CITATION: 673830 Ontario Limited v. MTCC 673 and others, 2014 ONSC #1720
DIVISIONAL COURT FILE NO.: 405/13
DATE: 20140318

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

KITELEY, NORDHEIMER & HARVISON YOUNG JJ.

BETWEEN:	)	
	)	
673830 ONTARIO LIMITED	)	*J. H. Fine*, for the appellant
	)	
Appellant	)	
– and –	)	
	)	
METROPOLITAN TORONTO CONDOMINIUM CORPORATION 673, HOWARD SHELDON, THOMAS BERARDO and JOHN MALMHOLT	)	*P. Greco*, for the respondents
	)	
Respondents	)	
	)	
	)	
	)	**HEARD at Toronto:** February 24, 2014

NORDHEIMER J.:

[1] This is an appeal from the decision of Lederman J. dated August 16, 2013[1] in which he dismissed the appellant's application. The appellant had brought an application seeking a declaration that a special assessment levied by the respondent condominium corporation, MTCC 673, did not apply to the applicant's condominium unit, that the appellant was entitled to receive its proportionate share of any expropriation proceeds to be received by MTCC 673 and for other related relief.

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[1] *673830 Ontario Ltd. v. Metropolitan Toronto Condominium 673*, [2013] O.J. No. 3796 (S.C.J.)

Background

[2] MTCC 673 contains fifty-six commercial condominium units in three buildings located on Sheppard Avenue West in the City of Toronto. The individual respondents were the members of the Board of Directors.

[3] On October 28, 2010, the City of Toronto expropriated a portion of the common elements of MTCC 673 for the benefit of the Toronto Transit Commission. At MTCC 673's Annual Meeting on May 12, 2011, the Board advised the unit owners that a partial payment on account of the expropriation was expected in the near future. The Board also advised the unit owners that there was an urgent need to replace the roofs of the condominium buildings.

[4] On August 10, 2011, MTCC 673 received payment on account of the expropriation in the amount of $745,232.41. The Board decided to place these funds into the reserve fund for the condominium corporation. It was the intention of the Board to use these funds to pay for the roof replacement. On August 31, 2011, the Board advised the unit owners that the estimated cost of the roof replacement was $1.2 million, that once a study was done the Board would be seeking multiple estimates on the actual replacement costs and that the expropriation monies would be used for the costs of the roof replacement.

[5] On September 26, 2011, the appellant entered into an agreement of purchase and sale to purchase a unit in MTCC 673. On October 5, 2011, the appellant received a status certificate from MTCC 673. The status certificate contained, among others, the following statements:

> 12. The Corporation has no knowledge of any circumstances that may result in an increase in the common expenses for the unit, except due to the increased costs of utilities.
>
> 13. The Corporation's reserve fund amounts to $1,247,133.05 as of August 31, 2011.
>
> 15. The balance of the reserve fund at the beginning of the current fiscal year was $489,659. In accordance with the budget of the Corporation for the current fiscal year, the annual contribution to be made to the reserve fund in the current fiscal year is $99,200 and the anticipated expenditure to be made from the reserve fund in the current fiscal year amount is $70,943. The Board anticipates that the reserve fund will be adequate in the current fiscal year for the expected costs of

> major repair and replacement of the common elements and assets of the Corporation.

[6] There was no mention in the status certificate of the expropriation by the City, the monies received from the expropriation, the plan to replace the roofs of the condominium buildings or of the anticipated cost of the roof replacement.

[7] On November 10, 2011, the appellant completed the purchase of its unit in MTCC 673.

[8] On November 29, 2011, the Board issued a special assessment to the unit owners in the amount of $1,000,000 for the costs of the roof replacement. The special assessment provided that, in order to accommodate the complete replacement of the roofing systems commencing in 2012, the board was levying a special assessment of $1 million payable in two installments: $750,000 due on January 1, 2012; $250,000 due on July 1, 2012.

[9] At a special general meeting of MTCC 673 on February 28, 2012, certain unit owners expressed their desire to obtain their proportionate share of the expropriation funds directly. However, a majority of the unit owners agreed that the expropriation funds should be used to directly pay for the roof replacement.

[10] On June 28, 2012, the Board was preparing to enter into a contract to replace the roofs. The Board cancelled the earlier special assessment and replaced it with a second special assessment in the exact amount of the expropriation funds, namely $659,497.71 which was due on July 30, 2012. In an effort to balance the interests of all of the unit owners as expressed at the special general meeting, the Board provided two payment options:

> (a) those unit owners who were content to simply have the expropriation funds used to pay for the roof replacement could sign a direction to that effect;
>
> (b) those unit owners who wished to receive their proportionate share of the expropriation funds directly could first pay their proportionate share of the costs of the roof replacement to the condominium corporation after which the condominium corporation would pay those unit owners their proportionate share of the expropriation funds.

[11] The appellant objected to these options. The appellant took the position that it was not required to pay its proportionate share of the costs of the roof replacement because the roof

replacement had not been disclosed in the status certificate. The appellant also took the position that it was entitled to receive its proportionate share of the expropriation funds. The dispute between the appellant and MTCC 673 eventually led to the application, the decision on which gives rise to this appeal.

Analysis

[12] The application judge dismissed the application for a number of reasons. First, he found that the status certificate referred to the Reserve Fund Study. While the Reserve Fund Study was not provided with the status certificate, it was available had the applicant requested it and it would have supplied the details of the roof replacements. Second, the application judge also concluded that the status certificate was accurate when it stated that no increase in the amount of the common expenses was anticipated. Third, the application judge held that the applicant had not been treated differently than the other unit holders and had not been called upon to pay any extra monies on account of the roof replacement costs.

[13] In reaching his decision, the application judge did not make any reference to the statutory requirements directing the contents of the status certificate or the prevailing authorities on the purpose of the status certificate. He did not make any finding whether the status certificate in this case did, or did not, comply with those requirements. The application judge also did not make reference to the fact that the *Condominium Act, 1998,* S.O. 1998, c. 19 is legislation that is aimed at the protection of the consumer. As O'Connor A.C.J.O. said in *Lexington on the Green Inc. v. Toronto Standard Condominium Corp. No. 1930* at para. 49:

> A significant purpose of the Act is consumer protection. The Act sets out a detailed and sophisticated scheme of disclosure in an attempt to ensure that purchasers of condominium units are fully informed of the rights and obligations attendant on their purchases.

[14] In my view, the analysis called for in this case, revolving around the contents of the status certificate, cannot properly be undertaken in a vacuum devoid of any consideration of the objective of the statutory requirements. In particular, the importance of the status certificate to the purchasers of condominium units must weigh heavily in the analysis. The failure of the application judge to consider the legislative scheme and the established purpose underlying the

status certificate amounts to an error of law. As a consequence of this error, it falls to this court to consider the issue afresh.

[15] The contents of a status certificate are prescribed by statute. The form of status certificate is required to be in the form set out in s. 18 of the *Condominium Act, 1998*. Paragraph 12 of that form provides:

> The Corporation has no knowledge of any circumstances that may result in an increase in the common expenses for the unit *[if applicable add:* except *(give particulars of any potential increase, including any assessment levied by the board against the unit, and the reason for it)].*

[16] I accept the appellant's submission that the purpose behind a status certificate is to provide a prospective purchaser with as full and complete information as is possible regarding the state of the finances of the condominium corporation. This point was made in *Durham Condominium Corporation No. 63 v. On-Cite Solutions Ltd.*, [2010] O.J. No. 5214 (S.C.J.) where Lauwers J. said, at para. 25:

> I that*[sic]* find that the language used in paragraph 12, particularly the broad term "a circumstance" coupled with the word "may," which in context connotes "might," is intended to push a condominium corporation to disclose more, not less, information that could be financially material to the requester's purchase decision.

[17] The same point is made in *Condominium Law and Administration* (Toronto: Carswell, loose-leaf ed.) at p. 9-7 where the author says:

> This statement requires the corporation to give particulars of any potential increase that it knows or, in the author's view, ought to know about, including the potential for expenses that are forthcoming, for example, as a result of engineering studies currently being conducted, even if no increase in common expenses or a special assessment has been approved by the board.

[18] The fact is that the status certificate in this case did not make full and complete disclosure of the state of the condominium corporation's finances. It did not reveal that the condominium corporation was engaged in a planned project to replace the roofs of the condominium buildings and it did not reveal the potential costs of the replacement of the roofs. The status certificate also did not reveal that there was an expropriation under way by the City of Toronto of a portion of

the common elements of the condominium and that the proceeds of that expropriation were going to be used to fund the costs of the roof replacement. I should add that it was not clear at the time that the status certificate was issued that the expropriation proceeds would be sufficient to cover all of the costs of the replacement of the roofs.

[19] In my view, the status certificate ought to have contained information relating to the planned roof replacement and the expropriation, in some fashion. The appellant was entitled to know that the current level of the reserve fund included the expropriation funds and it was entitled to know that that same portion of the reserve fund was committed to the costs of the replacement of the roofs. The appellant was also entitled to know that, while the condominium corporation was expecting to cover the full cost of the roof replacement through the expropriation funds (both the funds received and any additional funds expected to be received), the actual cost of the roof replacement was not then finalized. It remains the fact that, at the time that the status certificate was issued, there was a potential, despite the best efforts of the Board, that the common expenses might have to be increased to cover any additional costs over and above the total amount of the expropriation proceeds received.

[20] The issue is what consequence flows from the failure to provide a complete and accurate status certificate. On that point, s. 76(6) of the *Condominium Act*, 1998 reads:

> The status certificate binds the corporation, as of the date it is given or deemed to have been given, with respect to the information that it contains or is deemed to contain as against a purchaser or mortgagee of a unit who relies on the certificate.

[21] It follows that MTCC 673 is bound by the status certificate that it gave. The statements in paragraphs 13 and 15 of the status certificate were technically correct: in the fiscal year ending December, 2011 the common expenses of the unit were not increased and the reserve fund was adequate for the expected costs of major repair and replacement. However, the statement in paragraph 12 was not accurate. MTCC 673 did have knowledge of circumstances that might result in an increase in the common expenses for the unit. It knew that there was a urgent need to replace the roofs of the condominium buildings and it did not as yet know if the costs of that replacement would be fully covered by the expropriation funds. Even if the Board had the intention, in case of a shortfall, to fund that shortfall from the reserve fund, MTCC 673

could not fairly and openly say that it did not know of any circumstance that might result in an increase in the common expenses. Simply put, the failure of MTCC 673 to disclose the roof replacement project, and the plans to pay for it, did not meet the standard of disclosing more, rather than less, information that could be financially material to the buyer's purchase decision.

[22] The conclusion that the status certificate was deficient does not automatically lead to relief in the hands of the appellant. Rather, the result is that MTCC 673 is bound to the contents of the status certificate. Binding MTCC 673 to the contents of the status certificate simply means that MTCC 673 is prohibited from seeking additional monies from the appellant with respect to an expenditure of which it knew but which it failed to disclose in the status certificate. However, MTCC 673 has not sought any additional funds from the appellant and the appellant is consequently not out of pocket regarding any matter of which it was not aware at the time that it decided to complete the purchase of its unit. This reality distinguishes this case from *Durham Condominium Corporation No. 63 v. On-Cite Solutions Ltd.* and from *Fisher v. Metropolitan Toronto Condominium Corp. No. 596*, [2004] O.J. No. 5758 (Div. Ct.).

[23] On the issue of harm, the appellant asserts that, when it was deprived of the information that it says that it ought to have had, it lost the opportunity to either renegotiate the purchase price or to have walked away from the purchase. That is simply a bald assertion by the appellant. The appellant is not able to point to any logical or rational reason why, had it received the information that it says it ought to have received, it would have acted differently than it did.

[24] While it is easy for the appellant to now make that assertion, it seems to me that the appellant is obliged to point to more. If the appellant had received all of the information that it contends it ought to have, it would have known that MTCC 673 was planning on replacing the roofs of the condominium buildings, that it had expropriation funds available that it anticipated would cover the entire costs of the roof replacement and that, as a consequence, no additional monies would be required from any unit owner. That state of affairs, while uncertain at the time of the status certificate, turned out to be true. Putting the appellant in the position that it ought to have been in, with the information that it says it ought to have had, it is difficult to see what reason a vendor would have had to lower its sale price and it is equally hard to see why a potential purchaser would walk away from the purchase. What a potential purchaser would

know is that it was buying a unit in a condominium that would be receiving brand new roofs, and presumably a consequential increase in value, the costs of which would be borne without any additional contribution from the unit owners. That is not a result that would cause a reasonable purchaser to walk away from the purchase.

[25] In the end result, the status certificate was deficient. It did not make full disclosure of the information that MTCC 673 had and is required to provide. The result of that deficiency, in the normal instance, would be that MTCC 673 could not require the appellant to provide it with additional funds to pay for a liability that was not disclosed in the status certificate. At the same time, however, there was nothing that prevented MTCC 673 from using the existing reserve funds to pay for the costs of the roof replacement and that includes the appellant's proportionate share of those reserve funds. Indeed, that is the very purpose of having a reserve fund: *Condominium Act, 1998*, s. 93(2).

[26] The appellant's position would have it benefit from the receipt of the expropriation funds but not make a corresponding contribution to the costs of the roof replacement. The appellant has no freestanding right to be paid its proportionate share of the reserve funds: *Condominium Act, 1998*, s. 95(3). If the appellant's position is correct, then it would fall to the other unit owners to each bear their share of the roof replacement costs not being borne by the appellant. That is not a result that compels itself and it is not one that should be adopted unless the language of the statute requires it.

[27] The *Condominium Act, 1998* does not contain any such requirement. To the contrary, s. 134 of the *Condominium Act, 1998,* that authorizes an application to be brought before the Superior Court of Justice to enforce compliance with the Act, authorizes the court, in s. 134(3)(c), to "grant such other relief as is fair and equitable in the circumstances".

[28] Given the circumstances in this particular case, what is fair and equitable relief is the following:

(i) a declaration that the status certificate dated October 5, 2011 issued by MTCC 673 to the appellant was non-compliant and deficient;

(ii) a declaration that, as a result of the non-compliant and deficient status certificate, the appellant is not required to pay any additional monies to MTCC 673 for the roof replacement costs as those costs were known at the time of the status certificate;

(iii) an order that MTCC 673 return to the appellant the amount of $14,368.08 for its share of the roof replacement paid under protest by the appellant, and;

(iv) a declaration that MTCC 673 may pay out of the reserve fund the appellant's proportionate share of the costs of the roof replacement in the amount of $14,368.08.

[29] The appeal is allowed, the order below is set aside and in its place the relief set out in paragraph 28 above is granted. The appellant has been successful, in part, in that it has established that the status certificate as issued by MTCC 673 was non-compliant and deficient. The appellant is entitled to the costs of the appeal, payable by MTCC 673, that the parties have agreed should be fixed in the amount of $15,000 inclusive of disbursements and HST.

[30] The issue of the proper disposition of the costs of the original application gives rise to different considerations. The parties did not have the opportunity to make submissions on that issue. Consequently, if the parties cannot agree on the costs of the original application, they may file written submissions not exceeding five pages each. The appellant shall file its submissions within ten days of the date of the release of these reasons and the respondents shall file their submissions within ten days thereafter.

NORDHEIMER J.

KITELEY J.

HARVISON YOUNG J.

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673830 ONTARIO LIMITED

Appellant

– and –

METROPOLITAN TORONTO CONDOMINIUM CORPORATION 673, HOWARD SHELDON, THOMAS BERARDO and JOHN MALMHOLT

Respondents

REASONS FOR JUDGMENT

NORDHEIMER J.

Date of Release: