

COURT CASE LESSONS LEARNED



MANITOBA COURT OF QUEEN'S BENCH: SMITH V. LEHMANN ET AL

One of the larger disputes that can arise between a Condominium Corporation and a unit owner stems from the financial responsibility of correcting deficiencies of a unit. The Manitoba Court of Queen's Bench made a ruling *Smith v. Lehmann et al.*¹ that provided reinforcement to the balance of a unit owner's duty under section 180(2) of The Condominium Act² versus the rights of a Condominium Corporation under section 181.

BACKGROUND

A condominium unit was purchased by the defendant Lehmann during foreclosure, who subsequently did renovations to the Unit including "the replacement of flooring, bathroom fixtures, and kitchen appliances, the installation of cabinetry and other interior finishings, painting, tiling, and sandblasting a brick wall." Lehmann sold the unit to Smith soon after the renovations were completed in 2015. In 2017, the City of Winnipeg inspected the unit and ordered that it be brought into compliance with City by-laws as it had numerous violations including the fact that it had been converted from a storage locker without obtaining the necessary occupancy permit.

Upon receipt of the City Order, the Condominium Corporation demanded that Smith rectify the deficiencies. As Smith remained non-compliant, the Condominium Corporation utilized the rights of the Corporation under The Condominium Act to rectify the deficiencies and charge the expense to Smith; later placing a lien on the unit. This prompted Smith to file suit against Lehmann, the Condominium Corporation, and others for negligence and breach of contract. Against the Condominium Corporation, Smith claimed that the Condominium Corporation had a "duty of care to oversee the Unit, to ensure that Lehmann performed renovations in accordance with the Declaration and by-laws, and to ensure that the Unit could be occupied as a residence." The Condominium Corporation filed a counterclaim seeking damages for the costs of remediating the unit and for the fines assessed by the City of Winnipeg due to the delay in bringing the unit into compliance.

COURT DECISION

Ultimately, the Court dismissed the claim against Lehmann and the Condominium Corporation and granted the counterclaim against Smith.

In the decision, the Honourable Justice Grammond made specific note of the following:

1. That as there was no evidence showing that Lehmann made any structural changes to the unit nor did he make any alterations or installations that served another unit in the complex, the approval of the Board of the Condominium Corporation was not required to be granted prior to Lehmann's renovations.
2. That while it would have been helpful for the Condominium Corporation to inform Smith that there was an issue of habitability of the unit prior to Smith purchasing it, there was no legal obligation for the Condominium Corporation to do so.
3. That as Smith failed to perform her duties to maintain the unit under section 180(2) of The Condominium Act, the Condominium Corporation had the authority to do the work after giving Smith appropriate notice and acted appropriately in adding the remediation costs to Smith common element expense.

LESSONS LEARNED

There are some things that can be used as a learning example for future situations to help make things go smoothly however should section 181 (1) be utilized by a Condominium Corporation:

1. Ensure that proper notice has been given to the unit owner, including the ability to show that the unit owner was aware of the deficiencies; and
2. Ensure that contractor's invoices specifically state the unit that the work was done for. If the work was done for multiple units, have individual invoices for each unit.
3. It also indirectly provides guidance that should a unit owner seek permission to do a renovation from the Condominium Corporation, the Board cannot be complacent thereafter and should ensure that the permission is granted only on the condition that the unit owner provide proof of building permits and provide any necessary documentation to show the renovations are completed properly. These elevated responsibilities of the Condominium Corporation may make a Board hesitant to provide permission, especially if a renovation project may overlap the change of a Board.

While providing guidance for the relationship between unit owner and Condominium Corporation, the *Smith* judgement does not provide guidance on the costs a Condominium Corporation may incur in recovery. Section 162(3) of The Condominium Act states that a Condominium Lien covers "all reasonable legal costs and expenses incurred to collect or attempt to collect". Further, most declarations state that a unit owner will fully indemnify the Condominium Corporation. As most litigators will tell you, the Courts rarely deviate from the Tariff in The Court of King's Bench Act which can be substantially lower than the actual legal expense. So, the question remains on whether the indemnity clause in declarations or the tariff amount would be the "reasonable legal costs and expenses".

Sean Restall, of Restall & Restall LLP, assists Condominium Boards and Property Managers with corporate governance and disputes among owners and the Condominium Corporation. He was one of the legal representatives of the Condominium Corporation in the Smith case. 🇺🇸

¹ *Smith v Lehmann et al.*, 2022 MBQB 155 (CanLII) <https://www.canlii.org/en/mb/mbqb/doc/2022/2022mbqb155/2022mbqb155.html?autocompleteStr=Smith%20v%20Lehmann%20et%20al.%2C%202022%20MBQB%20155&autocompletePos=1>

² *The Condominium Act, CCSM c C170* <https://web2.gov.mb.ca/laws/statutes/2011/c03011e.php>