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Real Estate

Concerns for condominium corporations: Fairness, oppression remedy

By **Harjot Atwal**

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(May 28, 2020, 11:19 AM EDT) -- Presidents and directors of condominiums have a tough job. As per s. 27 of the *Condominium Act*, the "board of directors shall manage the affairs of the [condominium] corporation." Such a mandated management role requires the board to regularly make major decisions that concern the well-being of the condominium corporation overall, such as with respect to its financial health, its necessary repairs and the maintenance of its building(s) and grounds.

Notwithstanding the fact that corporations employ property managers to assist with these undertakings, condominium directors are still required to act honestly and in good faith while exercising care, diligence and skill in attending to the various needs of all unit owners. It is also the condominium board's job to uphold compliance with the Act's requirements as well as the corporation's specific declaration, bylaws and rules. In certain situations, accomplishing all of these assigned tasks simultaneously and "fairly" can prove to be quite onerous.

What if there is "significant animosity" between different unit owners, which leads to complaints being made that the corporation is acting "oppressively?" Moreover, what if the board of directors here is comprised mostly of high-rise unit owners, who have imposed a number of expensive charges exclusively on townhouse unit owners? In what circumstances does charging such costly expenses amount to corporation conduct that meets the legal standard of "oppression?" Does it matter if these charges are made unilaterally, without proper notice, and in contravention of some of the aforementioned requirements that the board is supposed to uphold?

Such circumstances of "significant animosity" certainly matter, and a new judicial decision released on May 4, 2020, indicates they will be thoroughly considered in the courts' analysis of the applicability of the oppression remedy in condominium cases. In *Beswick et al v. York Region Standard Condominium Corporation No. 1175* 2020 ONSC 2785, the judge's decision was made on such facts, and it appears to have raised the already-high standard required to meet the test for the oppression remedy. In s. 135 of the Act, "oppression" is defined and distinguished as corporation conduct that is "unfairly prejudicial" to unit owners or "unfairly disregards" their interests (as opposed to simpler non-compliance with the Act which instead lead to court orders being issued pursuant to s. 134).

In the case, the townhouse unit owners' complaints, which were all framed in oppression, related to them being charged: (a) $5,016.02 each for replacement costs of their deteriorating steps and interlocking for which they were not given advance notice; (b) water charges for a previous year (without notice) that were not based on each unit's water meter readings in breach of the condominium's declaration; (c) unilaterally for maintenance, landscaping and snow removal without a corresponding decrease in their monthly common expenses for the first time since the condominium's creation; and (d) unilaterally for amenities for the first time in about seven to eight years.

Ultimately, the corporation's conduct was held (perhaps unjustly) to not meet the already-high legal standard of oppression. Nonetheless, the unit owners still won in the end here. The $5,016.02 replacement costs were all refunded to unit owners, the judge stated it was not "fair or equitable" to

impose water charges without notice on unit owners for a previous year, such water charges going forward would have to be based on an individual unit's meter readings and comply with the corporation's declaration, and the fiscal responsibility for snow removal and landscaping remained with the corporation.

While the charges for amenities (such as the pool, spa, exercise room, party room) were held to have been correctly imposed pursuant to the corporation's declaration, the court still chastised the corporation's conduct overall in deciding mostly in favour of the unit owners. More specifically, the court explicitly stated that "[t]he failure, based on all of the evidence, appears to lie with the leadership of the condominium." Indeed, the judge seemed concerned with the "tension and animosity [that] needs to be improved" and essentially blamed this on the corporation's board of directors. The judge went on to find that the corporation's board of directors displayed poor and unprofessional management, deficient communication skills and a lack of adherence to the corporation's declaration, bylaws and rules.

Yet, the corporation's conduct did not meet the already-high legal standard for oppression, leaving a question that begs to be answered. What does?

As stated by the court, the test for oppression essentially involves demonstrating that: (i) the corporation failed to meet and breached the applicant unit owners' reasonable expectations; and (ii) considered in the commercial context, the corporation's conduct was or threatened to be oppressive to, unfairly disregarding of, or unfairly prejudicial to the unit owners' interests.

At this point in the decision, a number of words and phrases are seemingly bandied about. Oppressive conduct is described as "coercive, harsh or an abuse of process" and "burdensome, harsh or wrongful," apparently in order to explain why the already-high legal standard is not met here. It should be noted, of course, that the judge did qualify her decision by stating that "the actions of the Board may be considered to have come close to oppression."

With all due respect, however, it appears it would be rather easy to characterize the corporation's conduct as embodying the meaning embedded in these words and phrases. For instance, one could say (as the decision suggests) that some charges were imposed unilaterally, without notice, in clear contravention of the condominium's constating documents, without regard to past accepted expense allocation practices, and in a way that clearly targeted townhouse unit owners to the betterment of high-rise unit owners.

In particular, depriving townhouse unit owners of notice requires them to effectively accept the corporation's repair receipts after the fact, without affording them the opportunity to seek out more economical quotes for the work being done. Imagery relating to "David and Goliath" certainly comes to mind.

At the end of the day, though, the unit owners were successful despite not being entitled to the oppression remedy. In essence, the aggrieved unit owners were granted the same relief as if oppressive conduct had been found (save for any additional damages that may have been ordered for such oppressive conduct, of course). Nevertheless, it is not clear what such decisions say about the ultimate availability of the oppression remedy going forward.

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