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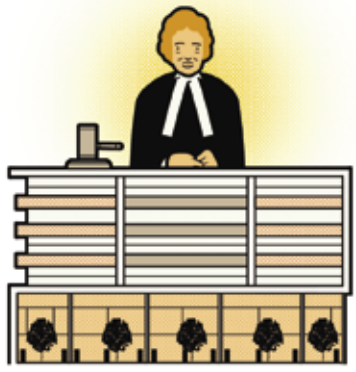
Case Law Update

Decisions From the Courts



- Enforcement for Necessary Work Must be Reasonable
- Short Term Rental Fight: "Rule 9" vs. "The Declaration"

Toronto Standard Condominium Corp. No. 1724 v. Evdassin, [2020] O.J. No. 1263

If you live in a condominium, you have probably heard of 'Kitec'. If not, consider yourself lucky. For those unaware, Kitec is a plastic piping system with a flexible aluminum lining historically used in construction as an alternative to copper pipes. However, due to a flaw in design, Kitec was manufactured with a high level of zinc content, sometimes resulting in the spontaneous failure of hot water lines employing the piping, usually by way of a pipe burst with high-volume flooding. As a result, Kitec was deemed inherently defective, and was recalled in 2005.

Kitec was an approved construction product when many condos were constructed. While some have experienced minimal or no complications for over 20 years, others have seen some serious issues created by Kitec and its sudden failures, especially where the pipe burst occurs on a high floor. As a result, many condos who have discovered the presence of Kitec have determined that the risk resulting from a failure of the piping would best be averted by removing and replacing all Kitec with a modern equivalent with a lower chance of failure, which has, unfortunately, been an area of controversy and led to increased costs for many owners.

The *Evdassin* decision revisits the issue of the control that a condo can assert over facilities (in this case, Kitec piping) that lie within an owner's unit, and which would be normally be the responsibility of the unit owner to maintain and repair.

In *Evdassin*, TSCC 1724 discovered that Kitec piping had been utilized during its original construction in 2017. To mitigate against potential risk, the condo decided on the mandatory replacement of all Kitec pipes in its building. Unit owners were responsible for the cost to replace the Kitec in their own units, but TSCC 1724 concluded that it would be most efficient and economical for it to oversee the Kitec replacement, and engaged its contractors to complete the work on behalf of its owners.

Mr. Evdassin was given notice that the work to replace the Kitec in his unit would start in January 2019. However, when the contractors arrived, he refused to let them into his unit. The work was rescheduled to March 2019; however, Evdassin again refused entry to TSCC 1724's contractors, and the Kitec in his unit was not replaced. As Kitec failures are typically spontaneous, Evdassin's refusal to permit the removal and replacement of the Kitec within his unit resulted in the existence of a condition that could cause damage to the other units and TSCC 1724's common elements.

TSCC 1724 subsequently commenced an application under Section 134 of the *Condominium Act, 1998*, seeking an order requiring Evdassin to replace his pipes, or, in the alternative, requiring him to pay for TSCC 1724 to do so. TSCC 1724 also sought an order that Evdassin refrain from interfering with its contractors, if the replacement was to be completed by TSCC 1724, as well as various other orders prohibiting Evdassin from harassing anyone employed by or at TSCC 1724, or interfering with work in the future. In response, Evdassin denied that he had refused entry and all allegations of harassment.

Upon hearing the Application, the Court accepted that the continued presence of Kitec pipes in Evdassin's unit created a risk of serious property damage upon failure, and therefore held that TSCC 1724 was entitled to require Evdassin to replace the Kitec in his unit. Because TSCC 1724 was prepared to complete

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the work on Evdassin's behalf, the Court ordered Evdassin to allow TSCC 1724's contractors to enter his unit, and confirmed that he would be responsible to pay all costs incurred by TSCC 1724 to complete the work.

With respect to the remaining issues, the Court found that Evdassin had interfered with the contractors retained by TSCC 1724 to replace the pipes, and agreed to grant an order that he refrain from doing so going forward. While the Court also found that there was evidence that Evdassin had been rude to TSCC 1724 staff and contractors in the past in contravention of both the Act and TSCC 1724's Rules, it confirmed that it was not satisfied that further broad, indefinite orders restricting Evdassin's future conduct were necessary, particularly because there was no evidence that such misconduct had persisted. Additionally, the Court found that: 1) much of the conduct complained of by TSCC 1724 was not particularly serious – there was no evidence of a pattern of conduct; and 2) there was no evidence of any problems or concerns since July 2019. In fact, the Court found that the evidence demonstrated that Evdassin ultimately responded to requests by TSCC 1724 to comply.

While the Court noted that it did not want to be seen as condoning Evdassin's conduct, it also expressed concern regarding the breadth of the compliance orders sought by TSCC 1724, finding that many were not responsive or proportionate to the conduct alleged, and instead likely added to the animosity between the parties. Accordingly, TSCC 1724's application was granted in part.

Author's Note: *As the deemed occupier of the common elements, TSCC 1724 was entitled to consider the security and liability implications for users of the common elements, as well as was required to consider the impact of the unit owner's failure to replace the Kitec in his unit on the interests of other unit owners. This case serves as a reminder that condos have a residual right of entry to the units to perform inspections or complete their own duties or objects, and especially where an owner fails to complete work necessary to maintain their unit and that failure presents a potential risk of property damage. This case also reinforces that enforcement efforts undertaken by a condominium must be reasonable; otherwise, they will be open to scrutiny by the Court.*

Kumar v. Toronto Standard Condominium Corp. No. 2492, [2020] O.J. No. 647

In Canada, the short-term rental market has grown rapidly, while continuing to operate largely in a legally 'grey' area. While many governments are still trying to figure out what to do with the influx of short-term rentals, the swift growth of the market has led to increasing concerns about consistent standards and the safety of owners and communities, especially within condominium corporations. In *Kumar*, a dispute arose over whether short-term rentals could be restricted by a rule, when permissive language existed within TSCC 2492's Declaration.

TSCC 2492 was developed by Daniels and registered as a condominium corporation in February 2016. At the time of its regis-

tration, Section 5.3 of TSCC 2492's Declaration contained wording stating that "some units, in addition to any other uses permitted herein, may also be used for business of providing residential accommodation on a furnished and/or unfurnished suite basis … through daily, short-term or long term license/lease arrangements … and the foregoing shall not in any way restrict any Owner, or a property manager acting on behalf of any owner, from leasing or renting any Residential Unit(s) in the Condominium from time to time, for any duration and on any number of occasions … ." However, Rule 9(f) of TSCC 2492's Rules also provided that, "Subject to the provisions in the Declaration, unless the prior written approval of the Board has been obtained, no lease shall be for a period of less than six (6) months."

Despite the contradictory wording within TSCC 2492's governing documentation, the Board did not permit short-term leasing from the outset, and continued to apply and enforce Rule 9(f). However, several unit owners remained under the impression that the short-term leasing of units was permitted at TSCC 2492. In order to obtain clarity on the situation, the Board consulted with Daniels. Daniels advised that it had originally intended to hold back some units for itself and rent them out, but never did so. Section 5.3 was intended to cover this situation, and should therefore have been removed from the Declaration given that Daniels did not proceed.

As a result of Daniels' explanation and its desire to clarify how short-term leasing would be addressed in the building going forward, TSCC 2492 commenced an application in March 2018 seeking to correct its Declaration by deleting s.5.3. However, the application judge expressed concern that TSCC 2492 was not seeking a correction so much as an amendment, and held that the more appropriate route was for the Board to seek approval from the owners for a change to the Declaration. The Board decided to take this advice, and set about seeking the approval of 80% of its owners required to amend the Declaration. At the same time, it continued to enforce the Rule against short-term leasing. It was transparent about both positions, announcing and discussing them with the owners after the court hearing. However, mainly due to a lack of response from owners, the Board was unable to achieve the required 80% approval required.

In February 2019, two unit owners commenced an application under Sections 134 and 135 of the Condominium Act, 1998, arguing, among other things, that: 1) s.5.3 of TSCC 2492's Declaration permitted short-term leasing; 2) Rule 9(f) was invalid because it contradicted the Declaration; and 3) the Board was behaving in an oppressive fashion in enforcing it. The owners sought declarations that short-term leasing was permitted and that TSCC 2492's conduct amounted to oppression, as well as an injunction prohibiting TSCC 2492 from preventing short-term leasing going forward. TSCC 2492 defended the application, arguing that Rule 9(f) could be read consistently with its Declaration, and that in applying the Rule to prohibit short-term leasing, the Board was well within a reasonable range of options available to it.

In consideration of the owners' application, the Court found that the Board had acted diligently and in good faith by seeking advice from Daniels, and by ultimately bringing a Court application seeking to remove any ambiguity from the situation. The Court also agreed with the Board's interpretation of s.5.3 of the declaration as permitting short-term leasing, but not to require that it be permitted, or to prohibit any conditions being placed on short leasing. The Court ultimately concluded that there was no basis for it to intervene, finding that it was open to TSCC 2492 to make rules to place limits on how leasing may occur without being inconsistent with the Declaration.

Finally, the Court noted that the fact that the Board had not always provided consistent explanations for its application of Rule 9(f) did not mean that it had behaved unreasonably, let alone in an oppressive or unfair fashion. To the contrary, the Court found that it was anticipated that explanations would evolve as circumstances changed, and that the Board had been consistent and unequivocal in that the Rule prohibiting short-term leasing applied to everyone. In all the circumstances, the Court agreed with TSCC 2492, and dismissed the owners' application in its entirely.

Author's Note: *There is an abundance of case law recognizing that decisions rendered by boards of condominium corporations should be shown some deference. As representatives elected by the unit owners, directors are generally better placed to make judgments about their community interests and to balance the competing interests engaged than are the Courts. In the absence of unreasonableness, deference should be paid to rules deemed appropriate by a board charged with the responsibility of balancing the private and communal interests of its unit owners. This case also revisits the difficulty experienced by many condos in achieving the 80% consent required by Section 107 of the Condominium Act, 1998, to amend the Declaration. While most owners are generally not opposed to the amendment proposed, the problem remains the lack of response or general engagement of unit owners.* CV

From the Guest Editor

– *Continued from page 5*

networking event in late April with 30 condo directors participating online to share their COVID-19 experiences. If there was a silver lining in this pandemic, it was to hear the heartwarming stories of how communities came together in a time of crisis. We have included a recap of those stories in the committee report section of this issue of the magazine.

By the time we go to print with this issue of the magazine, it is hoped that we may be starting to see a call from health officials for some of the social distancing and isolation measures to ease, but it will likely be some time before life gets back to 'normal'. Let's let our take-away from this pandemic be to be kind to one another, to take care of ourselves and the planet – and always, always remember to thank the helpers in our communities!

Stay well.

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