Focus REAL PROPERTY

Ruling a cautionary tale for condo boards

Joe Hoffer

Ontario's *Condominium Act* provides a mechanism for unhappy unit owners to stage a statutory uprising by overthrowing and replacing a condo board of directors. A recent Superior Court case (*MCC 232 v. Owners and Mortgagees of MCC 232* [2012] ONSC 4620) holds a cautionary tale about the adverse financial, political and practical consequences to a condo corporation when its board refuses to comply with the democratic governance process prescribed under the act. The case, heard Aug. 3 in London, Ont., also reinforces the dictum that those who volunteer to sit on a board perform a thankless task.

In *MCC 232,* the board was in conflict with a significant number of unit owners over proposed remedial work to common areas of the condo complex. Only one engineer had been consulted by the board, and exterior work to relieve water penetration at the condo complex was going to be very expensive. The board insisted on implementing a specific strategy, whereas the unit owners wanted the board to obtain a second opinion from a less costly engineering firm before making a final decision.

It would seem sensible for the board to obtain a second opinion which, if less costly and equally effective, would resolve the conflict between unit owners and the board and reduce the corporation's costs. The board and its legal advisers, however, drew a legal "red line," maintaining that the board was empowered to govern and that the unit owners had no say in the decision to proceed with the proposed work. In response, the unit owners demanded the right to a second opinion, failing which, they would "requisition" a meeting under the act, and would remove and replace the board with new directors who were prepared to entertain a second opinion. The board remained obdurate so the unit owners requisitioned an owners' meeting. The board refused to schedule the meeting.

The *Condominium Act* imposes a statutory form of governance for condominium corporations. While the act gives a board authority to manage the affairs of the corporation, much like government has the right to govern a country or province, it also gives constituents (unit owners) the right to hold the equivalent of a "non-confidence" vote and remove the governing board. Under ss. 33 and 46 of the act, unit owners have the right to requisition a meeting of owners and the right to remove one or more of the directors if more than 50 per cent of the owners agree. When a meeting is requisitioned, the act requires that the board "shall" schedule a meeting and, if it refuses to do so, the "requisitionists" may call and hold the meeting. In this case the requisitionists did call a meeting because the board refused to do so. In response, the board sought an injunction in an attempt to derail the democratic process, arguing that the corporation would suffer "irreparable harm" if the meeting proceeded.

Any court proceeding is expensive, time consuming, and inevitably results in hard feelings between the litigants which, in a condominium setting, can mean strained relations between neighbours, all at the financial expense of every unit owner in the corporation. In denying the *MCC 232* board's request for an injunction, the court found that "...the Board's motion is for the sole purpose of preventing the unit owners from exercising their rights to hold a Requisition Meeting for the purpose of removing the Board Members from office and preventing their right to elect a new Board." The court also determined that the removal of the board would not cause "irreparable harm" and that, in the circumstances, the requisition meeting should be held "as soon as possible." The requisitioned meeting proceeded and 60 per cent of the unit owners voted to remove and replace the board.

The message for condo boards and their legal counsel is that a board does not have absolute power. Legal counsel should ensure that boards are alive to the risks of recommending that a board usurp the statutory scheme set up by the act in an effort to retain power. A condominium corporation is ultimately a statutory, democratic institution and unit owners can stage a statutory 'coup' to depose autocratic governance. In the case of *MCC 232,* all members of the corporation were forced to incur substantial legal expenses and a breakdown in orderly governance because of a board that placed its interest in power over the statutory rights of its constituent unit owners. This board learned the hard way that serving on a condo board is truly a thankless task.

Joe Hoffer of Cohen Highley LLP represented the unit owners in the case cited, successfully dismissing the board's injunction application and deposing the board.

Title: Follow through fully on instructions

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ations where the client (whether the lender or the purchaser) has instructed the lawyer to obtain title insurance, the lawyer has taken the initial step of contacting the insurer about coverage, but then has failed to realize that the coverage has not been bound before closing. By "bound", I mean a contractual agreement that allows the insured to insist upon issuance of the policy, subject to payment of the premium and satisfaction of clearly defined pre-conditions to issuance (if any).

What kinds of loss can this problem apply to? Consider, for example, an instance of identity fraud: A lender requests title insurance as a condition of making a mortgage loan, the lawyer undertakes to obtain the insurance, the mortgage funds are advanced, and it later comes to light that the "owner" who obtained the mortgage was actually a fraudster, and the real owner of the property has no knowledge of the mortgage transaction.

Before the advent of title insurance, a lawyer who handled a transaction that turned out to be based on identity fraud would likely not be liable for the loss if he or she had taken reasonable steps to guard against fraud (for example, checking the mortgagor's identification). The essence of a good fraud has always been how hard it is to detect.

> "When a lawyer is asked to secure title insurance and doesn't, he or she effectively becomes responsible for everything the policy would have covered.

Kathleen Waters
LAWPRO

With the advent of title insurance, which provides coverage for fraud, the situation is markedly different: In instructing the lawyer to obtain title insurance, the lender is no longer relying on the lawyer's reasonable efforts to investigate the identity of the borrowers — it is purchasing protection against loss *regardless* of flaws in that process. The risk of identity theft is intended to be moved to the insurance company. The lawyer's failure to obtain the insurance is causally linked to the lender client's loss, if the mortgage proves to be unenforceable.

Sobering? We hope so. But the solution is conceptually straightforward, if time-consuming on occasion: Follow through fully on title insurance instructions; be sure you understand the legal effect of the insurer's response to the policy application, whichever insurance company you chose to deal with; consider before closing whether any conditions on the insurance binder or pre-approval are acceptable to you and your client, seeking instructions if necessary; comply with all conditions of coverage; and give the client prompt notice of issuance of the policy.

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