CITATION: Siemon v. Perth Standard Condominium Corporation, 2019 ONSC 5576
COURT FILE NO.: 17-2820
DATE: 20190927

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Laurie Siemon and Mary Siemon, Yanna McIntosh and Yanna McIntosh as litigation guardian for Icil Morgan, Ralph Wagner, Betty Mullin, Lorna Inman, Douglas Ahrens as litigation guardian for Mae Ahrens, Allan Meilke, Debra Hemstock and Beverley Armstrong	)	Paul Parlee, for the Plaintiffs
Plaintiffs	)	
– and –	)	
Perth Standard Condominium Corporation No. 39, Cedarcroft 2 Facility Inc., Cedarcroft 2 Facility Limited Partnership and All Seniors Care Living Centres Ltd.	)	Gavin Tighe and Anna Husa, for the Defendants
Defendants	)	
	)	**HEARD:** March 27, 28 and 29, 2019

RULING ON MOTIONS

HEBNER J.

[1] Perth Standard Condominium Corporation number 39 ("Condo 39") was established by registration of a declaration on December 18, 2013. It is comprised of a 124-unit building located at 200 McCarthy Road, Stratford, Ontario. It is a retirement residence known as McCarthy Place. McCarthy Place is a retirement home as defined in s. 2 of the *Retirement Homes Act, 2010*, S.O. 2010, c. 11.

[2] This action was commenced by certain individual owners of units at McCarthy Place. They claim that the defendants are in a conflict of interest; that the defendants have breached certain provisions of the condominium declaration; that the defendants have breached certain provisions of the condominium's bylaws; that the defendants have breached certain provisions of the *Retirement Homes Act, 2010*. Essentially, the plaintiffs claim that the defendants have enforced certain provisions of the condominium bylaws in

a discriminatory manner against only some of the owners of the units while exempting other owners. The plaintiffs claim oppressive conduct. They also claim damages as a result of the defendants' behaviours.

[3] On their motion for summary judgment, the plaintiffs seek an order that:

1. The defendants shall ensure that two members of the Board of Directors of Condo 39 are independent of, and not employees of, the defendants;

2. The defendants shall use an agreement with all tenants/occupants of condominium units that explicitly sets out the provision of the services program with mandatory services fees in accordance with bylaw number 2;

3. Damages in the sum of $50,000.00 under section 135 of the *Condominium Act*.

[4] The defendants agree that this matter ought to be dealt with by way of motion for summary judgment and claim that the plaintiffs' claims ought to be summarily dismissed.

Background Facts

[5] Condo 39 came into existence on December 18, 2013 when it was registered as a retirement condominium corporation. The license to operate Condo 39 was obtained by the builders/original owners RLC Palstratford LP ("RLC") and its general partner Palstratford GP Inc ("Palstratford"). RLC and Palstratford intended to sell a portion of the units to third parties and then lease the majority of the units to tenants.

[6] The condominium declaration includes the following provisions:

1. A requirement that each owner of a residential unit shall enter into a services operation agreement with the services manager (or its designate) in the form then in use by the services manager. Each owner is required to be a party to such services operation agreement for so long as the owner owns a residential unit. An owner is not entitled to opt out of the services program or the costs to be paid for the program. The costs for the services program are in addition to the common expenses. "No owner of a residential unit may convey, lease, grant a license or provide any other right of occupancy of such residential unit unless and until the prospective owner, lessee or licensee has entered into the then current form of services operation agreement with the services manager (or its designate)." (Clause 4.2(m))

2. The Corporation (Condo 39) is required to ensure that "a prospective owner or resident enter into the service manager's then current form of services operation agreement as a condition of the transfer to such prospective owner or resident's residential unit from time to time". (Clause 11.1 (p))

[7] Bylaw number 2 of Condo 39 attaches a services agreement between RLC and Palstratford on the one hand and Condo 39 on the other hand. It requires that:

1. Every owner, as a condition of ownership, is required to: (i) participate in a services program which may include some form of health care, housekeeping, meals, emergency response and laundry; (ii) enter into a services operations agreement with the services manager or a company related thereto; (iii) receive the services provided as part of the services program; and (iv) pay fees and costs and charges associated with the services program.

2. A services program's expenses are to be comprised of two types of charges: standard services and optional services. "No owner of a residential unit may convey, lease, grant a license or provide any other right of occupancy to his residential unit unless and until the prospective owner, lessee, tenant or licensee has entered into the then current form of services operation agreement with the services manager (or its designate)."

[8] The bylaw provides particulars of standard services and optional services. The standard services are required. They are provided to all unit occupants on an ongoing basis. The standard services include eight meals per month, access to a spa, access to a movie theatre, access to recreational and cultural programs and 24-hour emergency response. In addition, residents are required to purchase a certain amount of optional services. The bylaw provides that "each unit occupant shall be obligated to subscribe for a minimum level of optional services (the "mandatory services") from the following list (list provided) such that the minimum level of mandatory services shall be at least $125.00 together with applicable taxes thereon per unit occupant in each residential unit."

[9] Of the 124 condominium units at McCarthy Place, 11 were sold to individual purchasers, with eight of those units being owned by the plaintiffs. The plaintiffs entered into services operation agreements with RLC and Palstratford when they purchased their units. The services operation agreements are consistent with the provisions of bylaw number 2, outlined above. The agreements included the following provisions:

1. Basic services were to be provided to all unit occupants on an ongoing basis. The basic services are the standard services identified in bylaw number 2, namely; an indoor spa – wellness centre; eight meals per month in the dining room; access to emergency response 24 hours per day, seven days per week; access to social, recreational and cultural programs; and a movie theatre.

2. In addition to the standard services, optional services were to be available for each unit's occupants. The optional services included: additional lunch/dinner meal packages; weekly or daily housekeeping; weekly laundering of sheets and towels; personal laundry; and personal care.

3. The cost of the standard services were set out in schedule B of the services agreement. The cost was:

    (i) $500.00 per month;
    (ii) for each additional unit occupant, $385.00 per month;
    (iii) mandatory services expenses of $125.00 per month per occupant.

[10] In approximately November 2014, RLC and Palstratford, as vendors, sold 106 residential units to All Seniors Capital Inc. The agreement of purchase and sale was subsequently assigned to Cedarcroft 2 Facility Inc. ("Cedarcroft"), one of the defendants in this action. In February 2015, Cedarcroft acquired an additional seven residential units such that it now owns 113 of the units. All 113 of the Cedarcroft units are leased by Cedarcroft to third party tenants.

[11] The *Retirement Homes Act, 2010*, s. 54(1) requires that a package of information be given to every resident of the home. It requires that the package of information be accurate. After Cedarcroft purchased the majority of its units, it released a Care Home Information Package (CHIP) dated March 1, 2015 that established the total charges for each type of suite. The care and service component was a minimum of $870.00.

[12] The current manager for the retirement condominium is the defendant, All Seniors Care Living Centres LTD (All Seniors). Condo 39 has a Board of Directors consisting of three persons. Two of the three board members are employees of Cedarcroft and All Seniors. The defendant, Cedarcroft 2 Facility Limited Partnership ("Cedarcroft 2") is the services provider. All three entities, Cedarcroft (the owner), All Seniors (the manager) and Cedarcroft 2 (the services provider), are related corporations. They have common ownership.

The Plaintiffs' Claim

[13] The core of the plaintiffs' complaint is that Cedarcroft does not require its tenants to enter into the same services agreement that the plaintiffs, or tenants of the plaintiffs, are required to enter into. While the plaintiffs, or tenants of the plaintiffs, are required to pay for services, monthly, at the rate of $500.00 per unit, plus $385.00 per additional occupant, plus $125.00 per occupant, Cedarcroft does not require its own tenants to pay the same amount for services. The plaintiffs claim that the financial burden of the services program falls disproportionately on their shoulders.

The Defendants' Tenants' Services Agreements

[14] Cedarcroft opposed the production of all of the services agreements between it and each of its tenants. The matter was dealt with on a motion before Raikes J. on October 11, 2017. In his endorsement dated October 24, 2017 Raikes J. said:

> I find that the agreements are relevant. Their existence and terms are at the core of this claim. They are relevant to whether the residents in C2F units entered into service agreements upon occupancy and at what rate. How can the plaintiffs ensure that residents of C2F units are not given service expense holidays or discounted rates as inducements to rent a C2F unit?

[15] Raikes J. ordered production of the agreements with protections put in place, namely the use of random identification numbers, to ensure the privacy of the individual residents.

[16] A lawyer at Mr. Parlee's office, Ms. Vandersleen, reviewed the residency agreements and provided a spreadsheet compilation chart with the information found. Her affidavit attaching the spreadsheet discloses the following:

1. 49 units of Cedarcroft's tenants pay either nothing or less than the minimum $870.00 fee for primary basic services (the amount set out in the CHIP);

2. Cedarcroft waived or did not charge the second person occupancy fee for 21 units where more than one tenant occupied a given unit.

[17] The defendants provided a responding affidavit of Ms. Vohra, VP Finance of All Seniors. In her affidavit, she said that each of the tenants in the residential units owned by Cedarcroft must sign a written residency agreement. A blank form of the residency agreement was attached. In the residency agreement, the "basic rent" appears to include a fee for basic care services and meals. The "home care information package" is attached to the standard residency agreements. It lists all of the suites by type, the total monthly charges, the accommodation component and the care and service component.

[18] For example, the suite type "Othello" has an accommodation component of $2,041.00, and a care and service component of $870.00 for a total monthly charge of $2,911.00. The suite type "Rosalind" has an accommodation component of $3,126.00 per month plus a care and service component of $1,335.00 per month for a total monthly charge of $4,461.00. The suite type "Lancaster" has an accommodation component of $2,041.00 and a care and service component of $870.00 for a total monthly charge of $2,911.00. The suite type "Pembroke" has a basic rent component of $3,686.00 and a care and service component of $1,575.00 for total charge of $5,261.00.

[19] When one compares the information contained in the spreadsheet attached to Ms. Vandersleen's affidavit to the blank residence agreement and the CHIP, it is apparent that Cedarcroft has provided incentives in order to attract tenants for its units by not charging the care and service component, or by reducing the charge substantially. There are a number of suites rented at the accommodation component only, with nothing charged for the care and service component. There are a number of suites rented with a much-reduced charge for the care and service component. In her affidavit, paragraphs 56 and 57, Ms. Vohra states

> There are, in fact, only 10 units in respect of which a second person occupancy fee has actually been waived. The waivers are reflective of promotions which Cedarcroft offered from time to time for the purpose of securing tenants for its units. An example is the tenant identified in Ms. Vandersleen's chart as tab 117, random ID number 90107.
>
> There is no associated loss or cost that has been passed on to the plaintiff unit owners as a result. It is obviously in Cedarcroft's best interest to obtain tenants for its residential units so that Cedarcroft obtains some sort of return on its capital and the units do not sit vacant. It is obviously in Cedarcroft's financial interest to obtain as much return on investment by way of fees and rent from its capital invested in the units as the market will bear. To the extent that Cedarcroft, as owner, accepts a lower occupancy fee in respect of any particular tenant, any such loss is its own.

[20] In her cross-examination, Ms. Vohra said the following:

> Q. So is there any consistent set schedule of rent for various size suites rented by Cedarcroft?
>
> A. Okay, so if you're asking me if there's a standard price list, then yes… If you're asking me why there is a different price on the actual lease agreement, as service managers, we have the option of offering discounts, promotions, whatever the case may be, because our goal is to keep our building full. So, if there's any discounts or losses that we are incurring from that, that's our cost to bear as service managers. So, there's no impact to any other person or any other tenant.

[21] What is clear, then, is that Cedarcroft does not require its tenants to enter into the same, or a comparable, services agreement that the plaintiffs were required to enter into. In doing so, Cedarcroft has not complied with the condominium declaration and bylaws. Cedarcroft is able to manipulate the services fee because it, the manager of condo 39 and the services provider are all related corporations with a common ownership.

Position of the Plaintiffs

[22] The plaintiffs rely on s. 135 of the *Condominium Act, 1998*, S.O. 1998, c. 19. The section appears under the heading "Oppression Remedy". The section reads:

> 135 (1) An owner, a corporation, a declarant or mortgagee of a unit may make an application to the Superior Court of Justice for an order under this section.
>
> The grounds for order
>
> (2) On an application, if the court determines that the conduct of an owner, a corporation, a declarant or mortgagee of the unit is or threatens to be oppressive

> or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant, it may make an order to rectify the matter.
>
> Contents of order
>
> (3) on an application, the judge may make any order the judge deems proper including,
>
> (a) an order prohibiting the conduct referred to in the application; and
> (b) an order requiring the payment of compensation.

[23] The plaintiffs assert that the defendants are applying different rules to the plaintiffs than to their own tenants. The defendants are charging the plaintiffs a certain amount for services, as set out in the services agreement and the bylaws, whereas many of the tenants renting from Cedarcroft are charged something less. The plaintiffs assert that these actions put the plaintiffs on a different playing field when they try to rent their units. The plaintiffs assert that they are unable to remedy the problem internally as the defendants ensure that two of the three directors on the board of directors are designates of the defendants. The plaintiffs assert that the defendants have acted oppressively or unfairly such that s. 135 ought to be used to make the appropriate order.

Position of the Defendants

[24] The defendants take the position that the plaintiffs' claim ought to be dismissed in its entirety. The defendants assert that the plaintiffs have failed to show oppression; that the plaintiffs are paying the same price for services that they were five years ago with the original manager; that there is no evidence that the plaintiffs are not receiving the services they pay for. The defendants assert that the plaintiffs may be unhappy, but that doesn't mean that they are oppressed.

[25] With respect to the makeup of the Board of Directors, the defendants point to s. 10 of bylaw number 1, which provides that "a director shall not be disqualified by reason of his office from contracting with the corporation". The defendants also point to s. 40 of the *Condominium Act, 1998*, which sets out a protocol for disclosure on the part of a director who has an interest in a contract or transaction with the corporation. The defendants assert that there is nothing preventing two members of the board being nominees of the defendant corporations and points out that on any corporate board the majority shareholder has control of the board.

[26] The defendants assert that bad faith needs to be proven in order to prove oppression, that the plaintiffs have fallen short of proving bad faith and accordingly the plaintiffs claim ought to be dismissed.

Analysis

[27] In Black's Law dictionary, oppression is defined as:

> The act or an instance of unjustly exercising authority or power so that one or more people are unfairly or cruelly prevented from enjoying the same rights that other people have.

[28] The question for the court is whether the defendants' conduct in renting units without requiring occupants to pay for services is oppressive, is unfairly prejudicial to the plaintiffs or unfairly disregards the plaintiffs' interests. The plaintiffs are not in a position to offer the same incentives when renting out their units.

[29] I turn to the Supreme Court decision in *BCE Inc. v. 1976 Debentureholders*, [2008] 3 SCR 560. In that case, the Supreme Court dealt with the oppression remedy within the context of s. 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, that provides:

> 2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates
>
> (a) any act or omission of the corporation or any of its affiliates effects a result,
> (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
> (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

[30] The Supreme Court set out a framework when dealing with an application under that section. I take the following from that decision:

1. The oppression remedy focuses on harm to the legal and equitable interests of stakeholders affected by acts of the Corporation or its directors. The remedy gives the court a broad jurisdiction to enforce not just what is legal but what is fair.

2. Oppression is fact specific: what is just and equitable is judged by the reasonable expectations of the shareholders in the context of, and in regard to, the relationships at play.

3. In assessing an oppression claim, a court must answer 2 questions:
   a) does the evidence support the reasonable expectation asserted by the claimant? and

b) does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of the relevant interest?

4. Where conflicting interests arise, it falls to the directors of the corporation to resolve them in accordance with their fiduciary duty to act in the best interests of the Corporation. This duty includes a duty to treat individual stakeholders affected by corporate actions equitably and fairly.

[31] In *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc*, 214 D.L.R. (4th) 496, 27 B.L.R. (3d) 53, Lax J. said at paragraph 203:

> The oppression remedy has been a part of the Canadian corporate law landscape since 1975. It is a broad, remedial, curative provision that is designed to protect reasonable shareholder expectations, although the acts complained of may be entirely lawful. The court is concerned with the effect of conduct that is oppressive or unfairly prejudicial or unfairly disregards the interests of any stakeholder. The court has broad powers under section 241, and there are a variety of orders that can be made, including compensatory orders, or, under subsection 241(3)(h), an order to vary or set aside a contract to which corporation is a party.

[32] In *Walia Properties Ltd. v. York Condominium Corp. No 478*, 2007 CanLII 31573 (ONSC), Harvison Young J. dealt with an issue involving a condominium with commercial unit owners on the ground floor and residential unit owners on the upper floor. Although there were more residential unit owners than commercial unit owners, the condominium bylaws provided for a weighted vote so as to level the playing field. The five-person board of directors was comprised of two residential owners and two commercial owners. The fifth seat on the board was empty as the two groups couldn't agree on a choice for the fifth director. There was a deadlock on an issue respecting the common expenses and amenities. A meeting of the owners was called and, by majority of the owners on a "one vote per unit" basis, the two commercial directors were removed from the board. The residential unit owners, being the majority of the owners, essentially ousted the representatives of the commercial unit owners from the board of directors.

[33] At paragraphs 22 – 24, Harvison Young J. said the following about the oppression remedy:

> Section 135 allows a unit owner to apply to the court for relief from conduct that is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant. The section came into effect in 2001. While this is a new concept for Ontario condominium corporations, Canadian courts have dealt with the oppression remedy for many years in the context of corporate law. Corporate law principles regarding oppression are, therefore, applicable in determining what constitutes conduct that is oppressive, unfairly prejudicial or unfairly disregards the applicant's interests in the context of

condominium law: see *Niedermeier v. York Condominium Corp. No. 50* (2006), 149 A.C.W.S. (3d) 708, [2006] O.J. No. 2612 (Sup. Ct. J.).

In the corporate law context, oppressive conduct requires a finding of bad faith, while conduct that is unfairly prejudicial or that unfairly disregards the interests of the applicant does not: see *Brant Investments v. Keeprite Inc.* (1991), 1991 CanLII 2705 (ON CA), 3 O.R. (3d) 289 (C.A.) at 305-306. Oppressive conduct has been described as conduct that is burdensome, harsh and wrongful. Unfair prejudice has been held to mean a limitation on or injury to a complainant's rights or interests that is unfair or inequitable. Unfair disregard means to unjustly ignore or treat the interests of the complainant as being of no importance: see *Niedermeier*, supra, and *Consolidated Enfield Corp. v. Blair* (1994), 47 A.C.W.S. (3d) 728, [1994] O.J. No. 850 (Gen. Div.) at para. 80. Loeb suggests that in the context of condominium law:

> … "unfairly prejudicial" more appropriately describes deception, or different treatment for what may seem to be similar categories, whether financial or otherwise. "Unfairly disregards," however, may more accurately describe an alleged failure to take into account a legitimate minority interest or viewpoint: see *Audrey M. Loeb, Condominium Law and Administration*, loose-leaf (Scarborough, Ontario: Thomson Carswell, 1998) at 23-23.

When determining whether conduct falls within the meaning of s. 135, the court must be mindful that the oppression remedy protects the reasonable expectations of shareholders or unit owners. Reasonable expectations should be determined according to the arrangements that existed between the shareholders or unit owners of a corporation: see *Naneff v. Con-Crete Holdings Ltd. (1995)*, 1995 CanLII 959 (ON CA), 23 O.R. (3d) 481 (C.A.). In addition, the court must examine the cumulative effect of the conduct complained of. In *Blue-Red Holdings Ltd. v. Strata Plan VR 857 (1994)*, 42 R.P.R. (2d) 49 (B.C.S.C.) Dorgan J. looked at the cumulative effect of the conduct complained of and concluded that the conduct was unfairly prejudicial because it resulted in substantial and significant changes that affected only the commercial owners in a mixed-use condominium. Commenting on this case, Loeb suggests that where a proposed change or course of conduct in management dramatically alters the relationship between commercial and residential unit owners, courts are likely to grant a remedy to the aggrieved minority interest unless it can be demonstrated that the proposed change or the conduct itself represents an attempt to balance the competing economic interests of the two groups.

[34] Harvison Young J. found that the failure to use the weighted voting procedures set out in the bylaw "is unfairly prejudicial to and unfairly disregarded the interests of the

commercial owners who sat on the board." (Paragraph 25) She said the declaration had clearly contemplated the relatively level playing field between the commercial and residential owners and the change in the weighted vote "eliminated an important part of the balance for the commercial owners, as their protection in terms of weighted voting was gone". (Paragraph 26) She concluded "having found that the removal of the commercial unit owners from the board was unfairly prejudicial and unfairly disregarded the commercial owners' interests, a declaration that this conduct was oppressive within the meaning of section 135 is appropriate." (Paragraph 31)

[35] In terms of the remedy, Harvison Young J. said, "in my view, the most appropriate remedy in these circumstances is an order that the existing bylaw 2.03 (Board of Directors) be enforced". She said, "in my view this is the least intrusive and most appropriate remedy in the circumstances of this case". The defendants appealed the conclusion that their conduct relating to the composition of the board of directors was oppressive. The appeal was dismissed (2008 ONCA 461).

[36] In the case at hand the condominium declaration requires that every owner enter into a services operation agreement with the services manager. The declaration requires that if an owner rents their unit, the occupants must enter into the then current form of services operation agreement with the services manager. Condominium bylaw number 2 sets out the content of the required services agreement. The condominium bylaw number 2 requires that an owner of a residential unit who grants a right of occupancy must ensure that the tenant enters into the then current form of services operation agreement with the services manager. The declaration and bylaw together make it clear that all occupants of McCarthy Place are to be treated equally. All occupants of McCarthy Place are required to have the same services agreement with the services manager. All occupants of McCarthy Place are to pay the same amount for required services.

[37] In my view, the plaintiffs reasonably expected that all occupants of McCarthy Place would be treated equally and charged the same amount for services. The defendants have not complied with the declaration and bylaw. They have not ensured that all occupants be treated equally. They have not ensured that all occupants be charged the same amount for services. In doing so, the defendants have received an unfair advantage in renting their units, in that they have been able to offer incentives not available to the plaintiffs.

[38] In my view, the defendants' conduct, described above, is unfairly prejudicial to the plaintiffs and unfairly disregards the interests of the plaintiffs. Given that, it falls within conduct defined by the *Condominium Act, 1998*, s. 135. The section refers to conduct that is "oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant". Conduct need not be oppressive to engage the remedy – it need only be unfairly prejudicial or unfairly disregard an owner's interests. On my reading of the section, a finding of bad faith is not necessary.

Remedy

[39] What, then, is the appropriate remedy? The plaintiffs request the following:

1. An order that two of the three members of the Board of Directors be independent of, and not employees, officers or agents of, the defendants or any related corporations;

2. An order that the defendants utilize an agreement with all tenants/occupants of condominium units that explicitly sets out the provision of a services program that is the same as the services agreement the plaintiffs were required to sign and that is distinct from and apart from the basic rent component of the lease agreements.

3. The new board enter into a management agreement with a new services manager.

4. Cedarcroft and All Seniors pay to the plaintiffs damages in the amount of $50,000.00.

[40] In my view, the least intrusive remedy would be to order that the condominium declaration and bylaws be enforced by requiring that all occupants enter into the same services agreement with the services manager, separate and apart from the rent for a unit.

[41] In so far as the Board of Directors is concerned, the plaintiffs' complaint is that they are required to pay more for services than tenants of the defendants. This complaint can be dealt with by the order set out above. I decline to make any order respecting the makeup of the Board of Directors or the choice of services manager. In my view, there are sufficient protections in place in the *Condominium Act, 1998*, to deal with conflicts at the board level.

[42] I turn, then, to the request for damages. There has been no proof of a specific loss. Evidence was filed outlining the difficulties the plaintiffs have had in renting their units, however there is no evidence linking those difficulties to their inability to compete against the defendants. The defendants also appear to have difficulties leasing their units, which is the reason for the incentives. The difficulties in finding tenants could be the result of a downturn in a limited market. However, the failure to prove loss does not necessarily mean that compensation cannot, or ought not, be awarded.

[43] In *CI Covington Fund Inc. v. White* (2000), 22 C.B.R. (4th) 183, Swinton J. confirms that s. 248 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 (the oppression remedy section) confers broad discretion on the Court in determining an appropriate remedy, and mentions instances where compensation orders have been made in small closely held companies:

> Section 248(3) of the OBCA confers a broad discretion on the Court in determining an appropriate remedy, including "any interim or final order it thinks fit". The purpose of the remedy is to rectify the oppression. The provision has been used to make compensation orders against individual directors where their conduct has been found oppressive in small, closely held corporations such as Delta, and they have personally benefited - for

> example, by the removal of assets from the corporation (see, for example, *SCI; Sidaplex*, supra).

[44] In *Ford Motor Co. of Canada v. OMERS*, 79 O.R. (3d) 81, the Court of Appeal acknowledges that an appropriate remedy for an aggrieved shareholder is often compensation, sometimes in the form of enhanced share value:

> Generally, the remedy for compensating shareholders for past unfair dealings is to provide compensation through an appropriate oppression remedy for the oppression for the time that the shareholders held the shares. As the trial judge recognized at para. 259, there may be circumstances where a shareholder can receive enhanced share value because of past unfairness "if a corporation recovers funds or receives compensation arising from a successful application for oppression in respect of the corporation relating to a time period prior to that person becoming a shareholder". (paragraph 136)

[45] There doesn't appear to be anything to limit the remedy to orders that will correct the wrong done to the plaintiffs. There doesn't appear to be anything requiring the plaintiffs prove their damages in order to receive some compensation. Nonetheless, I am not prepared to order the defendants to pay damages to the plaintiffs unless those damages are proven. Here, the plaintiffs have been required to pay a certain amount for services and there is no evidence that they didn't receive the services they paid for. To order damages without proof that those damages have been incurred is akin to ordering punitive damages, which may be appropriate in some cases but I'm not satisfied that they are appropriate in this case.

Disposition

[46] A declaration shall issue to the effect that the defendants have engaged in conduct towards the plaintiffs that is unfairly prejudicial to the plaintiffs and unfairly disregards their interests within the meaning of the *Condominium Act, 1998*, s. 135.

[47] The declaration and bylaw shall be enforced such that all occupants of McCarthy Place shall be required to enter into the same services agreement with the services manager, separate and apart from the rental agreement.

[48] In the event the parties are unable to agree on costs, they may make submissions, to include a costs outline and any relevant offers to settle, according to the following timelines:

a) the plaintiffs may make submissions within 20 days;

b) the defendants may make submissions within 20 days thereafter;

c) the plaintiffs may make reply submissions within 10 days thereafter.

"Original Signed by Justice Hebner"
Pamela L. Hebner
Justice

Released: September 27, 2019

CITATION: Siemon v. Perth Standard Condominium Corporation, 2019 ONSC 5576
COURT FILE NO.: 17-2820

B E T W E E N :

Laurie Siemon and Mary Siemon, Yanna McIntosh and Yanna McIntosh as litigation guardian for Icil Morgan, Ralph Wagner, Betty Mullin, Lorna Inman, Douglas Ahrens as litigation guardian for Mae Ahrens, Allan Meilke, Debra Hemstock and Beverley Armstrong

Plaintiffs

– and –

Perth Standard Condominium Corporation No. 39, Cedarcroft 2 Facility Inc., Cedarcroft 2 Facility Limited Partnership and All Seniors Care Living Centres Ltd.

Defendants

Released: September 27, 2019