

Ontario
Superior Court of Justice
Small Claims Court

BETWEEN:

LONDON CONDOMINIUM CORPORATION No. 21

(Plaintiff)

-and-

LUIS RODRIGUES

(Defendant)

AND

File No. 1151/08D2

BETWEEN:

LUIS RODRIGUES

(Plaintiff in Defendant's Claim)

-and-

LONDON CONDOMINIUM CORPORATION No. 21

(Defendant in Defendant's Claim)

COUNSEL:

Benjamin Rutherford
LSUC #47259T

for the plaintiff and the defendant in the defendant's claim

James A. Murray
LSUC #55322R

for the defendant and plaintiff in the defendant's claim

HEARD:

February 10, 2009 and
February 18, 2009 and
April 16, 2009

INTRODUCTION:

On several occasions during this three day trial I asked the parties to consider reaching a settlement. Not only did I want to shorten the time for the trial but also to help the parties reduce their legal costs and conciliate their relationships. Most of the witnesses were neighbours in the condominium complex.

Unfortunately no settlement was reached. A court decision must be made.

BACKGROUND:

London Condominium Corporation No. 21 (hereafter LCC 21) was sued on June 10, 2008, by Great Northern Insulation (Woodstock) Ltd. in Claim No. 1151/08 for the sum of \$3,985.60 plus interest of \$1,180.11 and costs. LCC 21 entered a defence admitting to part of the claim in the amount of \$3,985.60 and, on the same day, June 28, 2008, made a Defendant's Claim for \$1,180.11 against Luis Rodrigues (hereafter Luis). That Defendant's Claim, being File No. 1151/08D1 initiated these proceedings. To avoid confusion LCC 21 has been named as plaintiff in the claim and Luis was named as defendant. Exhibit No. 3 produced a copy of File No. 1151/08D1 Claim, Defence, Amended Claim, Amended Defence and Amended Amended Defence. It also enclosed copies of the Defendant's Claim and Defence in File No. 1151/08D2.

Alas, there were more proceedings, including a vexatious proceeding. In my view, none, except for the settlement

conferences, are relevant to the disposition of these actions. They may be referred to later in a discussion on costs.

On May 24, 2006 Luis was elected to the board of directors of LCC 21. At that time there was an ongoing re-insulation project underway. Great Northern Insulation (Woodstock) Ltd. (hereafter GNI) was hired by an earlier board to perform the work. On June 11, 2007 Luis became president of LCC 21. On or about June 30, 2007 was presented with a cheque, for an invoice from GNI, by the property management company, Parkside Management Ltd. (hereafter Parkside). It was dated April 30, 2007 and for the sum of \$9,964.00. Luis instructed Parkside to pay only two-thirds the amount, namely \$5,978.40. A balance of \$3,985.60 remained outstanding. This became the subject matter of the above mentioned Claim No. 1151/08. On October 9, 2007, Luis ceased to act on the board. At a settlement conference on August 13, 2008, the claim by GNI against LCC 21 was settled for \$3,475.55 without an interest component. On September 5, 2008, the claim by LCC 21 for the amount of interest from Luis was settled. This was Claim No. 1151/08D1. His Honour Deputy Judge Mackenzie endorsed the record as follows:

"The plaintiff in the defendant's claim (LCC 21) and the defendant Rodrigues are on common ground that no damages exist apart from costs claimed by the defendant Rodrigues. The matter had NOT settled but the file #1151 D1 shall not be set down unless and until Luis Rogrigues pays the Court Trial fee of \$100.00 in accordance with the Practice Direction"

Luis brought the current Defendant's Claim #1151/08D2 on December 15, 2008 seeking to be indemnified pursuant to the Condominium Act and LCC 21's by laws by LCC 21 for the costs he incurred in defending the action brought against him and the costs associated with enforcing that indemnity.

ISSUES:

1. Is the plaintiff Luis in Clam #1151/08D2 entitled to be indemnified for the costs he has incurred in defending the action brought against him, i.e. Claim No. 1151/08D1, by LCC 21, and for the costs, including interest in enforcing any entitlement?
2. If successful, what costs ought to be awarded to the plaintiff?
3. If unsuccessful, what cost ought to be awarded to the defendant LCC 21?

STATUTORY LAW:

Condominium Act, 1998, S.O.1998,c.19

Section 27. In part,

A board of directors shall manage the affairs of the corporation.

Section 32.

Subject to subsection 42(5), the board of a corporation shall not transact any business of the corporation except at a meeting of directors at which a quorum of the board is present.

Standard of care;

Section 37.(1) Every director and every officer of a corporation in exercising the powers and discharging the duties of the office shall,

- (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. 1998, .c.19, .s.37(1).

Indemnification:

Section 38.(1) Subject to subsection (2), the by-laws of a corporation may provide that every director and every officer of the corporation and the person's heirs, executors, administrators, estate trustees and other legal personal representatives may from time to time be indemnified and saved harmless by the corporation from and against,

- (a) any liability and all costs, charges and expenses that the director or officer sustains or incurs in respect of any action, suit or proceeding that is proposed or commenced against the person for or in respect of anything that the person has done, omitted to do or permitted in respect of the execution of the duties of office; and
- (b) all other costs, charges and expenses that the person sustains or incurs in respect of the affairs of the corporation. 1998, .c.19, .s.38(1).

Not for breach of duty;

(2) No director or officer of a corporation shall be indemnified by the corporation in respect of any liability, costs, cares 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. 1998, c.19, s.38(2).

Section 56(8)

If any provision in a by-law - or a proposed by-law - is inconsistent with the provisions of this Act, the provisions of this Act shall prevail and the by-law - or

proposed by-law -, as the case may be, shall be deemed to be amended accordingly.

Section 119;

'A corporation, an owner and every person having a registered mortgage against a unit and its appurtenant common interest have the right to require the owners and the occupiers of the units to comply with this Act, the declaration, the by-laws and the rules'.

Bylaw Number 2 of LCC 21's Bylaws

The relevant section of LCC 21's Bylaw is s.3.11 (now section 38) and reads as follows:

3.11 Indemnity of Directors and Officers - Subject to the provisions of subsection 2 of Section 25 of the Act, every director or officer (or former director or officer) of the Corporation and his heirs, executors, administrators and other legal personal representatives shall from time to time be indemnified and saved harmless by the Corporation from and against:

- (a) any liability and all costs, charges and expenses that he sustains or incurs in respect of any action, suit or proceeding that is proposed or commenced against him for or in respect of anything done or permitted by him in respect of the execution of the duties of his office; and
- (b) all other costs, charges and expenses that he sustains or incurs in respect of the affairs of the Corporation;

except for those losses which result from his dishonesty or fraud, providing:

- (c) the Corporation is advised of any such proceeding or cost forthwith after the director or officer receives notice thereof; and
- (d) the Corporation is given the right to join in the defence of the action.

Bylaw number 2 of London Condominium Corporation No. 21 section 3.11 TAB 36 of the Joint Document Brief of the Plaintiff and Defendant.

Ontario Business Corporations Act (hereafter OBCA)

Subsections 136(1) and (3)

Indemnification;

136. (1) A corporation may indemnify a director or officer of the corporation, a former director or officer of the corporation or another individual who acts or acted at the corporation's request as a director or officer, or an individual acting in a similar capacity of another entity, against all costs, charges and expenses, including an amount paid to settle or satisfy a judgment, reasonable incurred by the individual in respect of any civil, criminal, administrative, investigative or other proceeding in which the individual is involved because of that association with the corporation or other entity. 2006, c.34, Sched. B, s.26.

Limitation;

(3) A corporation shall not indemnify an individual under subsection (1) unless the individual acted honestly and in good faith with a view to the best interests of the corporation or, as the case may be, to the best interests of the other entity for which the individual acted as a director officer or in a similar capacity at the corporation's request. 2006, c.34, Sched. B, s.26.

Business Corporations

Act, RSO.1990, c.B.16 section 136(1) and (3).

In my view, the language of subsections 38(1) and (2) of the Condominium Act are very similar to that of the subsections 136(1) and (3) of the OBCA and for that reason, much of the case law interpreting subsections 136(1) and (3) are helpful.

Also, I would agree with the final submission by counsel for Luis on the use of 'shall' in the indemnification provision of the by-law of LCC 21. It was:

"Like section 38(1) of the Condominium Act, subsection 136(1) contains the language 'may'. The language is permissive in the sense that gives a Corporation the ability to indemnify a director provided certain criteria are met. Specifically, in the Condominium Act, the language begins: "Subject to subsection (2), the by-law may provide..." This is meant to indicate that indemnity provisions are permitted in a condominium corporation's by-laws. The further language in subsection 38(1) of the Condominium Act indicates: "may from time to time be indemnified." This use of the word 'may' is, again, permissive in the sense that it gives a condominium corporation the permission to indemnify a director as it chooses. In section 3.11 of LCC 21's bylaws the word "may" which appears in both the Condominium Act and the OBCA is replaced by the word "shall". The use of the term "shall" does not conflict with statutory use of "may". The permissive term "may" in the statutory language is simply meant to grant a corporation the ability to indemnify a director and once such a permission is granted, the corporation, in its bylaws, is then free to make that indemnity mandatory. In this case, LCC 21 has taken the permission to indemnify directors set out in Condominium Act and, by its bylaws, made it a mandatory requirement. This of course, subject to the caveats set out in the Condominium Act which require that the director not have breached the duty to act honestly and in good faith. This language restricts the permission granted by the word "may". That is, if a director has breached the duty to act honestly and in good faith then the statute no longer permits the corporation to indemnify that director, regardless of what is contained in its bylaws."

Counsel for LCC 21 made no reference in his final submission to the inconsistency. Earlier in the proceedings he referred to Section 56(8) of the Condominium Act and to a practical guide on the Act by J. Robert Gardiner.

The guide discussed the caveats set out in the Condominium Act (section 37(1)(a) and (b)), which required a director to act "honestly and in good faith" and "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances".

LIABILITY:

LCC 21 took the position that Luis failed to meet the standard of care required under the Condominium Act and accordingly was not entitled to indemnification for his legal costs. It alleged that Luis breached his duty to act honestly and in good faith and he failed to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

Before dealing with the allegations, I would like to introduce the principal witnesses. Sandra Bradley and Luis Rodrigues were elected to the board on May 24, 2006. They joined Reg Thibault, Michelle Martin and Laura Crane, who were not witnesses. Catherine Papineau, Bev Seward and Bert Longpre were elected to the board on May 31, 2007. These five witnesses constituted the board of directors.

Shortly after the elections, allegations embracing a number of concerns were made about the new president, Luis. These included the BNI contract. At the August 31, 2007 meeting Ms. Seward found the work by GNI to be "unprofessional". Luis addressed them in his testimony.

On April 29, 2006 the board of directors for LCC 21 (hereinafter 'the board') conducted an owners meeting to address ongoing problems with unit roofs, mould and mildew. It was determined that these problems were the result of inadequate insulation. It was agreed, at the time, that the repair and installation was required to remedy and prevent moisture problems in the attics of the condominium units. It was also agreed that LCC 21 would be responsible for the cost of repairs. However the unit owners would be responsible for the cost of the insulation. It was agreed that the project would start immediately and the work would be done by GNI.

Mr. Albert Longpre (Bert Longpre), an engineer, testified that he was interested in the "GNI contract" because of the \$66,000.00 involved. Ms. Beverly Saward expressed concern with the project. She wouldn't let GNI into her place and she wanted to know, "what we were paying these people and why".

When GNI was hired, none of the above mentioned persons, including Luis were members of the board. The concerns surfaced after the new members of the board were elected in May, 2007.

Although some witnesses spoke of a contract with GNI, I would find none existed. At the April 29, 2006 meeting the president, Mr. Reg Thibault, "explained the owners would be invoiced once the job has been completed". In her testimony, Ms. Debbie Rosenwerg said she was consulted by three members of the board requesting contracts, including one from GNI. She told them there

was none from GNI, "only an invoice". It, or a copy, was included in the Joint Document Brief of the Plaintiff and Defendant. There was no contract in writing. An invoice, dated April 30, 2007, from GNI for \$9,964.00 was included under Tab 8 of the Document Brief.

Luis acted as liaison with Parkside, the property manager. Ms. Rosenweg was the project coordinator for Parkside. She handled accounts receivable, accounts payable and general clerical. Any contract with LCC 21 was through Luis. Both were "working for the board", she said.

At the end of June, 2007, Luis was shown the invoice from GNI and a TD Canada Trust cheque for \$9,964.00. In court he testified that he was concerned at the time about suggestions made by other board members, particularly Ms. Saward, with the cost and quality of the work performed by GNI. Mention was made also of over billing. He elected to pay GNI two-thirds of the invoice, i.e. \$5,978.40 and later discuss and pay the remaining one-third, "subject to adjustments". It was this remainder which prompted the law suits.

The minutes of the July 9, 2007 meeting of the board reflect the presence of Luis, Ms. Papineau, Mr. Longpre, Ms. Bradley and Ms. Saward. Mr. May, the representative from Parkside, was asked to leave.

In bold print it was recorded:

"Payment to Great Northern for approximately \$10,000.00 was vetoed by Luis, a partial payment of

\$5,500.00 has been made. The work did come in below estimates however 4 units were not done. Luis has requested copies of invoices by Parkside to each owner, wish to clarify fee for vents."

At the same meeting the board, by the minutes, wanted to know particulars of a contract. None of its members were apparently aware that there was no written contract.

On April 29, 2006, Mr. Thibault, the then president, detailed the work to be done by GNI and "the owners at the meeting agreed".

The project coordinator sent a fax to Luis on July 20, 2007 asking when the balance of \$3,985.60 should be paid. Luis replied on August 27, 2007, by fax, stating that the final payment was being held back because of outstanding issues, i.e. double billing, vent work and a discrepancy in amounts charged on different invoices. A copy of this fax was sent to Mr. Bert Longpre.

On August 19, 2007, Catherine Papineau sent an email to Luis listing 13 enquiries. Luis responded the next day by advising most of her questions would be answered by the property manager and the corporate legal counsel upon written request by the owners. A copy of this email went to Parkside.

Along with the 13 issues there were others. Ms. Papineau was the main witness for LCC 21. The other witnesses were Beverly Seward and Bert Longpre. Ms. Papineau first told the court that she 'replaced' Luis as the president on October 4, 2007. Her grievances were many, but mainly

she disliked how "he had arbitrarily taken control". She had "enough of him". Her list of questions - see Tab 6, Exhibit 2, and accusations included: 1. failing to provide up-dated legal documents; 2. Albert Longpre hadn't been signed up at the bank; 3. Sandra Bradley, as secretary, used to send everything to Luis first; 4. Luis 'filibusted' 45 minutes on double entry bookkeeping at one of the meetings; 5. Mr. Longpre wanted to see that contract (concern over whether or not the past board - when Mr. Thibault was present - had authority to 'get into the deal with GNI initially'); 6. Luis "tampered" the documents; 7. Luis 'made himself' liaison with the property manager, but he had no authority to make decisions - he was the "mouthpiece".; 8. At the October 4, 2007 meeting, he "didn't need the three of us".; 9. Luis "has been harassing the board and the owners are behind us".; 10. Luis failed to provide the invoice from GNI.

It was mainly these concerns which caused LCC 21 to sue Luis for the interest and to defend the claim by Luis for indemnification. Generally, I find there was a paucity of evidence to support or substantiate these allegations.

Ms. Papineau testified that, "we were unable to get minutes, financials and legal information," and, "Luis said constantly you can go to Parkside".

The last piece of advice was substantiated by the project manager from Parkside when she said, "Parkside keeps invoices, contracts, by-laws etc. The board could request copies absolutely".

At the July 9, 2007 meeting Luis passed out a package including older versions of the Declaration, By-Law and Management Agreement with Parkside. They did not completely agree with the documents received by some owners in their estoppel. Up-dating was in order.

At the same meeting there was a reference to the partial payment. LCC 21 witnesses felt the "short" payment was made because, "4 units were not done". I would disagree. The full sentence read, "The work did come in below estimates however, 4 units were not done". In my view, it was expected that a lower price resulted from 4 units not being done. Ms. Sandra Bradley testified "definitely not the reason that 4 units were not done that Luis withheld payment. Reason was we had concerns over billing re the vents and the quality of the work. There was no further decision. Everybody seemed to think that was the reason." In response to a claim for an invoice, Ms. Bradley said, "we knew there was an outstanding amount owing to GNI. We could see the breakdown on how the cheque was given and it was clearly evident in the payable section of the financial statements for June (Tab 14, exhibit 1), August (Tab 17) and September (Tab 21). It was the June statement which lead Luis to "filibuster 45 minutes" over the over the double entry system of bookkeeping." I find the system may be confusing to some board members but not Bev Saward, who was an accountant. Ms. Bradley went on to tell me. "It was standard practice for the statements to be distributed to the directors and they would sit until paid."

Ms. Bradley and Luis signed the "short" cheque before it was shown to the board. The proper practice was for the cheque to go to the board for consideration. Both signatories were faulted for not submitting an invoice. Bev Seward was told at the July, '07 meeting that only \$5,500.00 was paid. Bev Seward and Sandra Bradley heaved "a sigh of relief". They were happy only the \$5,500.00 was paid. I would find if a vote were taken at the July meeting, the actions of Luis and Ms. Bradley would have been approved.

Mr. Longpre was upset that he was not taken to the bank with Luis to include him as a signing officer. I find Luis delayed in doing this, but for a time Mr. Longpre was away because of illness. It was not until December, 2007 until Ms. Seward signed her first cheque. She and Mr. Longpre were made signing officers by the board at the same time.

The three new board members wanted a more efficient board. Ms. Bradley testified that the previous standard of practice was for the board to not look at all invoices that came in. Generally two directors would sign, Ms. Seward said "because we didn't know procedures". Mr. Longpre agreed, "we were new at this".

All of the new members wanted to be part of the decision making process on the board. Each was of the opinion that Luis, as president, made many decisions.

It remains to determine whether or not Luis did anything contrary to section 37(1) of the same Act. But first a

brief review of some of the applicable common law would be in order.

Common Law et al

"A corporation may include provisions dealing with the indemnification of directors and officers in its articles or by-laws. In Canada, it is most common to put these indemnity provisions in by-laws. By-laws indemnities have certain inherent limitations. They typically mirror the language of the corporate statutes, except to change the permissive "may" to "shall" to make the indemnity mandatory. Since the by-law is not a contract between the director or officer and the corporation, the director or officer cannot control whether the by-law is revised or even eliminated."

Hansell, Carol, *Directors and Officers in Canada: Law and Practice*, Thomson Carswell Looseleaf, 2005
Release at page 14-26.1

In *Manitoba (Securities Commission) v Crocus Investment Fund*, based on section 119(1) of the Canada Business Corporations Act, which also uses the term "may" the court indicates that the by-laws are important:

"The corporate by-laws of Crocus are important. By-law 1.7 (also attached as an Appendix) is the expression of a corporate intention that directors and officers shall be indemnified. This by-law is based on s. 119(1) of the Act and it creates a right of indemnity, subject to two conditions.

Manitoba (Securities Commission) v. Crocus Investment Fund, 2007 MBCA 36, 31 C.B.R. (5th), at para 12 TAB 1 of the Plaintiff's Book of Authorities.

In *Amirault v. Westminer Canada Ltd.*, a decision of the Nova Scotia Supreme Court Trial Division, the court rejects the argument that a mandatory wording in the bylaw conflicts with the permissive wording of the statute:

"The validity of the by-law was questioned by the defendants on the basis that the by-law appears in mandatory form while Section 124 of the Canada Business Corporations Act R.S.C.1985, c.C-44 as amended, states that a corporation may indemnify but there is no merit to this position as the test to apply, that the director or officer acted honestly and in good faith with a view to the best interests of the corporation, is identical under the by-law and the statute and no indemnification arises unless that test is met..."

Amirault v. Westminer Canada Ltd.,
120N.S.R. (2nd) 91, 332A.P.R. 91 TAB2 of the Plaintiff's
Book of Authorities at para 635 (total decision)

A leading case on the concept of good faith and director's indemnity is *Blair v. Consolidated Enfield Corp.* a decision of the Supreme Court of Canada and delivered by Iacobucci J. This case centered around whether a director had acted honestly and in good faith and thus entitled to be indemnified by the corporation pursuant to section 136(1) of the OBCA and the by-laws of the corporation which mirrored the statutory language but replaced the word "may" with "shall". In addressing the concept of good faith Iacobucci J. determined that persons are assumed to act in good faith unless proven otherwise:

"In this respect, contrary to the applicant's submissions before this Court, I believe that a

proper construction of the statute and law related to good faith issues reveals that Blair is not required to prove his good faith, although he may certainly call evidence in this regard to counter whatever evidence of bad faith may be adduced against him. To a large extent, it is the corporation that must establish, to the satisfaction of the court, exactly what Blair did that was inimical to its best interests."

Blair v. Consolidated Enfield Corp., 24 B.L.R. (2d) 161, 128 D.L.R. (4th) 73 para 35 page 23 TAB 3 of the Plaintiff's Book of Authorities.

In quoting a case referred to as Chromex which in turn cites Blair as persuasive, the court in Manitoba (Securities Commission) v. Crocus Investment Fund indicates:

"I am satisfied that those who are entitled to potential indemnification should be presumed to have acted in good faith in the absence of evidence to the contrary..."

Manitoba (Securities Commission) v. Crocus Investment Fund, 2007 MBCA 36, 31 C.B.R. (5th) 1, at para 21 TAB 1 of the Plaintiff's Book of Authorities.

These submissions were made on behalf of Luis. The following were made on behalf of LCC 21.

"Courts have approached the concept of "acting in good faith" both from a subjective point of view and an objective one. Thus, in Rossi v. York Condominium Corporation No. 123. [1989]O.J.No.1424, in making a determination as to whether directors acted in good faith, the court considers what the

directors may have believed, however, the court finds that the conduct complained of was "visible, non-deceptive and fully recorded."

In *Epp v. Hood*, respondent directors were required to pay costs on a substantial indemnity basis, and were explicitly not entitled to indemnity under section 25 (the predecessor to section 38 of the Act). The court writes:

"In my view, again considering all of the circumstances, the unexplained conduct of the individual respondents was completely contrary to their obligations under the Act, not only to the applicants but to the other unit owners during this time and I expressly hold that the individual respondents are not to indemnify under section 25 of the Act for any of the aforesaid costs."

Epp v. Hood, [1998] O.J. No. 575 (Ont. D.C.)

FINDINGS:

I accept the authorities submitted on behalf of Luis both with respect to the interpretation of the statutes and common law. The Blair v. Consolidated Enfield case stands for the proposition that persons are assumed to act in good faith unless proven otherwise. Thereby the onus of proving otherwise rests with LCC 21. In making a determination as to whether Luis acted in good faith, I should consider his conduct from an objective point of view. Rossi v. York Condominium Corporation No 127 [1989] O.J. No. 1424.

With respect to a contract, the above mentioned evidence (hereinafter the evidence) established that there was no written contract. The minutes of the April 29, 2006

meeting described what was known about the work to be done by GNI. Concern over an invoice from GNI was available upon request by any board member from Parkside. Ms. Rosenweig from Parkside testified to this in the evidence. The board found out in July of 2007, and two subsequent months, of the balance owing to GNI. Parkside had prepared and delivered financial statements showing the balance.

Luis and Ms. Bradley signed a cheque for the part payment. LCC 21 felt the cheque and invoice ought to have been presented to the board first. This would have been the proper practice; however Ms. Bradley testified that when she joined the board in May of 2006 invoices and billings were not presented to the board. If presented, I find that approval would have been given to the signing by a majority of the board in July, 2007. As well, I find no harm was done and in fact LCC 21 agreed later at the settlement conference to pay the balance less a small amount.

Luis was accused of taking control of the meetings. It is to be remembered that all members of the board were volunteers and the evidence showed they were all new at the job. When Luis "filibustered" he testified he was trying to explain the double entry system in bookkeeping - not an easy concept to understand. Luis was the president. LCC 21 argued that in failing to pay the entire invoice Luis acted without authority and this would disentitle him to the right to be indemnified. This argument ignored the traditional role of a president and is tantamount to a suggestion that all invoices and

decisions must be voted on at a meeting of the board of directors i.e. that common day-to-day operations must be approved at a board meeting. This argument ignores LCC 21's by-laws which grant the authority to manage the day-to-day affairs of the corporation to the president. The argument also ignores section 4.04 of LCC 21's by-law #2 which states the president "shall be charged with the general supervision of the business and affairs of the corporation". It was argued by LCC 21 that a president has a role no different than any other director or officer of the corporation. Section 56(1)(d) of the Condominium Act specifically allows the board to make by-laws, to govern the appointment, remuneration, functions, duties of officers and employees of the corporation. I would find Luis was more than a "gatekeeper". He appeared, to me, to be following a pattern of conduct established, according to Ms. Bradley, by previous board members.

LCC 21 also alleges that Luis represented, at the July 9, 2007 meeting, that 4 units were not done and this was the reason why the invoice was not paid in full. Luis testified and Ms. Bradley confirmed the reasons given were over whether owners were being fairly billed and if work was done satisfactorily. This evidence was supported by the June, 2007 and July minutes.

The three new members felt they were kept, not involved at meetings, but prevented by Luis from obtaining financial and legal information. As mentioned, Ms. Papineau, was told many times that the financials, i.e. invoices, statements, contracts could be obtained from

Parkside for asking and legal information was available at the offices of the corporate counsel and the registry office. Although it was important to have this information, it was something, particularly for Ms. Papineau, a lawyer, to obtain without spending too much time. I find that this was no evidence of dishonesty or bad faith on Luis's part. The same could be said with making the changes at the bank. Ms. Seward said she walked over to the bank to have her name added. Surprisingly she found that two persons who were not on the board were still shown as having signing authority. To me, this was another example of the more casual approach taken by prior members. Fortunately, no one was harmed. As well, there was no evidence of a resolution authorizing this change.

Mr. Longpre suggested Luis was revising minutes and that he, "was involved with GNI". On occasion he would speculate and more than once he couldn't recall and gave a few vague answers. There is no doubt however that Mr. Longpre wanted procedural changes so, "thing were done the right way." I found that neither his testimony or that of Ms. Seward contained any proof of dishonesty or bad faith by Luis. Ms. Papineau accused Ms. Bradley of sending everything to Luis first. Ms. Bradley acted as secretary on occasion. On the other hand Ms. Bradley testified that she would not take them, i.e. the minutes of the meeting, to Luis prior to the next meeting. I accept her testimony and find no act of dishonesty on the part of Luis. LCC 21 did not plead or pursue any instances of fraud on the part of Luis. I would also find that Luis acted in the best interest of the ..

corporation. He remembered concerns of some members when Parkside presented the cheque to him. He tried to show other members how a double entry system bookkeeping worked and tell them where to obtain information and do things for themselves. As mentioned, I found as an officer of the board he enjoyed some extra authority. I found no evidence to support the claims he held back on information he had or that he was deceptive, or vague, or unprofessional in his behavior. Indeed, I find most of the evidence presented on behalf of LCC 21 was conjecture. Luis had to fight the perception of that what he did caused any problems for LCC 21. I understand LCC 21 wanted to implement stronger standards and that was commendable.

I find that Luis is entitled to be compensated.

While preparing this decision I was mindful of Sections 25 and 96 of the Courts of Justice Act. Although not as summary as I would like, I would hope it "is considered just and agreeable to good conscience." At the same time and in addition I hope the decision reflects a general congruence with accepted legal principles. I find there was no evidence of a causal connection between any acts or omissions by Luis that resulted in GNI taking action to recover the debt owing.

CONCLUSION:

Judgment in favour of Luis Rodrigues for the sum of \$10,000.00, costs and interest. There was no evidence of dishonest or bad faith on his part. LCC 21 didn't

question the calculations for damages. I find they were reasonable. Mr. Rodrigues was billed \$22,390.93 for legal serves and disbursements. Unfortunately for him this court has a monetary jurisdiction of \$10,000.00. This could be described as a pyrrhic victory.

COSTS:

Mr. Rodrigues is entitled to costs of his action against LCC 21, costs of LCC 21's action against him, costs of the motion for summary judgment brought by LCC 21 and his costs of the motion brought by him in seeking leave to bring the defendant's claim (D2).

There is a limit on costs in Small Claims Court, other than disbursements. Only 15% of the amount claimed can be awarded pursuant to Section 29 of the Courts of Justice Act unless the court considers otherwise. I will allow 15% plus disbursements.

The claim 1151/08D1 was for \$1,180.11.

On that claim costs are awarded

to Mr. Rodrigues for

\$ 177.02

The claim 1151/08D2 was for \$10,000.00

On that claim costs are awarded

to Mr. Rodrigues for

\$1,500.00

Costs on the motion for summary judgment

\$ 150.00

Costs on the motion for leave

\$ 150.00

	Total costs	\$1,977.02
Disbursements		\$1,127.94
GST		<u>\$ 834.18</u>
		\$3,939.54

Judgment in favour of Luis Rodrigues for the sum of \$10,000.00, plus costs of \$3,939.54, plus pre-judgment interest pursuant to the Courts of Justice Act (the Act) from July 7, 2008 to today, and post-judgment interest pursuant to the Act.

Ordered further that money paid into court to the credit of this action be paid out to Luis Rodrigues.

Dated this 29th day of May, 2009

Reeves 159
Deputy Judge C. Reeves