LEGISLATIVE UPDATE

The Battle of the Parking Garage

A 30-year legal war of the underground.

By Mark H. Arnold, LLM

The 500-unit highrise condominium building located at 40 Homewood Avenue in Toronto was constructed in 1972. The developer/declarant was an investment group collectively known as Howard Investments.

The building was initially constructed to provide low-cost home ownership to people living in the city core. To achieve that goal, Howard registered the three-level, 500-space underground parking garage as a separately titled unit. It was rationalized that many home owners in the downtown Toronto building would not own a car and would therefore have no use for a parking space as part of the cost of their residential unit. Howard retained ownership of the garage with the right to operate the unit as a separate commercial entity. As a unit owner, Howard had the right to rent parking spaces to unit owners and others, giving Howard the ability to make a profit on the garage unit.

Like most condominium units, the garage unit at 40 Homewood Avenue had both a common element portion and an individual unit portion. The declaration did not require Howard to pay common element fees.

Immediately following registration of the condominium in October 1972, Howard, as the developer and declarant, took control of the board of directors. Wearing both hats, Howard prepared the garage agreement requiring it to pay a portion of the repair and maintenance costs of the garage unit directly to the condominium corporation. The agreement also gave the condominium corporation a future "option" to purchase the entire unit at a price to be negotiated.

Unknown to Howard and to potential unit purchasers at that time, the development plans for the underground parking garage at 40 Homewood Avenue contained the seeds of a protracted struggle between successive owner-controlled boards and Howard Investments over the meaning and administration of the garage agreement.

Fast Forward to 1996

Over the years, Howard attempted to operate the garage for commercial purposes but it failed to generate enough income to pay its financial obligations for the unit, including mortgage payments, municipal taxes, and repair and maintenance obligations under the garage agreement. To make matters worse, in 1996 a technical report revealed that the parking garage required a major retrofit of not less than $1 million.

The condominium corporation demanded that Howard repair the garage unit. Howard refused. The corporation retained legal counsel.

The corporation instructed its counsel to file an application under former section 49 of the *Condominium Act, 1990* for a court order requiring Howard to repair the unit. The corporation also told its lawyer to file a separate lawsuit for breach of Howard's obligation to pay for repairs under the garage agreement.

In a most unusual and interesting twist, Howard counterclaimed and alleged that the condominium corporation had really owned the underground parking garage from the beginning, a form of "constructive ownership" of real estate. That was a novel concept

unknown in Canadian law. Howard then argued that the repair obligation was that of the condominium corporation. Howard based its position on the terms of the garage agreement, the common law and the law of equity – despite the fact that the agreement only provided the corporation with an "option" rather than an imposed "obligation" to purchase the garage.

In its claim, Howard also sued the individual members of the board of directors who had initiated the section 49 application to repair the garage. Howard alleged that each individual member of the board personally induced the corporation to breach the garage agreement by failing to take title to the unit. Howard claimed $1.3 million in damages against each individual board member.

Despite the personal intimidation factor arising from the individual lawsuits, this was a blessing in disguise. The claim was reported to the corporation's errors and omissions insurer, who agreed to pick up a portion of the legal fees for the defence of the named individuals.

Howard's counterclaim was closely studied. It was determined that there was no legal basis for the claim that Howard did not own the parking garage, that the condominium corporation was required to pay for the repairs and that individual members of the board were guilty of inducing the corporation to breach the garage agreement. The corporation instructed its lawyer to try to have the counterclaim dismissed on the grounds that there was no reasonable cause of action to proceed to trial.

In August 1998, the Ontario Superior Court of Justice heard the corporation's motion to have the counterclaim dismissed. The court agreed that there was no reasonable case to proceed to trial, either on the issue of who owned the underground garage, or on the personal claims against individual unit owners.

Howard appealed the decision to the Ontario Court of Appeal. In September 1999, the highest court in the province upheld the lower court decision and the condominium corporation was awarded its legal costs.

During the autumn of 1999, the condominium's case for repair and maintenance was prepared in order to proceed to court for a final determination.

In December 1999, Howard proposed that a resolution be mediated rather than proceeding to court. The parties agreed to retain the mediation services of George Adams, QC, a former Ontario Superior Court Judge, to act as the mediator.

The first round of mediation took place in February 2000 and, as a result, the parties reached a tentative agreement, subject to ratification by the unit owners, that the condominium corporation would acquire ownership of the garage, free and clear of any debt following the undertaking of repairs to the garage by Howard at Howard's cost and under the supervision of a consulting engineer. Howard also agreed to establish a reserve fund for future repair and to retire all past debts owing with respect to the operation and maintenance of the garage.

The two sides could not agree on the selection of the consulting engineers, resulting in a second round of mediation in June 2000. The parties then agreed on a procedure for the appointment of consulting engineers.

Howard appointed consulting engineers to prepare an engineering report, an estimated cost to repair the underground parking garage and a reserve fund study. The reports were not delivered until early February 2001, when they were then sent to the condominium corporation's consulting engineers for review and analysis. The condominium's

engineers rejected the repair methodology proposed by Howard. It then became apparent that the mediation agreement was again breaking down.

In June 2001, the condominium corporation and Howard returned to mediation for a third time with both consulting engineers present. When it became apparent to the mediator that he could not reconcile the repair methodology for the garage proposed by both engineers, negotiations turned to the possibility of reaching a global financial settlement that would permit the condominium corporation to obtain a sum of money sufficient to pay the operational and maintenance arrears and repair the garage to the standard proposed by its engineers. After a period of negotiating and bargaining, mediation once again broke down.

In late June 2001, the board of directors of the condominium corporation decided that it should call a special meeting of unit owners to report on the events that had transpired and advised Howard of its intentions. Howard then tried to obtain a court order to remove the authority of the board on the issue of the underground parking garage and prevent the board from fully advising unit owners of all of the events that had transpired between the parties.

Following the hearing that took place July 6, 2001, a judge of the Ontario Superior Court wrote the following:

"The Applicant [Howard] seeks…an interim injunction precluding the Board of Directors of the condominium from conveying materials to the unit holders concerning the ultimate question of acceptance or refusal of the proposal. In my view, it is the duty of the Board of Directors to inform and to lead the unit holders in their decision. Nothing in the minutes of settlement prevents the Board from carrying out that duty.

"It would, in my view, be improper for the court to interfere with the Board's statutory rights to communicate with the unit holders. The unit holders will, of course, vote as they may see fit."

As a result of the court decision, the case between Howard and the condominium corporation entered into the final negotiation phase.

Working with its consulting engineers and property manager, the board determined the amount of money that was necessary to undertake a proper repair of the garage and pay for past maintenance and repair.

On August 22, 2001, the parties finally agreed that Howard would pay the condominium corporation $3.2 million and would then transfer ownership of the underground parking garage to the corporation free and clear of all debt, subject to ratification by two-thirds of unit owners in a vote under section 97 of the *Condominium Act, 1998.*

On September 20, 2001, an overwhelming majority of unit owners of the condominium corporation ratified the decision of the board.

On October 31, 2001, some 30 years after the struggle began, the condominium corporation received $3.2 million – among the highest settlements ever achieved in Canadian condominium building litigation – and became the owner of the underground parking garage unit at 40 Homewood Avenue. The battle had finally ended.

Legal battles of this type cannot be won without the full participation and commitment of the members of the board of directors and the corporation's property management. Opponents are well aware that if they can undermine the will of individual board members and the confidence that unit owners place in their board from year to year, there

is a good chance the corporation will either withdraw from the lawsuit or settle at levels that are seriously compromised.

The case of 40 Homewood Avenue owes its success to an intelligent, mature and well-informed board that took an active part in each phase of the struggle. Of equal importance was the contribution of the corporation's property manager, Pat Savoy, whose efforts on behalf of the condominium corporation greatly exceeded her job description.

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