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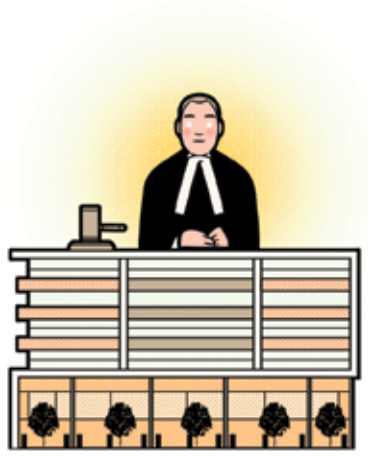
Case Law Update

Decisions From the Courts



- Individual Directors Held Liable for Oppression of Other Owners
- Status Certificates are Not Binding Against Subsequent Owners
- Directors are Not to Interfere With the Owner's Democratic Rights

Dewan v. Burdet, 2018 ONCA 195

Facts: A group of unit owners (the "Minority Owners") claimed oppression by Claude-Alain Burdet ("Burdet"), the owner of a majority of the units in the corporation. The Minority Owners claimed that Burdet used his votes over the years and in his capacity as President, Treasurer and Director of Carleton Condominium Corporation No. 396 (CCC 396), to benefit himself and his family at the expense of the Minority Owners and the corporation as a whole.

The trial judge found that Burdet oppressed the Minority Owners, was personally liable for the oppression, and terminated CCC 396 as a condominium corporation. Burdet appealed those findings.

The Court of Appeal upheld the trial judge's finding that Burdet acted oppressively. The evidence of oppressive conduct included a "long history of self-dealing, lack of financial disclosure, charging CCC 369 legal fees for personal matters, failing to declare conflicts, refusing to produce records despite being court-ordered to do so, and implementing an invalid by-law".

The trial judge also found Burdet personally liable to the Minority Owners for the oppression and the Court of Appeal also upheld this decision. In coming to its decision, the Court adopted a two-pronged test recently established by the Supreme Court of Canada in Wilson v. Alharayeri.

This test requires that:

i) the oppressive conduct must be properly attributable to the director because of his or her implication in the oppression; and
ii) imposing liability must be fit in all the circumstances.

In this case, Burdet was the "motivating force behind the oppressive conduct". In addition, imposing personal liability for costs was appropriate because to do otherwise would result in either the Minority Owners being denied costs or would make the corporation liable. This in turn would be unfair, as CCC 396 would have to pay for the costs of defending the oppression claim.

With respect to the trial judge's order terminating CCC 396, this was upheld by the Court of Appeal. There was ample evidence to support the order given the condominium's dysfunction, which included evidence from an independent court-appointed property manager that the corporation could not continue.

The Upshot. This case makes clear that individual directors can be held personally liable for conduct that leads to the oppression of other owners, to the extent those directors were themselves involved in the oppressive conduct.

Although the long litigation saga of CCC 396 is now at an end, the case continues to be a cautionary tale against tyrannical Boards. CCC 396 was entangled in multiple litigation proceedings spanning over 20 years related to the management and control of the corporation. The Court of Appeal had no reluctance in identifying the corporation as one of the most dysfunctional condo corporations conceivable, given its financial disarray. As a result of ongoing litigation, CCC 396 was financially unable to pay its creditors. If there is a case that serves as a warning to Boards against oppression of owners' interests and excessive litigation, this is it.

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Metropolitan Toronto Condominium Corporation No. 723 v. Reino, 2018 ONCA 223

Facts. A unit owner illegally altered his suite by adding a second bedroom and relocating a kitchen, both without the corporation's permission. The unit was subsequently sold to a new owner, Reino's mother, and then transferred to Reino himself. Two clean and clear status certificates were issued for each of the transfers.

A few years later, Reino sought to sell the unit. At that time, the corporation inspected the unit more carefully, and discovered the change in layout, which it reported on the status certificate. Reino brought an application and obtained an order that MTCC 723 was bound by the prior clean status certificates. The corporation appealed.

The Ontario Court of Appeal set aside the application judge's decision and allowed the corporation to report the illegal alteration on the status certificate. The Court further noted:

"If a condominium corporation becomes aware, after issuing a clean certificate, of a circumstance that is required to be disclosed by virtue of s. 76 of the regulations, it must when it next issues a certificate include such information on it."

With respect to the decrease in market value arising from the status certificate, the Court offered that Reino has a remedy if the corporation negligently issued him a clean status certificate – Reino could sue the corporation for damages representing the reduction in value of the unit.

The Upshot. In our view, this decision confirms the limitation of the scope of binding status certificates under Section 76 of the Condominium Act, 1998. Section 76(6) reads as follows:

The status certificate binds the corporation, as of the date it is given or deemed to have been given, with respect to the information that it contains or is deemed to contain, as against a purchaser or mortgagee of a unit who relies on the certificate.

A status certificate continues to bind the corporation vis-à-vis the current owner, but it is not binding against any subsequent owners. In addition, any owner who suffers a loss in market value as a result of a corporation error on the status certificate may be able to sue the corporation for negligence to recover damages related to that loss.

This case also confirms that if a corporation issues a clean status certificate and subsequently becomes aware of a circumstance that is required to be disclosed in a status certificate, such information must be included in the next status certificate issued for the unit.

Simcoe Standard Condominium Corporations Nos. 431 and 434 v. M. Atkins, 2018 ONSC 3105

Facts. This is an interesting case which dealt with a requisition for a meeting to remove the boards, a request to prohibit the use of proxies, and to prohibit communications with owners prior to the meeting and the vote.

SSCC Nos. 431 and 434 are recreational, vacation resort condominium corporations. The respondent, Marc Atkins ("Atkins") owned a unit through his company, but was personally named as the respondent in the application, and not the company. He spearheaded a requisition to remove the Board of Directors from both corporations.

The prohibition of proxies and communicating with owners was first requested by the corporations and rejected by Atkins. In light of this, the corporations commenced the application.

The applicants' main argument was that Atkins had initiated the requisition and had provided misleading information to owners to induce them to sign the requisition. The applicants also argued that the respondent was effectively acting as an agent of the declarant/developer against whom the Boards, part way through their first year after registration, had commenced litigation in relation to first-year budget statements and alleged misleading disclosure to purchasers about the common expenses.

The applicants asserted that because of the alleged misleading communication

with owners, the Court should step in to direct the calling of the meeting, prohibit the use of proxies, regulate communications with owners leading up to the meeting and vote, and set the process for the conduct of the meeting. All allegations were denied by Atkins.

At the hearing, the applicants conceded that the requisition was in fact valid. The Court held that there was no evidence that the respondent provided misleading information to induce owners to sign a requisition and that with the statutory criteria for a requisition having been met, there was no basis for the applicants to refuse to call the meeting.

The real significance of this case relates to proxies and communicating with owners before the meeting.

Attempt to Prohibit Proxies

While the Court did say that communications by Atkins were unconstructive, mean-spirited and contained personal insults directed at various individuals, ultimately, it was held that the communications were not misinformation but rather the other side of a debate. The Court commented that strongly-held opposing views are not unusual in democratic governance, but rather, are often part of the process. The substance of Atkin's communication was to put forward his position concerning the special assessment and that the directors should be removed.

Although the judge urged Atkins to use a more constructive tone in his communications going forward, the Court was not persuaded that the excesses warranted preventing the use of proxies. It is interesting to note that the Court also found that the proxies for this type of vacation condominium development take on increased importance as the owners' primary residence may be elsewhere.

Attempt to Prohibit Communication to Owners

With respect to communications prior to the meeting, the applicants requested that these be limited to written submissions by each side included in the meeting package, but that no other communication to owners be permitted. The Court rejected this request for the same reasons as refusing to prohibit proxies.

There are important comments by the Court with respect to the Act and each corporation's by-laws with respect to setting up a system of democratic governance for corporations. This democratic model means that owners are entitled to vote to elect the Board and to seek removal if they feel that the Board no longer represents the views of the owners.

The Court said that "… a necessary companion to the right to vote is in the right to discuss important issues that will be the subject of a vote." The Court ultimately held that a limitation of communication is "… not consistent with a democratic model in the Condominium Act, 1998", and thus refused to grant the order prohibiting communication.

The Court then went on to appoint an independent chair granting that person the right to make decisions concerning the conduct of the meeting.

As a side issue, the applicants sought an order requiring all individuals attending the meeting to provide government-issued photo ID in order to be allowed to vote. This was not included in the applicants' notice of application, but the Court held that there was no evidence whatsoever that there had been a problem of impersonation or fraudulent attendance at the meeting and therefore declined to make the order.

Ultimately, the applicants lost the application with legal costs awarded against them.

The Upshot. This case is important to the condominium industry. The case provides a lesson to condominium directors not to interfere with the democratic rights of owners except in very exceptional circumstances. The Courts will expect corporations to adhere to the provisions of the Act and their own by-laws in order to protect consumers. Given the democratic model of condominium corporations, these are important principles that have now been clarified, and confirms that the Condominium Act, 1998 is consumer protection legislation. CV