Can Enforcement Costs be Charged Back to Owners?

By Josh Milgrom and Sarah Morrey

Condominium corporations are tasked with enforcing their governing documents against owners. Unfortunately, warning letters from management without any "teeth" can fail to elicit compliance, triggering legal counsel to send a non-compliance letter to the offending owner. It has been common practice in the condominium industry for a condominium corporation to charge back these legal costs to the non-compliant owner; however, a recent case of the Superior Court of Justice has some in the Ontario condo industry taking the position that these chargebacks are no longer permissible, absent a court order.


Josh Milgrom


Sarah Morrey

The case highlights the importance of: (i) acting reasonably; and (ii) carefully reviewing the exact language of the indemnification provision to ensure that compliance-related costs can be charged back to a unit. The case, *Amlani v. York Condominium Corporation No. 473*, revolves around the conduct of the condominium corporation in addressing smoke migration and the condo corporation's ability to charge back its legal costs in dealing with the owner.

In response to complaints from neighbours, the owner took various steps to abate the smoke migration emanating from his unit and to work with the condominium corporation to address any concerns. Instead of working with the owner, the corporation made unreasonable demands and took unreasonable positions, prompting the owner to voluntarily move out of the unit until a resolution could be reached.

After the owner moved out, the corporation passed a rule prohibiting smoking but permitted existing smokers to be exempt from the rule. The condominium corporation refused the owner's request to be exempted from the rule because the owner was not actually *living in the unit* and the exemption was only for *current residents*.

The condominium corporation charged back over $25,000 in legal costs incurred and subsequently registered a lien against the unit. The corporation then tried to force the sale of the unit, prompting the owner to commence a court application preventing the sale.

The Court found that the position taken by the condominium corporation in dealing with the owner was both unreasonable and oppressive. The condo corporation's bylaws required negotiating in good faith, but the Court found that the condo corporation failed to do so.

Although there are many variations of indemnification clauses in declarations which permit charging back *certain costs* incurred by a condo corporation against a unit owner, they predominantly fall into two main categories:

Continued on p55

Continued from p52

1. Those which relate to costs incurred by the corporation for damage to the common elements or other units; and

2. Those which relate to all costs incurred by the corporation for any reason, including a breach of the governing documents or to enforce the governing documents (i.e., rules) against an owner.

The provision in the condo corporation's declaration fell into the former category. The Court found the condo corporation's interpretation unreasonable, as the provision did not permit the recovery of costs incurred for a breach of the governing documents.

In reviewing whether the indemnification permitted the chargeback, the Court also reviewed section 134(5) of the *Condominium Act*, which gives condo corporations a unique power: the ability to recover all costs incurred in obtaining a compliance order as a common expense against an owner. The Court differentiated costs that are recoverable under section 134(5) from the case at hand: the legal costs that arose in dealing with the owner were not incurred in obtaining a compliance order, and were therefore not able to be charged back to the owner as common expenses.

While some are interpreting the Court's decision as prohibiting the chargeback of all compliance and enforcement-related costs absent a court order, the Court's review of section 134(5) was situated in its analysis of the indemnification provision. The language of the indemnification provision and the condo corporation's conduct appear to have been the driving force behind the result in the case.

The Court has confirmed in prior cases (such as *Italiano v. Toronto Standard Condominium Corporation No. 1507*) that with an appropriately worded indemnification provision and different, non-oppressive tactics by a condo corporation, compliance and enforcement costs can be charged back as common expenses, without a court order.

The Act is consumer protection legislation. This includes protection against owners who cause the condominium corporation to incur legal costs due to their non-compliance. It would be contrary to the interests of all owners for a condo corporation not to be able to charge back the legal costs it incurs in enforcing compliance. Innocent unit owners should not have to bear the cost associated with the misconduct of one owner. However, the governing documents must permit the chargeback before a condominium corporation can seek recovery.

Although not yet in force, the upcoming amendments to the *Condominium Act* provide further support for the chargebacks of legal costs; the *Condominium Act* is going to specifically provide for these types of indemnifications provisions in a declaration, and the Condominium Authority Tribunal will be the venue for disputes pertaining to these clauses.

Until then, if seeking to charge back the legal costs associated with enforcing compliance, ensure that the condominium corporation: (i) has acted reasonably, and (ii) has a strong indemnification provision to rely on. ■

Josh Milgrom is a condo lawyer whose experience spans all things condo. Josh is actively involved in the condo industry, is a frequent speaker at industry conferences and seminars, and is the past president of his condo corporation in downtown Toronto.

Sarah Morrey recently graduated from the JD Program at Western Law and is now an articling student at Lash Condo Law. Sarah's practice has so far involved her in many aspects of condo law and she frequently contributes to the Lash Condo Law legal blog.
lashcondolaw.com