

Good Advice

Sub-section 37(3) of the Condominium Act, 1998, provides a special degree of protection from personal liability for condominium directors who rely in good faith on the advice of professionals “whose profession lends credibility to the report or opinion.” While the protection from liability is, in and of itself, attractive, the key element in this clause is, “in good faith”. So what does that mean?

Consider just plain and simple reliance. “Reliance” simply means, “dependence on or trust in someone or something.” If a director simply relies on professional advice, this likely involves little more than just doing whatever the professional has advised. If this is simple reliance, then what does the additional measure of relying “in good faith” mean?

There might be several answers that could be given to that question, some of which might depend on different types of situation and different types of professional; but one answer that is certain to apply in all cases is that good faith reliance means that the directors interact with their professional advisors, and accept their advice, with the same degree of honesty, care, diligence and skill that is required of them in all other circumstances.

In this sense, good faith reliance on professional advice will include that the board has selected the professional with care, having reasonable grounds to believe that the professional in question is competent to address the issue about which the advice is sought.

For example, it likely makes little sense to seek condominium law advice from a Family Law lawyer, even if the lawyer is a close friend of a director and offers to do the work for free. Likewise, the board would be unwise, and certainly neither diligent nor careful, if asking a lawyer or accountant about the interpretation of surveys (ask a surveyor) or the reliability of structures (ask an engineer), or asking an engineer about the accuracy of budgets (ask an accountant) or records (ask an auditor), or asking the auditor to interpret a section of the legislation (though they can offer some insights, ultimately this one should come back to the lawyers). It is an aspect of diligence and care, and an element of exercising good faith, to consider what kind of professional is required to obtain an effective answer the question at hand.

All the qualities of honesty, care, and diligence are also involved in ensuring the professional is both asked the right questions, and given the right information that will help them provide an answer. Giving the right information includes not only understanding the nature of the issue at hand, having knowledge of the facts that are relevant to it, and sharing all of those facts with the professional, but also not knowingly or carelessly saying or doing anything to mislead the professional as to the facts or nature of the issue. Doing anything to manipulate a professional’s advice so that you only get the answers you want is wrong and certainly can’t fit the definition of relying on that professional in good faith.

Finally, good faith reliance should also mean not having any good reasons to doubt the professional’s advice when relying upon it. If a director is aware that the professional in question lacks knowledge of certain facts that are relevant to the opinion or report given, or observes clear errors or discrepancies in the professional’s statements, that director cannot be said to rely on such professional’s advice in good faith, even if the professional was reasonably competent and the lack of complete or correct information is accidental. The fact that the director is aware of the problem could negate the possibility of being found to have relied “in good faith” on the professional and advice that was given.

These principles matter to more than just the risk of liability. Where a director fails to exercise such elements of genuine good faith in obtaining and relying on professional advice, not only might the director not be protected from liability, but in some cases it might even make the director’s situation worse. Therefore, while all professionals should be expected to strive to meet their respective standards of competence, decency and professionalism, directors of a condominium corporation need to hire, inform and rely upon them only in a manner that is consistent with their statutory standards.



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