CITATION: Middlesex Condominium v. Middlesex Condominium Corp. (Owners and Mortgagees of), 2012 ONSC 4620
COURT FILE NO.: 6738-12
DATE: 2012/08/10

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: MIDDLESEX CONDOMINIUM CORPORATION NO. 232 –and– MIDDLESEX CONDOMINIUM CORPORATION NO. 232 (OWNERS AND MORTGAGEES OF)

BEFORE: JUSTICE A. W. BRYANT

COUNSEL: Robert W. Dowhan, for the Applicant

Joe Hoffer, for the Respondents

HEARD: August 3, 2012

ENDORSEMENT

[1] The Board's application for an injunction is dismissed for the following reasons:

1. The Condominium Corporation No. 232 ("MCC 232") is governed by a five member Board of Directors.

2. On March 30, 2012, the Board sent a notice to unit owners that a vote on borrowing monies to fund the repairs that are needed to prevent further infiltration of water would be held at the Annual General Meeting scheduled for April 16, 2012.

3. On or about April 5, 2012, the Respondents filed a requisition to call an owners' meeting to vote on the removal of the Board members because they wished to obtain a second opinion on the costs of repair for the building. The Respondents represent the majority of the owners.

4. At the April 16, 2012 Annual General Meeting, owners voted in favour of a motion to delay voting on the loan. The Board aborted the AGM. The Board subsequently commenced proceedings in the

Superior Court to appoint an administrator to manage the affairs of MCC 232.

5. The Board brings this motion for an injunction to restrain the Respondents from exercising their statutory rights to hold a Requisition Meeting until after its application for the appointment of an administrator has been heard and adjudicated.

6. I do not accept the submissions of counsel for the Board that: (1) a small group of owners is frustrating the work of the Board; (2) the requisition meeting, if allowed to continue, will increase instability and conflict amongst the owners; (3) the Board elected by owners at a Requisition Meeting would jeopardize the safety of the occupants of the building (4) the building will deteriorate; and (5) the new Board would cancel any plans to undertake repairs.

7. The Court finds that the Board's motion is for the sole purpose of preventing the owners from exercising their rights to hold a Requisition Meeting to remove the Board members from office and preventing their right to elect a new Board.

8. The Respondents acknowledge that there is a need to make repairs to the building. The Court finds that MCC 232 is not in urgent financial circumstances and the owners are entitled to exercise their statutory right to hold a Requisition Meeting.

9. I do not accept counsel for the Board's submission that the state of affairs which exist at MCC 232 are similar to the state of affairs at *York Condominium Corp. 414, Metro Toronto Condominium Corp. 710* and *Persuad* as reported in the case law.

10. I find:

    (1) There is no urgency to appoint an administrator in the present circumstances which will result in incurring additional unnecessary legal costs;

    (2) There is no evidence of irreparable harm; and,

    (3) The balance of convenience favours allowing the Requisition Meeting to be held as soon as possible.

[2] If counsel are unable to resolve the issue of costs within 10 days of the release of this endorsement, the Respondent will file costs submissions on or before August 30, 2012 and the applicant shall file costs submissions on or before September 10, 2012. The submissions are to be two pages in length plus appendices.

Justice A. W. Bryant

Date: August 10, 2012

CITATION: Middlesex Condo. Corp. v. Middlesex Condo. Corp., 2012 ONSC 4819
COURT FILE NO.: 6738-12 (London)
DATE: 20121009

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Middlesex Condominium Corporation No. 232	Robert W. Dowhan, for the Applicant
Applicant	
– and –	Joe Hoffer, for the Respondents
Middlesex Condominium Corporation No. 232 (Owners and Mortgagees of)	
Respondents	
	HEARD: August 17, 2012

REASONS FOR JUDGMENT

CAREY J.:

Overview

[1] This is another case illustrating the disputes and divisions that can arise out of that unique type of home ownership – the condominium.

[2] The applicant Board of Directors (the "Board") Middlesex Condominium Corporation No. 232 ("MCC No. 232") seeks an order appointing an administrator pursuant to s.131 of the *Condominium Act, 1998*, S.O. 19 (the "Act"). The Board asserts the administrator would be in the best interests of the condominium as the Board is unable to govern because of significant interference by a "small group of owners" who have "misled the owners causing a poisoned atmosphere in which no board of directors can properly manage the condominium's affairs".

[3] In contrast, the respondents state that they represent a majority of the unit holders and have been frustrated in their attempts to raise reasonable questions and concerns about proposed repairs. They say they have now legitimately formed a new board capable of governing the affairs of MMC 232.

[4] The respondents maintain the applicant has manufactured a crisis for the purpose of thwarting the legitimate aims of the majority and preventing them from electing a new board.

Background

[5] For some years going back to 2007, there have been problems with exterior water entry at this 98 unit, 10 floor high condominium apartment building. Various solutions were tried and found wanting. In September of 2011, the Board received a report from Enerplan Building Consultants addressing the condition of the building envelope and balconies. A plan was proposed that would cost an estimated $1.6 million. Due to cost concerns the Board requested and received further reports and eventually four options for repairs.

[6] After an informational meeting for the owners, held on January 25, 2011, the Board chose to proceed with an option estimated to cost $755,000. As there was only $143,000 in the MCC 232 reserve fund, the Board prepared a borrowing bylaw to authorize a $600,000 loan to MCC 232. It scheduled this matter to be voted on at the Annual General Meeting ("AGM") of April 16, 2012.

[7] Before the meeting, some residents, concerned about the cost and other aspects of the proposal requested copies of documents, including the Enerplan report, and some time to review them. They wanted the Board to suspend contract negotiations for the work for a short period. They had also asked for permission to post a notice regarding the plans in the condominium building.

[8] Supervised access to some documents was offered by the Board's lawyer but the other requests were refused by the Board.

[9] Following an exchange of requests the respondents' representative prepared a requisition pursuant to s. 46 of the Act for a meeting concurrent with the AGM, to defer the vote on the bylaw to September 2012. If that motion failed, there was a further motion to remove the Board and replace it with a new one. Two of the five Board members were already up for re-election at the AGM.

[10] At the meeting, which went ahead following what might be described as strategic attempts to prevent a quorum and lively interaction from the floor, the bylaw motion supported by the Board was defeated. At that point the Board ended the meeting before the scheduled election and respondents' requisition motion to remove the Board could be voted upon.

[11] The Board subsequently brought this motion to appoint an administrator and a subsequent injunction application preventing the respondents' requisition meeting from occurring before this motion was heard. The requisition meeting was eventually scheduled for August 8, 2012 and the injunction application was heard August 3, 2012 by Bryant J. His decision denying the injunction was released August 10, 2012, two days after the meeting was held and a new Board voted in.

[12] Two separate groups now claim to be the legitimate Board for MCC No. 232. The applicant's position is that the meeting was invalid. The respondents say that a new board was duly elected at the meeting duly called for August 8, 2012.

Issues

[13] The issues here are:

1) Is this a proper case for appointing an administrator under the *Condominium Act*?

2) Was there a valid requisition meeting held that resulted in the election of a new board?

3) If the answer to 2) is yes, are there still concerns about the corporation's governability that require the appointment of an administrator?

Analysis

[14] The vote scheduled for the AGM of April 16, 2012 did not give the owners a choice as to the repairs being done as proposed, The Board had decided on that course they say, pursuant to their maintenance obligations under s. 97(1) of the Act. The bylaw was to decide whether to borrow the money for the work or assess the owners for the costs. The Official Notice of the Meeting provided in bold type "**If the 51% vote required is not received, all units will be special assessed for their portion of the project funding without the loan option.**" (Application Record, Tab 4)

[15] There are 98 units in the condominium and the estimated project cost was $755,000. This translated into a one-time assessment of $5,665 for one bedroom units and $8,195 for two bedroom units. I accept that this is not a luxury building and that these assessments would be significant ones to most owners.

[16] The Act provides in s. 89 that the corporation has a duty to repair the common elements in the condominium after damage subject to s. 91 and s. 123. Neither party has argued that either s. 91 (altering the obligation to repair) or s. 123 (termination of the Act's governance after substantial damage) apply in this case. The applicant relies on s. 97(1) of the Act which provides that repairs to common elements may be made without notice to the unit holders.

[17] While the applicants are correct that s. 97(1) of the Act allows for maintenance work to the common elements where there is an obligation to repair, there may not always be a consensus among owners as to when proposed construction constitutes "repairs" and when it is an "addition, alteration, improvement or change" under s. 97(2) or (3). If it is an "alteration, improvement, etc.", unless the proposed work is: a) necessary to comply with a s. 113 Mutual Use Agreement; b) necessary for safety, security or to prevent imminent damage to the property; or c) costs no more than the greater of $1,000 and one percent of the annual budgeted common expenses, the corporation can only make additions, alterations or improvements to the common elements upon notice to the owners under s. 97(3). That notice must describe the proposed work, outline the

estimated cost and include a copy of s. 46 of the Act along with notification that the owners have the right within 30 days of receiving the notice, to requisition a meeting of owners. The work can only proceed if no s. 46 meeting has been requisitioned or if a meeting was called, the proposed work has not been voted down. This scheme for "non repair" construction reflects the Act's general democratic approach to expensive projects.

[18] While it is open to boards to make expensive decisions about what they regard as pursuant to their obligation to repair without several quotes and full disclosure to owners and without a voted mandate, they do so at the risk that the response will be exactly as it was here.

[19] A condominium Board is ceded a lot of power over the condominium by the Act. This shift in power from individuals to a board is addressed in at least two ways. One was described recently by Mr. Robert Mullin, one of the respondents' counsel, in an article in a magazine for the Condominium Management Industry on s. 55 of the Act.

> To level this imbalance, Ontario's condominium legislation has always granted unit owners a broad right to review and/or receive copies of a condominium's records. . . The courts have ruled that condominiums must run like "an open book", . . . (Respondents' Application Record, Tab 1(I))

This is a correct summary of the current state of the law.

[20] A second way that the imbalance in the Act is addressed is by the inclusion of s. 46 of the Act. While a board can say to unit holders "this is our decision and that decision is final," s. 46 provides residents with a remedy. Essentially residents are put in the same position as electors in jurisdictions that provide for "recall votes".

[21] Section 46 reads as follows:

> Requisition for meeting
>
> 46. (1) A requisition for a meeting of owners may be made by those owners who at the time the board receives the requisition, own at least 15 per cent of the units, are listed in the record maintained by the corporation under subsection 47 (2) and are entitled to vote. 1998, c. 19, s. 46 (1).
>
> Form of requisition
>
> (2) The requisition shall,
>
> (a) be in writing and be signed by the requisitionists;
>
> (b) state the nature of the business to be presented at the meeting; and
>
> (c) be delivered personally or by registered mail to the president or secretary of the board or deposited at the address for service of the corporation. 1998, c. 19, s. 46 (2).

Same, removal of directors

(3) If the nature of the business to be presented at the meeting includes the removal of one or more of the directors, the requisition shall state, for each director who is proposed to be removed, the name of the director, the reasons for the removal and whether the director occupies a position on the board that under subsection 51 (6) is reserved for voting by owners of owner-occupied units. 1998, c. 19, s. 46 (3).

Duty of board

(4) Upon receiving a requisition mentioned in subsection (1), the board shall,

(a) if the requisitionists so request in the requisition or consent in writing, add the business to be presented at the meeting to the agenda of items for the next annual general meeting; or

(b) otherwise call and hold a meeting of owners within 35 days. 1998, c. 19, s. 46 (4).

Non-compliance

(5) If the board does not comply with subsection (4), a requisitionist may call a meeting of owners which shall be held within 45 days of the day on which the meeting is called. 1998, c. 19, s. 46 (5).

Reimbursement of cost

(6) Upon request, the corporation shall reimburse a requisitionist who calls a meeting under subsection (5) for the reasonable costs incurred in calling the meeting. 1998, c. 19, s. 46 (6).

[22] Section 46 is a significant remedy for unit holders convinced they are being governed arbitrarily, their money is being spent unwisely or are otherwise dissatisfied. Section 46(3) requires that reasons for the removal request be stated in the requisition. There is no requirement in the section as to the type of reasons for the removal although I accept that the reasons given cannot be misleading. (See *Perper v. York Region Condominium No. 860*, 2012 O.J. No. 2594 at para. 40)

[23] This Board should not have been surprised that these proposed repairs were controversial. The original quote ranged from $750,000 - $1.6 million. Further, in their letter sent just prior to the April AGM, blame for the need for expensive repairs was laid squarely on previous boards and property management that had been replaced in 2010. Owners were advised that civil action against those previous parties was being considered. This letter may have stirred up old divisions and encouraged the unit holders to question the judgment not of previous boards, but of the current one.

[24] The respondent group initially was asking for more information, then for a deferral of the spending decision for a few months. This was stated to allow for more information and opinions from other experts in the area on what needed to be done to repair this building. On April 2, a letter was sent to the Board under the signature of Jay Mohammed and Angel Nakevski.

Reference: Building Envelope Restoration Plan

Dear Board Members,

We would like to inform you that a tremendous number of owners of 95 Base Line Rd W, London ON, have expressed their concerns regarding the project mentioned above. In this regard, we are asking for the detailed information, which should be readily available to us under the Condominium Act.

The following is the list of the expected documents and information:

- Request for Proposals including scopes, capacities costs
- Detailed Engineering Report, designs drawings, estimates, cost analysis etc.
- Requests for quotes, bid packages and offers
- Contractors prequalification screening, tendering participation and process
- Company history, background, competency
- Any other possible solutions and options explored
- Technical report of cladding sample testing and data analysis
- Contingency and business plans to deal with extras to contract, beyond $755,000
- Contractual agreements with Enerplan and A1 restoration, scope, capacity, cost etc.

Furthermore, we are asking you to immediately discontinue any negotiations, renewal of and further signing of any and all contracts, unless and until the requested information is provided to us within 7 days, and further to allow 7 days for us to properly review the information and reply.

Without prejudice, please note that we have already secured support and signatures from over 51% of the owners in the complex. We are expecting your full and professional cooperation to avoid further escalation.

Owner's Representatives

Jay Mohammed # 602

Angel Nakevski #403

(Application Record of Respondents, Tab H)

[25] The following day, the same individuals requested permission to post a notice to residents reproduced below:

BUILDING RESTORATION PLAN

Dear Residents,

Over the weekend we successfully gained the support and signatures of over 51% of the residents and that number continues to grow. We have forwarded our request for detailed information to the board and the secondary parties.

Many thanks to those who believe in the purpose and who signed in the support of this action. To our neighbours who declined to participate, we respect your decision and we would like you to know that it does not and will not interfere with our neighbourly relationship.

To residents who are unaware of the upcoming financial burden and who wish to voice their concerns and / or participate, you may contact:

Angel Nakevski, unit 403

Jay Mohammed, unit 602,

(Application Record of Respondents, Tab J)

[26] In my view, neither of these communications can be described as "misleading" or contributing to a "poisoned atmosphere".

[27] In response to the request of Mr. Nakevski and Mr. Mohammed, the Board chose to reply through their solicitor Mr. Mullin. In his letter of April 4, 2012, he requested that all further correspondence with the Board go through him. While agreeing to the examination and copying of documents at a reasonable fee, Mr. Mullin rejected the request for other information:

> However, in keeping with attending case law (*York Condominium Corporation No. 60 v. Brown* (2001) CarswellOnt 3470, a condominium is not required to respond to questions or participate in the reply to interrogatories. Unit owners are entitled to review records and arrive at their own conclusions thereafter. As a result, the Condominium would be

> pleased to assist in any record review/copying, but shall not enter into a series of questions and answers.

[28] As well, the request for a suspension of negotiations and signing of contracts while the material was reviewed was rejected out of hand.

> **Respectfully, maintenance and repair obligations are the sole purview of the Board of Directors to decide upon.** (Emphasis added) The matters pertaining to the building envelope restoration activities have been explained in detail to the unit owners. This occurred on January 25th, 2012, at the Hillside Church of London, in which all attending unit owners were able to listen and make inquiries of both the Board of Directors and the Corporation's Engineer. Despite the comment of having secured support and signatures from over 51% of the owners in the complex, the Condominium is charged with these duties and shall continue to fulfill them.
>
> Respectfully, if every condominium board of directors received letter such as yours, indicating that all work should stop, effecting condominium widespread business would be impossible.
>
> Finally, it is understood that you have also recently asked Mr. Sean Eglinton to post a notice to all unit owners, drafted by yourselves and referred to as "Building Restoration Plan". Such permissions has been denied.
>
> Please follow-up with me directly should you wish to conduct a review of the Condominium's records pertaining to the Building Envelope Restoration, at your convenience.

(Application Record of Respondents, Tab L)

[29] This response created an escalation of the situation in several ways. First of all, the Board removed themselves from direct conversation with non confrontational representatives who purported to represent a majority of those residents and inserted their lawyer. Secondly, any discussion about the records and how the decision was arrived at and what alternatives were sought has been dismissed as not required — with the legalistic "in keeping with attending case law". While repair decisions may be generally left to the board to decide, there is nothing that prohibits their wide consultation and input seeking from owners. Finally, "[r]espectfully, if every condominium board of directors received letters such as yours, indicating that all work should stop, effecting condominium widespread business would be impossible" is unhelpful at best and at worst can be interpreted as patronizing and dismissive.

[30] Clearly getting more information as requested would be pointless if the Board went ahead and signed contracts while the information was being reviewed.

[31] Following the requests to the Board, one of the Board members Neil McQuarrie wrote to his fellow board members and the property manager on April 4, having reviewed Mr. Mullin's proposed letter to Mr. Nakevski and Mr. Mohammed. His letter (Application Record of the Respondents, Tab 1(K)) reports on running into Mr. Nakevski, "I had the good fortune to ride the elevator with Angel" and inviting him into his apartment where they spent 30 minutes discussing the letter.

[32] Mr. McQuarrie writes in his e-mail:

> I am concerned always about good communication in the building. He is concerned about the envelope restoration plan and the significant costs. He just wants to take time to learn more.
> I told him that we felt that our communication had been significant, he simply had missed it.
> He contends there are many owners that are upset about not enough information and not enough understanding (despite our efforts).

In the e-mail he says that he told Mr. Nakevski that the Board were the owner's representatives but that he personally was impressed with Nakevksi's concerns as an owner and that he told him that he wished all others were as concerned. He writes:

> *I personally think that it is one of those times that we consider making lemonade as the situation has presented us with lemons.*
> *I would suggest that we did our duties, but, this might be one of those times that a general meeting could be held after the AGM. – Near future- to further explain the process, board's efforts , decisions and certainly explain the plan as required. (We would have to field a few questions I am sure)*
> *I said I would be willing to personally support having that meeting, but , could not speak for the board--only as an individual director.*
> Communication is the key. We have tried , but, more is needed.

(Application Record of Respondents, Tab K)

[33] Mr. Nakevski was copied with the letter which ends with "***Then I read R. Mullen's suggested reply (2 hours later)***". (Emphasis his)

[34] Mr. McQuarrie's e-mail is thoughtful, reasonable and proposes a sharing of information to address the concerns raised by Mr. Nakevski and Mr. Mohammed. It stands in sharp contrast to the dismissive and legalistic position reflected in Mr. Mullin's letter.

[35] Given the rigidity demonstrated by the applicant Board and their rejection outright that some time be taken and further information gathered, the respondents' alternative motion try to get a board more receptive to their position, was entirely understandable and reasonable it is a remedy provided for under the Act. The reason given for removal is "we believe that they are not acting in good faith and the best interests of the residents" seems an honest reaction to the Board's response to the residents' reasonable requests. Good

faith has been defined amongst other definitions as "faithfulness to one's duty or obligation" (Black's Law Dictionary (2009) West, 9th Ed.). To the extent that some residents felt the refusal of the board to provide more information and refrain from signing a contract while this was reviewed was unreasonable and contrary to the best interests of the residents, this characterization cannot be described as "misleading".

[36] The subsequent events pointed to by the applicant in their material are indicia of democracy at work, not anarchy. Anarchists are opposed to governance and government. The respondents, in contrast, have scrupulously followed the provisions of the Act and in fact are prepared to govern in the place of the applicant. The meeting that I find the applicant arbitrarily aborted, was, until that point, demonstrative of democracy as well. Non attendance at a meeting or legislature to prevent a quorum is a time honoured parliamentary strategy. Heckling and interrupting, although often unhelpful, are part of the sometimes messy functioning of democratic bodies. The televised proceedings of the House of Commons of Provincial Legislature Question Period or local council debates illustrate the rambunctiousness that frequently accompanies democratic functioning. The noisy AGM was functional, not dysfunctional and not analogous to the armed storming of Parliament. The requisition was brought according to the governing Act. Elected boards can be unelected and replaced by other representatives who then continue their governance responsibilities. That reflects the democratic theme of the Act.

[37] In rejecting the Board's injunction application, Bryant J. found it had been brought "for the sole purpose of preventing the owners from exercising their rights to hold a requisition meeting to remove the Board members from office and preventing their right to elect a new Board". He also found the owners were entitled to exercise their statutory duty, that there was no urgency to appoint an administrator and "the balance of convenience favours holding the meeting as soon as possible." (Bryant J.'s decision, August 10, 2012, Supplementary Application Record of the Respondents, Tab 2(A))

[38] The applicant relies on much of the same material that was before Bryant J. on the injunction application as well as supplementary material including a new affidavit of Sean Eglinton, the condominium manager, sworn after the August 8 meeting. In it, he states in a section headed "Uncertainty and Chaos" that the fact that the old Board did not recognize the new Board "has significantly increased the confusion amongst the owners" and, as a result, the Condominium is ungovernable". He states that without an independent third party administrator "the condominium will continue to see-saw back and forth as each group requisitions meetings to remove the other group". He also expresses the concern that the assessment for $20,000 in legal bills occasioned by the Board "working their way through, in the best interests of all owners, this unfortunate mess" will not be paid by the new Board. Finally, he expresses fear that further building deterioration will occur if the building repairs are not completed and injuries may occur from falling bricks.

[39] Ms. Zammit, a board member, states in her affidavit (Application Record, Tab 3, paras. 6-8) that she has reviewed the reports and that it concludes that "wing-walls at the sides of the balconies are deteriorating at such a rate that significant damage to the building and injury to the occupants will occur if the work is not completed in a timely fashion."

[40] The Enerplan report (Application Record, Tab 2(B)) says that "[t]he exterior walls at the building are at a critical stage in their life cycle." It concludes that while it is not necessary to discontinue use of balconies and collapse is not imminent, it does warn of the "potential for delaminations that exist and/or are forming to break away and fall to the ground and the potential liability this poses to the Corporation" referring to both personal injury or property damage. The report does not state that significant damage to the building and injury to occupants will occur if work is not completed in a timely fashion.

[41] The respondents say that they can and will address the maintenance issue and have consulted a local engineering firm, Concentric Associates, with experience with this type of work, with the intention of having them review the Enerplan Report and provide an assessment of the condition of the building. They believe, based on speaking to people who have employed them, that Concentric could do the work needed at considerably less cost.

[42] Concern over disintegrating concrete could easily be addressed by temporary fencing while alternatives are considered.

[43] The expressed concern of Mr. Eglinton over the legal fees assessment is puzzling. It is understandable that some residents would feel resentment in having to pay the legal fees associated with the Board's response to the respondent owners. This issue is clearly one that the elected board will have to deal with. It may require a review of those expenses by the board. There may be a difference of opinion about this issue. But neither this issue or speculation about further requisitions being brought are reasons to suspend the democratic functioning of this condominium community. Perhaps the results of the litigation to date will help the building move forward in a more cohesive fashion.

[44] Nothing in the applicant's material or supplementary material supports the submission that this building is stumbling into the "abyss" in "chaos" and cannot be governed. Anarchy is the absence of government, lawlessness (Black's Law Dictionary (2009) West, 9th Ed., and The Dictionary of Canadian Law). The language used in the applicant's material is in turn hyperbolic, exaggerated and alarmist.

Applicability of the Law to the Issues

1) Is the appointment of an administrator necessary in these circumstances?

[45] The governing test for appointing an administrator is set out in s. 131(2): "if the court is of the opinion that it would be just and convenient having regard to the scheme and intent of this act and the best interests of the owners."

[46] The scheme of the Act contemplates that the unit holders will govern themselves through an elected Board.

[47] The appointment of an administrator should be a last resort (see *Bahadoor v. York Condominium Corp. No. 82*, 2006 CarswellOnt 7608 (Ont. S.C.J.), at para. 26: Tab 1, Respondent Book of Authorities.

> When a court is considering either the appointment or termination of an administrator, good reason must be shown why unit owners should not manage their corporation's affairs through an elected board of directors. Self-governance is the norm; administrators are the exception. Or, as put by Huddart J. in *Cook v. Strata Plan N-50*, [1995] B.C.J. No. 2882 (B.C. S.C.): '...the democratic government of the strata community should not be overridden by the Court except where absolutely necessary.'

[48] A number of factors may be considered by a court in determining whether the appointment of an administrator, even for a short term as urged by the applicant, is in the best interests of the condominium corporation.

[49] They include factors not applicable in this case — a demonstrated inability to manage the corporation, and demonstrated mismanagement or misconduct of the corporation affairs.

[50] What are relevant considerations outlined in the case law are: a) whether there is a struggle between competing groups that prevents proper governments of the condominium; b) whether appointing an administrator is necessary to bring order to the condominium governance; and c) only an administrator has any reasonable prospect of bringing order. Cost of an administrator is also a relevant consideration.

(See *Skyline Executive Properties Inc. v. Metropolitan Toronto Condominium Corp. No. 1385*, 2002 CarswellOnt 5670 at paras. 26-28 (Ont. S.C.J.); aff'd 2003 CarswellOnt 5050 (Ont. C.A.))

[51] In applying these factors to the facts here, it is necessary to answer issue 2) regarding the validity of the requisition meeting that elected a new board.

2) Was the election of a new Board valid?

[52] The respondents argue that the only logical inference that can be drawn from the fact that no injunction was granted prior to August 8 is that Bryant J. intended the meeting to be held. The Board disagrees. In my view, the inference argued by the Board would render Bryant J.'s decision meaningless and in effect result in the Board having succeeded in delaying the vote despite Bryant J.'s clear rejection of their argument and pointed conclusions as to the Board's ulterior motive.

[53] It is clear that the date of the August 8 meeting was in the material before Bryant J. on August 1, 2012.

[54] Had Bryant J. intended to issue an injunction it was a simple matter to issue a "one liner". It is also clear that had the injunction been granted, any purported meeting would indeed be invalid.

[55] On all of the evidence there is no reason to consider the meeting invalid as it was duly called and notice was given pursuant to the Act. The solicitors for the Board chose to advise all the unit holders not to go to the meeting and took the position with counsel for the respondents that an earlier ruling had enjoined the meeting from taking place until the

ruling was issued. There is nothing whatsoever in the record that could be taken as supporting this position. If owners missed the meeting it was due to the questionable advice in the letter they were sent. It was not due to any action of the respondent group. The meeting and the election of a new board were valid.

2) With a new board elected is an administrator necessary?

[56] I am not bound by Bryant J.'s findings but they are in my view sound and firmly founded on the evidence. I agree with Bryant J.'s conclusion that the facts in this case are dissimilar to the facts in the case law cited by the applicant. There is no urgency in the need for a solution to the building's envelope issue that would justify the appointment of an administrator.

[57] Contrary to the submissions of the applicant that "anarchy" and "chaos" are leading the Condominium to the "abyss", I find the owners very capable of governing themselves without an administrator. If there is confusion as Mr. Eglinton states, it has been caused by the Board's immovable positions, their stand that the August 8 election was invalid, and their determination to thwart those opposed to their view of what needed to be done.

[58] Section 131 was designed as a last resort for condominiums in perilous circumstances. It was not intended to be used to allow a board which has lost the confidence of the majority of owners to get their way regardless of the democratic will of the owners. Applying the case law as reviewed, there is no reason demonstrated for the appointment of an administrator, even on a short term basis. No valid reason existed for this application even before the election of a new board on August 8. This condominium corporation is clearly able to govern itself and the differences of opinion over the type of repairs that are required are all capable of being resolved within the democratic framework of the corporation. I reject any suggestion in the applicant's material that this group of owners is ungovernable.

[59] For all of these reasons the application is dismissed with costs to the respondents.

[60] If the parties cannot agree on costs I will receive written submission within ten days of this decision.

Thomas J. Carey
Justice

Released: October 9, 2012

CITATION: Middlesex Condo. Corp. v. Middlesex Condo. Corp., 2012 ONSC 4819

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Middlesex Condominium Corporation No. 232

Applicant

– and –

Middlesex Condominium Corporation No. 232 (Owners and Mortgagees of)

Respondents

REASONS FOR JUDGMENT

Carey J.

Released: October 9, 2012

CITATION: Middlesex Condo. Corp. v. Middlesex Condo. Corp., 2013 ONSC 736
COURT FILE NO.: 6738-12 (London)
DATE: 20130211

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Middlesex Condominium Corporation No. 232	Robert W. Dowhan, for the Applicant
Applicant	
– and –	Joe Hoffer, for the Respondents
Middlesex Condominium Corporation No. 232 (Owners and Mortgagees of)	
Respondents	

COSTS RULING

CAREY J.:

[1] Subsequent to the hearing of this application a second requisition vote was held pertaining to the Board of Directors (the "Board") of this London condominium. The result of this vote held September 18, 2012 was the same as the August 8, 2012 meeting. The previous Board that had initiated this application and a second application to restrain the August 8th vote from taking place was replaced in both votes by members of the former respondent group who are now the operating Board of MCC No. 232. Thus, the submissions as to costs have been made jointly by the applicant and respondents both represented by the same counsel, Cohen Highley. The joint submission on behalf of the applicant and respondents is that the individual former Board members be required to pay costs.

[2] They have filed no new material but rely on the affidavits of Jennifer Anne Zammit and Sean Brant Michael Eglinton, both sworn May 15, 2012. I have expressed my view of those affidavits in my Ruling. The court did not receive this material directly despite several requests but only through the offices of the respondents, who provided a copy from their file.

[3] In considering the issue of costs I have relied on the following findings of fact:

1. The former Board asked only one contractor to quote on the work that they wished to have done. While that quote was adjusted by the contractors, it remained as just one company's opinion. The request for a second quote from the group representing a large number of residents was met with condescension and dismissiveness.

2. The Board all participated in what I find was a pre-orchestrated termination of the Annual General Meeting ("AGM") when the vote on financing the repairs went contrary to their wishes and they were facing a removal vote.

3. The former Board members, rather than agreeing to postpone the decision and seek another opinion as to remedying the building's issues, brought an action to appoint an administrator and suspend the operation of democracy in the building based on what I found to be wildly exaggerated claims lumped together in their material under the heading "Uncertainty Chaos and Anarchy".

4. The former Board members had their counsel advise residents not to attend the meeting called for August 8, 2012 when they should have known that the facts claimed in that letter were not correct as there was no order prohibiting the meeting from going ahead.

5. The former Board members instructed their counsel to proceed with the application for the appointment of an administrator even though they had been voted out at the August 8th meeting. The former Board members continued to use the MC 232 designation and declined to participate in their personal capacity. This appears designed to avoid cost liability.

6. The former Board members tried to use their refusal to recognize the August 8th vote as further reason for the court to appoint an administrator and further evidence of chaos at the condominium as two groups were claiming to be the Board. They in effect tried to use their refusal to accept the democratic will of the majority of residents, as a reason to suspend its operation.

[4] As a result of these findings I conclude that the Board was not acting in good faith in pushing ahead with this unnecessary litigation. It would be unfair to have the majority of residents who opposed the arbitrary measures of the former Board pay for their actions out of the condominium's reserve fund. The former Board members were in effect the true litigating parties.

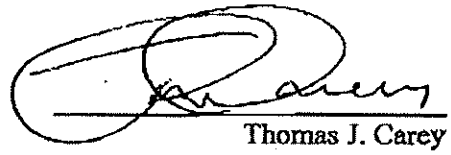
[5] I have no evidence that the Board relied on legal advice in their actions. I can only conclude that their legal counsel were instructed to take the steps they did.

[6] As to the advice of professional engineers, I concluded in my reasons for denying the requested order that the Enerplan Report did not state that significant damage will occur if work is not completed in a timely fashion (para. 40, Reasons for Judgment). I found much of the former Board's material "in turn hyperbolic, exaggerated and alarmist". The Board ultimately is responsible for their own decisions and cannot on these facts hide behind either their counsel or the Enerplan report.

[7] The Board's property manager was employed by the Board and reported to that Board. He was answerable to the Board and not in my view independent of them. The fact that his affidavit supported the actions of the Board cannot relieve the Board of responsibility for their actions.

[8] My conclusion that the former Board members were not acting in good faith precludes their indemnification pursuant to s. 38(2) of the *Condominium Act, 1998*, S.O. 19.

[9] I have concluded that the facts here support an award of costs against the former Board members personally. Their behaviour was deliberate, egregious and requires sanction. Anything short of full indemnity costs would penalize the residents unfairly. The costs requested by the new Board are reasonable and will be fixed at $21,300.52 on a joint and several basis between the five former Board members namely Neil McQuarrie, Dwain Bodkin, Lynda Kirkham, Norm Walker and Jennifer Zammit.



Thomas J. Carey
Justice

Released: February 11, 2013

CITATION: Middlesex Condo. Corp. v. Middlesex Condo. Corp., 2013 ONSC 736

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Middlesex Condominium Corporation No. 232

Applicant

– and –

Middlesex Condominium Corporation No. 232 (Owners and Mortgagees of)

Respondents

COSTS RULING

Carey J.

Released: February 11, 2013

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Middlesex **Condominium Corp**. No. 232 v. Middlesex **Condominium Corp**. No. 232

Middlesex **Condominium Corporation** No. 232, Applicant and Middlesex **Condominium Corporation** No. 232 (Owners and Mortgagees of), Respondents

Ontario Superior Court of Justice

A.W. Bryant J.

Judgment: February 11, **2013**
Docket: London 6738-12

Proceedings: Additional reasons, 2012 ONSC 4620 (Ont. S.C.J.)

Counsel: Robert W. Dowhan, for Applicant

Joe Hoffer, for Respondents

Subject: Civil Practice and Procedure; Property

Civil practice and procedure

Real property

***A.W. Bryant J.*:**

I Facts

1 The Middlesex **Condominium Corporation** No. 232 ("MCC 232") is a 98 unit, 10 storey apartment condominium building. Since 2007, exterior water entry problems occurred at some units. The repairs were suite specific.

2 In September 2011, MCC 232's Board of Directors ("Board" or "old Board") received a report from Enerplan Building Consultants ("Enerplan") addressing the condition of the building envelope and balconies. The cost of Enerplan's proposed project was estimated at $1.6 million. At the request of the Board, Enerplan proposed an alternative plan with an estimated cost of $755,000. MCC 232 or individual unit owners would need to obtain financing for the construction project since the reserve fund had only $143,000.

3 In January 2012, the members of the Board were Neil McQuarrie, Dwain Bodkin, Lynda Kirkham, Norm Walker and Jennifer Zammit. The Board held an information meeting for the unit owners. The Board chose the alternate Enerplan option with an estimated cost of $755,000. The Board prepared a borrowing bylaw to authorize a $600,000 loan to pay for the repairs. The Board planned a vote by the unit owners on the Enerplan proposal and the associated borrowing by-law at the MCC 232 Annual General Meeting ("AGM") scheduled for April 16, 2012.

4 Some interested unit owners requested copies of documents, including the Enerplan report, and asked for an opportunity to review them. These residents requested the Board to suspend contract negotiations to allow them to review the Enerplan proposal. They also requested permission to post a notice regarding the plans in the condominium building.

5 The Board provided supervised access to some documents but refused access to others. The unit owners sought to defer the vote on the borrowing by-law to September 2012. Two of the five Board members were scheduled to end their term at the AGM. A group of unit owners prepared a requisition pursuant to s. 46 of the *Condominium Act* (the *Act)* 1998 (S.O. 1998, c. 18) to remove the current Board members and to hold elections to appoint new Directors.

6 On April 16th 2012, some unit owners attempted to dissuade other unit owners from attending the AGM to prevent a quorum. There were strong exchanges between the Board members and the leaders of a group of unit owners who opposed the Enerplan proposal and wished to receive a second opinion from another engineering consultant. The Board's motion to pass a borrowing by-law was defeated at the AGM. The Board terminated the AGM before the unit owners' motion to remove the members of the Board could be voted on.

7 The failure of the Board's motion to pass the borrowing by-law at the AGM should have clearly informed the Board that the Enerplan project did not have the confidence of the majority of the unit owners. Counsel for the majority of unit owners and counsel for the Board exchanged correspondence in an attempt to resolve their differences, a matter I will refer to later in these reasons.

8 The unit owners scheduled a requisition meeting pursuant to s. 46 of the *Act* to remove the current members of the Board and replace them with five nominees. The Board's response was to apply to the Court for an order appointing an administrator pursuant to s. 131 of the *Act.* The Board asserted that the administrator would be in the best interests of the condominium as the Board was unable to govern because of significant interference by a "small group of owners" who have "misled the owners causing a poisoned atmosphere in which no board of directors can properly manage the condominium's affairs."

9 The Board applied to the Court for an injunction to prevent the unit holders from holding a meeting to remove members of the Board and elect other unit members to the Board pursuant to s. 46 of the *Act*. The Board's application for an injunction was heard on August 1 and 3, 2012. Counsel for the Board attempted to persuade the Court that the "small group" of owners were irresponsible, engaged in disruptive conduct and misstated the qualifications of an affiant. Counsel submitted the situation was urgent and that dire consequence would occur if an administrator was not appointed. The Court did not accept the submissions made on behalf of the old Board.

10 On August 8, 2012, the unit holders representing more than 50% of the owners removed the old Board and elected five new Board members: Zarko Radakovic, Trecia Brown, Jay Mohammed, Jacqueline Griffin and Angel Makeviski ("the new Board"). The old Board did not accept the validity of their removal, On August 10, 2012, the Court released its decision dismissing the application for an injunction.

II Cost Submissions

11 On August 29, 2012, the Respondents submitted that costs of the injunction application should be paid by the members of the old Board. On November 5, 2012 the Court wrote to Mr. Dowhan, counsel for the old Board, requesting him to inform members of the old Board that the Respondents sought costs they had incurred in the injunction litigation. The Court requested Mr. Dowhan to inquire if members of the old Board wished to retain counsel to make submissions on their behalf. On November 16, 2012, Mr. Dowhan filed submissions on behalf of the members of the old Board. On November 29, 2012, Mr. Hoffer filed responding submissions on behalf of the Respondents.

III Analysis and Decision

12 The Applicant's application for an injunction was dismissed. The normal rule is that costs follow the event. Since the application was brought by MCC 232, the application of the normal rule would produce a perverse result because the Respondents would bear an equal portion of the Applicant's costs even though they were the successful parties.

13 Section 131 of the *Courts of Justice Act* R.S.O 1990, c. C.43 provides that costs of a step in a proceeding are in the discretion of a court. Rule 57.01 identifies factors to be considered when a court exercises that discretion. In *Epp y Hood* (1988) CarswellOnt 3210; 1988 CarswellOnt 3215 (Ont. Dist. Ct.), the court ordered costs against individual board members on a solicitor client basis. In *Boily v. Carleton* ***Condominium Corp.*** *No. 145*, [2012] ONSC 1324, at para 48 (Master S.C.O.) some of the costs were awarded against the Board of Directors. Thus, Courts have recognized that in some circumstances, Board members of a **condominium corporation** may be responsible for costs.

14 The *Act* establishes a democratic process to elect and remove directors. A director may be removed from office before the expiry of his or her term by a vote of owners at a meeting called for this purpose where more than 50 per cent of all units in the corporation vote in favour of the director's removal. Another person may be appointed to replace the former director (ss. 45, 46, 47).

15 The old Board aborted the AGM to avoid a vote on the removal of directors and the election of new directors. The members of the old Board rejected the request of the majority of unit owners who sought a second opinion from another consultant for a modest sum ($5,000). Instead, the old Board engaged MCC232 in expensive and unnecessary litigation to twart the purpose of s. 46 of the *Act*, Counsel for the old Board improperly characterized the unit owners as obstructionists and exaggerated the urgency of the circumstances to undermine the Respondents' desire to exercise their rights under the *Act*.

16 The *Act* provides a standard of care for officers and directors of a **condominium corporation**. Sections 37(1), 37(3) and 38(2) of the *Act* state:

> 37. (1) Every director and every officer of a corporation in exercising the powers and discharging the duties of office shall,
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> (a) act honestly and in good faith; and
>
> (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.
>
> 37(3) A director shall not be found liable for a breach of duty mentioned in subsection (1) if the breach arises as a result of the director's relying in good faith upon,
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> . . .
>
> (b) a report or opinion of a lawyer, ... engineer... or other person whose profession lends credibility to the report or opinion.
>
> . . .
>
> 38 (2) No director or officer of a corporation shall be indemnified by the corporation in respect of any liability, costs, charges or expenses that the person sustains or incurs in or about an action, suit or other proceeding as a result of which the person is adjudged to be in breach of the duty to act honestly and in good faith.

17 Counsel for members of the old Board did not file any evidence that members of the old Board relied in good faith upon a report or opinion of a lawyer. Counsel for the old Board did not file any new material on the matter of cots. Counsel recycled documents previously filed, for example, the affidavits of Mr. Eglinton, sworn May 15, 2012 and Ms. Zammit, sworn May 15, 2012 which had been filed to support the request for the appointment of an administrator which was dealt with by Carey J.

18 Based on the material filed before me, I find that the old Board acted in bad faith when it brought an injunction to prevent the unit holders from exercising their statutory right to remove the old directors and elect the new directors pursuant to s. 46 of the *Act*. This Court in dismissing the application for an injunction stated:

The Court finds that the Board's motion is for the sole purpose of preventing the owner's from exercising their rights to hold a Requisition Meeting to remove the Board Members from office and preventing their statutory right to elect a new Board.

19 In the *Law of Cots*, Mark Orkin, 2nd, ed., vol. II, *Thomson Reuters*, 4-33 writes:

> Central to the issue of the costs of a motion for an interlocutory injunction is an extraordinary equitable remedy that ought to be sough with caution and granted sparingly. Thus, a motion for an injunction was dismissed with costs on a solicitor-and-client scale where the claim was without merit,... the grounds for the motion were tenuous... and also where the plaintiff's motive for seeking an interim injunction was improper and the claim upon which it was obtained lacked legal merit, but costs may also be awarded on a lesser scale, depending on the circumstances.

20 The application for an injunction was an unnecessary step in the proceeding. The old Board members tried to maintain its positions as Directors when they no longer represented the majority of unit holders. It was improper because it attempted to prevent unit owners from exercising their statutory right to remove the older directors and elect new directors. I find that the Applicant's application for an injunction was tenuous and without merit.

21 The rates billed by the Respondent's counsel were reasonable. Counsel for the Board members did not file a cost outline and the Court infers that the unsuccessful Applicant devoted as much time to prosecute the injunction as the Respondents did in defending the injunction application (*United States of America v. Yemec* (2007), 85 O.R. (3d) 751, at para 54 (Div. Ct).

22 The Court reduces the cost award from $22,000 to $15,000 because the injunction was a distinct step in the context of a general dispute between the parties and some of the line items were not limited to the injunction application. The members of the old Board are jointly and severally liable for the $15,000 cost award but as between themselves are responsible for one-fifth.

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