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Condo Alert!

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Condo lien is not slander of title when owner in arrears

Christopher J. Jaglowitz, B.A., LL.B., ACCI

The Ontario Superior Court of Justice recently confirmed the simple notion that a condominium lien is not slander of title where the unit owner is in arrears of common expenses at the time the certificate of lien is registered on title.

The following portion of Madam Justice Low's decision in *Jeffers v. YCC 98*, 2010 ONSC 474 (CanLII) is instructive:

"[52] *I turn now to the plaintiffs' claim against the Condo Corporation. The plaintiffs claim damages for slander of title and for property damage.*

[53] The plaintiffs allege that the registration by the Condo Corporation of a notice of lien for $967 on November 22, 2005 was a slander of title.

[54] The elements of the tort of slander of title are:

(a) that the party registering the offending instrument published words in disparagement of the complaining party's property;

(b) that such words were false;

(c) that the words were published with actual malice in that the words were published with the direct objective of causing damage;

(d) that the complaining party has sustained special damages as a result.

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How to escape a Human Rights claim

J. Robert Gardiner, B.A., LL.B., ACCI, FCCI

Bob, hard at work

Canada, the multicultural experiment, is at the leading edge of human rights, but Condo World has become much more complex as a result. Often condo directors and managers find themselves standing at the brink of conflicting principles as they try to navigate the competing rights arising from the condominium corporation's duty to uphold its declaration, by-law and rule provisions, subject to the superseding rights of persons who might turn out to have valid human rights claims.

Condos are drawn into a variety of human rights battles because of their obligation under s. 17 (3) of the *Condominium Act, 1998* to enforce their declaration, by-laws and rules in multicultural communities where each of the 14 grounds of discrimination apply to the provisions of goods, services and facilities, provision of accommodations and employment scenarios.

While there is no exhaustive list of defences to a human rights claim, three human rights precedent cases list some useful factors which the Tribunal will consider when deciding whether it is inappropriate to continue to accuse an individual director or manager in a human rights case where the condominium or management company should be the primary respondent.

1) Should the manager or director be let off the hook because the corporate respondent is alleged to be directly liable for the same conduct or deemed to be vicariously liable for the conduct of its director(s), manager or management company?

2) Is the condominium corporation able to respond or remedy the alleged Code infringement?

3) Is there any compelling reason why the proceeding should be continued against the manager or director (i.e., where it is manager's individual conduct that is the central issue, or where the nature of a director's conduct makes it appropriate to award a remedy specifically against that person)?

4) Would any prejudice be caused to any party to the proceedings by removing the personal respondent?

If a corporate respondent would likely be held directly or vicariously liable for the actions of its directors, manager and management company and the condominium corporation is able to remedy an alleged Code infringement, personal respondents can be released from a human rights claim in the absence of some other compelling judicial reason. Those criteria are only guidelines and are not determinative in every case. While they do not resolve the primary issues pertaining to the human rights claim, they at least provide the opportunity for the innocent directors and manager to avoid the cost, stress, effort and stigma of defending a human rights attack which so often occurs when a complainant uses a shotgun approach instead of a sniper's rifle in an attempt to hit the target.

Often directors and managers, while earnestly trying to do their job, find themselves the butt of a human rights attack and the stigma of being accused of discriminatory conduct. Various human rights principles and case precedents can take a board of directors by surprise and often enough, an experienced human rights lawyer can only guess how the Human Rights Tribunal will elect to decide whether discrimination or a lack of accommodation has occurred in a particular case.

Slander, continued from page 1 ...

[55] The onus of showing that the statement was false rests on the plaintiffs.

[56] The plaintiffs have not met the onus of showing that the Condo Corporation made a false statement."

After reciting the relevant evidence as to the debits and credits, Her Honour found that the unit owners were clearly in arrears of common expenses at the time the lien was registered. She then went on to say:

"[72] I find that the plaintiffs have not met the onus of proof of showing that the notice of lien was false. There is no need to deal with the other elements of the cause of action. I find that the claim for damages for slander of title fails."

Justice Low then dismissed the claim for slander of title, as well as an unrelated claim over property damage. She further dismissed the unit owners' claims against their bank over the amount owing on their mortgage.

Because they were completely successful at trial, the condo corporation and the bank were each awarded part of their legal costs. The plaintiffs (who represented themselves in the lawsuit) were ordered to pay costs of $20,000 to each defendant, representing about half of the total costs paid. In reaching her decision about the precise amount of the costs to be paid, Her Honour considered that:

"The plaintiffs appear genuinely, although mistakenly, to believe that they have been treated oppressively. On the evidence before the court however, it is apparent that the plaintiffs have been the authors of their own misfortunes through their failure to appreciate the consequences of and to take responsibility for their actions and inactions, their failure to appreciate that their litigation conduct was increasing the costs which might be awarded against them, and their apparent unwillingness to take legal advice."

This observation is strikingly familiar to us condo lawyers because it accurately describes the situation in most lawsuits brought by unrepresented unit owners against their condo corporations. The outcome of those sorts of lawsuits is invariably bad, with serious financial consequences both for the unit owner plaintiffs and the defendant condominium corporations. Unit owners with a problem with their condominium corporation should get legal advice as to whether they have a case before they start a lawsuit. They should then follow their lawyer's advice.

Alterations: Should they stay or should they go now?

Andrea C. Krywonis, B.Sc. (Hons), LL.B.

Many condos have provisions in their declaration, by-laws or rules about additions, alterations and decorations to common elements. These provisions are intended to allow boards to control the type, cost and implication of certain alterations. In the most general sense, alterations to the common elements (exclusive use and otherwise) are governed by section 98 of the *Condominium Act, 1998* (the "Act").

Two recent decisions of the Ontario Superior Court of Justice have examined the treatment of owner alteration/decoration to exclusive use common elements and condos should be aware of these precedents with the outdoor season approaching (any time now…).

They Stay - The Hot Tub Case

The first case, which ultimately went to the Court of Appeal, involves an owner installing a hot tub on his exclusive use common element backyard patio (*WCC 198 v. McMahon, 2009 ONCA 870 (CanLII)*). The owner did not obtain the approval of the board so the corporation brought an application for removal of the hot tub under ss. 98, 116 and 117 of the Act and by virtue of the condo's declaration. The Superior Court of Justice agreed with the owner that the hot tub was not an addition, alteration or improvement within the meaning of s. 98 (1) of the Act and the corporation appealed that finding.

The hot tub owner was successful on appeal as well. The Court of Appeal upheld the lower court's interpretation of s. 98:

"Therefore, I find that the word "addition" means something that is joined or connected to a structure, and the word "alteration" means something that changes the structure.

I find that the word "improvement" means the betterment of the property or enhancement of the value of the property. I also accept that an "improvement" refers to an improvement or betterment of the property. That is, to be an improvement there must be an increase in the value of the property. If the item increases the enjoyment of the property, but does not increase the value of the property, I find that the item is not an improvement. …

The hot tub is not an addition as it is not something that sensibly can be seen as being joined to or connected to the structure. It is connected by an electrical cable, but the purpose of the electrical cable is to supply power to the hot tub, not to fix the hot tub to the structure. Furthermore, even though it may take a half-hour and two men to move, the hot tub is still designed to be removed from the property. It is not a permanent fixture on the property.

The hot tub is not an alteration as it does not change the structure of the property. The hot tub may alter the landscape, but any such alteration does not cause any permanent change to the structure.

The hot tub is not an improvement as it does not increase the value of the condominium unit. It is not a fixture that is so attached to the property that it becomes a part of the property. Thus, it cannot increase the value of the property."

The Court of Appeal also upheld the lower court's analysis of s. 98 (1), saying:

"The equation of "addition", "alteration" and "improvement" with "change" creates a result that is far too broad. Barbecues, picnic tables, small inflatable swimming pools, children's toys and thousands of other ordinary articles that are regularly found on backyard patios would constitute "changes" to the common elements of the condominium property under the appellant's definition because they would "make different the pre-existing condition of the common elements".

Indeed the barbecue analogy relied on by the respondent strikes me as particularly apt. Both the barbecue and the hot tub are placed somewhere on the patio stones. Both are connected in a limited sense to the condominium unit, the barbecue by a gas line and the hot tub by an electrical cable. Yet, as the application judge observed, the condominium corporation has not required any owner to seek approval to install a barbecue on the patio common elements of the condominium property."

The lower court's finding on the application of ss. 116 and 117 of the Act and the condo's declaration was also upheld – they did not prevent the installation of the hot tub. The Court of Appeal did comment on the availability of s. 58 (1) of the Act to the condo to make a rule prohibiting hot tubs so as to balance the rights of individual owners and the rights of the collective owners (speaking through the board) and noted the fact that the finding and analysis in this case may not apply to all cases.

Continued on next page...

Alterations, continued from previous page...

They Go - The Gazebo Case
The second case, which has not been appealed, involves an owner placing a gazebo on an exclusive use common element outdoor terrace (*MTCC 985 v. Vanduzer, 2010 ONSC 900 (CanLII)).* The owner sought approval for the replacement of lattice work, fencing, trees and planter boxes on the terrace and wanted to erect a gazebo and water fountain. The condo did not approve the gazebo or water fountain as these items had been removed from the owner's proposal. Nonetheless, the owner installed a gazebo on her terrace.

The gazebo was intended, by the manufacturer, to be attached to the ground surface in a fixed way. The owner did not attach the gazebo to the ground as intended, but instead weighed down the footings of the structure with flower planters. When the board attempted to gain entry to the terrace under s. 19 of the Act, the owner refused to permit entry and when the board proposed approval of the gazebo conditional on the owner's entry into a s. 98 agreement, the owner was not satisfied with the draft agreement and refused to execute it. The condo's declaration also restricted the alteration, decoration, etc., of exclusive use common elements.

At the hearing of the application, the court revisited the hot tub case but came to a different result. The owner was required to remove the gazebo. The court found that the owner had not erected the gazebo in accordance with the manufacturer' instructions and the board had the discretion to deny an alteration, addition or improvement based on several criteria including safety concerns, aesthetic reasons or market value of the property. In this case the board's safety concern was reasonable and the court referred to the board's duty under ss. 17 and 26 of the Act to manage the common elements and act as the occupier of the common elements for the purposes of liability assessment. Finally, the court did consider the corporation's alternate argument that the gazebo breached the condo's declaration and agreed with that proposition.

Fixtures
The treatment of exclusive use common element additions, alterations or decoration is tricky. Each case should be examined independently, but using the recent court precedents as a guide. To add some context, the basic rule of fixtures was established over a hundred years ago in the case of *Stack v. Eaton* (1902), 4 OLR 335 (O.C.A.).

"(1) That articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to shew that they were intended to be part of the land; (2) That articles affixed to the land even slightly are to be considered part of the land unless the circumstances are such as to shew that they were intended to continue chattels; (3) That the circumstances necessary to be shewn to alter the prima facie character of the articles are circumstances which shew the degree of annexation and object of such annexation, which are patent to all to see; (4) That the intention of the person affixing the article to the soil is material only in so far as it can be presumed from the degree and object of the annexation. ..."

This definition, like those in the aforementioned cases, is not absolute and varies case by case. The main consideration is the intention of the party placing an object on the land and as we can see from the examples above, different interpretation of similar facts can lead to varying results. Similarly, presenting the condo's case based on different sections of the Act or declaration can yield different results.

If your condo is stumped on whether an owner's use of exclusive common elements is allowed it is best to seek advice from your lawyers.

Single family use provisions do not violate Human Rights Code

Syed Ali Ahmed, B.Math, B.A., J.D., Student-at-Law

Many residential condominiums have a "single family use" provision in their declaration restricting the occupancy of residential units to single families only. Often, the term "family" is also defined in the declaration. Single family use provisions are typically intended to prevent owners from renting individual rooms in their units to various unrelated tenants – for example, students at a nearby college or university – with the aim of promoting the condo as a residential community for families.

The Ontario Court of Appeal recognized this purpose when it recently upheld an application judge's ruling that a condominium declaration restricting the occupancy of units to a "one family residence" was valid and did not contravene the Ontario *Human Rights Code* (the "Code") (*NCC 4 v. Kilfoyl et. al., 2010 ONCA 217 (CanLII)*).

The condo in this case had applied for a compliance order under section 134 of the *Condominium Act*, *1998* (the "Act") against owners who were renting individual rooms in their units to multiple, unrelated students. The condo asserted that this practice was contrary to the single family use provision in its declaration and was contributing to a rise in complaints of excessive noise, littering and other problems. The condo's declaration defined a family as "a social unit consisting of parent(s) and their children, whether natural or adopted and includes other relatives if living with the primary group."

The application judge had to decide whether the condo's single family use provision infringed the Code, specifically the right to equal treatment with respect to the occupancy of accommodation without discrimination based on family status or other grounds. "Family status" is defined in the Code as "the status of being in a parent and child relationship."

The judge found that the condo attributed a more expansive definition to "family" than the Code's definition of "family status," and had done so in order to comply with the non-discrimination requirement of the Code.

The judge noted that the Act permits a declaration to contain conditions or restrictions on the occupation and use of units or common elements. The unit owners were aware of the single family use restriction when they purchased their unit. The owners were required to comply with the Act and with the condo's declaration, bylaws and rules.

The application judge ruled that the declaration's restriction on the use of units to a "one family residence" and exclusion of roomers or boarders was valid and did not infringe the Code.

The Court of Appeal agreed. The court emphasized that at the time the owners had purchased their units, the status certificate showed that the units could not be leased to multiple tenants but only to single families. The owners ought not to be able to breach the peaceful use and enjoyment by other families of their own units by not conforming to this contractual obligation, the court restated.

The Court of Appeal's decision means that condos with single family use provisions in their declarations can enforce these provisions in similar fact situations without fear of a challenge on human rights grounds. Condos should ensure that their single family use provisions are clear. Key terms such as "family" should be appropriately defined to satisfy the Code requirement for non-discrimination with respect to occupancy of accommodation.

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