be informed so that on renewal, contracts can have service suspension clauses built-in if necessary (The gardening service isn't needed while the ground is torn up). Life in the building must go on with the goal of keeping a sense of normalcy about the building. This can often help owners through the emotional stresses of the process.

Setting up a building committee to lessen the load on the strata council can help streamline the process with the other building professionals and owners.

Keeping the all important paper trail and minutes alive and up to date can become one of the most important roles of the property manager.

The time frame between the start of evaluating a building's problems and the end of the building's remediation and legal processes can be several years and several strata council members later. Ask to be copied on all correspondence or have the faxes and letters flow through the property manager's office. This can often save time down the road as councils and committees work through the various steps in the process.

The property manager often is approached directly by the owners for updates on the status of the process. Nothing can frustrate the process more than owners feeling left out of the loop. Newsletters, posters in the elevators (nothing like a captive audience) e-mails, etc. all help to keep owners informed without a lot of expense. Asking for feedback from owners is one role that the property manager must take on. Owners need time to absorb and completely understand a very complex picture and the building professionals need to be reminded of this from time to time.

Ian A. Stuart: A property manager for 12 years in Victoria. Ian works primarily with Strata Corporations for Newport Realty Property Management, a company with a strong presence in the strata management field in Victoria.

The litigation process is not a quick or easy one and many owners and strata councils become tired and annoyed by a seeming lack of progress after a few months. Ask the legal team to write memos and keep the owners informed of any details that they can.

The decision to keep privileged information from owners should rest with the legal team. The decision of when and how to have meetings should be made by the property manager and the strata council. Holding meetings too often may result in owners feeling that their time is being wasted. Holding meetings too far apart may result in the conspiracy theories and rumors begin to fly. This balancing act gives property managers sleepless nights.

The managing of a building in need of remediation can be difficult. The strata corporation owners need to be reminded of the need to listen and take guidance from all the professionals involved.

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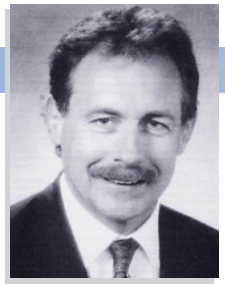

Lump Sum Contract or Unit Price Contract

What Kind of Contract Should You Use for Your Leaky Condo Retrofit?

Brian Chatwin, P.Eng.
CHATWIN ENGINEERING LTD.

Strata title unit holders of all kinds, whether they like it or not, are getting a crash course in construction procedures because of the leaky condo syndrome. You've learned to select consultants, review condition assessment reports, decide on strategic financial initiatives, understand retrofitting alternatives, and have a working knowledge of the tendering process.

But what happens when you get to the point when you're about to tender your project and the consultant comes to you and says, "We recommend a lump sum construction contract" or "Would you like this to be a lump sum construction contract or unit price construction contract?" What does all this mean? What are the pros and cons of each option? Which one is better?

The two major types of construction contracts are lump sum and unit price.

A lump sum contract is one where the contractor is paid a fixed sum of money to perform all the work outlined in the specifications and drawings.

A unit price contract is one where the contractor will get paid on the basis of units of work performed. In other words, if in your construction project 20 windows have to be removed and replaced in a manner that would prevent leakage, the contractor will bid the job on a per window basis. At the start of the project, your consultant would make an estimate of all of the different components of work such as windows, roof repair, rainscreen, etc. and provide his estimate of the quantity of repairs required (in other words, 20 windows, 200 square metres of rainscreen application, etc.). The amount of the contractor's bid on the unit price contract is derived by multiplying the contractor's unit price bid by the engineer's estimate of quantities and adding all of those numbers up. Sound complicated? It's really not!

Which method should you use? I would hazard a guess that 95% of all contracts initiated over my company's eighteen years of experience in this area have been unit price contracts. Why is this the case? Here are a couple of points to consider:

- If a contractor bids a lump sum contract and the specifications are general such as "remove all of the rotten portions of the wall and replace with a rainscreen," then the contractor will probably assume the worst case scenario and price out at the bidding stage the cost of removing all of the wall.
- If during construction, additional work is requested (ie. replace 25 windows as opposed to 20 windows), the tendered unit price contract can easily accommodate this change. If this situation occurred in a lump sum contract, you are somewhat at the mercy of the contractor to give you a fair break on what the extra work would cost.
- In a unit price contract, if the engineer overestimates the work required to be done based on their findings, then the scope of work can be adjusted and only that work performed will be paid based on the unit price contract to the benefit of the owner.
- It is generally accepted that a unit price contract is more closely specified and that more competitive bids with less claims for extra work result from using this type of contract.

In summary, lump sum contracts have their place. This is generally with smaller, very well defined projects. In more complex work such as retrofits for leaky condos, strata corporations should use unit price contracts to get the best bang for their buck.

Brian Chatwin, P.Eng. is a Professional Engineer who specializes in contract administration. Mr. Chatwin has over 25 years of experience in this field and has successfully administered many construction contracts in the field of construction engineering.

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Are Leaky Buildings
A Cause for Litigation?

Leslie B. B. Peer, Ph.D., P. Eng.
READ JONES CHRISTOFFERSEN LTD, VANCOUVER

There are always technical issues in construction litigation that should be considered before venturing into Chancery Street (court). Amazing as it may seem to the Canadian consumer who has bought a building he or she thinks is deficient, it is entirely possible to build a house or condominium that meets the requirements of the BC building code in every respect that 'leaks', and because of that is returning 'prematurely' to nature. How is this possible?

Except in some isolated clauses, the Canadian building codes have not, until the 1998 BC Building Code, addressed the issue of quality in construction or service life of buildings. Building codes were implemented to address life, safety and health issues such as structural adequacy, fire control, and in some respects health and sanitation. The code describes the minimum acceptable standard of construction in these areas while the quality of construction has always been left to the consumer to discern with the traditional reliance on caveat emptor (buyer beware). For instance, the quality of a stone as opposed to a softwood timber home has been known to generations of peoples, since the timber homes have always required greater maintenance and care to preserve them over time. The Canadian code is mute on which building material to choose except in its requirements for masonry to provide resistance to fire, and structural methods in Parts 4 and 9 provide for building in both timber and masonry.

A significant code influence in the design of buildings is the mandate for obtaining professional design and supervision during construction. One of the great freedoms Canadians enjoy is Part 9 of the building code which allows a house or small building to be built entirely by non-professional people. Using the 'kit of parts' specification provided in Part 9, any person in Canada can build a "small building" and have it inspected by the local Authority Having Jurisdiction to deem it fit for occupancy. The parallel path requires that larger buildings be built under Part 3 of the code, where a full suit of professionals, including engineers and architects, must be retained to design all parts of the building including the wall assemblies (under Part 5, the use of which is mandated in Part 3). An example of the differences in the requirements for design of enclosures between these two Parts is that, while Part 9 requires stucco to be 3/4" thick and contain a wire mesh nailed onto the wall over building paper, Part 5 requires that provision be made in the wall assembly to control any water that may penetrate past the stucco or other cladding. This obviously puts a different onus on the designers of the buildings under these Parts of the code.

A surprising number of condominiums in BC were built under Part 9 of the code which still includes buildings of up to 3 storeys in height and less than 600 m2 per floor between fire walls. Many jurisdictions involve design professionals for these buildings for structural, fire code, mechanical, and more recently building envelope design, when they are considered too 'complex' for permitting directly under Part 9 of the code.

The City of Vancouver has modified Part 2 of its building code to redefine a small building as a single family house or duplex. This amendment preserves the right of a Vancouver resident to build his or her own home while providing more sophisticated design requirements for builders, and ultimately for buyers, of most multi-family units.

While a wealth of research and industry information is available in Canada to support homeowners and design professionals specifying assemblies under all parts of the code, until recently, not a lot of Canadian research work was directly applicable to the climate and conditions in Coastal BC (or even other coastal parts of Canada). Even now our wood construction industry is in flux as it moves from using coastal species of wood and plywood to interior species and laminated chip products which are inherently less durable in exposure to moisture. The BC Building Code and referenced timber standards will not respond quickly to this potentially significant technology change in the industry, just as it has not been able to respond to other unique influences in our climate zone during the last 30 years.

As a consequence of these code issues, one of the most important tasks in "leaky condominium" litigation is to discover under which part of the code a building was designed, and then to discover if any code infractions occurred which caused the leakage. To my knowledge no cases have yet tried this issue, so it may be that a leaking house or condominium could have no code infractions under the applicable building code of the day and therefore nobody 'responsible' for the leakage damage. Even if design professionals were involved in the design of leaky buildings, they may have a legitimate defense for their designs if they met the applicable code standard of the day, even though specialist consultants may have had more up to date or specific information available to them.

Dr. Peer graduated with a degree in structural engineering from the University of Toronto and received his doctorate degree in materials engineering from Cambridge University. He is a Professional Engineer and works in the Structural Restoration Group at Read Jones Christoffersen Ltd. in Vancouver.

Homeowner Protection Office
"Update"

Shayne Ramsay, CEO
HOMEOWNER PROTECTION OFFICE

The Homeowner Protection Office's mandate is to restore confidence in the residential construction industry. It's four program areas include no-interest loans for owners of leaky condominiums who cannot pay for the required repairs to their homes, a residential builder licensing and mandatory warranty system on new homes as well as a research and education function. This fall, the office will have been open for one year. Below is a summary of our activities since the office opened in October 1998.

Shayne Ramsay, CEO, Homeowner Protection Office. Mr. Ramsay's experience in the housing and Construction field goes back to 1986. He is the former Director of Development Services for the B.C. Housing Management Commission (1996-1998) & Housing Policy and Program Development with the B.C. Ministry of Municipal Affairs & Housing (1995-1996).

RECONSTRUCTION PROGRAM:

Our first priority was to establish a no-interest loan program for owners of leaky homes who were not able to finance the repairs to their buildings suffering from premature building envelope failure.

The program is available to those owners who cannot secure a bank loan to pay for the cost of repairs. Typically, these are owners with little or no equity remaining in their homes to borrow against. Other homeowners that may have equity in their homes, but cannot afford the monthly payments of a loan are also eligible for assistance. Homeowners are not required to cash in RRSPs and pension assets or sell other assets like cars, jewelry or furniture in order to qualify for assistance.

By mid August, the HPO approved about 820 no-interest loans totaling nearly $15 million.

In April, 1999, we expanded the loan program to include co-operative housing which was previously not eligible due to its ownership structure (homeowners do not have legal title to their units).

On June 28, further expansions to the no-interest Reconstruction Loan program were announced allowing a greater number of affected homeowners to qualify for assistance. The following changes were made to make the program more flexible:

- the first $10,000 in net liquid assets will be exempt from the eligibility assessment (an increase from $5,000);
- up to $250,000 in non-pension savings for seniors will be exempt (no exemption previously for non-pension assets); and,
- individuals who own more than one leaky unit may qualify for additional assistance.

The province also recently introduced the PST Relief Grant for owners of leaky homes. This program, administered by the Homeowner Protection Office, provides grant assistance to eligible owners to repair damage caused by the premature building envelope failure. The grant is based on a formula that equates to the cost of PST paid on repairs.

Eligible recipients include strata buildings, housing co-operatives and single detached dwellings. Investor-owned rental properties are not eligible since repair costs can be deducted from rental income. Repairs completed on or after July 28, 1998 are eligible for assistance. This is the date the Homeowner Protection Act was passed.

Applications for the PST Relief Grant are available through the Homeowner Protection Office. Supporting documentation required includes:

- a completed application form;
- an engineer's certificate to verify that the repair was necessary due to a premature building envelope failure and not simply related to maintenance;
- a copy of the repair contract to verify total amount of repairs; and,
- a statutory declaration by the contractor confirming repairs have been completed.

LICENSING AND MANDATORY THIRD-PARTY WARRANTIES:

The Homeowner Protection Office is also responsible for the licensing of residential builders and setting the regulations for mandatory third party warranties on new homes. Since my last article in the Spring 1999 issue of the Strata-sphere newsletter, the implementation of the builder licensing and mandatory third-party warranty regulations were delayed by two months to July 1, 1999. This delay was necessitated by the financial collapse of New Home Warranty when 1,600 registered builders had to register with a different warranty provider.

As of July 1, 1999, all residential builders applying for building permits are required to be licensed by the Homeowner Protection Office. A public registry of builders is now available on our website. As of the last week in August, 500 builders were licensed with the Homeowner Protection Office.

In order to obtain a building permit, builders have to show proof that they are licensed and that the proposed new home is covered by a third-party home warranty provider authorized by the Financial Institutions Commission (FICom). Under the new system, warranty providers are large general insurance companies that must meet specified capital and operating reserve requirements. This will ensure that warranty providers are able to meet all future claims when they arise.

Regulations on mandatory mediation of residential construction disputes were passed in May, 1999. Under this system, any party to a residential construction dispute can compel the other parties of the dispute to go to mediation in an attempt to solve the issues before it goes to court. Settling a dispute through mediation can be a quicker and more cost-effective solution when compared to the court system.

Our next priority is the licensing of renovators and mandatory warranties on major wall repairs. We are currently consulting with stakeholder groups about these regulations. The renovation regulations will be in place by the end of this year.

RESEARCH AND EDUCATION:

The Homeowner Protection Office also has a research and education function. Several items have been produced to assist condominium owners and buyers. Buying a New Home: A Consumer Protection Guide discusses the importance of hiring an inspector, investigating the builder and understanding the extent of any home warranties that might be in place.

BCTV aired our new video called Managing Leaky Condo Repairs which is scheduled to run again on Sunday, September 19 at 3:00 p.m. This video and the corresponding printed guide called Managing Major Repairs are available by calling the Homeowner Protection Office. The video and guide offers useful information on the process to repair a leaky condo, financial assistance available through the Homeowner Protection Office, and the licensing and warranty regulations that took affect as of July 1, 1999.

A handout called Advice to Strata Councils and Property Managers is also available for condo owners affected by the collapse of the builder's New Home Warranty program. It provides information on the responsibilities of the strata councils to repair their buildings and what to do to file a proof of claim.

For more information on the Homeowner Protection Office, please call our information line at 1-800-407-7757 or visit out website at www.hpo.bc.ca.

Leaky Condos

Who is to Blame?

Dr. Straube, Leading Building Envelope Specialist in Canada
CONSULTANT & FACULTY MEMBER, UNIVERSITY OF WATERLOO

Dr Straube is deeply involved in the areas of building envelope design, moisture physics, and whole building performance as a consultant, researcher, and educator. He is a faculty member in both the Civil Engineering Department and the School of Architecture at the University of Waterloo.

When something as serious as rain penetration, rot, and decay occur in your home, it is tempting to blame all of the problems on a single visible culprit, e.g., the contractor, the designer, the materials, the climate, or even fate. However, in reality, many factors typically must conspire to cause a serious problem.

Much has been written, and even more said, about "The Cause" of the building problems in the Lower Mainland. Some of the various causes that various champions have argued were the Magic Bullet include:

- Climate. Proponents of this theory argue that the Lower Mainland has a climate that is so different from others in North America that normal buildings just won't work.
- Poor quality construction. The building boom, and the use of non-union or unskilled workers combined with "greedy" developers resulted in buildings so poorly constructed that they could not work.
- Changes in building materials. Oriented Strand Board ("OSB") has recently been used in lieu of the more traditional plywood. It is argued by some that plywood is not nearly as susceptible to rot and mold. Other changes include the use of synthetic housewraps (such as Dupont's Tyvek) instead of asphalt-infused building paper, more cement in the stucco instead of lime, etc.
- Changes in wall assemblies. The increase in insulation level, the use of polyethylene vapour barriers, and newer leakier windows each supposedly caused a change sufficient enough to cause the huge number of observed failures.
- Architectural style. The use of California style buildings, with exposed and cantilevered decks, closed hand rails, and complex shapes, the change from three to four storeys and the lack of overhangs each or all together conspired to cause the crisis.

Lets consider each of these Magic Bullet candidates in turn.

A huge stock of buildings built before the 1980's exist in the Lower Mainland - buildings that show that the local climate does not make it impossible to build durable buildings. In fact, while it does rain for many hours in the Lower Mainland area, the amount of driving rain in St. Johns and Halifax is in fact greater, and these two East Coast cities have less sunny hours than the West Coast to dry out buildings. It is true that modern expectations for draft-free, energy-efficient housing makes the task a bit more difficult.

Although difficult to prove, the quality of construction is not likely a major factor. While there is no doubt that some failures are due to truly poor workmanship, the significant number of failures in well-built condos suggests that construction quality played a small role. Despite the common misconception, this author's inspections of many old buildings during repairs and renovations have shown that the quality of construction in the past was worse, not better, in most respects.

Synthetic housewraps, OSB, and cement stuccos all have different properties than the building paper, plywood, and cement-lime stuccos they replaced. While each may have had a negative impact on the performance of some walls, the impact was small, and not enough to explain the widespread problems observed. Similarly, the addition of insulation and the use of polyethylene vapour barriers clearly reduce from the ability of walls to dry out incidental rain penetration but not to such an extent that a disaster should have been expected.

Of course, almost every one of the factors discussed above can, in extreme cases, cause a failure. However, it is a rare situation where any single factor on its own is sufficient.

The change in architectural style likely has more significance for the problems experienced in the Lower Mainland than any other single factor. Zoning laws contributed by encouraging reduced or no overhangs and increased area of partially enclosed decks. The complex "California Style" of architecture ignored the lessons learned over a century of building in the Pacific Northwest and had the effect of dramatically increasing the rain load on buildings.

During the period from the late 80's to mid-90's, the Lower Mainland experienced almost all of the changes listed earlier - an unprecedented period of upheaval for the building industry. These changes individually and simultaneously increased the rain load and reduced the moisture resistance. The combined effect of all the changes has been clearly been disastrous.

Historically, one item was changed in a building at a time and the impact of this change on building performance was then observed. The faster pace of change did not allow us to learn how our buildings would respond to the changes, since we imposed them all at once. Considering the scale and speed of the changes experienced, it should be little surprise that problems developed. For this reason, future changes to building techniques and materials (including repairs) should either be implemented slowly, so that we can develop experience, or be well-engineered and properly tested.

The condo crisis is a complex issue, and a search for simple causes, or simple solutions, is unlikely to be successful.

strata-SPHERE condominium services inc.
630 Terminal Ave. North, Nanaimo, BC V9S 4K2
www.stratasphere.com

Layout: Colette Semple Printed by Quadra Printers Ltd.