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The Superior Court recently awarded an owner \$69,691.39 in damages for a condominium corporation's failure to repair the common elements with reasonable haste.

The Duty to Repair with Reasonable Haste: *Ryan v. York Condominium Corp. No. 340*

York Condominium Corporation No. 340 is a 701-unit residential condominium consisting of three highrise buildings and adjacent townhouses. It was registered in 1977. Peter John Bart Ryan purchased a highrise unit in 1980. Throughout its history, the condominium had experienced intermittent water penetration problems caused by the developer's failure to install a proper building envelope for the upper highrise floors.

Mr. Ryan's sister, Marilyn Bird, acts as his power of attorney. She owns another unit in the condominium and served on the board of directors from time to time. In March 2010, Mrs. Bird began notifying the corporation about water penetration into Mr. Ryan's unit. In November 2010, the corporation's engineer recommended a major exterior repair project at an estimated cost of 4 million dollars. The corporation delayed the project while Mrs. Bird reported more water penetration and the discovery of mould. Despite temporary repairs, the water penetration problems were not resolved until November 2014 after the corporation installed a new window, new exterior bricks, a new flashing membrane, and replacement bricks for Mr. Ryan's unit. The corporation did not complete mould remediation until October 2015.

Around April 2011, Mr. Ryan stopped residing in his unit. He moved to a

farm property that he co-owned in Dacre, Ontario. He suffered from Stage III prostate cancer and required ongoing treatments at a hospital in Mississauga, Ontario, a 350 km commute from his farm. Upon moving into his farm, he paid for all utilities, insurance, and taxes compared to having previously paid for half. He nonetheless continued to pay all costs associated with his ownership of a condominium unit, including common expenses, municipal taxes, and a special assessment levied against all owners to fund the exterior repair project.

In October 2015, Mr. Ryan commenced a court application for (a) a mandatory order that the corporation restore his unit to a habitable state; (b) \$78,897.63 in special damages; and (c) \$150,000 in general damages for mental distress, anxiety, and psychological and emotional damages. Mr. Ryan sought the above orders under Section 134 of the *Condominium Act, 1998* (the "Act") for non-compliance with the duty to maintain and repair the common elements and under Section 135 of the Act for conduct that amounts to oppression, unfair prejudice, or unfair disregard.

In determining whether a corporation breached its duty to maintain and repair the common elements, courts apply a standard of reasonableness. Rather than engaging in a step-by-step analysis, the court examined the



whole history of the condominium and the parties. What emerged from this broader analysis was that the corporation did not fix a widespread water penetration problem that it had known about for over 30 years and that, after being notified about water infiltration into Mr. Ryan's unit, took 4.5 years to stop the infiltration and 1 additional year to remediate the mould. The court ruled that the corporation failed to reasonably attend to common element repairs.

The court did not find any oppression, unfair prejudice, or unfair disregard. While the corporation breached its repair obligations, it was not abusive or oppressive because it agreed that repairs had to be made and it tried to remedy the problems. The corporation's unreasonable delay in making repairs did not in and of itself warrant an oppression remedy. In the end, the court awarded Mr. Ryan \$69,691.39, broken down as follows:

- **\$37,457.07** for common expenses for 2011 to 2015.
- **\$7,456.84** for municipal realty taxes for 2011 to 2015.
- **\$3,780** for gas mileage

expenses for medical appointments.

- **\$5,997.48** for legal expenses incurred prior to the court proceeding.
- **\$15,000** in general damages for repairs to the interior of the unit.

The court did not award a mandatory order or damages for mental distress, anxiety, and psychological and emotional damages.

Interestingly, the court awarded the above common expense and municipal realty tax amounts as special damages even though they arguably were not losses suffered by Mr. Ryan as a result of the corporation's non-compliance. Mr. Ryan would have incurred those expenses as a unit owner even if his unit was habitable. The court classified them as wasted expenses, in contrast to the farm-related expenses and special assessment for which the court did not award damages.

This case includes the following lessons:

- **Corporations have a duty to repair the common elements with reasonable haste.**
- **Owners who cannot live**

in their units until repairs render the unit habitable can claim damages for "wasted" common expenses and municipal realty taxes.

- **An owner making a claim under both Sections 134 and 135 of the Act can apply to court and obtain a compliance order even if the oppression claim is dismissed.**
- **Mediation and arbitration are pre-conditions for applying to court for a compliance order under Section 134 alone.**

Corporations facing repair problems are strongly encouraged to obtain and act upon professional legal and engineering advice early on. In doing so, the problems are more likely to be resolved in a reasonable amount of time and any delays are less likely to be attributed to a corporation that strictly follows professional advice. ◀

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