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Let's Talk Condo...

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Dispute Resolution: Are All The Parties At The Table?

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Disputes between neighbouring unit owners/residents in a condominium property are certainly not uncommon. These disputes will typically be about some form of alleged nuisance from one unit to another, perhaps about alleged transfer of noise or odours. Disputes between neighbours regarding noise have been and will likely always be part of the nature of condominium living. We are finding that the transfer of tobacco smoke is also becoming a more common issue of contention.

Is a Condominium Corporation allowed to turn a blind eye to these types of unit owner/resident disputes? Can the Board of Directors take the position that it is a private matter between the residents in question and that the Corporation should not get involved? The answer is: "no".

The reason is the duties imposed on a Corporation by the Condominium Act, 1998 (the "Act"). More specifically, the Act provides that every Corporation has an obligation to take reasonable steps to enforce unit owner/resident compliance with, among other things, any provisions of the Act, declaration or rules dealing with noise and nuisance.

Therefore, if property management or the Board receives complaints of noise or nuisance from a unit owner/resident, the Corporation has a duty to, at minimum, investigate the complaint and exercise prudence and good faith in determining whether to take enforcement steps against any alleged offenders.

If the initial informal enforcement steps, involving correspondence, do not resolve the problem, the Corporation may be required to commence some form of legal action against the owner/resident in breach. For noise and nuisance matters, this will typically mean enforcement through the mediation-arbitration process set out in section 132 of the Act.

So who are the actual parties to any such enforcement litigation? Consider a simple and typical example, as follows. Unit resident A complains to the Corporation that neighbouring unit resident B is creating noise (loud music). The condominium rules provide that owners/residents are not permitted to create noise etc. which disturbs the comfort or quiet enjoyment of other residents/owners. Resident B denies that any noise from his/her unit is loud or disturbing. Resident A is adamant and continuously complains to the Corporation and demands enforcement. The Corporation determines that enforcement steps against resident B are necessary. Typically the Corporation will commence the proceeding as the party seeking relief and Resident B (in this example) will be the defending or responding party.

So what happens to resident A in this example? Typically, as the complainant, resident A will be the main (and perhaps only) witness for the Corporation but will not be a party to the dispute. The following 2005 court case regarding a Condominium Corporation in Ottawa illustrates why the resident/owner who is complaining must also be brought to the table as a party to the dispute.

The owners of a condominium unit complained to the Condominium Corporation of noise which they attributed to the unit above them, owned and occupied by a Ms. Conroy. The unit owners below, referred to as "the Majors" in the court decision, argued that Ms. Conroy installed new hardwood flooring in her unit which was prohibited by the rules and regulations. Ms. Conroy denied that she was the source of the noise,

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NEWSLETTER TIPS

Condominium corporations that have Thyssen Krupp elevators and had to replace sheave jammers, the cost for which was not covered by the Ontario New Home Warranty Plan Act, major structural seven year warranty and compensated by Tarion, our partner in this process, the firm of Paliare Roland, has a web site to which you can refer for information on the status of this matter. The most current information is as follows: *"The first major hurdle in a class action law suit is to have the class "certified" by the court. This class action has been certified by the court. An appeal to overturn that certification, brought by Thyssen Krupp, has been denied. The law suit will now be moving forward."* To stay informed please refer to http://www.paliareroland.com/Elevator-Class-Action.asp and if you wish to have a specific question answered please use the following e-mail address info@elevatorclassaction.com.

CASE COMMENT

Hakim et al v. TSCC 1737 (2012) ONSC 404

by
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The Condominium Act's oppression remedy has been in effect for more than 10 years, but there is relatively little Ontario case law on it. A recent Superior Court case has tackled the subject head-on, and provides some useful guidance as to what will and will not be considered, oppressive conduct.

THE FACTS

Unit owners FH and JK purchased their unit at 18 Mondeo Drive from the developer in 2005. The purchase included a parking unit, and from 2005 to 2008 FH and JK parked their van in the garage without incident.

In February 2008, the van had an encounter with the garage door. This led to the Board of Directors issuing a notice to them advising that the Declaration restricted the height of vehicles in the garage to 1.9 meters. They were directed to cease parking the van in the garage.

FH and JK asked for an exemption from this restriction, presumably on the basis of non-enforcement. They also denied that their vehicle was responsible for the damage. The Board met with them in March 2008, declined their request for an exemption, but gave them until June 2008 to move their vehicle.

In April, a notice went out to all residents setting out the height restriction on vehicles in the garage. The notice advised that over-height vehicles might damage the sprinkler system. It further advised that as an accommodation, owners of over-height vehicles could apply for a permit to use outdoor visitor parking for up to 30 days. The case is not clear as to whether such permission could be granted more than once.

JK decided he wanted to run for the Board, and so advised the Board. In the run-up to the AGM, the Board served JK with notice submitting the height restriction issue to mediation. At the AGM, he was told that he did not qualify as a candidate for the board, as he had "pending litigation" with the corporation in accordance with the by-laws of the corporation.

In June, the Board had a steel beam installed at the garage entrance. This prevented oversized vehicles from getting through the garage door. This was later removed, as FH and JK established that it contravened municipal regulations. In the meantime, JK asked for a permit to park in the visitor parking spaces. This was originally denied by the Board, and then agreed to. At this point JK decided there was no place to park his vehicle in the corporation and he moved out.

NEGOTIATIONS

The corporation served notice to arbitrate the dispute in August 2008. In the arbitration, FH and JK were self-represented, and took the position that they should be grandfathered, as they had parked their vehicle in the garage between 2005 and 2008 without incident. The parties met in March 2009. The Board agreed to exempt FH and JK from the height restriction, provided FH and JK agreed to pay for any damage their van did to the garage. The Board also offered to issue monthly permits to JK to use the visitor parking until the matter was finally resolved.

Because of changes on the Board, the parties could not follow up on the March 2009 meeting until July 2009. At this meeting FH and JK suggested they wanted monetary compensation. This crystallized into a demand in August 2009, that not only should their vehicle be grandfathered, but they should also receive $150,000 in compensation.

The Board rejected this proposal and indicated the arbitration would proceed. In December 2009, the corporation counter offered by withdrawing their grandfathering proposal, and demanding that FH and JK sell their unit by June 30, 2010. Until then, they could park in visitor's parking, but after that date, they could not park the van anywhere on condominium property.

FH and JK rejected the proposal and stated that they would move from the condominium voluntarily. In their subsequent oppression application, FH and JK stated that this letter was "entirely sardonic and not sincere". But the Board took them at their word, and revoked the visitor parking permit effective January 31, 2010, rather than wait until June 30, 2010.

JK and his vehicle moved away again, but returned in June, allegedly to help his family move, and to that end, altered a parking permit so that he could park in visitor parking. FH and JK suffered several other indignities, in their view. They were advised that the wrong keys were issued to them originally, and required to pay for replacement keys. They refused. The corporation repinned their locks to correct the problem, and charged them back $2,373.00 for the repinning. When JK and FH refused to pay this charge, the corporation sued them in small claims court to recover the cost. The small claims judge dismissed the case on grounds that FH and JK were not at fault.

Even after they left the condominium, FH and JK felt they were being mistreated by the condominium, alleging that their tenant was being harassed, as she received continual complaints about her barking dog. She eventually moved out.

THE OPPRESSION APPLICATION

FH and JK launched an application against the corporation, claiming damages for oppression. They represented themselves, and laid out what they regarded as a whole long history of oppression by the corporation, right from the initial demand that their vehicle be removed from the garage, through JK's failed efforts to stand for a position on the Board, the protracted negotiations, the proffered and then retracted offer to grandfather their vehicle, the corporation's failed court action to have them pay for keys, and the alleged harassment of their tenant.

The Court dismissed their application and awarded the condominium corporation costs of $45,000 plus disbursements.

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THE COURT'S REASONING

While any oppression remedy application depends heavily on its own facts, some parts of the Court's judgment are instructive. Several times, the Court states that the Board must balance private interests against communal interests. The judge states that some prejudice or disregard of the applicant's interests is acceptable, provided it is not unfair. The Court must recognize that there is a balancing act involved, and must look at the conduct of the Board overall. The purpose of the oppression remedy is to protect reasonable expectations only, having regard to this balancing. And the Court is entitled to look not only at the Board's conduct, but also at the Applicant's.

The Court was unimpressed by the Applicants' decision to bring all of the Board's interactions with them under scrutiny as unfair, without acknowledging that they, the Applicants, were in breach of the Rules, and were being asked to comply in the same manner as were all other owners. Similarly, the Applicants' argument that proceedings against them were protracted was rejected. The Court took a very different view. The corporation was trying to compromise, to accommodate certain of the Applicants; demands. Any delays were part of reasonable and good faith efforts to balance the requests and interests of the applicants with the interest of other residents.

The argument that the placement of the steel beam in the parking garage was oppressive was similarly dismissed. The steel beam did not target the applicants alone, and for an action to be oppressive, it must target a single owner. The court also noted that the beam was installed because of legitimate concerns for protection the common elements, and emphasized that the Board sought legal advice regarding the issue.

The importance of, and the protection afforded by, acting on legal advice also appears in the Court's brief discussion of the Board's decision to serve notice to mediate on the Applicants in the face of JK's stated intention to run for the Board. The court emphasizes that legal counsel was sought, and that it was legal counsel who advised JK at the annual general meeting of the corporation that he was disqualified from running for the Board. The Court stated that, given the Applicants' adversarial approach, it was clear that litigation was inevitable, and declined to find any ulterior motive behind the action of the Board in serving notice to mediate.

The Court made it clear that invoking the oppression remedy invites the Court to look closely at the conduct of the Applicant. Here, the Court was clearly troubled by the applicants' demand for high monetary compensation, $150,000, when the corporation had offered to grandfather them. Similarly, the applicant's altering of a parking permit in July 2010 is sternly reproved, the court noting: that this incident of self help by the Applicants must be considered when the Applicants claim victimization, as it shows how far they are prepared to go in opposition to the corporation.

LESSONS TO BE LEARNED

Initially, it is surprising that the Court was not moved by the Applicant's argument that the vehicle height restriction must be grandfathered, as it was not enforced against anyone between 2005 and 2008. However, the hearing was held 3 years later, in 2011, and the evidence before the Court seems to have been that all owners were by that time complying with the restriction without objection, save and except the Applicants. The Court clarified that the oppression remedy does not require that the corporation act in the Applicants' best interests, but rather that the corporation balance fairly that interest against the communal interest.

Throughout the case report, it is evident that the Court took into account that the corporation was seeking and taking counsel's advice. This weighs heavily in the corporation's favour, as the Court stated that it could not find bad faith, or an ulterior motive, or (in the case of the failed small claims action) that the steps taken were unduly burdensome or acrimonious.

This case does not make any new law regarding oppression; indeed, it explicitly adopts the existing case law's statements regarding the kind of conduct which will be regarded as oppressive. However, looked at overall, it does appear to raise the bar on the kind of conduct which will result in a finding of oppression against the corporation. It also raises the stakes for any unit owner trying to make that case. The costs of being wrong, even if you self-represent, can be very high.

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NEWSLETTER TIPS

When we act for a purchaser of a condominium unit, the best advice that we give to the purchaser is to carry unit owner's insurance with the same company that insures the condominium corporation. By having the same insurer, there will be no holes in coverage. In addition, having the same insurer as the corporation facilitates settlement of any potential claim, as there is no one to whom the insurer can turn to for coverage except itself. We recommend that similar advice be given to all unit owners, where possible.

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but the Majors insisted that the property manager enforce the rules as against her. Ms. Conroy refused to attend the mediation of the disagreement.. The Corporation commenced a court application for an order that the dispute proceed to arbitration.

There was disagreement between Ms. Conroy and the Corporation regarding who should be appointed as the arbitrator of the dispute. The Majors stayed on the sidelines; they were not named as a party in the court application and they themselves did not attempt to get involved in the proceeding directly, nor did they appear in court. Right before the court application was heard, the respective lawyers for Ms. Conroy and the Corporation reached an agreement regarding the arbitration. Minutes of Settlement were signed, which provided for arbitration to resolve this dispute. The Majors were not parties to this settlement agreement.

The Corporation and Ms. Conroy agreed upon an arbitrator. Dates for the arbitration were suggested and fees determined. However, before a formal arbitration agreement was signed, the Majors informed the Corporation that they were not in a position to pursue this matter any further. Apparently, the Majors made this decision upon learning of the arbitrator's fees that they would be expected to share in paying. The lawyer for the Corporation informed the arbitrator there would be no arbitration of this matter.

Ms. Conroy then decided to commence a court application against the Corporation for a ruling that the above-mentioned Minutes of Settlement signed by her and the Corporation, is valid, binding and enforceable against the Corporation. Ms. Conroy sought various alternative court orders, all of which were meant to require the Corporation to reimburse her for the legal costs she had incurred in this matter.

The judge hearing Ms. Conroy's application for costs orders stated, in part, as follows:

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"In my view, it is justifiable to place some blame on the condominium [corporation] itself for the unsatisfactory manner in which the arbitration was approached and aborted. Getting so far down the track without having the complaining party, the Majors, committed to the process was a serious error…I suppose Ms. Conroy too, as a party by her counsel to the Minutes of Settlement including its final provision as to costs, must accept some responsibility for the dead end position she ended up in when the proposed arbitration was aborted."

The judge issued a costs award, in the reduced amount of $3,500, to be paid by the Corporation to Ms. Conroy. The judge noted that he would have imposed a costs award against the Majors too, had they been made a party to this court application. Because they were not named as a party, nor served or given notice of the court application, the judge ruled that he was unable to impose any share of the costs burden on them.

The above case is an excellent illustration of why the owner/resident complaining about the noise or nuisance etc. allegedly caused by another owner/resident, and demanding enforcement by the Corporation, must always be made a party to any enforcement step that the Corporation decides to take. Both the Corporation and the owner/resident who is alleged to be causing the noise, nuisance etc. should insist that the complaining owner(s)/resident(s) is/are a party to any enforcement process. In addition to avoiding the above outcome, the advantages of proceeding in this manner are as follows:

Firstly, it will be a very good initial indicator of how credible the position of the complaining unit owner/resident truly is. If the owner/resident who is complaining is aware that he/she could be responsible for some (or possibly all) of the legal costs incurred by the Corporation and/or the defending owner/resident, the complaining owner/resident will think twice before insisting on enforcement steps by the Corporation. This is especially important in cases involving only one owner versus another given the difficulty for the Corporation in assessing whose position is more credible. Secondly, and most importantly, if the complainant's position is determined (by a judge or arbitrator) not to be credible, and the Corporation is not successful in its enforcement proceeding, or (even worse) if the complainant backs out as a witness, the complainant will likely be responsible for some or all of the legal costs incurred by the other parties.

So why is the above relevant to condominium Boards and unit owners? Isn't this something that only lawyers have to be concerned with? Not necessarily. Many Corporations have provisions in their by-laws which provide that disputes between the Corporation and unit owners/residents must proceed to an informal negotiation meeting between the parties before a court or mediation-arbitration proceeding is commenced. In the vast majority of cases this negotiation meeting does not involve lawyers. Therefore, it is important to involve the owner/resident who is complaining in this initial negotiation stage so that it is understood that they are a party at the table from the very beginning.

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