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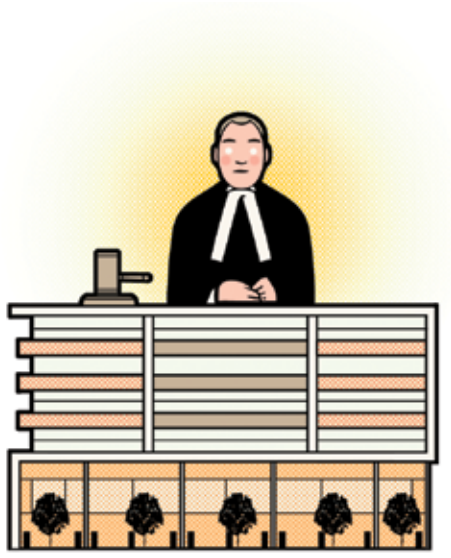
Case Law Update

Decisions From the Courts

- A "Vexatious Litigant" is Voted Off the Board
- Redacted and Unredacted Copies of the Records
- Opressive Action?



Swan v. Durham Condominium Corporation No. 45, 2019 ONSC 1567

Leslie Arthur Swan ("Swan") was a unit owner in Durham Condominium Corporation No. 45 ("DCC 45"). He was elected to the board of directors of DCC 45 (the "Board") in June 2009 and served as the President of the Board. His term, however, was very brief. Only three months after his election, Swan was removed from the Board by a vote of the unit owners.

In May 2010, DCC 45 commenced an application against Swan for the following:

- An order requiring Swan to remove a satellite dish that he had affixed to the common elements appurtenant to his unit under Section 134 of the Condominium Act, 1998 (the "Act");
- A declaration that Swan had breached the applicable standard of care as a director contrary to Section 37(1) of the Act; and
- A declaration that Swan was a vexatious litigant pursuant to Section 140 of the Courts of Justice Act.

In June 2012, DCC 45 obtained a declaration that Swan had breached section 37 of the Act during his tenure on the Board. However, the Court declined to make an order declaring that Swan was a vexatious litigant and found that the relief sought in relation to the satellite dish was moot because Swan had removed it by the time of the hearing. DCC 45 was awarded $45,000 in partial indemnity costs. For the next seven years, the Corporation and Swan were engaged in litigation over whether Swan was entitled to be indemnified for such costs. The Court ultimately found that Swan had acted in bad faith and was not entitled to be indemnified.

In February 2013, DCC 45 registered a lien against Swan's unit in the amount of $225,841.81 for the chargeback of legal costs (the "Lien"). No steps to enforce the Lien were taken while Swan's appeals of the costs award were pending. Nonetheless, DCC 45 sought an assessment of those legal accounts, which resulted in a 38% reduction in fees. In August 2018, DCC 45 advised Swan that the total amount owing in respect of the Lien was $134,064.80.

Swan commenced this court proceeding to vacate the Lien. The Court had some concerns respecting DCC 45's claim under the Lien and ordered DCC 45 to recalculate the amount that it is entitled to claim against Swan. While the Lien was discharged, DCC 45 was permitted to register a new lien based on the revised amount.

Specifically, the Court was concerned that DCC 45 included the legal costs relating to its application for an order declaring Swan a vexatious litigant in the Lien. Such costs cannot be claimed under Section 134 of the Act because they were not incurred as a result of DCC 45's efforts to secure Swan's compliance with Act.

The Court clarified that an "order" under Section 134 of the Act includes a declaratory judgement that a director breached his or her duties under Section 37 of the Act. The Court reasoned that DCC 45 incurred legal costs in attempting to ensure Swan's compliance with the Act in his capacity as a director, and so Swan is responsible for the legal costs of obtaining and maintaining such order (given his numerous appeals of same). This reasoning indicates that courts seek to protect innocent unit owners from the financial burden of enforcing compliance with the provisions of the Act.

ILLUSTRATION BY JASON SCHNEIDER

The Court also confirmed that costs can be awarded against a unit owner pursuant to Section 134 of the Act even if the disputed conduct had been rectified prior to the hearing of the application. This is important for condominium corporations to note, since the legal costs of bringing an application to enforce compliance could be significant. Again, the Courts are clear that innocent unit owners ought to be shielded from such costs.

Author's Note: *The Court found that Section 134 of Act does not permit the costs of a "compliance letter" to be added to the Lien because no proceeding was commenced in relation to the conduct of that letter and no award of costs or damages were made. However, a condominium corporation may have the authority to charge back the legal costs of compliance letters pursuant to its Declaration, By-Laws, and / or Rules.*

Emerald PG Holdings Ltd. v. Metro Toronto Condominium Corporation No. 2519, 2019 ONCAT 5

Emerald PH Holdings Ltd. ("Emerald") is the owner of two commercial / retail units in Metro Toronto Condominium Corporation No. 2519 ("MTCC 2519"). We assume that the condominium corporation was mistakenly named and is Toronto Standard Condominium Corporation No. 2519, but will refer to same as MTCC 2519 for the remainder of this article. Emerald applied to the Condominium Authority Tribunal (the "CAT") for the production of an aged receivables report and a spreadsheet setting out the details of revenue received by Enercare (the "Records").

MTCC 2519 refused to provide access to and copies of the Records by relying on Section 55(4)(c) of the Condominium Act, 1998 (the "Act"), which exempts condominium corporations from disclosing information related to specific units or owners, and claiming that Emerald's request for the Records did not reasonably relate to the purpose of the Act.

It is not disputed that the Records contained information which relate to Emerald, as well as other specific units and owners. Respecting MTCC 2519's refusal on the basis of Section 55(4)(c) of the Act, the CAT determined that Section 55(5) of the Act gives owners the right to examine records which, in part, relate to them. The CAT found that Emerald was entitled to redacted copies of the Records.

This distinction between redacted and unredacted copies of the Records is important. MTCC 2519 previously provided Emerald with unredacted copies of its financial statements, which included information relating to other specific units and owners. The CAT noted that such disclosure may be in breach of the Act, and that such conduct does not now create an obligation on MTCC 2519 to provide unredacted copies of similar records.

Respecting MTCC 2519's refusal on the basis that the request does not reasonably relate to the Act, the CAT reiterated that owners are not required to specify a purpose when making a request for records. Further, it is the condominium corporation's responsibility to explain or show how the request does not relate to the purposes of the Act. In this case, MTCC 2519 did not participate in the hearing process and did not satisfy this evidentiary burden. Accordingly, the CAT rejected this basis for refusal.

Emerald argued that a penalty of $1,000 should be awarded against MTCC 2519 for its failure to join the case and its "cavalier, unreflective and relatively unargued refusal" to provide the Records. The CAT dismissed this argument because MTCC 2519 did not willfully disregard the request for records or remain willfully blind to its legal requirements under the Act. In fact, MTCC 2519 granted access to and provided copies of most of the records that Emerald had originally requested. With respect to the Records, the CAT found that MTCC 2519 did not act "without reasonable excuse" since it provided reasons for its refusal. Ultimately, the CAT awarded costs to Emerald and no penalty against MTCC 2519.

Author's Note: T*he CAT has previously awarded penalties against condominium corporations that do not participate in the hearing process. This case suggests that condominium corporation may not penalized for its failure to participate if it satisfactorily met the requirements of the Act and Regulations in its initial response to a records request.*

Toronto Standard Condominium Corporation No. 2051 v. Georgian Clairlea Inc., 2019 ONCA 43

How far can a Declarant go in self-dealing arrangements when it controls the board of a condominium?

When Toronto Standard Condominium Corporation No. 2051 ("TSCC 2051") was created, developed, the Declarant intended to have the HVAC systems leased from a third party.

Partway through development, after some units had already been sold, the Declarant changed its mind and decided to buy the HVAC equipment and sell it to TSCC 2051. It bought and installed the HVAC systems, then signed a mortgage between TSCC 2051 and itself.

Since the Declarant controlled the board of directors of TSCC 2051 (the "Board") at the time, it was signing both sides of the mortgage.

The Declarant decided that a mortgage in the amount of $2.2 million at 10%/annum was fair.

At the time TSCC 2051 was registered, the Declarant faced a second dilemma. 32 parking units, 16 storage units and two combination parking/storage units were unsold. Since it had sold all or almost all the residential units in the building, the market for these units was non-existent.

The Declarant decided that TSCC 2051 would buy them. To purchase them, TSCC 2051 gave the Declarant a vendor take-back mortgage in the amount of $1.0 million at 10% per annum.

Once again, the Declarant signed both sides of the mortgage.

After unit owners gained control of the Board, they realized what had been done in their name. TSCC 2051 brought an action for oppression against the party that owned the mortgages.

After a summary judgment motion, the Superior Court found that both mortgages were oppressive and insufficiently disclosed and reduced their principal balances.

The HVAC mortgage was reduced to $652,050, a number consistent with the actual cost of the HVAC equipment. The parking unit mortgage was reduced even further to $73,000.

Both findings were appealed to the Court of Appeals. The Court of Appeals upheld the original finding in each case.

The Court's Reasoning

The Declarant argued to the Court of Appeals that (a) the mortgages were immaterial and (b) that its disclosure was clear. The Court of Appeals made short work of these arguments, finding that mortgages in the amounts of $2.2 and $1 million were clearly material.

The Court of Appeals agreed with the motion judge that the Declarant's disclosure was confusing, finding that the mere fact that purchase could have found the mortgages by conducting a title search or calculated the amount by figuring out how many parking units remained unsold was not enough to make the disclosure clear, as required by s. 74(3) of the Condominium Act, 1998 (the "Act").

The Court of Appeals noted, in particular, that the letter intended to provide the summary of particulars required by s. 74(3) of the Act pointed buyers to the revised budget, but the revised budget did not reveal the mortgage payments.

The Court of Appeals also upheld the findings of oppression.

It agreed with the motion judge that the sale of the HVAC equipment along with the wires and pipes was oppressive because it violated the unit owners' reasonable expectation that they had bought the wires and pipes connecting the HVAC with their individual units. Using the Declarant's control of the Board to force this sale was, in the court's view, oppressive. The Court of Appeal found it entirely reasonable to reduce the mortgage to the amount spent for the HVAC.

Similarly, the Court of Appeal agreed that it was oppressive for the Declarant to use its control of the Board to offload unsold parking units at much higher prices than they could ever be marketed for later. The Court also noted that the Declarant had structured the mortgage so that it would not appear on the first-year's budget. It was entirely reasonable to reduce the principal of the mortgage to the fair market value of the parking units.

In this case, the Declarant combined lack of disclosure with oppressive conduct. The Court of Appeals did not opine on whether the conduct would have been oppressive if it had been clearly disclosed, but the requirement for a violation of reasonable expectations lends some support to the idea that conduct might not be oppressive if it was openly and clearly disclosed.

Author's Note: *This case suggests, at least, that a sufficiently brazen Declarant might have succeeded in foisting these terrible mortgages on TSCC #2051.* CV

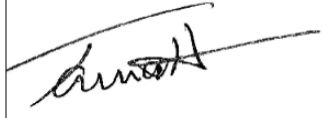
President's Message

Continued from page 3

When this edition goes to print, we will have attended the CCI National Leaders Forum, a semi- annual conference for all CCI chapters to share information across the country on topics that impact all of us on the same level, regardless of differing legislation or regulations. This is an exciting reboot for the board to glean information from other provinces and find solutions for common problems and concerns that we can share with you. Toronto is hosting the Fall forum which coincides with our 30th anniversary, stay tuned for s'more details for that celebration.

We hope you have enjoyed the monthly legislative updates and e-blasts to keep you informed on areas outside of the Condo Act which may impact your condo community. This is part of our mandate to support condominium communities to be financially and socially successful.

Enjoy s'more summer, apply sunscreen and be excellent to each other! We'll see you at the annual Condo Conference in the Fall.



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