Condo Directors Held Personally Liable For Legal Costs

The *Condominium Act* (the "**Act**") has several provisions (sections 85, 134(5) and 135(3) which place the financial burden of obtaining compliance orders on those responsible for the non-compliance, thus relieving innocent owners of this financial burden. There are numerous reported cases where the costs of legal proceedings were enforced against individual non-compliant owners. In a recent case, *Boily v. Carleton Condominium Corp. No. 145*, the court was asked to decide whether innocent unit owners should have to bear the legal costs of proceedings in cases where there has been misconduct on the part of the board of directors.

The *Boily* case involved a dispute as to whether proposed modifications to the condominium courtyard constituted a "substantial change" to the common elements as contemplated by section 97 of the Act. The proposed redesign of the courtyard included the removal of significant vegetation, the addition of parking spaces, changes to the design, shape, size and configuration of the courtyard and the replacement of the podium's original red-brick with significantly different-looking limestone veneer cladding.

Rod Escayola of our firm was retained by a group of owners who felt that the proposed work constituted a "substantial change" that required the approval of 66 2/3% of the owners. The board argued that the work constituted "maintenance" not requiring a vote by the owners.

The board refused to hold a special meeting of owners as requested

The group of owners eventually requisitioned a special meeting of owners pursuant to section 46, requesting (amongst other things) the question of the new courtyard configuration be put to a vote requiring approval of 66 2/3% of the owners.

The board refused to recognize the validity of the applicants' requisition for a special meeting, alleging that they had not met the 15% threshold required to requisition such a meeting. In support of their refusal to call a special owners' meeting, the board took the position that in the case of units that were jointly owned, the requisition needed to be signed by the majority of the joint owners of each unit. Moreover, the board refused to provide the group of owners with the list of registered owners, despite numerous requests. The owners had requested this list, on four occasions, in order to rectify any alleged deficiencies in their requisition.

The board then issued its own requisition for a special meeting of owners, which indicated that the board intended on submitting the question of the courtyard configuration to a *simple* majority vote at the meeting called by the board – all along refusing to allow the special meeting requisitioned by the other group of owners. The board also advised that the work would start the morning after the special meeting it had called.

The group of owners sought an emergency injunction to prevent the board's special meeting to proceed and to prevent the work on the courtyard from starting until they were allowed to hold

the special meeting of owners they were requisitioning. The court granted the emergency injunction only hours before the board's special meeting of the owners.

Immediately following the granting of the injunction, the parties entered into settlement discussions which resulted in minutes of settlement negotiated by the respective legal counsel for the parties. Pursuant to the minutes of settlement, the Corporation was to submit the proposed courtyard alterations to the approval of 66 2/3% of the owners. In the event that the board was unable to obtain this level of approval, the board had agreed to reinstate the courtyard and parking as it existed with the closest matching brick.

The owners' meeting proceeded and the question was put to a vote but the board was unable to obtain the requisite 66 2/3% approval to the proposed courtyard alteration. The board immediately took the position that there was no agreement on the issue of the owner approval required for the courtyard configuration and that this level of approval was not required.

The group of owners went back to court to enforce the minutes of settlement and force the board to respect the agreement it had reached. The court agreed with the group of owners and concluded:

The terms of the settlement are clear. The meeting was to go ahead – it did. The Board's proposed design was to be submitted to a vote – it did. The Board's design required a 66 2/3% vote – it did NOT obtain that result. The Board is required to reinstate the Courtyard as it existed after the repairs to the garage.

The court concluded that the board was acting in bad faith and imposed costs

In determining who should bear the costs of the legal proceedings, the court concluded that the board acted in bad faith when it attempted to back out of the agreement once it realized it had not obtained the level of approval required.

The court criticized the board for having refused to allow the special meeting of the owners as requested by the group of owners. The court also criticized the board for not having immediately supplied the owners with a list of registered owners. The court concluded that the board's refusal to recognize the legitimacy of the owners' requisition only served to deepen the mistrust in this community, which in turn precipitated the court proceedings. However, the main area of concern for the court involved the board's attempt to renege on the settlement it had reached with the owners.

The court ordered that the legal costs of the group of owners be paid by the Corporation but specifically ordered that the legal costs incurred to enforce the settlement were to be paid by the board members individually, without any re-allocation to the condominium owners. Those legal costs amounted to $12,000, plus $1,560 for HST. Unfortunately though, the balance of the costs order as well as the legal costs incurred by the condominium corporation, will end up as common expenses of the Corporation, which will be allocated to all of the owners of the Corporation, including the opposing owners in this case.

In most cases, board members will not be held personally liable for their acts and omissions provided that they acted honestly and in good faith and exercised the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. After all, they are volunteers acting for the benefit of the Corporation and its owners. However, board members will not be indemnified and may face steep costs consequences if they breach their duty to act honestly and in good faith.