

Great American Insurance Group
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October 3, 2022

VIA EMAIL: Miroslav.Babjarcik@fsresidential.com

The Owners, Strata Plan EPS3084
% Miroslav Babjarcik
FirstService Residential
#700 – 200 Granville Street
Vancouver, BC V6C 1S4
Canada

RE: Insurer: Great American Insurance Company
 Insured: The Owners, Strata Plan EPS3084 (the “Strata”)
 Policy No.: CDO5201020
 Policy Period: January 1, 2022 to January 1, 2023
 Claim No.: A00465221
 Matter: *Scott Gilbert*

Dear Mr. Babjarcik:

Please note, this correspondence supplements our letter dated August 26, 2022, which in incorporated herein by reference. On behalf of Great American Insurance Company (“Great American”), I acknowledge receipt on September 26, 2022, of an email from Allan Pasacreta, forwarding us a copy of a dispute filed against the Strata by Scott Gilbert with the Civil Resolution Tribunal on September 4, 2022 (the “Dispute”).

We note, on August 15, 2022, via an email from Gloria Luu of BFL CANADA, we were provided copies the following materials:

- (1) An email sent, on August 14, 2022, by the Strata’s former building manager, Scott Gilbert, to members of the Strata’s Council (the “Email”);
- (2) A letter, also dated August 14, 2022, sent to you by Mr. Gilbert, seeking payment for certain repairs he performed for the Association (the “Contract Demand”); and,
- (3) A notice from the Employment Standards Branch of British Columbia, indicating that Mr. Gilbert filed a complaint on August 14, 2022 (the “Notice”).

As the Dispute concerns the same and **Related Wrongful Acts**, we are treating the Dispute and the previously submitted materials as a single **Claim**, pursuant to Sections III.L. and V.B. of the Policy.

We are directing this correspondence to your attention based upon our understanding that you are the **Insureds'** representative for insurance purposes. If we are incorrect, please provide the correct contact information so that we can correct our records.

We have reviewed the materials listed above and the Directors' and Officers' Liability insurance policy issued to the Strata by Great American, policy number CDO5201020 (the "Policy"), and have determined, as set forth in further detail below, that there is coverage for this matter, subject to a reservation of Great American's rights and other coverage limitations.

The Policy

The Policy provides coverage for **Claims**, first made during the **Policy Period**, for **Wrongful Acts**, committed or allegedly committed by an **Insured**, as those terms are defined by the Policy. The Policy provides a \$2 million aggregate **Limit of Liability**. We are evaluating coverage for this matter under the Policy Period for January 1, 2022 to January 1, 2023.

Background Facts

As we understand the matter, Mr. Gilbert was contracted by the Strata to serve as its building manager. During the course of his contract, Mr. Gilbert started performing additional tasks for the Strata, for which he was paid separately from his fee to serve as building manager. Recently, the Strata decided to terminate Mr. Gilbert's contract as building manager.

Following the termination of his contract, Mr. Gilbert began demanding payment for certain repairs he made on behalf of the Association, as set forth in the Contract Demand. Further, he has taken the position that he was misclassified as a contractor and was, in fact, the Strata's employee. As such, he contends that is entitled to payment for certain benefits he did not receive, including certain wage payments, as set forth in the Email.

Per his own words and as indicated in the Notice, Mr. Gilbert has purportedly filed a complaint with the ESB regarding his misclassification.

We have now received a copy of the Dispute. In the Dispute, Mr. Gilbert asserts that the Strata improperly terminated his contract as building management by voting on the same in contravention of the terms of the contract and the Association's by-laws. He also asserts that the Association has improperly appointed certain members to Strata council. In the Dispute, Mr. Gilbert is seeking reinstatement of the contract and removal of the purportedly improperly appointed council member.

By summarizing the general allegations, we do not intend to imply that they have any merit and only do so for the purposes of the coverage discussion in this correspondence.

Coverage Analysis

As indicated above, pursuant to the provisions of and endorsements to the Policy, and under a reservation of Great American's rights, including the coverage limitations set forth below, we have determined that this matter continues to constitute a **Claim** for which coverage is available to the Strata and FirstService Residential.

Please note, Great American's coverage is always limited by the Policy's definition of **Loss**. Section III.G. of the Policy defines **Loss** as:

settlements and judgments, including punitive or exemplary damages or the multiple portion of any multiplied damage award, and subject to the provisions of Section V. and Section VI., **Costs of Defence** incurred by the **Insured**, provided always, however, **Loss** shall not include taxes, criminal or civil fines or penalties imposed by law, except as provided pursuant to Section IX.H., or any matter which may be deemed uninsurable under the law pursuant to which this Policy shall be construed. It is understood and agreed that the enforceability of the foregoing coverage shall be governed by such applicable law which most favors coverage for punitive or exemplary damages or the multiple portion of any multiplied damage award.

Notwithstanding the foregoing, it is further understood and agreed that **Loss** shall also include:

- (1) taxes and related penalties and interest assessed against a director based upon, arising out of or attributable to the failure to deduct, withhold or remit tax from a payment of salary or wages of an employee pursuant to the Income Tax Act R.S.C. 1985 (5th Supp.), the Employment Insurance Act, S.C. 1996, c. 23, and the Canada Pension Plan, R.S.C. c. C-8, the regulations promulgated thereunder and amendments thereto or any similar provisions of any provincial law;
- (2) any amount constituting wages pursuant to the Canada Business Corporations Act R.S.C. 1985, c. C-44, s.119 and the Business Corporations Act, R.S.O. 1990, c.B.16, s.131, the regulations promulgated thereunder and the amendments thereto or any similar provisions of any other provincial law; or
- (3) unpaid tax liabilities of the **Insured** arising from the laws of Canada, the laws of any province of Canada, or any municipality therein, which the **Insured** is unable to pay due to **Financial Insolvency** and which the directors of the **Organization** or any **Subsidiary** become legally obligated to pay.

As such, please note there is no coverage for any amounts incurred in this matter which do not meet the Policy's definition of **Loss**, including any amount constituting wages under relevant Canadian law.

Second, we direct your attention to Section IV.H. of the Policy, which excludes coverage for **Claims**:

for any actual or alleged liability of any **Insured** under any contract or agreement, express or implied, written or oral, except if such liability would have attached absent such contract or agreement;

Consequently, Great American will not provide coverage for any amounts incurred by the Strata which are the result of any actual or alleged contractual objections, including payments owed to Mr. Gilbert for any services he performed for the Strata pursuant to any express or implied contract.

Third, we note that pursuant to Section IV.J. of the Policy, coverage is limited to **Costs of Defence** for **Claims**:

for the failure to afford an employee with reasonable notice of termination, except this exclusion shall not apply to that portion of **Loss** that is increased by reason of an **Insured** engaging in an **Employment Practices Wrongful Act**;

Here, Mr. Gilbert is asserting that he was an employee and, as such, he might seek certain pay in lieu of notice damages. Any coverage for the same is limited to **Costs of Defence**.

Defence

Pursuant to Section I. of the Policy, Great American has the right and duty to defend any **Claim** to which this insurance applies. As such, we previously appointed:

Tom Newnham
Dolden Wallace Folick
Eighteenth Floor – 609 Granville St.
Vancouver, BC V7Y 1G5
O: 604.891.0384 E: tnewnham@dolden.com

Dolden Wallace Folick will continue to provide a defence for this matter. Please cooperate with representatives from the law firm to the fullest extent. Moreover, pursuant to Section VI.A. of the Policy, the **Insured** shall not admit liability for, offer to settle, or incur **Costs of Defence** in connection with any **Claim** without the **Insurer's** prior written consent.

Other Insurance

Pursuant to Section VIII.L. of the Policy,

This Policy shall apply only as excess over, and shall not contribute with, any other valid and collectible insurance available to any **Insured**, unless such insurance is written specifically excess of this Policy by reference in such other policy to this Policy. This Policy will not be subject to the terms of any other insurance.

As the coverage provided by the Policy may be limited by the availability of other insurance coverage, we ask that you provide copies of any information received from any other insurance carrier regarding this matter. In addition, we request you provide the contact information for any other insurance carrier which may also be responsible for this matter.

Conclusion

Our discussion is based upon the issues discussed and the information available to date. If there is other information you would like us to consider with respect to our coverage evaluation, please provide the same to the undersigned so that we can evaluate any impact it may have on our analysis. Great American expressly reserves all of its rights and defences in this matter under the Policy and the law.

Should you have any questions or comments, please do not hesitate to contact me.

Very truly yours,
GREAT AMERICAN INSURANCE COMPANY



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PNC/drz

cc: Gloria Luu / BFL CANADA Insurance Services Inc. / gluu@bflcanada.ca
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