condo law commentary

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IN THIS ISSUE

"Where's the Beef?": Joint Reserve Funds for Shared Facilities 1

Small Claims Court Conundrum 2

Court Clarifies Mediation/Arbitration Requirements 3

"Where's the Beef?": Joint Reserve Funds for Shared Facilities

By
Lou Natale

What were the drafters of the new Condominium Act, 1998, thinking about (or not thinking about) when they significantly increased the number of sections under the old Act from 60 sections to 183 sections under the new Act, and yet failed to properly address matters dealing with shared facilities? The Act barely recognizes the existence of shared facilities which is quite surprising when you consider the huge impact shared facilities have within the condominium industry. In fact, the phrase "shared facilities" is used only once in the entire Act. Section 59 (Joint By-laws and Rules) and Section 113 (Termination of Mutual Use Agreements) are the only two sections in the Act which deal directly with shared facilities and cost sharing/shared facilities agreements ("SFA").

The result of this utter lack of legislative guidance and regulation with respect to shared facilities has been that the SFA, and not the Act, dictates the structure and framework for the operation, maintenance and governance of shared facilities. This is made more problematic because the SFAs are drafted and implemented in most cases by the developer and its lawyer. Although many SFAs look the same, there are some significant differences in the way in which these agreements are structured and the level of authority and duties given to the shared facilities committee. Quite often SFAs fail to properly and fully address important matters. Such is the case with joint shared reserve funds.

How a shared facilities committee (the "Committee") deals with reserve fund studies and ensuring that the sister corporations have adequate reserve funds, is a significant matter. Depending on the type of SFA, a corporation can find itself in a serious situation if its sister condominium has failed to reserve an adequate amount of money for its portion of the cost for major repairs and replacements of the shared facilities. What do you do when the shared garage requires immediate major repairs yet one of the sister corporations is in financial crisis and has inadequate reserve funds to contribute?

In some cases, SFAs specifically require the Committee to obtain reserve fund studies and to collect monthly from each corporation the amount required to deposit into a joint reserve fund bank account. However, there are many SFAs which are silent on the issue of joint shared reserve funds. In those circumstances, can any one corporation insist that the other sister corporation agree to establish and contribute to a joint reserve fund for the shared facilities? Our office has been asked to provide opinions and make recommendations to a number of our clients who are confronted with this dilemma. Our answer depends primarily on the wording of the SFA. We are not aware of any case law which is helpful on this issue and the Act is of no real assistance either.

Even if the SFA does not deal with joint reserve funds, the sister corporations can mutually agree to establish a joint reserve fund and implement a protocol to deal with the reserve funds. A fairly short, straight forward agreement can be drafted in most cases and made as an addendum to the existing SFA. No by-law is required and no vote of owners is necessary in most cases. However, where there are

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disputing Committee members, the implementation of an agreement of this nature will be difficult. In those cases, although it makes good sense to establish a joint reserve fund, there are usually underlying disputes and a great deal of mistrust between the Corporations and Committee members which interfere with prudent operational and management decisions. With a strong legal strategy and some political maneuvering, it is possible to get the opposing corporation to contribute to a joint reserve fund.

To avoid problems between sister corporations and to ensure that there are adequate reserve funds for major repairs and replacements of shared facilities, it is hoped that when the Act is amended (at some point in the future), that corporations which share facilities are required to establish joint reserve funds.

Small Claims Court Conundrum

By
Carol Dirks

Is the "People's Court" getting your corporation down? With the maximum claim being $10,000.00 (and possibly increasing to a higher threshold in the future) and a reluctance on Corporations to put these claims through their insurance for fear of rising premiums, Small Claims Court creates a conundrum for many condominium corporations.

1. With most Plaintiff's seeking the maximum award of $10,000.00, small claims actions are commanding Boards of Directors to give these actions proper attention. This includes making sure a proper defence is prepared and filed, getting legal advice on issues such as whether the proper parties have been named, and utilizing the Court rules to the benefit of the corporation.

2. Yet despite recent improvements, Small Claims Court is limited in terms of what can be recovered for defence costs incurred by a corporation. In certain cases, a Small Claims Court Judge has the authority to award costs of up to 15% of the amount claimed. For a $10,000.00 action, this means that the most that can be recovered for costs is $1,500.00.

Over the last two years, the Small Claims court has demonstrated a willingness in limited cases to make an award of substantial indemnity costs to Corporations where the dispute is over common expense collections. The typical case is where an owner sues a corporation (and usually the property manager) to recover costs and interest charged to the owner following the registration of a Certificate of Lien. The owner pays the amount under protest and then sues to recover in Small Claims. Using the language of Section 84 of the Condominium Act, 1998, the Small Claims Court has allowed corporations to recover for reasonable costs incurred in collecting the unpaid common expenses, even it such costs relate to defending a Small Claims Court action. Unfortunately, the circumstances where a corporation can recover an increased level of costs is restricted.

Here are some practical tips for corporations in terms of defending such actions:

1. Rarely do small claims actions arise "out of the blue". In the majority of cases, the owner will bring an action on the basis of misinformation concerning their rights and obligations as an owner, or due to a lack of response by the Corporation. Attempting to head off cases by seeking to educate the owner or responding to the owner in writing can prove to be financially savvy. In some cases, it may be worthwhile to engage the Corporation's lawyer to provide a written response to the owner.

2. Have the proper parties been named? There seems to be a growing trend for the owner to name the property management company or the property manager, as a defendant, instead of the Corporation, as the party the owner has direct contact with. This can complicate matters, and increase costs, because most management contracts contain a clause entitling the property manager to be indemnified by the Corporation for actions arising in the course of their management functions. Steps should be taken to clear this

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matter up at the start, including if necessary, bringing a motion to a Judge of the Small Claims Court.

3. Utilize the Settlement Conference to your benefit. In Toronto, having a Settlement Conference is mandatory and typically scheduled within two months of the Defence being filed. To expedite the action and require the Plaintiff owner to appreciate the merits (or lack thereof) of the Claim, I often seek to use the Settlement Conference to outline weaknesses in the parties case, by either correcting the parties named, requiring the production of documents and even expert reports if the matter involves a dispute concerning maintenance and repair.

4 Small Claims Court Judges are becoming more familiar with the mandatory mediation and arbitration requirements of the Condominium Act, 1998. A judge can dispose of the action at the first Settlement Conference on the basis that the Plaintiff owner is required to proceed by mediation instead. This same approach can apply if the Plaintiff is really seeking an order that the Corporation do something required under the Condominium Act, 1998. In those cases, a Judge can find that the Small Claims court has no jurisdiction but is required to be deal with by way of application to the Superior Court.

5. Finally, in cases where the Plaintiff owner insists on proceeding to a full trial, there can be costs benefits to the Corporation to making an Offer to Settle early on and leaving it open until the start of trial. While the cost benefits would still be subject to the 15% maximum, the Courts of Justice Act does provide for increased recovery of costs above 15% where the Court considers it necessary to penalize a party for unreasonable behaviour. Establishing unreasonable behaviour may include the failure of the Plaintiff to accept a reasonable Offer to Settle made.

Court Clarifies Mediation/Arbitration Requirements

By David Thiel

In a decision released at the end of January 2008, a Judge of the Ontario Superior Court of Justice has finally resolved open questions concerning the application of the mediation and arbitration procedures found in the Condominium Act, 1998 (the "Act").

The case of Metropolitan Toronto Condominium Corporation No. 1143 v. Li Peng (the "Peng case") involved an owner's alleged violation of the Condominium Corporation's rules relating to noise and pets. The Corporation, after failed attempts to conduct a mediation and arbitration because of the lack of response from the owner, applied to the Ontario Superior Court under Section 134 (compliance application) of the Act for a Court order requiring the owner's compliance with the rules.

The owner argued that Section 132 of the Act requires a "disagreement" regarding the declaration, by-Laws or rules to proceed to mediation/arbitration and that therefore the Condominium Corporation's application to the Court should be dismissed.

Justice Pattilo held that a Condominium Corporation may not apply directly to Court under Section 134 of the Act to enforce its rules and instead must use the mediation and arbitration procedures as outlined in Section 132 of the Act. The Corporation's application was dismissed.

That mediation and arbitration procedures are required in certain cases may seem like a non-issue after having lived with the "new" Act for almost seven years. However, until now it has remained an open question as to whether or not a Corporation may proceed directly to Court under Section 134 of the Act on a pure "enforcement" matter as opposed to proceeding to mediation/arbitration to resolve a "disagreement".

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The Condominium Corporation in the Peng case relied upon this argument. The Court disagreed and decided that enforcement matters were 'disagreements' within the meaning of Section 132 of the Act.

There have been strong indications in the caselaw that "enforcement" matters must proceed via mediation and arbitration instead of through application to the Court. Unfortunately, no decision has addressed the issue with the degree of detail of the Peng case, which we expect has finally resolved the issue.

Further confusing the issue was the fact that over the past several years in the reported cases, the Ontario Superior Court has made many decisions concerning enforcement of condominium declarations, by-laws and rules. It appears that in those cases, the mediation/arbitration issue was not raised.

It is surprising that it took this long to obtain a clear Court decision on the mediation/arbitration issue as commentators have questioned for years whether or not enforcement matters are 'disagreements' requiring mediation and arbitration.

The Peng case also highlights the desirability of having a mediation and arbitration procedures By-law in place. In this case, there appears to have been no By-law governing the mediation and arbitration process. One of the Condominium Corporation's arguments was that because the owner did not consent to the appointment of an arbitrator, the arbitration process was not available in this situation and that therefore the Corporation was entitled to apply under Section 134 of the Act for a compliance order. The Court responded that the Corporation could have utilized the Arbitration Act, 1991 and apply to Court to have the Court appoint an arbitrator.

A mediation and arbitration procedures By-law would help in particular with the appointment of the arbitrator by providing a procedure where the arbitrator can be appointed, even where the owner fails to respond, and without obtaining a Court order. In our experience, having to apply to Court for the appointment of an arbitrator can add thousands of dollars to the Condominium Corporation's costs and months of delay to the arbitration process.

While perhaps not a ground breaking case or a surprising result, the Peng case is important clarification of the correct procedure to follow to enforce the Corporation's Declaration, By-laws and Rules.

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Your Condominium Law Group
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News and Notes

- **Lou Natale was a recent guest speaker at the Property Managers' Course offered at Humber College where he spoke about recent developments in Human Rights and Tort Law.**
- **If you have a question or topic which you would like covered in the next Fogler, Rubinoff LLP condo law commentary, please contact us.**

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