Fall 2007

Let's Talk Condo...

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Announcements:

We are Growing
We are pleased to announce that David Ertl has joined Miller Thomson's Condominium Practice Group.

The *Living In A Condo* booklet, authored by Audrey Loeb, is available to clients of Miller Thomson's Condominium Practice Group in electronic format for inclusion in resident Welcome Packages.

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ONTARIO'S LEADING CONDOMINIUM LAW PRACTICE

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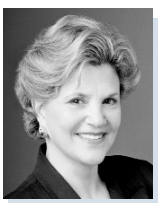
REPAIRS AND MAINTENANCE – ACTING REASONABLY



by
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A recent decision from British Columbia helps boards of directors deal with the issue of how much unit owners are entitled to expect when the issue of maintenance and repair arises and an owner is demanding that repairs be carried out which affect his or her unit.

In this case, the owner sued the corporation for failing to carry out repairs which resulted in damage to his unit, as well as for loss of rental income when the unit became uninhabitable. The owner sought a declaration from the court that the corporation failed in its statutory duty to repair and maintain the common property of the corporation. He also asked for: a declaration that the corporation had treated him in a significantly unfair manner, the appointment of an administrator, direction that the administrator immediately carry out repairs to his unit, and that he be permitted to pay his maintenance fees and any special assessments into court until an occupancy permit for his unit was obtained. It is noted that subsequent to the filing of the petition, the corporation had approved a special assessment in the amount of $77,000 to do repairs which the corporation said would then allow the owner to complete the interior repairs to his suite.

The owner complained that the repairs necessary for his unit to be habitable were not done in either a timely or an appropriate manner. He claimed that the failure of the building envelope had resulted in his suffering damages and financial losses due to the wet interior of his unit and the creation of a biotoxic mould infestation. This, he claimed, resulted in a loss of rental income, losses due to repairs that he had incurred, as well as depreciation in the value of his unit.

The corporation argued that it implemented a strategy recommended by its engineers and contractors and acted "reasonably throughout". The corporation argued that any delay which prevented interior repairs to the owner's unit was not as a result of any improper or unreasonable conduct on its part.

The owner's evidence was that the first indication of water penetration occurred in 1997 when his tenants reported water leaking into the unit. Roof repairs were done at that time by unlicensed and untrained contractors hired by the corporation. The water continued to leak and by mid-June 2000 his suite was uninhabitable. In November 2000 a proposal was put forward by an engineering firm which recommended

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The 2nd edition of "The Condominium Act: A User's Manual", authored by Audrey Loeb, is available from Carswell Publishing. To obtain a copy, please call: (416) 609-3800 or 1-800-387-5164, E-mail orders at carswell.orders@thomson.com; ISBN: 0-459-24273-3; $75.00

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a complete building envelope repair. This proposal was not accepted by the board. Shortly thereafter a proposal relating to engineering services solely for repair to the owner's unit was accepted by the board.

In January 2001 the board approved that the repair work be paid for out of the reserve fund. The company that had quoted on the remedial work to repair the problem in the owner's unit decided that it was not prepared to proceed on this limited basis and suggested that the corporation consult a professional to determine if there was a "premature envelope failure". The engineers advised the condominium corporation that unless it dealt with the full building approach it was not prepared to proceed with the remedial work.

In April 2001, the owner and others commenced an action against the board members in which it alleged mismanagement, negligence and bad faith. In June 2001, an administrator was appointed. The court held *that the board had acted reasonably except for its failure to carry out a proper examination of the exterior wall of the building even though there was evidence of a problem with water penetration. The board's duty to repair is tempered by the board's need to act reasonably. The board must consider the needs of all owners or at least a majority of the owners even if some owners will be negatively impacted as a result.*

The owner took the position that his interest was sacrificed to save money. The court stated as follows:

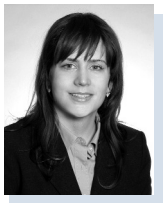
> *... The costs of the remedial work undertaken at Pendrell Place in the past decade and of the litigation which has been ongoing for far too long have been sizable and must have created an onerous financial burden for at least some of the owners. It is to be expected that one of the considerations in any case where expensive repairs to a building envelope are required will be the ability of the owners to finance those repairs. There is no evidence that any council member or any owner acted in furtherance of their own interests, financial or otherwise, in a manner which would lead to a conclusion that an action or decision of the corporation including the council was significantly unfair, as that phrase has been interpreted in the case law, to Mr. Oldaker.*
>
> *I therefore dismiss the owner's claim for a declaration that there has been a breach of S. 164 of the Act.*
>
> *The owner also argues that a fiduciary duty is owed by board member to the corporation as a whole. I am not inclined to the view that such a duty exists but as I consider the question to be academic, it is not necessary to decide the issue. I have already concluded that with one exception, there has not been a breach of s. 72 of the Strata Property Act and that there has not been a breach of s. 164. Given these findings, I cannot see any factual basis for a conclusion that a fiduciary duty, if such existed, was breached.*

In addition, the court found that there was no reason to appoint an administrator as the board had acted properly in all respects except for its failure to carry out a proper examination of the exterior wall of the building.

INSURANCE ALERT

There are many technical legal reasons why a condominium corporation may have expanded insurance obligations with respect to items that would normally be considered to be improvements and the unit owners' responsibility if a corporation has not passed a standard unit by-law. If your corporation has not yet passed a standard unit by-law, this should be made a priority of the board.

FIRING AN EMPLOYEE? SEEK LEGAL ADVICE *FIRST*



by
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Failing to dismiss an employee properly can leave a condo corporation open to substantial claims for pay in lieu of notice, bad faith damages, punitive damages, damages for breach of the *Human Rights Code*, damages for loss of benefits, and more. In some cases, the damages can add up to hundreds of thousands, or even millions, of dollars. In most cases, however, consulting an employment lawyer can help you to minimize the risk. This article will serve to alert employers of some of the issues they should be aware of and address before terminating an employee.

Employees can be terminated "with cause", or "without cause". An employee can only be terminated with cause when they have engaged in serious misconduct. It is

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not always clear what the Courts will regard as serious misconduct, but it is often quite different from the views of the employer. An allegation of just cause that is not upheld can lead to severe legal consequences for the employer; anyone considering terminating an individual for cause should seek legal advice before doing so.

Generally, employees who are terminated without cause must be given proper written notice, or termination pay instead of notice. The *Employment Standards Act* sets out minimum termination pay and notice periods that must be adhered to when terminating without cause. In addition, the common law requires that "reasonable notice" be provided; there is no black and white rule with respect to how the exact amount is determined. However, lawyers who specialize in employment law can provide their guidance. We recommend that employers have all employees sign employment agreements that specify the exact amount of notice that will be required in the event of termination. Doing so can eliminate the guesswork and reduce the costs of dismissing employees without cause.

Regardless of whether an employee is terminated with or without cause, employers should always ensure that they do not breach any provisions of the *Ontario Human Rights Code*. For example, employees with disabilities must be accommodated by the employer, unless the employer would suffer undue hardship as a result of the accommodation. Because of this requirement, termination of a disabled employee can put an employer at legal risk. Similarly, under the *Employment Standards Act*, employers may not terminate an employee because he or she has taken, or plans to take, a pregnancy, parental, personal emergency, declared emergency or family medical leave.

Employers should also be aware that they can be penalized for the manner in which they terminate an employee. Employers who terminate employees in a malicious or callous manner, or exhibit blatant disregard for the employee in the course of termination, can be ordered to pay damages over and above the requisite pay in lieu of notice.

These are only a few of the pitfalls an employer can encounter when navigating the termination process. Condominium corporations should be aware of these, and seek out appropriate legal advice. Ideally, they should protect their interests by having appropriate employment agreements, policies and procedures in place. Property management companies, while experienced in the industry, are not legal professionals and therefore are not a reliable source of legal advice.

For assistance with the termination of employees, or any other workplace matter, contact your Miller Thomson LLP Labour and Employment lawyer. For contact information visit our website at www.millerthomson.com.

MANAGEMENT AGREEMENTS – ARE YOU PROTECTED?

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Lately, we are seeing an increasing number of situations where condominiums are having problems that stem from rights given to managers in management contracts which do not properly protect the interests of the corporation.

Here is a list of three of the many areas of management contracts that should always be reviewed by a solicitor:

1. Authority - Is the authority of management to sign contracts and cheques on behalf of condominium adequately limited? Too many contracts give management almost unlimited authority to bind a corporation.

2. Termination - When can the management agreement be terminated? Does there need to be cause? What are the obligations of management on termination? A condominium corporation should be able to terminate a management agreement without cause and the agreement should adequately set out management's responsibilities upon termination, including but not limited to, handing over documents, corporate seals, post-dated cheques, transfer of bank accounts, etc.

3. Insurance and Indemnity - Is management required to have adequate insurance in place and does the contract include sufficient indemnification provisions? Some managers rely on the corporation's insurance policies for coverage and are not themselves adequately insured.

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TSSA ADVISORY REFERENCE NUMBER FS-101-07

A TSSA Advisory Reference Number FS-101-07 dated April 16, 2007 and the clarification notice for Advisory FS-101-07 apply to plastic vent piping servicing gas fired appliances. The TSSA Advisory and Clarification Notice deal with the adoption of the 2007 Supplement to the National Natural Gas and Propane Installation Code (B149.1S1-07), on August 1, 2007. The Code Supplement requires that all plastic piping servicing gas-fired appliances will have to be certified to ULC S636 "Standard for Type BH Gas Venting Systems". The code change will affect new gas-fired appliance installations, as well as replacement installations. New appliances will require a certified ULCS S636 Plastic Venting System. For replacement installations, when a new appliance is replaced, the existing plastic venting must be completely replaced with a certified ULC S636 Plastic Venting System. The code change is not retroactive for existing appliances, and their plastic venting systems do not require replacement until replacement of the appliance is required.

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