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"Act or Omission": A Case Study in Condominium Law
Lozano v TSCC No. 1765, 2020 ONSC 4583; 2021 ONSC 983 (CanLII)

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Chargebacks and Acts and Omissions

Condominium living boasts many benefits, including, among other things, a wide array of physical amenities, provision of various services (i.e. security, concierge etc.) and having ownership of a financially growing and profitable real estate asset. However, condominium living also carries a degree of responsibility on the unit owners in respect to their units. Of these responsibilities, perhaps one of the most prominent, is an owner's responsibility to ensure that their unit is well maintained and is not the source of property damage to any other units or the common elements of a corporation.

Subsection 105(2) of the *Condominium Act, 1998* ("***Act***") provides that if an owner, a resident or guest of a unit ("**Origin Unit**"), causes damages to the Origin Unit, through an act or omission, the amount that is lesser of the cost of repairing the damage to the Origin Unit and the deductible limit of the corporation's insurance policy, shall be added to the Origin Unit as a common expense.

Thus, subsection 105(2) of the *Act*, has two qualifications:

(1) The chargeback can only be applied to the cost of repairing the Origin Unit and cannot be applied to the cost of repairing any other affected units and/or common elements which were damaged from a cause that originated in the Origin Unit; and,

(2) The chargeback can only be applied if the corporation can establish "an act or omission" on the part of the Owner of the Origin Unit that has caused and/or resulted in the damage.

Most Ontario condominium corporations have a deductible bylaw which eliminates the first qualification of subsection 105(2) and, thereby, allows a corporation to chargeback the Origin Unit not only the costs of repairing the Origin Unit but also the costs of repairing any other affected units and common elements, up to the corporation's insurance deductible. Significantly, however, standard deductible bylaws commonly preserve the second qualification of subsection 105(2), requiring a corporation to establish "an act or omission" on behalf of the Owner of the Origin Unit that had caused and/or resulted in the damage, before being able to impose a chargeback against the Origin Unit.[1]

[1] Not all deductible bylaws preserve the requirement for the corporation to establish an act or omission on the part of an Owner before a chargeback, up to the corporation's insurance deductible amount, can be imposed. The analysis

But what is an "act or omission"? And how is this broad term interpreted and applied by our courts?

Until recently, a debate ensued between opposing lawyers, with those representing condominium corporations insisting that the term "act or omission" imposed a strict liability standard on owners, while those representing unit owners insisted that the term "act or omission" is to be defined as negligence.

In the leading decision of *Lozano v. TSCC 1765*, 2020 ONSC 4583 ("***Lozano***"), subsequently upheld on appeal, J.E. Ferguson J. dispelled much of this confusion and provided some clarify to an otherwise ambiguous term.

Factual Overview

The Lozanos owned a condominium unit (the "**Unit**") in Toronto. In April 2018, the float in their en-suite toilet tank cracked (the "**Toilet**"). The Lozanos replaced the Toilet's float themselves. No other work or repair was done to the Toilet, nor did the Lozanos encounter any other problems with the Toilet.

In November 2018, the Lozanos went to the Philippines for five (5) months. The Unit was unoccupied during their absence; however, their nephew and family friend attended at the Unit once every two weeks to check the premises to ensure that the heat was turned on and to collect the mail. Neither the Lozanos' nephew, nor their family friend, used the Toilet while they were in the Unit.

On April 12, 2019, approximately twelve months after the Lozanos replaced the Toilet float, a flood occurred in the Unit (the "**Flood**"). The Flood caused damage to the Unit, the unit below, and the third and fourth floor hallways.

The Flood was caused by a broken ballcock at the base of the stem of the Toilet, which caused water to constantly fill and overflow the Toilet. The Lozanos' condominium corporation, Toronto Standard Condominium Corporation 1765 ("**TSCC 1765**"), has a by-law which provides that unit owners are responsible for the cost of repairing damages (up to TSCC 1765's insurance deductible limit) when the damage is caused by the unit owners' "act or omission".

TSCC 1765 paid to repair the damage caused by the Flood and, subsequently, demanded reimbursement of same from the Lozanos (the "**Chargeback**"). TSCC 1765 took the position that the Lozanos were responsible for the payment of the Chargeback, in accordance with its by-law.

The Lozanos' home insurer, Allstate Insurance Company ("**Allstate**"), contested the validity of TSCC 1765's Chargeback demand. Allstate argued that the Lozanos did not commit an "act or

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discussed in this article does not apply to those corporations that have a deductible bylaw that does not contain the "act or omission" qualification.

omission" which caused and/or resulted in the Flood, as required by TSCC 1765's by-law in order for the Chargeback to be imposed.

TSCC 1765 registered a lien against the Unit for the amount of the Chargeback. Allstate, on behalf of the Lozanos, paid the Chargeback under protest, in order to discharge the lien. Allstate then commenced an application against TSCC 1765, seeking, *inter alia*, a declaration that TSCC 1765 had no lawful right to the Chargeback.

Application Judge's Findings

There was no dispute that the Flood originated from a malfunction of the Toilet. The material question for the Application Judge was whether the Lozanos committed an "act or omission" which caused and/or resulted in the Toilet's malfunction (and subsequent Flood).

The Application Judge reviewed s. 105(2) of the *Act*, which provides:

> If an owner […] **through an act or omission causes damage** to the owner's unit, the amount that is the lesser of the cost of repairing the damage and the deductible limit of the insurance policy obtained by the corporation shall be added to the expense payable for the owner's unit. [**emphasis added**]

TSCC 1765 argued that: (1) the Lozanos committed an "unreasonable act by failing to have a plumber repair their toilet when its plastic parts first showed signs of decay in April 2018"; and (2) "when the Lozanos made repairs in 2018, they should have replaced the entire ballcock mechanism and not just the float element" of the Toilet.

Allstate, on the other hand, argued that the Lozanos did not commit an "act or omission" that caused the Toilet's malfunction and subsequent Flood. The Lozanos diligently maintained the Unit and made the necessary repairs in April 2018. In fact, the Toilet functioned properly after being repaired, and the decay on the plastic mechanism was "completely unforeseeable".

The Application Judge relied on the decision of *Cornerstone Heights Condominium Corporation v. Payam and Sanaz Holdings Limited,* 2019 SKBC 70 in holding that that an "act or omission" does not depend on a finding of negligent behavior. In that regard, the Judge held that the standard of establishing liability, under s.105 of the *Act*, is between the standard of negligence, and strict liability, and is "perhaps closer to the latter".

Thus, despite finding that the Lozanos diligently maintained their Unit, the Application Judge determined that the Lozanos' decision in not hiring a plumber in 2018 to undertake thorough repairs of the Toilet, was an "omission" for which the Lozanos were responsible. In addition, and importantly, the Application Judge found that the Lozanos should have shut off the water to the Unit during their prolonged absence from the Unit. Consequently, the Application Judge held that the Lozanos were liable to TSCC 1765 for payment of the Chargeback.

Divisional Court's Findings

On appeal, Allstate argued, *inter alia*, that the Application Judge adopted the wrong legal test in determining whether an "act or omission" "caused" the Flood. Allstate's proposed test sought to import an element of "reasonableness" and "foreseeability" into the s. 105 analysis. Specifically, Allstate argued that, in order to find liability, a unit owner must "ordinarily and reasonably" be expected to maintain a unit component, and that failure to "use, maintain, monitor, or repair a unit component" must foreseeably result in damage.

The Divisional Court confirmed that a s.105 analysis does not import any requirement of unit owner negligence, and in that regard, a reasonableness inquiry as to the unit owner's "act or omission" does not form part of the liability analysis. Similarly, the court also confirmed that a strict liability analysis is not appropriate.

The Divisional Court offered guidance on what a condominium corporation must prove when seeking to claim a chargeback pursuant to s.105 of the *Act*. Specifically, to invoke liability, the loss/damage must be "caused by the unit owner's act or omission". In other words, the Court held that TSCC 1765 carries the evidentiary burden of proving, on a balance of probabilities, that the Flood was **caused** by the Lozanos' "act or omission". Therefore, the liability analysis is entirely dependent on TSCC 1765's ability to establish a causal link between the Flood and the Lozanos' alleged "act or omission".

Further emphasizing the causation analysis, and rejecting a negligence standard, the Court stated:

> [24] … Theories of liability have long held that there are two components to the causation analysis: cause in fact; and cause in law. Cause in fact is the more purely factual enquiry, sometimes described as the "but for" or the "necessary condition" test. "But for" the defendant's act (or omission), would the damage have occurred? Cause in law is the more vexed question, involving more "policy oriented" considerations. These typically include questions like: was the alleged act or omission too "remote" from its purported effect; was the result abnormal when compared to what might otherwise have been expected; was the damage "unforeseeable", lacking in "proximity" or coincidental; and, were there other, intervening causes.

Having set out this framework, the Divisional Court rejected the first of TSCC 1765's arguments, namely, that the Lozanos committed an "omission" by failing to hire a plumber to perform the original repair work of the Toilet in April 2018. The Court held that "[t]here was no evidence that the [Lozanos'] replacement of the cracked float in April 2018 was the cause of the leak in April 2019. Likewise, there was no evidence that, if a plumber had attended in April 2018, he or she would have found a defect or failure in the ballcock mechanism and replaced this entire mechanism with a new one, thus avoiding the damage". Consequently, the Court found TSCC 1765's argument a matter of "pure speculation" because there was no form of notice or warning such as an ongoing problem that required attention which the Lozanos ignored.

However, the Court found TSCC 1765's second argument – relating to the Lozanos' failure to shut off the water to the Unit during their extended absence - more convincing; specifically, the Court held this "omission" to have been the "cause" of the Flood. In simple terms, "but for" the "omission", the damage would not have occurred. The Divisional Court specified that but for the Lozanos' five-month absence, if the Unit were occupied or inspected daily, the leak would have been discovered and remedial action would have been taken immediately, thus preventing the damage that occurred.

Conclusion

Thus, in order to enforce a chargeback for repairs against a unit, up to a corporation's insurance deductible amount, the corporation has to be able to identify an act or omission by the owner that caused the damage. A chargeback can be enforced as long as the corporation is able to establish a causal link between an owner's act or omission and the damage that occurred. The owner's act or omission does not have to be reasonable nor does the damage have to be foreseeable in order to enforce a chargeback against the unit from which the damage had originated (up to the corporation's insurance deductible amount). For instance, in the Lozano decision, the Lozanos' act of travelling outside of the country for five months while having a family member attend at the unit every 2 weeks was reasonable. Further, the Lozanos' omission of not turning off the water supply to the unit, during their absence, was not unreasonable. Nonetheless, the Lozanos were found liable for the chargeback strictly on the basis of there being a causal link between their omission (i.e., failure to turn the water supply off) and the subsequent water leak.

In summary, the Divisional Court provided much needed guidance on the applicable framework for establishing liability against unit owners under section 105 of the *Act*. The court held that the loss or damage must be caused – in fact and in law - by the owner's "act or omission".

Finally, although the legal test is clear, the question of whether an "act or omission" is the cause of certain damage will depend on the particular facts of each case.