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CASE LAW UPDATE, JUNE 2009

Conduct Not Oppressive, But Likely Still Not Right

April 16, 2009: *Di Nardo v. Simcoe Condominium Corporation No. 92*, 2009 CanLII 19932 (Ontario Superior Court of Justice, Court File No. 08-1519)

FACTS

This was an application under section 135 of the *Condominium Act, 1998* (the "Act"), known generally as "the oppression remedy", which reads:

135. (1) An owner, a corporation, a declarant or a mortgagee of a unit may make an application to the Superior Court of Justice for an order under this section.

(2) On an application, if the court determines that the conduct of an owner, a corporation, a declarant or a mortgagee of a unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant, it may make an order to rectify the matter.

(3) On an application, the judge may make any order the judge deems proper including,

(a) an order prohibiting the conduct referred to in the application; and

(b) an order requiring the payment of compensation.

The applicant was a unit owner who possessed two adjacent residential units in one block of the condominium. In front of the block was a common element grassy area bordered by a parking lot. The applicant had exclusive use of two parking spaces within the parking lot.

The design of the parking lot and grassy area resulted in a situation where other owners trying to reach their parking spaces had to navigate around the applicant's parked vehicles. The board of directors considered this to be unsafe and at first designated the first of the applicant's parking spaces as a no parking zone, replacing it with a parking space in a different parking lot within the condominium plan. The unit owner complained

and the board reinstated the original allocation. Neither the unit owner nor the board at that time appeared aware that the parking spaces were designated exclusive use portions of the common element.

The following year, the board tried again to reassign parking spaces. This time, the applicant's two spaces, though moved, were kept together and remained close to the applicant's units; however, the applicant discussed the matter with legal counsel and threatened legal action. It was at this time, the court states, that the board members learned that the parking spaces were designated exclusive use areas and that amendments to the declaration and description were required to reassign them.

As its third attempt to rectify what it considered to be an unsafe situation, the board decided to construct a walkway to the parking lot which cut across the common element grassy area.

The applicant complained that the walkway interfered with his privacy and wanted it removed. He argued that construction of the walkway was deliberate to treat the applicant in a manner that was "*harsh, vindictive or oppressive.*" As part of his evidence supporting such allegation the applicant noted that when a similar situation arose in another part of the condominium the board shifted the location of the entire parking lot rather than cut a walkway out of the grassy area in front of the units, which the applicant considered to be a more appropriate and less intrusive course of action.

JUDGMENT

The court did not agree with the applicant that the walkway installation or any of the board's prior conduct in assigning and reassigning parking spaces contrary to the declaration and description of the condominium constituted oppression or unfair prejudice to the applicant.

In seeking to define the terms of section 135 of the Act, the court relied particularly on the decision of the Ontario Court of Appeal in *Brant Investments Ltd. v. KeepRite Inc.* (1991 CanLII 2705; (1991), 3 O.R. (3d) 289), which dealt with the use of such terms in Canadian business law, where a provision similar to section 135 exists in the Canada *Business Corporations Act*.¹ In that case, it was determined that oppressive conduct is that which is "*burdensome, harsh and wrongful,*" and that conduct is "*unfairly prejudicial*" if it "*prejudices rights or disregards interests unfairly.*" The court noted there need not be bad faith or a deliberate intent to commit such prejudicial unfairness.

The court found that although some of the board's actions were unreasonable or illegitimate, it had in generally conducted itself appropriately. In presenting its finding, the court noted the following key points:

1. There was a legitimate concern relating to the lack of direct and safe access to the parking lot by other residents and guests of the block containing the unit owner's units;

¹ It may be noted that the Ontario *Business Corporations Act* and many similar statutes also contain such provisions, although the court did not (and did not need to) refer to any such other statutes or cases based upon them.

2. The board admitted its original reassignment of the parking spaces was unreasonable, but reversed the decision when the unit owner raised his concerns;
3. Although illegitimate, the board's second reassignment of parking spaces was not unreasonable and only failed due to the lack of cooperation of the applicant unit owner; and
4. The board had, in fact, considered moving the parking lot in question as was done in the other situation cited by the applicant, but based upon the opinion of engineering professionals determined that construction of the walkway was the best option.

APPLICATION

As with any case in which there are allegations of oppression and unfairness, the key application lessons revolve around answering questions such as, "*how did it get this bad?*" and "*why did it go this far?*" And, almost always, the answer has something to do with two of the cardinal sins of condominium living:

1. a failure to communicate, and
2. a failure to cooperate.

Since we do not know the parties involved, and only have such facts as the court presented in its judgment, we cannot say with certainty that in the present case no efforts to communicate and cooperate were ever made by either party. However, based upon the judgment alone, we can identify circumstances in which a greater effort in either direction might have made a significant difference.

For example, the court identified that the board's second solution to its parking problem was one that, although technically illegitimate, could have succeeded but for the lack of cooperation of the applicant unit owner.

Then, on the other side of the coin, the applicant's reactions to the first two changes to the parking allocations suggest that the board did not give prior notice or information to the unit owners about them. The board admitted its conduct had been unreasonable and this might have been a part of it.

One can easily construct a couple of possible excuses for the board if it did not inform owners of the changes it was making beforehand:

- First, since the changes were intended to address safety concerns, formal notice to the unit owners likely was not required pursuant to section 97(2) of the Act. However, it is worth every board considering that *the mere fact that something is not required to be done does not, in and of itself, mean it should not be done*. In the circumstances, it would have made substantial sense to inform affected unit owners before going ahead with the changes even though such notice, and such owners' approval, was not required.

- Second, the board might have been hesitant to deal directly with a unit owner who had been difficult to deal with in the past. Anyone can sympathize if this was the case, but the fault would seem to lie on both sides. On the one hand, a lesson to be learned is that aggressive and confrontational communication at one time tends to undermine the possibility for dialogue in the future; on the other hand, it is generally not allowable that personal feelings should interfere with appropriate leadership. Although it is never necessary to subject oneself to abuse, and while there comes a time when the benefit of the doubt cannot be given or an issue of legal privilege intercedes, it is otherwise inappropriate for a board to avoid informing even its most objectionable owner of circumstances or decisions that might affect his or her use or enjoyment of the property.

Again, while it is possible these statements do not reflect the actual behaviour of the parties, these are lessons that can be learned by the rest of us.

This case also contains an insight into one of the foibles of contemporary condominium litigation, which in turn represents a failing experienced by many condominium boards, managers and unit owners.

This insight arises where the court, in seeking to define the terms of section 135 of the Act, does not refer to any other condominium cases and in fact states,

Counsel for both parties indicated there were unable to locate any reported decisions on the interpretation of those provisions.

This is somewhat extraordinary. At least the following cases could have been cited to and by the court for guidance in this regard:

- *McKinstry v. York Condominium Corporation No. 472* (2003) Carswell Ont. 4948, in which the Ontario Court of Appeal indicated that the oppression remedy under the Act can be used to deal with a broad pattern of conduct, including threatened conduct and conduct which is technically legal;
- *Niedermeier v. York Condominium Corporation No. 50* (June 23, 2006), where the Ontario Superior Court of Justice found that although a condominium corporation had acted without authority from the Act or any express rule or policy, there was no oppression since, amongst other things, the conduct complained of was not “harsh or wrongful” and did not contain the element of “abuse of power”;
- *York Region Vacant Land Condominium Corporation No. 968 v. Schickendanz Bros. Ltd.*, 2006 CanLII 32596, in which the Ontario Court of Appeal determined that:
 - a. simply because a circumstance favours the interests of one party over another, it does not necessarily follow that the conduct is either oppressive or unfairly prejudicial; and
 - b. where the conduct complained of was lawful, properly disclosed, and for “a reasonable and legitimate business purpose” it did not constitute oppression or unfair prejudice to the complaining party; and

- *Darby v. Lorchrist Properties Limited*, 2007 CanLII 36819, in which the Ontario Superior Court of Justice determined that the retaining of control of a condominium by a developer long after turnover should have occurred, in conjunction with a failure to properly address significant building deficiencies and then seeking to have the same paid for by a special assessment against the unit owners, constituted oppression under the Act.

Noting the failure of the court to cite any of these cases should serve as a reminder that judges might not always have or fully consider all the available resources before deciding upon what the law should be. The responsibility for helping them do so rests primarily with the lawyers conducting the case (or the parties if representing themselves).

As it turned out, this failure was not problematic in this case. The judgment of the court appears to agree in principle with the tenor and gist of all those other judgments and adds to the knowledge we now have of the principles in question. However, it could have been otherwise. In other cases, we have seen that a failure by lawyers or parties to identify and present to the court an accurate analysis of condominium concepts has lead the court to make erroneous decisions which only serve to harm the law.

Likewise, condominium managers, boards and unit owners are often susceptible to the same failing – that of making decisions based on minimal or only colloquial knowledge of the Act and other applicable law, or, for that matter, of applicable engineering facts or accounting principles or whathaveyou, depending on the issue at hand.

“A little knowledge is a dangerous thing,” as the saying goes, and the failure to engage in a considered and full investigation of any issue before making a decision about it can at times produce damaging consequences. (This, of course, is one of the key reasons why the Act rewards boards who seek professional, reliable advice in good faith with an avoidance of liability under section 37(3).)

The bottom line is that, notwithstanding that there is a crucial component of common sense that must be invested into every decision making process, it is very important that there be more study and understanding and less guessing or presuming (or any other kind of short-term, reactive or unformed method for determining how things ought to be done).

Although the court determined that their conduct did not constitute oppression, it is also noteworthy that the board of directors of the condominium in this case apparently remained unaware till nearly the end that the parking spaces with which they were dealing were designated for exclusive use. It is therefore imaginable that if the board had more fully and accurately studied the matter when considering their options in the first place, they might have more quickly reached an appropriate solution and not have made the litany of changes that likely contributed to the ire and unreasonable reactions of the unit owner in question.

Michael H. Clifton (June 2009)