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Don't Beat Around the Bush

Not Addressing Nuisance Complaints can be Oppressive

In a recent decision, the Superior Court of Justice examined the serious repercussions that condominium corporations may face if they fail to respond and adequately address common element deficiency and noise-related complaints from unit owners in a timely manner which, in this case, went on for between 10 and 11 years.

In *Wong v. TSCC No. 1918*, 2022 ONSC 3409, Ms. Wong, a unit owner, commenced a Court application against Toronto Standard Condominium Corporation No. 1918 ("TSCC 1918") on the grounds that excessive noise and vibration from the common element garbage room had been emanating into her unit since November 2010.

Ms. Wong's unit was adjacent to the garbage room, which contained a compactor and was the termination point of the garbage chute used by all residents of the condominium building.

On November 11, 2010, Ms. Wong made her first noise complaint to the condominium corporation. Thereafter, she continued to make noise complaints to TSCC 1918 for over a year. As a result of her persistent complaints, TSCC 1918 sought legal advice and, in 2012, finally undertook some informal testing of the noise level. Condominium management determined that the noise was "unbearable."

Subsequently, in August 2012, the board directed management to conduct meter readings and advised Ms. Wong of their next steps in dealing with her complaint.

In August 2015, the corporation's board of directors president advised Ms. Wong that she should have known that there would be noise emanating from the garbage room, which was clearly adjacent to her unit and visible to her when she bought the unit. Such comments from the board members were unnecessary as they just increased the tensions between the parties.

From 2012 to 2017, the condominium corporation took some remedial actions but failed to resolve the issue adequately.

In light of Ms. Wong's ongoing complaints, the condominium manage-

ment asked Ms. Wong to locate a sound insulation or soundproofing company on behalf of the condominium corporation. Ms. Wong found a third-party contractor, and TSCC 1918 approved the investigation.

The contractor conducted on-site testing in 2018 and reported that the noise and vibrations were "*unacceptable*" and caused "*human annoyance*." The contractor also provided soundproofing recommendations at an estimated cost of $19,984 plus HST.

The board decided to obtain a peer review of the report and recommendations in light of the high cost. The peer review did not involve any new testing or on-site inspections. The peer review concluded that the tests conducted by the previous contractor were fundamentally flawed as they did not measure the sound and vibrations caused by the operation of the chute and compactor system.

As a result of the board's inaction, Ms. Wong retained a lawyer and demanded that, at a minimum, the board retain a new independent contractor to conduct the necessary tests. Accordingly, the board hired JAD Contracting Ltd. ("JAD"). The report from JAD concluded that the noise permeated Ms. Wong's unit and came from the garbage system. JAD made recommendations to address the issue, which the condominium corporation approved.

Meanwhile, Ms. Wong brought her application claiming that she was forced to live with unacceptable noise and vibration levels in her unit and that by taking time to respond inadequately and in a piecemeal manner, the condominium corporation had unfairly disregarded her interests. Ms. Wong sought an order requiring TSCC 1918 to remedy the noise and vibration issues to her satisfaction, which she claimed was within the reasonable expectations of a unit owner. In addition, Ms. Wong sought various orders, including declaratory relief and damages under the oppression remedy pursuant to the provisions of the *Condominium Act, 1998* (the "Act"), including damages for nuisance and mental distress.

In response to her application, the condominium corporation unilaterally decided that no further remediation work would be done unless and until Ms. Wong rescinded her application. This attempt at some type of "quid pro quo" was neither appropriate nor acceptable and suggested that the condominium corporation was engaged in the form of reprisal against Ms. Wong.

Fact-Specific Test of Reasonableness

In applying a fact-specific test of reasonableness to determine whether the condominium corporation had satisfied its statutory duty to maintain and repair the common elements the court considered the following:

1. the relationship of the parties;
2. their contractual obligations;
3. the cost of work required; and
4. the benefit to all parties if the repairs are completed compared to the detriment that may be occasioned by the failure to undertake repairs.

Applying the test, the court held:

a) There has been a history of complaints by Wong to the corporation, which has been met with, at best, a delayed and inadequate responses up to 2021 (including what can be best described as a piecemeal approach by the corporation);

b) The parties' contractual obligations are substantially reflected in the Act, Declaration, and by-laws of the corporation as well as its Rules;

c) The corporation has proposed a further solution consistent with proposals in the JAD Report (dated January 29, 2021). Furthermore, the costs of JAD's proposals had been approved and therefore are not a barrier to the corporation;

d) The only benefactor of the requested work would be Wong since only her unit is impacted by the noise and vibrations caused by the operation of the garbage system.

Though Ms. Wong provided no expert evidence, the court relied upon the fact that the condominium corporation was aware of the noise and vibration issues. Furthermore, the same was confirmed by condominium management and three independent contractors.

The court was of the view that "Wong has had to endure unacceptable noise and vibration levels while TSCC No. 1918 reacted in a piecemeal fashion and then, impermissibly stopped the work it had authorized to remediate the noise when Wong exercised her legal right to start this application. I am assessing damages at $30,000 to reflect the interference with the use and enjoyment of her unit as a result of the ongoing excessive noise and vibrations caused by the use of the garbage system."

In addition, the court made an order under section 135 of the *Condominium Act, 1998*, requiring the corporation to cause JAD to proceed with the remedial work specified in the latest proposal.

Takeaways from this Decision:

1. Always take unit owner complaints seriously.
2. Investigate promptly to identify the cause of the problem using appropriate tests.
3. Follow the advice of professionals such as engineers and lawyers.
4. Always carry out necessary repairs without delay, even if litigation is pending.
5. Don't beat around the bush – Take appropriate steps to rectify the issue. ■

Brian Horlick has been successfully engaged in the practice of law for over 30 years. He is a senior partner with the law firm of Horlick Levitt Di Lella LLP and practices exclusively in the area of condominium law. Brian is actively involved in the condominium community and believes that education and knowledge are the cornerstones of a healthy and vibrant condominium industry. Brian is also a long-time director and the former President of CCI's Toronto and area Chapter and sits on the ACMO/CCI Condominium Conference Committee.

Bharat Kapoor was admitted to the Law Society of Ontario (formerly the Law Society of Upper Canada) in 2020. He received his Certificate of Qualification from the National Committee on Accreditation (NCA) in 2018. He received his BB.A LL.B. from Symbiosis Law School, India and was admitted to the Bar Council of India in 2012. Prior to joining HLD, Bharat worked at a boutique law firm in India primarily dealing in corporate advisory and white-collar crimes. Bharat is fluent in Hindi and proficient in Punjabi.
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