

CITATION: Middlesex Condominium Corporation No. 232 v. Middlesex Condominium Corporation No. 232 et al, 2013 ONSC 696
COURT FILE NO.: 6738-12 (London)
DATE: 2013/02/11

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
Middlesex Condominium Corporation)	
No. 232)	Robert W. Dowhan, for the Applicant
)	
Applicant)	
)	
- and -)	Joe Hoffer, for the Respondents
)	
Middlesex Condominium Corporation)	
No. 232 (Owners and Mortgagees of))	
)	
Respondents)	
)	
)	
)	
)	

COSTS ENDORSEMENT

BRYANT J.:

I Facts

- [1] The Middlesex Condominium Corporation No. 232 ("MCC 232") is a 98 unit, 10 storey apartment condominium building. Since 2007, exterior water entry problems occurred at some units. The repairs were suite specific.
- [2] In September 2011, MCC 232's Board of Directors ("Board" or "old Board") received a report from Enerplan Building Consultants ("Enerplan") addressing the condition of the building envelope and balconies. The cost of Enerplan's proposed

project was estimated at \$1.6 million. At the request of the Board, Enerplan proposed an alternative plan with an estimated cost of \$755,000. MCC 232 or individual unit owners would need to obtain financing for the construction project since the reserve fund had only \$143,000.

- [3] In January 2012, the members of the Board were Neil McQuarrie, Dwain Bodkin, Lynda Kirkham, Norm Walker and Jennifer Zammit. The Board held an information meeting for the unit owners. The Board chose the alternate Enerplan option with an estimated cost of \$755,000. The Board prepared a borrowing by-law to authorize a \$600,000 loan to pay for the repairs. The Board planned a vote by the unit owners on the Enerplan proposal and the associated borrowing by-law at the MCC 232 Annual General Meeting ("AGM") scheduled for April 16, 2012.
- [4] Some interested unit owners requested copies of documents, including the Enerplan report, and asked for an opportunity to review them. These residents requested the Board to suspend contract negotiations to allow them to review the Enerplan proposal. They also requested permission to post a notice regarding the plans in the condominium building.
- [5] The Board provided supervised access to some documents but refused access to others. The unit owners sought to defer the vote on the borrowing by-law to September 2012. Two of the five Board members were scheduled to end their term at the AGM. A group of unit owners prepared a requisition pursuant to s. 46 of the *Condominium Act* (the *Act*) 1998 (S.O. 1998, c. 18) to remove the current Board members and to hold elections to appoint new Directors.
- [6] On April 16th 2012, some unit owners attempted to dissuade other unit owners from attending the AGM to prevent a quorum. There were strong exchanges between the Board members and the leaders of a group of unit owners who opposed the Enerplan proposal and wished to receive a second opinion from

another engineering consultant. The Board's motion to pass a borrowing by-law was defeated at the AGM. The Board terminated the AGM before the unit owners' motion to remove the members of the Board could be voted on.

[7] The failure of the Board's motion to pass the borrowing by-law at the AGM should have clearly informed the Board that the Enerplan project did not have the confidence of the majority of the unit owners. Counsel for the majority of unit owners and counsel for the Board exchanged correspondence in an attempt to resolve their differences, a matter I will refer to later in these reasons.

[8] The unit owners scheduled a requisition meeting pursuant to s. 46 of the *Act* to remove the current members of the Board and replace them with five nominees. The Board's response was to apply to the Court for an order appointing an administrator pursuant to s. 131 of the *Act*. The Board asserted that the administrator would be in the best interests of the condominium as the Board was unable to govern because of significant interference by a "small group of owners" who have "misled the owners causing a poisoned atmosphere in which no board of directors can properly manage the condominium's affairs."

[9] The Board applied to the Court for an injunction to prevent the unit holders from holding a meeting to remove members of the Board and elect other unit members to the Board pursuant to s. 46 of the *Act*. The Board's application for an injunction was heard on August 1 and 3, 2012. Counsel for the Board attempted to persuade the Court that the "small group" of owners were irresponsible, engaged in disruptive conduct and misstated the qualifications of an affiant. Counsel submitted the situation was urgent and that dire consequence would occur if an administrator was not appointed. The Court did not accept the submissions made on behalf of the old Board.

[10] On August 8, 2012, the unit holders representing more than 50% of the owners removed the old Board and elected five new Board members: Zarko Radakovic, Trecia Brown, Jay Mohammed, Jacqueline Griffin and Angel Makeviski ("the new Board"). The old Board did not accept the validity of their removal. On August 10, 2012, the Court released its decision dismissing the application for an injunction.

II Cost Submissions

[11] On August 29, 2012, the Respondents submitted that costs of the injunction application should be paid by the members of the old Board. On November 5, 2012 the Court wrote to Mr. Dowhan, counsel for the old Board, requesting him to inform members of the old Board that the Respondents sought costs they had incurred in the injunction litigation. The Court requested Mr. Dowhan to inquire if members of the old Board wished to retain counsel to make submissions on their behalf. On November 16, 2012, Mr. Dowhan filed submissions on behalf of the members of the old Board. On November 29, 2012, Mr. Hoffer filed responding submissions on behalf of the Respondents.

III Analysis and Decision

[12] The Applicant's application for an injunction was dismissed. The normal rule is that costs follow the event. Since the application was brought by MCC 232, the application of the normal rule would produce a perverse result because the Respondents would bear an equal portion of the Applicant's costs even though they were the successful parties.

[13] Section 131 of the *Courts of Justice Act* R.S.O 1990, c. C.43 provides that costs of a step in a proceeding are in the discretion of a court. Rule 57.01 identifies factors to be considered when a court exercises that discretion. In *Epp v Hood* (1988) CarswellOnt 3210; 1988 CarswellOnt 3215 (Ont. Dist. Ct.), the court ordered costs against individual board members on a solicitor client basis. In *Boily v. Carleton Condominium Corp. No. 145* [2012] ONSC 1324, at para 48

(Master S.C.O.) some of the costs were awarded against the Board of Directors. Thus, Courts have recognized that in some circumstances, Board members of a condominium corporation may be responsible for costs.

[14] The *Act* establishes a democratic process to elect and remove directors. A director may be removed from office before the expiry of his or her term by a vote of owners at a meeting called for this purpose where more than 50 per cent of all units in the corporation vote in favour of the director's removal. Another person may be appointed to replace the former director (ss. 45, 46, 47).

[15] The old Board aborted the AGM to avoid a vote on the removal of directors and the election of new directors. The members of the old Board rejected the request of the majority of unit owners who sought a second opinion from another consultant for a modest sum (\$5,000). Instead, the old Board engaged MCC232 in expensive and unnecessary litigation to thwart the purpose of s. 46 of the *Act*. Counsel for the old Board improperly characterized the unit owners as obstructionists and exaggerated the urgency of the circumstances to undermine the Respondents' desire to exercise their rights under the *Act*.

[16] The *Act* provides a standard of care for officers and directors of a condominium corporation. Sections 37(1), 37(3) and 38(2) of the *Act* state:

37. (1) Every director and every officer of a corporation in exercising the powers and discharging the duties of office shall,

(a) act honestly and in good faith; and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

37(3) A director shall not be found liable for a breach of duty mentioned in subsection (1) if the breach arises as a result of the director's relying in good faith upon,

...
(b) a report or opinion of a lawyer, .. engineer... or other person whose profession lends credibility to the report or opinion.

...
38 (2) No director or officer of a corporation shall be indemnified by the corporation in respect of any liability, costs, charges or expenses that the person sustains or incurs in or about an action, suit or other proceeding as a result of which the person is adjudged to be in breach of the duty to act honestly and in good faith.

[17] Counsel for members of the old Board did not file any evidence that members of the old Board relied in good faith upon a report or opinion of a lawyer. Counsel for the old Board did not file any new material on the matter of costs. Counsel recycled documents previously filed, for example, the affidavits of Mr. Eglinton, sworn May 15, 2012 and Ms. Zammit, sworn May 15, 2012 which had been filed to support the request for the appointment of an administrator which was dealt with by Carey J.

[18] Based on the material filed before me, I find that the old Board acted in bad faith when it brought an injunction to prevent the unit holders from exercising their statutory right to remove the old directors and elect the new directors pursuant to s. 46 of the *Act*. This Court in dismissing the application for an injunction stated:

The Court finds that the Board's motion is for the sole purpose of preventing the owner's from exercising their rights to hold a Requisition Meeting to remove the Board Members from office and preventing their statutory right to elect a new Board.

[19] In the *Law of Costs*, Mark Orkin, 2nd, ed., vol. II, *Thomson Reuters*, 4-33 writes:

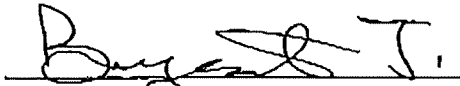
Central to the issue of the costs of a motion for an interlocutory injunction is an extraordinary equitable remedy

that ought to be sought with caution and granted sparingly. Thus, a motion for an injunction was dismissed with costs on a solicitor-and-client scale where the claim was without merit, ... the grounds for the motion were tenuous... and also where the plaintiff's motive for seeking an interim injunction was improper and the claim upon which it was obtained lacked legal merit, but costs may also be awarded on a lesser scale, depending on the circumstances.

- [20] The application for an injunction was an unnecessary step in the proceeding. The old Board members tried to maintain its positions as Directors when they no longer represented the majority of unit holders. It was improper because it attempted to prevent unit owners from exercising their statutory right to remove the older directors and elect new directors. I find that the Applicant's application for an injunction was tenuous and without merit.

- [21] The rates billed by the Respondent's counsel were reasonable. Counsel for the Board members did not file a cost outline and the Court infers that the unsuccessful Applicant devoted as much time to prosecute the injunction as the Respondents did in defending the injunction application (*United States of America v. Yemec* (2007), 85 O.R. (3d) 751, at para 54 (Div. Ct.).

- [22] The Court reduces the cost award from \$22,000 to \$15,000 because the injunction was a distinct step in the context of a general dispute between the parties and some of the line items were not limited to the injunction application. The members of the old Board are jointly and severally liable for the \$15,000 cost award but as between themselves are responsible for one-fifth.


Justice A. W. Bryant

CITATION: Middlesex Condominium Corporation No. 232 v. Middlesex Condominium Corporation No. 232 et al, 2013 ONSC 696

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Middlesex Condominium Corporation No. 232

Applicant

– and –

Middlesex Condominium Corporation No. 232
(Owners and Mortgagees of)

Respondents

REASONS FOR JUDGMENT

Bryant J.

Released: February 11, 2013