Condo Cases across Canada

I have been asked, and it is my pleasure, to provide these brief summaries of recent court decisions across Canada, respecting condominium matters. I don't provide summaries of every decision rendered. I select a handful of decisions that I hope readers will find interesting. I hope readers enjoy this regular column of the CCI Review.

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THE HOT TOPIC: NO COVERAGE UNDER DIRECTORS AND OFFICERS LIABILITY INSURANCE POLICY

Boland v. Allianz Insurance Co. of Canada (Ontario) (May 19, 2006)

Condominium owners sued the condominium corporation and other parties for alleged defects in the construction of the attics. The condominium corporation, in turn, sued a previous director of the condominium for failing to disclose the alleged defect. The director then sought the protection of the corporation's Directors and Officers Liability Insurance policy. (That insurance policy had been arranged after the director's time on the board.)

The Court said that there was no coverage for these claims under the Directors and Officers Liability Insurance policy, because, at the effective date of the policy, the condominium corporation had knowledge of the attic problem and could reasonably foresee that this might result in a claim.

[Editorial Comment: This case demonstrates one of the important difficulties with Directors and Officers liability insurance (D&O Insurance). The difficulty is as follows: D&O Insurance generally will not cover claims if the corporation could reasonably foresee the claim (i.e. the potential claim was known) at the time the insurance is obtained. When making the insurance application, the corporation normally must tell the new insurer about any known potential claims. The insurer will normally refuse coverage for those sorts of existing, known risks. And if the known risk (the known potential claim) is not mentioned in the insurance application, the policy will usually say that there is no coverage for that undisclosed potential claim (when it becomes an actual claim).

Note as well that the previous insurer (the insurer at the time of the mistake) likely has no responsibility. D&O Insurance is normally "claims made" insurance. This means that the insurance only applies to actual claims made during the term of the insurance (or during any extension period provided under the policy).

So the bottom line is as follows: If there is a "known potential claim" at the time a condominium corporation arranges or changes D&O Insurance, there may be no insurance coverage for that claim (when it arrives).

Other Ontario Cases

Niedermeier v. York Condominium Corp. No. 50 (June 23, 2006)

Terminating owner's access to common rooms not oppressive

After causing damage to the common elements, the unit owner refused to fully indemnify the condominium corporation for the resulting repair costs. After a number of demands for payment, the corporation removed the owner's rights to access the lounge, library, exercise room and sauna.

The owner submitted that he had an absolute right to use the common elements and he asserted that the corporation's denial of access to some of the common elements constituted oppression. The owner applied, under Section 135 of Ontario's Condominium Act, 1998, for various oppression remedies, including reimbursement of common expenses as compensation for denial of access to the common elements. The Court dismissed the application. The Court said:

"Although the corporation acted without authorization from the Act, or an express rule or policy, I am not satisfied that there was the requisite abuse of power or harsh and wrongful conduct to bring the oppression remedy into play…While the steps chosen by the corporation may be subject to criticism for not following written policy, Mr. Niedermeier's conduct in this matter is not above reproach, for failing to pay a debt that was, by written policy, due to the corporation."

Metro Toronto Condominium Corporation No. 545 v. Stein (Ontario Court of Appeal - June 21, 2006)

Decision upheld on appeal

At the lower court level, the condominium corporation was unsuccessful on its application for an order allowing the corporation entry (to residential units) in order to carry out mould remediation on fan-coil units. The lower court was not satisfied that the corporation's proposed remediation work was necessary or that the less expensive remediation proposed by the owners was insufficient.

The condominium corporation appealed

to the Ontario Court of Appeal. The Appeal was dismissed. In dismissing the Appeal, the Court of Appeal considered the application of the principles in the case of York Condominium Corporation #382 v. Dvorchik. In the Dvorchik case, the Court of Appeal said that the courts should give deference to the views of elected condominium boards respecting the propriety of rules for the condominium community, unless the rules are clearly unreasonable or contrary to the scheme of the Condominium Act. The Court of Appeal said that these principles do not apply in this case because this was not a case about a condominium rule. This was a case about the responsibility of unit holders to maintain their units. The Court said:

"The corporation only has the authority to interfere with and override these unit holders' responsibilities and obligations where the unit holder has failed in his obligation to such a degree that a risk outlined in Section 92(3) or a condition likely to damage the property or cause injury to an individual as described in Section 117 is allowed to exist and continue."

"As the statutory rights and obligations of both parties are engaged, a careful balancing is required. There is no statutory or principled reason why deference should be afforded to the corporation's decision on the facts of this case."

Wentworth Condominium Corporation No. 66 v. Margaret Hamilton (May 24, 2006)

Rule prohibiting dogs over 35 pounds upheld

The condominium corporation passed a rule prohibiting dogs weighing more than 35 pounds. The Court held that the rule was enforceable (based on the principles laid down by the Court of Appeal in York Condominium Corporation No. 382 v. Dvorchik). However, although the condominium corporation was successful in its application against the owner of a large dog, the Court did not award any costs to the condominium corporation, because the Court found that there were some "mistakes in recording the passing of the rule changes".

Alberta Cases

Condominium Plan No. 982-2595 v. Fantasy Homes Ltd. (May 3, 2006)

Special assessment against one unit found to be valid

A reserve fund study, arranged by the condominium corporation, identified $82,000 worth of original building deficiencies. The developer, Fantasy, continued to own a unit in the condominium. The condominium corporation passed a by-law establishing the special levy in the amount of $82,000 and requiring that it be paid by the one owner, Fantasy.

The Court said that this special levy was permitted by Section 39(1)(c) of the Condominium Property Act. The Court also said that this was fair and consistent with the purposes and objectives of the Act. The Court said:

"Having regard to the purpose and the objectives of the Act, I have no difficulty concluding on the basis of fairness that this is a proper circumstance for allocation against one owner's unit albeit arising from what appears to be misconduct of that owner as a developer. I am bolstered in my view in reaching this conclusion as otherwise the developer would retain a benefit for itself by in effect taking a profit while failing to meet its obligations to the condominium corporation which by definition is all of the owners including the developer as owner."

Nova Scotia Case

CitiGroup Properties Ltd. v. Halifax County Condominium Corporation No. 54 (Nova Scotia Small Claims Court - May 16, 2006)

Management Agreement not properly terminated

Under the terms of the Management Agreement, either party could terminate the agreement at any year-end, upon 90 days written notice to the other party. In addition, the condominium corporation had the right to terminate the agreement at any time upon 60 days written notice to the manager, in the event of a substantial breach on the part of the manager.

The condominium corporation did not exercise the 90-day termination right. Instead, the condominium corporation subsequently purported to terminate the agreement on 60 days notice based upon the manager's "substantial breach". The Court found that the manager's failings did not constitute a "substantial breach" on the part of the manager. The condominium corporation accordingly was not entitled to terminate the agreement and the manager was entitled to one year's worth of property management fees.

British Columbia Cases

Dimitrov v. Summit Square Strata Corporation (June 21, 2006)

Fines not properly levied against owner

The Strata Corporation imposed fines upon the owner, based upon the owner's continued violation of the corporation's by-law prohibiting pets. The fines were upheld by the Small Claims Court. On appeal, the British Columbia Supreme Court said that, under Section 135 of the Strata Property Act, fines cannot be imposed until the owner has been given the opportunity to answer the complaint. This requirement had not been met in this case and the fines were accordingly found to be invalid.

Schaper-Kotter et al. v. The Owners, Strata Plan 148 (April 24, 2006)

Equal sharing of common expenses not oppressive

Two Strata Plans were amalgamated. Prior to amalgamation, each of the Strata lots had an equal unit entitlement of one. Following amalgamation, this equal sharing was continued. However, there were significant differences in the habitable square areas between the Strata lots in the two amalgamated Strata Plans.

Some of the Strata owners petitioned for an order that the contribution to the common expenses should be based upon the habitable square area of each Strata lot. The Court dismissed the petition, for the following reasons:

a. Section 246 (7) of the Strata Property Act did not apply because the unit entitlements had not been calculated on the basis of habitable area. (If the unit entitlements had been calculated on the basis of habitable area, any inaccuracy could be corrected under that section).

b. The Court was not satisfied that equal sharing was "significantly unfair".