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Condo Alert!

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Top 10 Condo Law Cases of 2012

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It's time for our annual tradition of looking back at the past year of cases decided by Ontario courts and tribunals and highlighting a few noteworthy items.

10. ***Pearson v. CCC 178***
2012 ONSC 3300

Indemnification clauses contained in condo declarations, by-laws and rules do not permit condo corporations to recover (as common expenses) legal costs incurred in defending against small claims court actions brought by unit owners. The court vacated a lien registered by the condo to secure collection of its legal costs incurred where the small claims court dismissed the unit owner's action against the condo but did not award the condo any costs.

9. ***YCC 42 v. Hashmi***
2012 ONSC 4533

After six years of court-appointed administration, the unit owners of YCC 42 voted overwhelmingly in favour of returning to self-governance but needed the court to give detailed directions on conducting the first election of directors. Given that director elections are amply governed by the *Condominium Act, 1998* and the corporation's own by-laws, the fact that a court ruling was required does not bode well for this condo's successful rehabilitation from administration. Let us hope that these unit owners have learned the lesson to pay attention to the goings-on at their condo and, further, to ignore the siren song of "vote for me and I'll reduce your condo fees" which brought this condo and others like it to the brink of disaster.

8. ***MTCC 1352 v. Newport Beach Development Inc.***
2012 ONCA 850

In a detailed discussion on the nature of the Tarion warranty conciliation and decision-making process, the Ontario Court of Appeal confirmed that an unsuccessful attempt to address construction deficiencies using the Tarion processes does not prevent a unit owner or condo corporation from subsequently bringing a lawsuit to deal with those deficiencies, so long as an appeal of the Tarion ruling is not heard and decided by the License Appeal Tribunal. Condo corporations need to get legal advice at an early stage on how to pursue claims for construction deficiencies.

7. ***Boily v. CCC 145***
2012 ONSC 1324

Where the condo corporation breached a settlement agreement made with unit owners, the court found that the directors had acted in bad faith and were liable personally for the legal costs incurred by the unit owners in enforcing the settlement. This is among the first instances where such a costs ruling was made and is probably not the last. While any decision that visits personal liability on condo directors might potentially scare people away from holding office, an effective deterrent is needed for directors who abuse their powers and improperly squelch owners' democratic rights. This type of ruling is long overdue.

6. ***MCC 232 v. Owners***,
2012 ONSC 4819

Faced with an increasingly unhappy ownership, the board commenced an application for appointment of an administrator. The owners then requisitioned a meeting to remove directors, prompting the board to make an unsuccessful bid for the requisition meeting to be delayed until after the application for appointing an administrator was heard. The court ultimately dismissed the board's application to appoint an administrator, finding that s. 131 of the *Condominium Act, 1998* was designed as a last resort for condominiums in perilous circumstances and not as a way to allow a board that has lost the confidence of the owners to get their way regardless of the democratic will of the owners. The court has not yet released its decision on costs, but given this board's brazen disregard for owners' democratic rights, this seems like a suitable case for the directors to be held personally responsible for the legal costs as in *Boily v. CCC 145* above. The tactics used by the corporation in this instance were despicable.

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Andrea Lusk

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5. ***Chan v. TSCC No. 1834***
2012 ONCA 312

The unit owner unsuccessfully appealed a judge's decision upholding a lien against the owner's unit and granting the condo's request to enforce the single family use restriction and to charge back certain repair costs. Further, the unit owner challenged the lower court's costs award against her for $41,706 on a full indemnity basis. The court of appeal saw no basis for interfering with this costs award and found that, with respect to the owner's argument that this award may be increased if the condo were to seek 'additional actual costs' above this amount using s.134(5) of the *Condominium Act, 1998* the unit owner would have the right to have those costs, if they were demanded, assessed under s. 9 of the *Solicitors Act*. The owner's application for leave to appeal this decision to the Supreme Court of Canada was dismissed in November 2012.

4. ***DSCC 187 v. Morton***
2012 ONSC 5132

In successfully obtaining a compliance order requiring the unit owner to remove a dog, DCC 187 obtained a costs award of $10,000. Two months later, the condo demanded that the owner pay over $73,000 for legal costs and registered a lien for that amount. On a subsequent motion, the court ruled that the owner must pay only $29,000 but, because no evidence of the actual legal costs was tendered, the condo was ordered to pay the owner $6,000 for legal costs of that motion. The owner appealed this ruling and succeeded in reducing his obligation to the original $10,000, less the $6,000 costs he obtained on the subsequent motion and costs of the appeal of $11,000. The ultimate result of the case was that while the condo had successfully obtained a compliance order, it had to absorb all of its legal costs (over $70,000) and pay the unit owner $7,000.

3. ***MTCC 710 v. Khan***
2012 ONSC 5494

Notorious rogue property manager Manzoor Moorshed Khan and several of his companies were ordered to pay $1.3 million as damages for fraud. The court found that Khan orchestrated a massive fraud by using his management firm (Channel) and other related companies to invoice the condo for work which was never performed or was not authorized by the board. The court heard that the condo board relied on Khan's advice regarding payments to be made to service providers and contractors and that if Khan had approved a payment and gave the board a cheque to sign, the board members would sign the cheque. Given that Khan went bankrupt then fled the country, there is no prospect of recovering money here.

2. ***Ahmad v. 1288124 Ontario Inc.***
(3 decisions)

In this multi-stage proceeding regarding a declarant's failure to comply with its turnover obligations under s. 43 of the Condominium Act, 1998, the court gave a number of orders, including:

First: That the turnover meeting and election of directors was valid notwithstanding that the declarant's principal (holding proxies for more than half the units) did not arrive until after the meeting had concluded and, further, that that the declarant failed to turn over to the condominium the materials specified in sections 43(4), (5) and (7) and 55;

Second: Costs of over $16,000 was awarded to the corporation and its unit owners for costs of the application, plus an additional $10,000 in damages as per section 43(9)(c);

Third: Contempt proceedings were initiated against the declarant's principal for wanton failure to obey orders to deliver materials. The contempt appears to have been ultimately purged.

1. ***Perper v. YRCC 860***
2012 ONSC 3019

A requisition calling for an owners meeting to remove condo directors was declared invalid because it and an accompanying letter contained false and misleading statements. The ringleaders circulating those materials were found to have deliberately disseminated false information so as to persuade their neighbours that the board was engaged in misconduct and that the condo was in financial trouble in order to induce owners to sign the requisition. In addition to invalidating the requisition, the court restrained the ringleaders from circulating those written materials or making those allegations and from canvassing or soliciting in respect of any election or owners' meeting for the balance of the year. This decision is a dangerous one that uses a sledgehammer to fix a problem easily solved with a flyswatter.

Happy New Year from all of us at GMA!

"Additional actual costs" – how condominium corporations could win the battle but lose the war

Syed Ali Ahmed, B.Math, B.A., J.D.

If used wisely, section 134 (5) of the *Condominium Act ,1998* (the "Act") is a powerful tool for condominium corporations to recover all of their reasonable legal costs in obtaining a compliance order against a unit owner for breach act, declarations, bylaws and rules.

Condominium corporations who approach costs recovery the wrong way can end up winning the battle for a compliance order but losing the war for costs. Or to deny costs entirely. The courts have the discretion to fix additional, actual costs under s. 134 (5) and are frequently exercising this discretion, looking at the conduct of the board in enforcement and whether the costs are reasonable and can be substantiated.

Durham Standard Condominium Corporation No. 187 v. Morton is a recent decision of the Divisional Court where a successful condominium corporation ended up owing money to the unsuccessful unit owner because of the corporation's misguided attempt to collect additional, actual costs.

DCC 187 (or "Durham") was successful in its application for the owner to remove his dogs to comply with the corporation's bylaws. Durham submitted a costs outline claiming $30,527 in costs on a partial indemnity basis and $50,878 on a substantial indemnity basis. The application judge awarded costs against the owner for $10,000.

Subsequently, the condominium corporation registered a lien the owner's unit for close to $74,000, claiming the excess amount as the full legal expenses incurred to obtain the order and therefore as an additional actual costs under s. 134 (5).

The owner then brought a motion to limit the total costs payable to $10,000. The motion judge ordered a total costs amount of $29,000. Durham appealed to the Divisional Court, seeking full costs in the amount of the lien. Durham argued that the motions judge had failed to explain how she arrived at the $29,000 figure, which she was required to do by earlier court decisions on this subject. The owner cross-appealed, submitting that Durham had failed to provide any evidence that it had incurred any additional actual costs beyond the $10,000 that had been awarded originally. The only evidence submitted by Durham of additional actual costs was an affidavit by its lawyer stating that the $74,000 figure included billings for additional legal work completed after the application decision.

The Divisional Court agreed with Durham that the motion judge had erred in law by failing to provide the calculations for reaching the $29,000 figure. The Court said that:

> "… a court determining "additional actual costs" under s. 134(5) of the Act must consider what would be a reasonable amount for the condominium corporation to pay its own lawyer to obtain the compliance order... The court must then explain how it arrived at the right amount. It is not sufficient for the court to take a broad-brush approach, refer to a number of factors, and then provide a number – without providing the underlying calculations."

However, the Court noted that Durham had failed to provide necessary evidence to support its additional actual costs claim. The Court agreed with the motion judge that Durham, despite knowing the quantum of costs was the issue and had been challenged by the owner, had

> "…failed to provide… any evidence as to what costs were actually charged to, collected from, or acknowledged by Durham as owing to its lawyer. It would have been easy for Durham to have provided copies of invoices received from its lawyer noted paid, or copies of invoices regarding disbursements. Durham's lawyer could have provided dockets to show the time devoted to obtaining the compliance order and the amounts charged in regard thereto. Instead, Durham claimed privilege in regard to this information."

The Court found that "it was incumbent upon Durham to provide the necessary evidence to support its claim as to the costs it had properly incurred… Durham made a deliberate decision not to tender relevant and available evidence on the motion" for the determination of costs.

Since the only evidence of costs before the motion judge was the very first costs determination of $10,000, the Divisional Court limited the costs payable by the owner limited to that amount. After deducting costs of the motion and the appeal in favour of the owner, Durham ended up owing the owner about $7,000 and the Court ordered the lien to be discharged. If in fact the legal costs incurred by DCC 187 were $74,000, someone would have required to absorb much of those costs.

The case is a lesson that s. 134 (5) costs recovery is not automatic and a condominium corporation seeking to obtain complete recovery of its must put its best foot forward by supplying complete dockets and supporting documentation of the work done and billed in obtaining the compliance order, and show that those costs are reasonable in the circumstances.

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