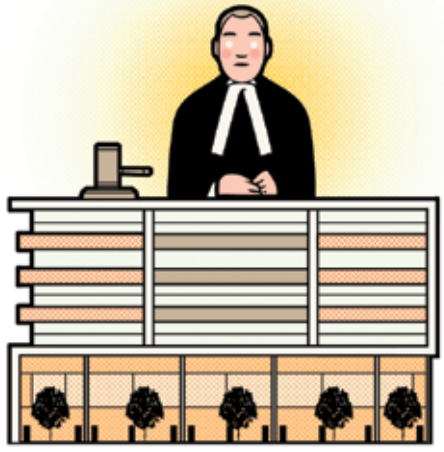
Jake A. Fine
B. Mgmt, JD
Associate
Fine & Deo Condominium Lawyers

Case Law Update

Who's on First?

Sometimes in Baseball, a Home Run is Not the Best Option. Sure, it Would be Nice – But it is Far Riskier Than Trying to Hit a Single.



Imagine this: *two outs, bottom of the ninth, bases loaded, game 7 of the World Series, 3 balls, 2 strikes, and your team is down by 1 run. You can:*

a) stay your normal course and try to smash the ball out of the park, but run a far greater risk of striking out; or,
b) choke up on the bat, reduce the strike zone, and increase your chances of getting a base hit.

If successful, both options produce the same result, but one is far riskier – which do you choose?

The case below is a cautionary tale of trying to hit a home run, when a single was all that was needed.

1658410 Ontario Inc. (Advance Repairs & Maintenance) v. TSCC 2514 et. al.

The Facts

In February of 2016, Advance Repairs & Maintenance ("Advance") entered into a Service Provider Agreement (the "Agreement") to perform janitorial services for TSCC 2514. The following September, TSCC 2514 terminated the agreement, purportedly for cause, pursuant to the agreement.

What should have amounted to a claim in Small Claims Court for wrongful termination and outstanding invoices for $11,074.06, turned into an over-the-top and vindictive claim for $1.9 million in damages.

In addition to a lack of notice of termination and unpaid invoices, the claim included assertions of, among other things, slander and injurious falsehood said to have damaged the reputation of Advance within the construction, development and building-services community, and the loss of opportunity of future cleaning and superintendent services.

TSCC 2514 smartly conceded some issues claimed by Advance for purely economic reasons. The concession included the unpaid invoices and the amount owing with respect to the lack of 30-days' notice to terminate the contract. The total amount of the concession by TSCC 2514, and the amount that should have been claimed by Advance, was $11,074.06. The other claims by Advance were swiftly rejected by the court.

In this case, the evidence put forward by Advance was based on hearsay, bald allegations or mere speculation. It was clear to the court that the evidence put forward by Advance could easily be contradicted and/or was unreliable.

The interesting aspect of this case will be the costs decision. As the "real" amount of the claim was within the jurisdiction of the Small Claims Court, and as such should have been commenced there, the disparity in the amount claimed and the amount awarded may be a cause for a substantial costs award against Advance. That decision has not yet been made by the courts.

The Takeaway

This case represents a valuable lesson on the harsh outcomes that can flow from acting out of pride and principle, instead of reason.

Advance commenced a $1.9 million claim out of pride, and was not satisfied with the $11,074.06 claim that reason would have dictated. Advance's evidence was circum-

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stantial at best, and did not lend credence to the claims asserted. They tried to swing for the fences, when all they needed was a base hit.

It is important for Boards to realize that it is risky to commence an action on pride or principle. It is important for Boards to assess the case at hand and make sure the claim is appropriate.

Although the costs decision has not been released, the possible financial impact it may impose should act as a warning for bringing over-the-top and vindictive claims. The costs award in the case at hand will likely far outweigh the $11,074.06 that was awarded to Advance.

Finally, this case illustrates the idea of giving an inch to take a yard. TSCC 2514 conceded certain issues (even if they were not at fault) in order to dismiss the claim summarily. The amount they conceded pales in comparison to the amount they would have spent at trial fighting this case. Sometimes, you must pay a little to save a lot.

Peel Standard Condominium Corporation No. 984 v. 8645361 Canada Limited

Three Strikes You're Out

The best words a pitcher in baseball can hear, "strike three, you're out!" All it takes is three pitches – three strikes to get a batter out. Similarly, as you will see in the case below, it can take three strikes for a court to order a unit owner to sell and vacate his unit.

The Facts

The respondent, Mirza Ahmed ("Mr. Ahmed"), was the president of a corporation that owned a unit in the applicant's condominium. Three prior orders had been issued by the court addressing the conduct of Mr. Ahmed towards various personnel of PSCC 984.

Mr. Ahmed's conduct included verbally, and at times physically, abusing and threatening PSCC 984 personnel. In 2017, Mr. Ahmed was prohibited, on an interim basis, from "contacting, communicating, harassing or coming within 25 feet of PSCC 984 personnel".

Mr. Ahmed's conduct continued despite the interim order. Two attempts were made by PSCC 984 to make this order permanent, however each time, Mr. Ahmed requested an adjournment based on an alleged medical condition.

At the most recent hearing, Mr. Ahmed requested another adjournment due to the same alleged medical condition. The court rejected the request based on "unsubstantiated assertions".

In addition to permanently prohibiting Mr. Ahmed from contacting, communicating, harassing or coming within 25 feet of PSCC 984 personnel, the court ordered Mr. Ahmed to vacate and sell his unit.

In coming to this decision, the court noted that "Ahmed continued to blatantly ignore court orders". Similarly, the court noted "where the subject of the order has demonstrated an unwillingness to comply with an injunction, the court must have the ability to go to the terminal remedy of sale in order to fashion an effective remedy…only a sale would resolve the problem".

The Takeaway

The continuing harassment and abuse by Mr. Ahmed towards PSCC984's personnel should be a lesson to all condominium corporations of the duty to provide a harassment free and safe workplace under the Occupational Health and Safety Act. This applies not only to staff hired by the condominium corporation – but to directors as well. Management and directors should be diligent in documenting any abuse or harassment that takes place, in order to provide the court with substantial proof of the harassment alleged.

Although a remedy seldom used by the courts, the order against Mr. Ahmed to sell and vacate his unit was "appropriate" given the continuing breach of prior court orders. This remedy however, is not one that was given by the courts instantly. Rather, it required three strikes by Mr. Ahmed in order for him to be out.

Metropolitan Toronto Condominium Corporation No. 596 v. Best View Dining Ltd

The Play is Under Review

Instant replay has changed the game of baseball. It has effectively removed the discretion of umpires and given a safeguard

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www.atrensmgmt.com

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to managers for human error. However, it has allowed for a system in which all rulings can be scrutinized by a third party to ensure that they are correct.
The following case is an example of how instant replay was used on a call made by a condominium corporation to ensure that the call was correct.

The Facts

Best View Dining Ltd. ("Best View") entered into a ten-year commercial lease of a unit within the applicant's condominium corporation. Best View opened a restaurant.

The noise that emanated from the restaurant became the subject of "vociferous complaints" of the residents and was in violation of the MTCC 596's governing documents.

In response, MTCC 596 commenced enforcement proceedings under s. 134 of the Condominium Act, 1998, against Best View -- which were successful -- and Best View was ordered to abate the noise.

The noise problem persisted, and MTCC 596 brought a contempt motion for breaching the provision of the previous order.

The motion was adjourned, but MTCC 596 complained of approximately $40,000 in costs incurred in attempting to enforce the compliance order. Subsequently, MTCC 596 registered a lien, which Best View argued was invalid. Best View's main objection was that MTCC 596 was "writing itself a blank cheque without the court reviewing the claim for costs" – Best View wanted an instant replay.

After reviewing "the play", the court concluded that the legal costs incurred by MTCC 596 in enforcing the compliance order were common expenses under s. 85(1) of the Condominium Act, 1998, and that the lien was proper.

The court noted that if there was an overcharge from the lien, Best View could resolve the situation either pursuant to s. 12 of the Mortgages Act or pursuant to the oppression remedy provisions in the Condominium Act, 1998. As a result, there was "no prospect of MTCC 596 writing itself a blank cheque".

The Takeaway

This case is important for condominium corporations in both the recovery of costs incurred and the enforceability of liens.

Specifically, the case clarifies that legal costs incurred by condominium corporations in enforcing compliance are considered common expenses under s. 85 and are lienable without first having an adjudication of the validity of the amount of the costs.

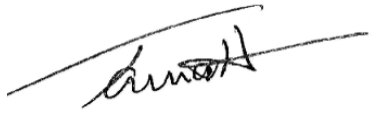
In addition, there are safeguards in place for unit owners in the event that there is an overcharge on a lien registered. This further enforces that the Condominium Act, 1998, is consumer protection legislation.

– *continued from page 3*

President's Message

We continue to work as part of the CCI National family of chapters across Canada to collaborate with and support each other. As Chair of the new National Operations and Support committee we look forward to sharing best practices with our local members and those in other provinces.

Lastly, I would like to acknowledge the dedication and hard work of the board of directors, many of whom I've known for most of my career, our support from Association Concepts, keeping us focused and holding the legacy knowledge throughout CCI Toronto's history, and the many volunteers who serve tirelessly on committees and special projects for the love we share in serving the condominium residents. I look forward to an exciting future; we are already well into planning stages for next year's condo conference and a variety of other learning opportunities to share with and for you! Until then, we wish you and your families all the best over the Holidays.



Tanya Haluk, RCM