

The Recovery of Proceeds Payable to Strata Corporations

In some circumstances, strata corporations are receiving funds to offset damages they have incurred in relation to defective construction and/or water penetration. These funds might be the result of judgments, insurance/warranty claims, or settlements. When such funds are received, a strata corporation may decide that some or all of these funds are to be returned to the owners. In some cases a previous owner of a strata lot may have contributed to a special levy raised for the purpose of either funding the repair, or perhaps a lawsuit to recover damages. By the time that recovery is realized, the owner who paid the special levy may no longer be the registered owner.

The purchase of a strata unit involves purchasing, in addition to the ownership rights in the strata unit itself, an interest in both the assets and liabilities of the strata corporation. For example, while an owner may have regularly contributed to a contingency reserve fund over the period of ownership, when the unit is sold the owner does not have any right to recover these contributions. As a result, where a strata corporation recovers funds and there is to be a disbursement, it will likely deem these funds to be payable to the owners as registered on title at the time of disbursement.

What should licensees do to assist their clients in this regard? When licensees list strata units for sale they should determine the state of affairs with respect to both the strata unit specifically and the strata corporation in general. Have insurance or warranty claims been filed? Is there any litigation under way or pending that may result in a financial recovery? Are there any special levies being

contemplated? As with all real estate transactions, licensees must be careful in conducting transactions involving strata properties located in market areas that are unfamiliar to them. Information regarding particular strata properties that may be known to licensees working in a particular area may not be common knowledge outside that area.

Where there is an indication of the possible future recovery of funds, **the seller should be made aware that typically the assets and liabilities of the strata corporation flow with the registered owners as shown on title at the time of disbursement, and proportionate to their unit entitlement.** If the seller expresses a desire to retain certain rights or benefits (e.g. the right to recover funds payable after completion of a sale, the right to vote on future decisions with respect to the possible recovery, etc.), the seller should be made aware that retaining these rights or benefits should be negotiated with a prospective buyer. As a result, the seller should seek legal advice from a lawyer familiar with strata property issues prior to entertaining offers.

In situations where the possibility of future recovery of funds is uncertain, the least complicated approach may be to ensure that both the seller and buyer are aware of the current status of any anticipated recovery and related expenses. With that knowledge the end price negotiated will reflect how the parties have valued the possibility and uncertainty of future recovery and related expenses, knowing that if there is a recovery, any funds disbursed will be payable to the registered owner at the time of disbursement.

In this scenario, a clause such as the following could be incorporated into the Contract of Purchase and Sale to ratify the agreement of the parties:

"The Buyer and Seller agree that all proceeds that may arise from (insert description of the event that may lead to a future fund recovery) (the "Proceeds"), which have not been received by the Seller prior to the completion date, are payable to the registered owner of the strata unit at the time the Proceeds are paid. The Seller will, on completion, assign all of the Seller's rights and interests in the Proceeds due and owing, or to be due and owing, on or after the completion date to the registered owner of the strata unit. The Seller will, on completion of this transaction, authorize Strata Corporation (Strata Plan #) to pay the Proceeds direct to the registered owner of the strata unit. The Buyer and Seller covenant that they and each of them will execute all further documents or do such things as may be required to give full effect to this acknowledgement and assignment."

If the seller and/or buyer wish to negotiate an agreement other than described above, each should be advised to seek independent legal advice from a lawyer who is familiar with strata property matters. Licensees should be cautious about drafting clauses in these circumstances, given the uncertainty of future events and the difficulty in identifying issues that may or may not be readily apparent or foreseeable.