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PROPERTY MANAGEMENT : WHEN DOES A BREACH OF CONTRACT BECOME GROSS NEGLIGENCE?

Louis-Martin Dubé

On October 10, 2012, the Québec Court of Appeal rendered a most interesting judgment for owners and managers of commercial real estate.[1] In May 1976, Samen Investments Inc. acquires the Gordon Brown Building on De Maisonneuve Boulevard West, near Bleury Street.

Samen immediately entrusts its management to Monit Management Limited pursuant to a contract that will remain in force for some 28 years. In September 2003, Samen advises Monit that the management contract will end on December 31 of that same year.

An inspection of the Gordon Brown Building by Gestion Sidev Inc., the property management firm hired by Samen to replace Monit, reveals that parts of the structure of the underground parking garage are deteriorated to the point of having to be demolished and rebuilt. In a letter sent to Monit by Samen's lawyers, the owner claims that Monit is responsible for the poor state of repair of the concrete slab, having neglected to perform appropriate maintenance and repairs during its tenure as property manager between 1977 and 2004. Accordingly, Samen requires that Monit carry out the necessary repairs at its cost. Monit denies any wrongdoing and claims that Samen never complained about anything having to do with the level of Monit's maintenance and repairs and that the owner is known for neglecting to invest in the maintenance of its real estate properties in Montreal.

Samen decides to go ahead with the extensive repair work recommended by its structural engineer and institutes proceedings against Monit before the Québec Superior Court claiming contractual damages in the amount of $743,229.77. Monit responds with a counter-claim for $135,000 in damages alleging that Samen's action is illegal and abusive. On June 17, 2010, Mr. Justice Louis Crête, J.S.C.[2], rules that Monit failed to properly execute its obligations under the contract and that its conduct constituted gross negligence and rules in favor of Samen at least for part of the damages claimed. Monit appeals the judgment to the Québec Court of Appeal.

Justice Jacques A. Léger, J.C.A., writing for a unanimous bench of three judges, first examines

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Monit's obligations under the property management agreement with Samen and rules that pursuant to Section 2 of the agreement, Monit must "*operate and manage the Property as a prudent administrator*" and must, among other obligations, "*cause to be made all Landlord's repairs which the Manager in its sole discretion shall deem necessary for the maintenance and preservation of the Property.*" The agreement also contains a provision exonerating Monit from liability towards Samen, except for instances where the manager is guilty of willful misconduct or gross negligence.

Monit argues that its management strategy consisted in maximizing revenue and limiting expenses and that this was done in accordance with the owner's instructions. It contends further that it had the responsibility to act in the best interest of the owner. It therefore made a business decision to minimize the maintenance of the property in order to maximize profit. Rather than disregarding the interests of the owner, Monit claims that it acted in its best interest and, therefore, its conduct should not be considered gross negligence.
While it cannot be denied that the management company was hired to maximize the profits of the Gordon Brown Building, can this obligation completely negate Monit's other obligations that are clearly set forth in the agreement, in particular the obligation to maintain and preserve the property as required by Section 2?

The Court does not think so. In the end, the considerable length of time during which Monit neglected the maintenance and repair of the concrete slab of the parking garage and the knowledge that the structure was deteriorating significantly were, according to the Court, tantamount to gross negligence. And, while it is true that Section 2 of the agreement gave the management company discretion as to the determination of the maintenance and repair work that the property may require from time to time, it did not give it the right to neglect the performance of an obligation very clearly expressed in the property management agreement - the obligation to maintain and preserve the property - on the basis that it was preferable to let the concrete slab of the parking garage deteriorate until it needed a complete replacement, to avoid the cost of maintenance.

WHAT CAN WE LEARN FROM THE CASE OF MONIT V. SAMEN?

First, that a property manager should be vigilant with an owner that does not wish to over spend on maintenance and repairs, in particular if certain components of the property are aging and in need of more than regular maintenance. In such circumstances, there is an inherent difficulty for the property manager who has undertaken to maintain and preserve the property, but ultimately does not hold the purse strings. A property manager should always make regular written recommendations to the owner for appropriate maintenance programs, major repairs and capital expenditures with the corresponding budgets, leaving it up to the owner to make the final decision as to how much it is willing to spend on the property.

Second, a contract provision exonerating the property manager from liability, although valid, has its limits. Not only will the property manager be responsible in clear cases of intentional or gross fault (whether or not the contract speaks of intentional or gross fault) but also, in the face of a clear and serious breach of contract by the manager, a court may be tempted to grant relief to the owner that has suffered damages notwithstanding the presence of an exoneration clause in the contract.

ENSURING THE SAFETY OF CITIZENS IS A PRIMARY OBLIGATION OF THE STATE

Ariana Lisio

Ex-Premier Jean Charest and his cabinet probably had the safety of citizens in mind when, on June 20, 2012, they introduced the draft regulation entitled "Regulation to improve building safety"[3] (the

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"**Regulation**"), which would amend the Safety Code of Québec (the "**Code**") adopted under the *Building Act*[4]. This Regulation, if enacted by the new government, would amend the Code by adding a new chapter entitled "Buildings".

The Regulation sets out the standards applicable for the territory of Quebec that owners, occupiers and users must comply with to improve building safety. It contains applicable construction standards that would ensure the safety, soundness and protection of buildings from fire and structural damage. It would also introduce provisions, which would be more restrictive than the initial construction requirements, for sleeping accommodations and care occupancies, including special requirements for private seniors' residences subject to the certification mechanism of the *ministère de la Santé et des Services sociaux*. The Regulation also contains provisions concerning the inspection and maintenance of building façades and multistorey garages.

As of the date of this bulletin, the Regulation has not been enacted by the government. If it were enacted in its entirety, what would be the immediate consequences for the owners?

In practical terms, owners would have to comply with new standards for fire alarm and detection systems. These standards will simply implement the fire protection provisions contained in the National Fire Code of Canada.[5] Also, more rigourous and periodical maintenance will be necessary for building façades and underground and aboveground multistorey garages.

The maintenance of building façades will be required for any building having five or more storeys above ground. A register must be kept on the premises during the lifetime of the building to record certain basic information. Among other things, a description of the repair work, maintenance work and modifications made to the façade, as well as verification reports, must be included in or appended to this register. In addition, every 5 years, the building owner must obtain a verification report from an engineer or architect stating that the building's façades are not in a dangerous condition, and that recommendations have been made for the correction of deficiencies, if any are found. Also, special conditions apply concerning the frequency for obtaining verification reports when buildings are more than 10 years old.

The same reasoning applies to the verification of multistorey garages. A register must be kept on the premises of the garage for recording basic information, including the owner's name, description of work done, etc. In addition, the Regulation also requires the owner to conduct an annual verification of the multistorey garage. This verification must take the form of an information sheet (contained in the Regulation), describing the specific conditions observed and supported by dated photographs. Furthermore, every 5 years, the owner must obtain an in-depth verification report from an engineer. Finally, an additional verification of the multistorey garage will be required if any event should occur that could affect its structural behaviour.

This bulletin provides a summary of the responsibilities and additional costs that will apply to the owners of buildings covered by the Regulation. If the draft regulation is ultimately enacted, it is hoped that the rationale of safety underlying the regulation will serve as a guide for the owners who are subject to it.

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[1] *Monit Management Ltd.* v. *Samen Investments Inc.*, 2012 QCCA 1821.

[2] *Samen Investments Inc.* v. *Monit Management Ltd.*, 2010 QCCS 2618.

[3] *Gazette officielle du Québec*, June 20, 2012, Part 2, Vol. 144, no. 25, page 1997.

[4] R.S.Q. c. B-1.1.

[5] Standards established by the National Fire Code of Canada 2010 (NRCC 53303) published by the Canadian Commission on Building and Fire Codes of the National Research Council of Canada.

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