

COURT FILE NO.: C-780-07

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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Shawn Darby, Michael Gardner, George
Mouradian, Siegfried Wiens, Michael
Terzian, Mark Arruda, Sue & Nick Marcella,
Dan Drouin Charters, Sandy Wang, Robert
Muschamp, Jon & Laura Ross, John & Rachel
Pefanis, Ken Hicknell, Catherine Tokic, John
Yee, Mariana Pupic, Filipe Martins, Gordon
Nantais, Brian Dietrich, Tyler Grant, Octavian
Ciubotariu, Mate Blekic, Carrie Osborne,
Pamela Lao, William Yeung, Lisa Dinh, Peter
Mccarten, Eric Gosse, Julie Anthony, Paul
Holley, Paul Motz and Martin Sookhoo

Plaintiffs

Robert W. Dowhan and Robert M. Mullin,
for the Plaintiffs

- and -

Lorchrist Properties Limited, Waterloo
Standard Condominium Corporation No. 424,
Loren Andrew Drotos, Lorena Christine
Drotos and Lorraine Barlow

Defendants

Jonathan H. Fine, for the Defendants

HEARD: July 26, 2007

THE HONOURABLE MR. JUSTICE P.B. HAMBLY

2007 CanLII 36819 (ON SC)

[1] This is a motion for an order appointing an inspector and an administrator of a condominium development under the *Condominium Act*.

Background

[2] Lorchrist Properties Limited (Lorchrist) purchased the former Eaton's store at 276 King Street West in the City of Kitchener (the premises). It planned to construct, in the former Eaton's store, 30 commercial units on the first floor, 32 residential units on the second and third floors and 55 parking spaces and 38 storage units to be sold with the residential units in the basement and a rooftop patio. It conveyed the property to Waterloo Standard Condominium Corporation No. 424 (W.S.C.C.) pursuant to the *Condominium Act*. It purported to complete the residential units. It registered W.S.C.C. on February 24, 2006. It sold 29 of the residential units in February and March 2006 for prices in the range of \$200,000. The rest of the construction has not been completed. The owners of the residential units commenced an application against W.S.C.C. on April 27, 2007 for the appointment of an inspector and other relief. The application was settled. The settlement was incorporated in the order of Justice Reilly dated July 4, 2007. It required that W.S.C.C. produce a reserve fund study by July 31, 2007, produce an audit to be available at the annual general meeting, to conduct an annual general meeting "on or about June 27, 2007 or as soon as reasonably possible thereafter" and provide to the solicitor of the applicants "within ten days of this order", a copy of the bank statements from the appropriate financial institutions, representing all of the respondent's operating and reserve fund account. The residential unit holders caused to be issued a statement of claim on July 23, 2007 against Lorchrist, W.S.C.C., Loren Andrew Drotos (Drotos), Lorena Christine Drotos (Lorena Drotos) and Lorraine Barlow (Barlow).

[3] Drotos and Lorena Drotos are the principals of Lorchrist. Barlow is a relative of Drotos and Lorena Drotos. These persons also comprise the Board of Directors of W.S.C.C. The plaintiffs' claims include damages of twenty million dollars against Lorchrist for breach of contract and negligence, damages of twenty million dollars against W.S.C.C. for breach of statutory duty and negligence, damages of five million dollars against Drotos, Lorena Drotos and Barlow for breach of fiduciary duty, a declaration that the conduct of W.S.C.C. has been oppressive pursuant to the *Condominium Act*, the appointment of an inspector pursuant to the *Condominium Act*, an order removing Drotos, Lorena Drotos and Barlow from the Board of Directors of W.S.C.C., an order appointing three of the plaintiffs to the Board of Directors, the appointment of an administrator pursuant to the *Condominium Act* and injunctive relief.

[4] The matter came before me on July 26, 2007 for an interim order appointing an inspector and an administrator pursuant to the *Condominium Act*, which I granted. I undertook to provide written reasons if my orders were appealed. I received a fax from Steven Bellissimo on July 31, 2007 advising that he had been retained by the defendants to appeal my orders and requesting written reasons. These are my reasons.

Orders Made Under the *Fire Protection and Prevention Act (FPPA)* and the *Building Code Act (BCA)*

[5] May 31, 2007 – Blake Moggy, an Assistant to the Fire Marshal, gave notice under section 15 of the FPPA to W.S.C.C. and to Lorchrist. He stated in the notice that he had reasonable grounds to believe that a risk of fire posed an immediate threat to life at the premises. His grounds were that the sprinkler system and the fire alarm system did not conform to the

regulations. The procedure that he adopted under the FPPA was to post a fire watch at the premises.

[6] May 25, 2007 – The Electrical Safety Authority (ESA) gave notice to the W.S.C.C. pursuant to section 21(3) of the FPPA. The notice set out a list of 20 deficiencies identified in an inspection on May 24, 2007, which “pose serious life and/or fire hazards and must be corrected by June 7, 2007”.

[7] May 18, 2007 – Michael Seiling, Acting Director of Building and Chief Building Official for the City of Kitchener and Paul Hillenaar, Municipal Building Official for the City of Kitchener issued an “Order to Remedy Unsafe Building” regarding the premises. It was sent to everyone with an ownership interest in the premises. It was directed to W.S.C.C. and Lorchrist. The notice identified the unsafe conditions as follows:

A site inspection at 276 King St W. known as the Eaton’s Lofts with representatives from Building, Fire, ESA and the Project Architect was completed at 2:30 this afternoon. An unsafe condition was found regarding a new 15 foot wide by 70 foot long opening cut into the main floor creating an interconnected floor space between basement and main floor. Further there are sprinkler heads located approximately 3 feet from the finished ceiling on both floors which do not comply with NFPA 13. There is no containment or adequate suppression due to this newly created interconnected opening. And there are exposed steel columns supporting the first and second floors with no fire protection.

[8] The remedy taken was to post a fire watch 24/7 until one of the following remedial actions had been completed:

- 1) A certified sprinkler installer is to relocate, test and certify all of the sprinkler heads in the basement and main floor areas to meet NFPA 13.
- or

2) A fire separation is to be installed either vertically or horizontally to properly separate the basement area from the main floor area and eliminate the interconnected floor space.

Note: Protection for the exposed steel columns must be adequately provided with both option 1 or 2.

[9] On May 17, 2007 Blake Moggy, an inspector with the Kitchener Fire Department, gave notice to W.S.C.C. and to Drotos of an inspection conducted by him at the premises in which he noted contravention of the Ontario Fire Code as follows:

Emergency lighting shall be provided in public corridors and exit stairway and verification that this emergency lighting is operational

Doors into stairwells shall be maintained to ensure proper closing and latching

Written record of tests shall be kept and made available including Fire Alarm System, Emergency Lighting, Sprinkler System and Portable Extinguishers

Fire Separations shall be provided between residential occupancies and other major occupancies. Damaged fire separations shall be repaired in all areas so that the integrity of the fire separations are maintained.

Exit lights shall be illuminated

An approved Fire Safety Plan needs to be posted in an approved location (main lobby)

Fire extinguishers shall be maintained in conformance with NFPA 10 "Portable Fire Extinguishers"

[10] May 17, 2007 – Blake Moggy, an Assistant to the Fire Marshal, gave notice under section 15 of the *FPPA* directed to W.S.C.C. and to Lorchrist. He stated that he had reasonable grounds to believe that a risk of fire posed an immediate threat to life at the premises. His grounds were as follows:

combustible materials adjacent to faulty wiring in many locations
floor level fire separation compromised
unprotected structural steel
obstructed sprinkler system components
fire alarm system components relocated and not verified
emergency lighting not operational

His remedy was to post a fire watch.

[11] June 15, 2007 – The ESA gave notice to the W.S.C.C. that the 20 deficiencies first identified on May 24, 2007 “pose serious life and/or fire hazards and must be corrected by June 18, 2007”.

[12] July 10, 2007 – The ESA gave notice to “all co-owners of the W.S.C.C.” at the premises. The notice applied to the defects identified on May 24, 2007 and referred to in several previous notices. The notice stated the following:

These defects have resulted in a wiring condition, which is dangerous to both persons and property. Our records show, and our Inspector has confirmed, that to-date no effort has been made to remedy the condition.

This is to confirm that power to the above-noted premises has been ordered disconnected on or about July 31, 2007. This is in accordance with Sections 2-018 and 2-004 of the Ontario Electrical Safety Code. The power will remain disconnected until such time as all deficiencies have been corrected and permission is granted by this office for reconnection.

Asbestos

[13] The City of Kitchener sent a letter dated July 20, 2007 to the W.S.C.C. to the attention of Drotos “Re: Asbestos found in basement area of 276 King Street West”. The City had hired a contractor to perform the work required by its work orders. The contractor discovered asbestos in the basement and as a result could not continue with the work. The letter noted that the City

had not been informed that there was asbestos in the basement dating back to the first permit to create residential suites, which it issued in August 2005. The letter stated the following:

This City of Kitchener is requesting that you provide us a copy of any/all written documentation of ongoing asbestos management programs or asbestos abatement programs that you have allegedly already provided to the City of Kitchener, the Ministry of Labour or other agencies. We also request that you provide information as to the physical locations of asbestos in your building. This would include undisturbed locations as well as material that you, your employees or your contractors have removed from its original locations and stored in debris piles. We also require a copy of your training program that you have documented and provided to JM Electric and Ray Electric as detailed in your letter provided on July 13, 2007. All of the aforementioned information is required so that we can provide this to both our employees and contractors hired by the City of Kitchener. It is imperative this information be forwarded to the City of Kitchener with due regard to timing. Our contractor requires the information to be able to complete the work required to remedy the outstanding Orders given to you. These are the same Orders that you have not taken appropriate action on to this point. Considering you already have this information and the urgency of the situation, we ask that you forward, to the City of Kitchener this information before July 26, 2007.

The City of Kitchener fully understands and realizes the seriousness of this situation and assures you, that if not provided with this information, we will not be allowed to precede with the required work to satisfy the Kitchener Fire Department's Immediate Threat to Life Order or the Building Division's Unsafe Building Order. The City of Kitchener will not proceed with the required work to establish an asbestos management or abatement procedure. This responsibility rests solely with you, the building owner.

We also remind you the City of Kitchener can proceed with the removal of occupancy from this building if we feel that the terms of our orders, as our numerous written correspondence over the past several months has clearly detailed to you, have not been met in a timely manner. The situation as it has continued to develop with this structure may leave the City of Kitchener with no other feasible options.

Further to past requests and attempts to meet, most recently in our letter dated July 11, 2007, this is to confirm we have not received any available dates or times with your ability to meet with us. We are requesting you review your schedule again and advise the undersigned with your availability to meet. A meeting with all the important parties will greatly assist in resolving the outstanding issues and resolve the confusion. As noted previously, your lawyer(s) is most welcome to

attend this meeting; we could meet on-site or here at City Hall. The City will offer to complete minutes of the meeting for clarity and consistency purposes or you may prefer to have one of your staff record the minutes. Either way the City looks forward in receiving a reply to this meeting invitation before July 26, 2007 along with all of the information requested above.

Ray Electric

[14] Correspondence between Mr. R. Mullin, who represents the applicants and Mr. J. Fine, who represents the defendants, indicates that W.S.C.C. retained Ray Electric on or about July 13, 2007 to correct the electrical deficiencies in the premises. It also complied with the demand of Mr. Mullin to pay \$10,000 into the trust account of Mr. Fine to secure payment for this work. However, in a letter to Mr. Fine dated July 17, 2007 Mr. Mullin stated the following:

Finally, today I had the opportunity to speak with Mr. Larry Ray of Ray Electric. Mr. Ray indicated that he has work crews currently on site, and work is progressing with respect to the listed outstanding E.S.A. deficiencies, a copy of which was sent to your respective attention on July 16th, 2007. I note that such deficiencies must still be satisfied no sooner than July 31st, 2007. That said, Mr. Ray did indicate that the electrical repairs that he is co-ordinating will eventually be forestalled, given the current state of the condominium's basement. Mr. Ray indicated that he will not be able to fulfil the E.S.A.'s July 31st, 2007, requirements, as such repairs will require his entry to the basement. The basement, it is understood, contains both asbestos and contains a volume of construction materials, making it impossible to attend to the basement's ceiling, where the electrical work is located. Removal of both the asbestos and construction material is urgently required to permit Ray Electric to complete the outstanding E.S.A. July 31st, 2007, requirements.

[15] There is no response to this concern of Mr. Mullin from Mr. Fine before me. Mr. Fine provided a memorandum to Mr. Mullin dated July 20, 2007 in which he purported to respond to some of the other matters raised on behalf of the applicants by Mr. Mullin. He made no response to the deficiencies posed by asbestos in the building to rectification of the electrical deficiencies

and hence to prevent eviction of the applicants on July 31, 2007. On July 13, 2007 the Board of Directors passed a resolution enacting a special assessment against all unit holders at the premises in the amount of \$66,000. Each unit holder was required to contribute. It was comprised of the following:

Legal costs	\$26,000
Architect	\$13,500
Repair and maintenance of the common elements	\$12,000
Garbage removal and elevator repair	\$ 2,300
Costs of mailing meetings and property management	\$ 1,200
Performance audit	<u>\$11,000</u>
TOTAL:	<u>\$66,000</u>

[16] John Yee, who was the owner of Unit 303 and who filed an affidavit in support of the motion was given notice that he was required to pay \$1,313.28 by July 31 and \$262.66 by September 15, for a total of \$1,575.94.

Financial Records

[17] Michael Anthony Manera is a chartered accountant. He provided an affidavit sworn July 23, 2007. He is a partner in a firm in Guelph. He has practised for 23 years. He currently performs 24 audits annually for condominium corporations in Guelph, Cambridge and Kitchener-Waterloo. W.S.C.C. did provide some financial records to Mr. Mullin pursuant to the order of Justice Reilly dated July 4, 2007. Mr. Mullin sent them to Mr. Manera. They consisted of a profit and loss statement from March 1, 2006 to February 15, 2007, bank statements of

W.S.C.C., an unaudited reserve fund statement and a first year budget. Mr. Manera stated that the profit and loss statement is not a general ledger. Missing were financial accounts of payables, receivables, a reserve fund and prepaid outlays. He stated the following:

Given my review of the mentioned documentation, it is my opinion that they do not conform with standard and commonly accepted accounting procedures for condominium corporations. Such documents have raised my professional concerns for the overall financial status of the condominium corporation, for the following reasons.

[18] He was not able to reconcile the profit and loss statement with the banking records. He found a number of inconsistencies, including the following:

1. The profit and loss statement showed a hydro expense of \$17,000. The bank records showed \$47,389.
2. The profit and loss statement showed expenses of \$23,000 for repairs, maintenance and elevator costs. The bank statements were significantly lower.
3. The profit and loss statements showed administrative costs of \$20,752. The bank statements showed nothing.
4. The profit and loss statements showed accounts receivable of \$11,120. There was no evidence to show normal condominium recovery processes of this amount.
5. The profit and loss statement showed a variation in expenses of \$19,590 and in revenues of \$11,120, which Mr. Manera could not account for.
6. There was no bank statement for the period April 5, 2007 to April 30, 2007.
7. There was no bank statement for a reserve fund.
8. The bank statement showed an overdraft of \$3,593.28 without an explanation.
9. The bank statement showed accrued accounts payable of \$6,360 without an explanation.

10. There was no monthly assessment for common expenses.

11. He could not determine a year end.

The Law

Condominium Act

[19] The following sections are relevant:

First Owners Meeting

s. 42(1) Within 10 days after the registration of the declaration and description, the declarant shall appoint the first board of a corporation.

(3) The first board shall hold office until a new board is elected at a turn-over meeting held under section 43.

(4) The first board shall consist of three persons or such greater number as the declaration provides.

(6) Subject to subsection (7), the first board shall call and hold a meeting of owners by the later of,

(a) the 30th day by which the declarant has transferred 20 per cent of the units in the corporation; and

(b) the 90th day after the declarant transfers the first unit in the corporation.

(8) At the meeting mentioned in subsection (6), the owners, other than the declarant, may elect two directors to the first board.

Annual General Meeting

s. 45 (2) The board shall hold a general meeting owners not more than three months after the registration of the declaration and description and subsequently within six months of the end of each fiscal year of the corporation.

Performance Audit

s. 44 (2) A performance audit shall be conducted no earlier than six months, and no later than 10 months, following the registration of the declaration and description.

Reserve Fund

s. 93 (1) The corporation shall establish and maintain one or more reserve funds.

s. 94 (1) The corporation shall conduct periodic studies to determine whether the amount of money in the reserve fund and the amount of contributions collected by the corporation are adequate to provide for the expected costs of major repair and replacement of the common elements and assets of the corporation.

(4) A corporation created on or after the day this section comes into force shall conduct a reserve fund study within the year following the registration of the declaration and description and subsequently at the prescribed times.

Audited Financial Statements

s. 69 (1) The board shall place before each annual general meeting,

- (a) the financial statements as approved by the board;
- (b) the auditors report; and
- (c) all further information respecting the financial position of the corporation that the by-laws of the corporation require.

Appointment of Inspector

s. 130 (1) Upon application by the corporation, a lessor of a leasehold condominium corporation, and an owner or a mortgagee of a unit, the Superior Court of Justice may make an order appointing an inspector to,

- (a) investigate the items that the declarant is required to give to the board under sub sections 43 (4), (5) and (7);
- (b) investigate the corporation's records mentioned in subsection 55 (1);
- (c) investigate the affairs of a person mentioned in subsection 115 (1) ; or
- (d) conduct an audit of the accounts and records mentioned in section 43, 55 or 115.

Appointment of an Administrator

s. 131 (1) Upon application by the corporation, a lessor of a leasehold condominium corporation, an owner or a mortgagee of a unit, the Superior Court of Justice may make an order appointing an administrator for a corporation under this Act if at least 120- days have passed since a turn-over meeting has been held under section 43.

(2) The court may make the order if the court is of the opinion that it would be just or convenient, having regard to the scheme and intent of this Act and the best interests of the owners.

(3) The order shall,

- (a) specify the powers of the administrator;
- (b) state which powers and duties, if any, of the board shall be transferred to the administrator; and
- (c) contain the directions and impose the terms that the court considers just.

(4) The administrator may apply to the court for the opinion, advice or direction of the court on any question regarding the management or administration of the corporation.

Oppression Remedy

s. 135 (1) An owner, a corporation, a declarant or a mortgagee of a unit may make an application to the Superior Court of Justice for an order under this section.

(2) On an application, if the court determines that the conduct of an owner, a corporation, a declarant or a mortgagee of a 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.

(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.

Case Law

[20] In *McKinstry v. York Condominium* [2003], 68 O.R. (3d) 557 Justice Juriensz stated the way in which a court should apply the oppression remedy in s. 135 of the *Condominium Act* as follows:

33. ... This new creature of statute should not be unduly restricted but given a broad and flexible interpretation that will give effect to the remedy it created. Stakeholders may apply to protect their legitimate expectations from conduct that is unlawful or without authority, and even from conduct that may be technically authorized and ostensibly legal. The only prerequisite to the court's jurisdiction to fashion a remedy is that the conduct must be or threaten to be oppressive or unfairly prejudicial to the applicant, or unfairly disregard the interests of the applicant. Once that prerequisite is established, the court may "make any order the judge deems proper" including prohibiting the conduct and requiring the payment

of compensation. This broad powerful remedy and the potential protection it offers are appropriately described as “awesome”. It must be remembered that the section protects legitimate expectations and not individual wish lists, and that the court must balance the objectively reasonable expectations of the owner with the condominium board’s ability to exercise judgment and secure the safety, security and welfare of all owners and the condominium’s property and assets.

[21] In *Skyline Executive Properties Inc. v. Metropolitan Toronto Condominium Corp. No. 1385* [2002], 17 R.P.R. (4th) 156 Justice Hoilett set out the test for the appointment of an administrator under s. 131 of the *Condominium Act* as follows:

26. It appears, based on counsel’s submissions, that s. 131 of the Act is yet to be invoked in Ontario. The British Columbia Supreme Court, however, has had occasion to deal with the province’s comparable legislation. Harvey J. in *Lum v. Strata Plan VR519* [2001] Carswell BC 637 (B.C. S.C.)] in paragraph 11 of his reasons, suggested the following factors to be taken into consideration by the court:

...

11. In my view after reviewing the authority available bearing upon the question, factors to be considered in exercising the Court’s discretion whether the appointment of an administrator is in the best interest of the strata corporation include:

- (a) whether there has been established a demonstrated substantial inability to manage the strata corporation,
- (b) whether there has been demonstrated substantial misconduct of mismanagement or both in relation to affairs of the strata corporation,
- (c) whether the appointment of an administrator is necessary to bring order to the affairs of the strata corporation,
- (d) where there is a struggle within the strata corporation among competing groups such as to impede or prevent proper governance of the strata corporation,
- (e) where only the appointment of an administrator has any reasonable prospect of bringing to order the affairs of the strata corporation.

In addition, there is always to be considered the problem presented by the costs of involvement of an administrator.

[22] Mr. Manera, in his affidavit, stated the following:

8. As a result, there are significant and material variances. Given my experience in reviewing condominium budgets and records, these variance are material and unusual in condominium accounting. They give rise for professional concern as to the production and accuracy of the profit and loss statement.
9. A material variance is a significant account issue. Material variances such as these present a red flag and give me concern of either negligent account keeping or worse.

Analysis

[23] The immediate threat to the applicants was the prospect of eviction if the deficiencies in the electrical work were not remedied by July 31, 2007. The work of the contractor hired by the City and of Ray Electric hired by W.S.C.C. was brought to a halt by the discovery of asbestos in the basement. This is something that Lorchrist should have addressed long ago. They presented no plan of how they were going address it. Immediate action was required to avoid eviction. Lorchrist was also negligent in allowing the electrical deficiencies to exist and in not immediately taking steps to rectify them when it was first notified on May 25, 2007.

[24] The Board of Directors of W.S.C.C. continues to be controlled by Drotos and Lorena Drotos who are the principals of Lorchrist. W.S.C.C. was registered on February 24, 2006 under the Condominium Act. The Board was required by the Condominium Act to hold a meeting of the owners by the later of the 30th day after it had transferred 20% of the units in the condominium corporation and the 90th day after it had transferred the first unit in the

condominium corporation. These dates expired long ago. At that meeting the owners could elect two directors to the Board. This would allow the owners to make a contribution to the management of the condominium.

[25] The deficiencies set out in the work orders are deficiencies that are the responsibility of Lorchrist. These are not deficiencies whose correction should be financed by a special assessment against the owners.

[26] There is no evidence of a bank account for a reserve fund.

[27] The financial records that have been produced show “material variances” which “present a red flag and give me (Mr. Manera) concern of either negligent account keeping or worse”.

Conclusion

[28] Apart from being violations of the *Condominium Act* the conduct of Lorchrist, W.S.C.C. and the personal defendants constitute oppression under the *Condominium Act* as it is defined in *McKinstry* toward the unit owners. The applicants have satisfied the test for the appointment of an inspector and an administrator under the *Condominium Act*. There will be orders accordingly. The balance of the relief sought in the motion is adjourned to September 6, 2007 to be spoken to. Costs are reserved.

P.B. HAMBLY J.

Released: August 8, 2007