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**The Ontario  
Court of Appeal  
decision in *Orr  
v Metropolitan  
Condominium  
Corporation  
No. 1056*<sup>1</sup> says  
a fair bit about  
standards of  
care.**

## Standard of Care in a Condominium Purchase

For lawyers, it establishes some of the steps a lawyer must take to meet the standard of care owed to a purchaser of a condominium unit. For condominium property managers and directors, it doesn't set out the standard of care precisely in relation to preparing status certificates, but describes what does not meet the standard of care and the consequences of not doing so. One lesson each of these parties can take from this case is that failing to meet the applicable standard of care can be costly.

### Case summary

This case involves a town-home style condominium project in which Richard Weldon, one of

the principals of the declarant, purchased a two-storey unit into which he built an unauthorized third floor in its common element attic. Weldon, who subsequently became president of the board of directors, never disclosed the third floor to the board or took any steps to have the condominium's declaration or description amended to address the change to the unit.

The plaintiff purchased the unit, listed as a three-storey unit, from Weldon in 1998. She was provided with two status certificates for the unit. Both were prepared by the property manager. The first certificate incorrectly listed information relating to a different condominium property. This was corrected, but then the

<sup>1</sup> 2014 ONCA 855; Supplementary Judgment 2015 ONCA 407.

second certificate erroneously stated there were “no continuing violations of the declaration, by-laws, and/or rules of the Corporation.” The court noted that the property manager had taken no steps to confirm such statement was accurate, beyond reviewing the unit files that had recently been turned over by the previous property manager “in drips and drabs”.

On the day of closing the plaintiff met with a law clerk at her lawyer’s office. She informed the court that she was told the unit included “the uppermost surface of the drywall to the concrete level in the basement”. The plaintiff took that to mean that she would own from the basement floor to the ceiling on the third floor. She was never shown any plans of survey depicting the unit location and boundaries, which would have

revealed the illegal third floor.

The plaintiff began renovations to the unit and discovered a number of defects in the unit’s construction. She informed the condominium of the defects and was advised to stop all work until further notice. Upon inspection of the unit, the declaration and the description plans, the condominium’s engineer discovered the illegal third floor.

The plaintiff was notified of this discovery but continued with her renovations. In April, 1998 the condominium issued an application for an injunction and compliance. In March, 2001 the plaintiff started an action against various responsible parties, including her lawyer who had handled the sale, Weldon, the

condominium and the property manager.

The trial judge found the plaintiff’s lawyer, the condominium and Weldon liable for damages. The plaintiff was ordered to close up the third floor and to pay the condominium occupation rent for

...confirm the statements in the status certificate are accurate.

her use of the third floor. She and some of the other parties appealed various aspects of the judgment. The Court of Appeal upheld some of the original judgment and altered other parts of it, and in the process set out many relevant and interesting principles of law for condominiums. In this >>>





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>>> article, we outline only those having to do with standards of care.

## Appeal

### *Solicitor Negligence*

The Court of Appeal upheld the trial judge's finding that the plaintiff's lawyer fell below the standard of care of a real estate lawyer practicing in Toronto in 1998. The trial judge found that

*it is the lawyer's responsibility when acting for a purchaser of a condominium unit to ensure that the client is getting title to what they believe they have transacted for. In order to confirm this, the client must be shown the plans to ensure that their unit is the one identified, in the correct location, the size, whether it has a terrace which might be an exclusive use common element, whether it is a single storey unit or multi-level.<sup>1</sup>*

The lawyer was not able to rely on the status certificate stating there were no violations of the declaration. The lawyer had a duty to review the plans (both horizontal and vertical) with the plaintiff and discuss what she was legally taking title to.

### *Plaintiff's Claim against the Condominium and Property Manager for Negligence*

The Court of Appeal found a reversible error in the trial judge's finding that the condominium and property manager were not negligent in the preparation of the status certificate. The appeal court stated that:

- *The condominium owed the plaintiff a duty of care in the preparation of the status certificate which could not be escaped by contracting out the completion of the status*

<sup>1</sup> 2011 ONSC 4876 at para 271.

*certificate to the property manager;*

- *the property manager was acting as the condominium's agent for the purpose of the status certificate and the actions of the property manager are, in law, the condominium's actions;*
- *the property manager's failure to make virtually any inquiries into whether the unit complied with the declaration was not reasonable or prudent in the circumstances and could not meet any reasonable standard of care; and*
- *although the property manager completed the status certificates, the condominium was still ultimately responsible for the contents of the certificates and it had an obligation to take reasonable steps to ensure the information in the certificates was correct. The court concluded: "The failure to do so amounted to a breach of any reasonable standard of care".*

The Court of Appeal did not find the property manager directly liable to the plaintiff for the status certificate as it did not owe her an independent duty of care. However, it did find that the property manager must indemnify the condominium for the damages that the condominium was ordered to pay the plaintiff for the negligent status certificate, which speaks to the manager's duty of care to the condominium and its ultimate responsibility for errors in status certificates.

As a result of the negligence in preparation of the status certificate, the condominium was prevented from demanding that the plaintiff close-up the third floor at her own expense and to pay occupation rent for her use of the third floor. Closing up the third floor would be done at the condominium's own cost.

## Lessons

Based on this case, a lawyer practicing in real estate law today should ensure that his or her standard practice for a condominium sale includes reviewing the description plans in detail with the purchaser and ensuring it is very clear that the purchaser understands the size, layout, boundaries and location of the unit being purchased. Failing to do so can be a costly mistake. In costs awards alone, the lawyer was ordered to pay \$297,987.03. In this case, the lawyer was also liable to the plaintiff for damages, including the difference in the value of the unit as a two-storey unit and a three-storey unit.

In the absence of expert testimony, the Court of Appeal declined to set out a detailed list of the steps a condominium or property manager must take to comply with the standard of care in completing a status certificate. However, what is clear is that something more than reviewing unit files is required, especially poorly maintained ones. Some positive action – which it would appear could in some cases, like this one, include an inspection of the unit – to confirm the statements in the status certificate are accurate is necessary. Further, even where the completion of the certificate is delegated to the property manager or other agent, the condominium itself (i.e., its board of directors) also has a duty to ensure the accuracy of the statements in the certificate.

Both the trial and appeal decisions in Orr cover additional issues relevant to condominiums and a careful read of both decisions can be educational. ◀

*Jessica Spataro is an associate lawyer with Clifton Kok LLP practicing primarily in the area of condominium management law. She assists property managers, condominium boards and unit owners in an array of matters including indemnity agreements, declaration and by-law amendments, condominium liens, compliance letters, status certificates, and owners' meetings. Jessica also assists with the firm's real estate and corporate matters.*