CITATION: Durham Condominium Corporation No. 63 v. On-Cite Solutions Ltd., 2010 ONSC 6342
DURHAM COURT FILE NO.: 65164/10
DATE: 20101202

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
DURHAM CONDOMINIUM CORPORATION NO. 63	)	
	)	
	)	Paul Chornobay, for the Applicant
Applicant	)	
- and -	)	
	)	
ON-CITE SOLUTIONS LTD.	)	
Respondent	)	
	)	Kyle Armagon, for the Respondent
	)	
	)	HEARD: November 17, 2010

REASONS FOR DECISION

LAUWERS J.

[1] The applicant, Durham Condominium Corporation No. 63 (the "Corporation"), has existed since February 6, 1978 and is responsible for 35 industrial use units and the common elements in Durham Condominium Plan number 63.

[2] The respondent, On-Cite Solutions Ltd., has owned unit 10, level 1 on Durham Condominium Plan number 63, known municipally as unit 10, 1730 McPherson Court, Pickering, Ontario, since October 31, 2008. Inside the unit is a 10-inch thick load-bearing wall made of concrete block that divides the office and the warehouse. The wall supports the roof trusses. Originally the wall had a doorway about 36-inches wide, but at some undetermined point in the past it was widened to 10 feet.

[3] The Corporation applies for an order under the *Condominium Act, 1998*, S.O. 1998, c. 19 (the "Act"), requiring On-Cite Solutions Ltd. to restore the wall to its original condition, or, alternatively, an order permitting the Corporation to do so at the expense of On-Cite Solutions Ltd.

The Facts

[4] The respondent entered into an Agreement of Purchase and Sale on October 20, 2008 to buy the unit from A & J Barbour Holdings Ltd., conditional on the receipt of a clean Status Certificate from the Corporation.

[5] Richard Duval, the president of the Corporation, attended at the unit "for a routine inspection" on or about October 24, 2008. The common assumption during the argument was that he had inspected the unit before he signed the Status Certificate on October 22, 2008 on behalf of the Corporation, but nothing turns on the discrepancy in the dates since the Corporation had time to correct it. Relying on the Status Certificate, the respondent closed the transaction and took possession of the unit on October 31, 2008.

[6] Mr. Duval noticed that the doorway in the wall had been widened to 10 feet. He swore an affidavit asserting that this had been done without the approval of the Corporation, in violation of section 10 of Article XV of the declaration:

> **Modification of Units**
>
> No boundary wall, roof or interior partition wall shall be added to, altered, removed in all or in part, improved or renovated without the prior written consent of the Corporation of [*sic*] the Board. The Corporation or the Board may impose such conditions as it deems necessary in consideration for granting such consent.

[7] Mr. Duval swore that he tried to bring the problem to the attention of a representative of the owner of the unit at the time of his inspection. He also attended at the unit on October 30, 2008, the day on which he thought that the respondent was taking possession, and spoke to a person on the site who was not, as it turns out, a representative of the respondent. Mr. Duval gave no names.

[8] A little more than two weeks after closing the transaction and taking possession, the respondent received a letter from counsel for the Corporation stating that there had been an unauthorized alteration to the wall. This was the respondent's first notice of a problem with the wall since the Status Certificate did not refer to it and the problem did not otherwise come to the respondent's attention.

[9] Paul Goostrey, president of the respondent, deposed that real estate counsel for the respondent, Randall Longfield, forwarded this letter of complaint from counsel for the Corporation to David McKay, counsel for the seller of the unit. In his response dated December 4, 2008, Mr. McKay stated:

> [The principal and officers of the company] can produce evidence that the wall was in its present configuration [when] they bought the unit in 1984. No condition or reference relating to the wall was made in the Estoppel Certificate obtained in the purchase. We have spoken and received instructions from the officers/directors of the vendor in British Columbia who state that they were

> neither aware of a potential violation of the Declaration nor directed any person to assume responsibility as stated in your letter. We presume you also obtained a Status Certificate which set out no condition or reference to the alteration.

[10] In April and May 2010, the respondent retained a structural engineer, Kevin Hu, P. Eng., of Magnate Genivar, who assessed the situation, designed the necessary reinforcement work for the wall, and supervised its execution. The drawings were forwarded to the Corporation's counsel. Mr. Hu later confirmed: "The overall construction work was complete and found to be in general conformance with the structural drawings. The lintel reinforcing column was installed as per structural drawings and is structurally adequate to support the masonry wall above the door opening" (emphasis in original).

[11] Mr. Chornobay initially argued: "D.C.C. 63 does not have confirmation that the wall has been restored to its original condition, or any indication that it is structurally adequate to support the roof trusses." Permitting a structurally inadequate wall to exist would constitute a breach of section 117 of the Act; but it seemed inconceivable to me that a professional engineer would stamp a drawing and execute work if the result were unsafe, as it would be if the reinforced lintel were not capable of carrying both the wall and the roof trusses. I directed counsel to contact Mr. Hu during a recess, who confirmed that the reinforced lintel was capable of carrying both the wall and the load associated with the roof trusses. Mr. Chornobay conceded that this disposed of the safety argument under section 117 of the Act.

[12] The Corporation complains that the respondent's work did not return the unit to its original condition by removing the 10-foot doorway and restoring the 36-inch doorway.

Issues

[13] The following issues remain to be resolved:

1. Does the Status Certificate operate to estop the Corporation from compelling the respondent to restore the wall of the unit to its original condition?

2. Is the respondent obliged to restore the unit to its original condition?

3. Is the Corporation entitled to its legal costs?

[14] I now turn to consider each of these issues in turn.

1. Does the Status Certificate operate to estop the Corporation from pursuing the respondent to restore the wall of the unit to its original condition?

[15] Section 76 of the Act governs Status Certificates. It obliges a condominium corporation to give a Status Certificate with respect to a unit in the prescribed form setting out the specific information required in the section and in the Status Certificate itself. Subsection 76 (6) provides:

> (6) 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.

[16] Mr. Chornobay argues that even though Mr. Duval is the president, he is not the Corporation, which accordingly did not have notice of the problem with the wall in order to inform the completion of the Status Certificate.

[17] The president of the Corporation may carry out certain functions as provided in the by-laws, pursuant to section 56(1) of the Act. The D.C.C. 63 by-law provides in Article VII subsection (1)(iv):

> The president shall be the chairperson of all meetings of the Board and of the Owners or shall designate the chairperson at all such meetings, shall have only one vote at all meetings of the Board, shall coordinate the activities of the remaining members of the Board and officers, shall in the absence of a resolution of the Board specifying another officer, deal directly with the property manager and corporate solicitor in all areas of concern, and shall direct the enforcement of the Act, the declaration, the by-laws and the rules and regulations of the Corporation by all lawful means of the Board's disposal.

[18] Mr. Duval, as president, is responsible for signing Status Certificates. Actual knowledge that he obtains in his capacity as president carrying out executive functions as required by the by-laws, such as a "routine inspection" must be imputed to the Corporation. Since the president has authority to sign a Status Certificate on behalf of the Corporation, he is obliged to take into account personal knowledge he acquires in his capacity as president. I therefore reject the argument that this information technically was not within the knowledge of the Corporation itself.

[19] Mr. Duval's unsuccessful efforts to bring the specific problem with the wall to the respondent's attention effectively admit that his status as president authorized him to do so following his inspection. It would have been more effective for him to have amended the Status Certificate, to have sent a revised Certificate, or to have sent a supplementary letter to the requester or to the seller of the unit on a timely basis than it was for him to pay a random visit or two to the unit.

[20] Is the Corporation estopped by the Status Certificate signed by Mr. Duval?

[21] In her book *Condominium Law and Administration*, 2d ed., looseleaf (Toronto: Carswell, 1998-Updated), Audrey M. Loeb comments on the purpose of the Status Certificate required by

section 76 at p. 9-2: “This document is intended to ensure that prospective purchasers and mortgagees of units are immediately given sufficient information regarding the property to make an informed buying or lending decision.”

[22] From a purposive perspective, the problem posed by the alteration of the wall could be expected to have had an impact on the respondent’s decision to purchase the unit. Timely notice of the problem with the wall would have permitted the respondent to negotiate with the seller of the unit over the costs of remediation.

[23] Mr. Chornobay argues that the problem with the wall that Mr. Duval discovered on his inspection does not fall within any of the clauses in subsection 76(1) of the Act or in the prescribed Status Certificate. Accordingly, he argues, Mr. Duval was not obliged to disclose the problem in the Status Certificate since there is no place on the prescribed form for him to do so.

[24] Paragraph 12 of the Status Certificate requires a condominium corporation to disclose certain information: “The Corporation has no knowledge of a circumstance that may result in an increase in the common expenses for the unit(s).” If the Corporation does have such knowledge “of a circumstance”, then the Status Certificate must be altered by the addition of the word “except…” with a list of the items anticipated. Ms. Loeb, in the annotated Status Certificate in her book at p. 9-7, states:

> 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.

[25] Ms. Loeb takes the position that necessary financial information that a buyer would reasonably take into account in the purchase decision ought not to fall between the cracks because of timing fortuities, as in this case, but should be referred to in the Status Certificate. I agree. See *Fisher v. Metropolitan Toronto Condominium Corp. No. 596*, [2004] O.J. No. 5758, 31 R.P.R. (4th) 273 (S.C.J. – Div. Ct.) at para. 10. I that 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. The problem with the wall was just such a circumstance, and in failing to disclose it in responding to paragraph 12 of the Status Certificate or by a timely correction, the Corporation failed to comply with its duty under the Act.

[26] The path to a determination that such a “potential for expenses” existed in this case is not hard to trace. As Ms. Loeb notes at p. 9-5: “There are numerous sections of the *Condominium Act, 1998* which authorize the condominium corporation to add costs, which are deemed to be common expenses, to the unit.” She mentions, among others, section 92(3) of the Act which permits the “[c]osts of repairs to units and common elements where an owner has an obligation to maintain and repair and/or the owner does not do it and the corporation does”, and section

134(5), being "[a]n order as to damages or costs against an owner or occupier of a unit, together with the excess amount that the corporation actually spent in obtaining the court order." Ms. Loeb notes that these additional expenses are meant to be addressed in the Status Certificate under paragraph 8.

[27] Had Mr. Duvall conducted an inspection in the years before the unit was sold to the respondent, then the Corporation would predictably have sent to the owner at the time virtually the same letter requiring restoration of the wall that it sent to the respondent. If the previous owner had not complied, then the information about the associated charges and costs would have been disclosed under paragraph 8 of the Status Certificate, which provides: "There are no amounts that the *Condominium Act, 1998* requires to be added to the common expenses payable for the unit(s), [except…]."

[28] I find that the Corporation was aware of the problem with the wall and the potential financial issue it raised on a timely basis, that the respondent reasonably relied upon the silence of the Status Certificate on the issue, that the Certificate is binding on the Corporation, and that the Corporation is estopped from pursuing the respondent for the restoration of the wall.

2. Is the respondent obliged to restore the unit to its original condition?

[29] Section 10 of the Corporation's declaration provides: "No boundary wall, roof or interior partition wall shall be added to, altered, removed in all or in part, improved or renovated without the prior written consent of the Corporation of [*sic*] the Board. The Corporation or the Board may impose such conditions as it deems necessary in consideration for granting such consent." Section 11 of the declaration goes on to oblige each unit owner to comply with the Act, the declaration, the by-laws and so on. Any default allows the corporation to take legal action to compel compliance.

[30] The court's jurisdiction to deal with such applications is found in section 134 of the Act:

> 134. (1) Subject to subsection (2), an owner, an occupier of a proposed unit, a corporation, a declarant, a lessor of a leasehold condominium corporation or a mortgagee of a unit may make an application to the Superior Court of Justice for an order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules or an agreement between two or more corporations for the mutual use, provision or maintenance or the cost-sharing of facilities or services of any of the parties to the agreement. …
>
> (3) On an application, the court may, subject to subsection (4),
>
> (a) grant the order applied for;
>
> (b) require the persons named in the order to pay,

> (i) the damages incurred by the applicant as a result of the acts of non-compliance, and
>
> (ii) the costs incurred by the applicant in obtaining the order; or
>
> (c) grant such other relief as is fair and equitable in the circumstances.
>
> …

[31] As interpreted by the courts, section 134 is a fairly draconian tool in the hands of a corporation. Courts have required even attractive and useful features to be removed at the insistence of the board of a condominium: see, for example, *East Gate Estates Essex Condominium Corporation No. 2 v. Kimmerly*, [2003] O.J. No. 582 at paras. 7-12 (S.C.J.). As Flynn J. said in *Halton Condominium Corporation No. 315 v. Sid Gucciardi* (April 15, 2004), (S.C.J.): "The Board of Directors of this condominium was elected by the unit owners to administer this condominium in the best interests and for the welfare for the whole corporation. It is not for the court to step into this fray". In *Peel Standard Condominium Corp. No. 721 v. Derveni*, [2007] O.J. No. 5585 (S.C.J.), Van Rensburg J. said at para. 2: "While there does not appear to be anything unsafe or unattractive about the walkway and while it may be very useful to the unit owners, nevertheless it contravenes the Declaration and the Act and must be removed".

[32] There is, however, discretion in the court, as subsection 134(3) provides. It would be neither fair nor equitable for the court to order the restoration of the wall in this case. The respondent has paid to reinforce the wall even though it was not the one who altered it. No useful purpose, including deterrence, would be served by compelling the respondent to restore the wall now and, assuming without deciding that I have authority to do so, I decline to exercise it.

3. Is the Applicant entitled to its legal costs?

[33] At the argument of this motion, it rapidly became plain that the applicant's real goal in proceeding was to have the respondent pay the applicant's legal and incidental costs.

[34] In respect of costs, section 134 of the Act provides:

> (5) If a corporation obtains an award of damages or costs in an order made against an owner or occupier of a unit, the damages or costs, together with any additional actual costs to the corporation in obtaining the order, shall be added to the common expenses for the unit and the corporation may specify a time for payment by the owner of the unit.

[35] The purport of subsection 134(5) of the Act was explained at length by the Ontario Court of Appeal in *Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc*. (2005), 253 D.L.R. (4th) 656 per Doherty J.A.:

> **40** My review of the terms of s. 134(5) leads me to agree with counsel for MTCC's submission that the section was intended to shift the financial burden of obtaining compliance orders from the condominium corporation and ultimately, the innocent unit owners, to the unit owners whose conduct necessitated the obtaining of the order. Furthermore, the section was enacted to provide a means whereby the condominium corporation could, if necessary, recover those costs from the unit owner through the sale of the unit.

The court held at para. 38 that "any additional actual costs" means costs that go beyond the normal award of costs.

[36] The concept, as explained by Wood J. in *Muskoka Condominium Corporation No. 39 v. Kreutzweiser*, 2010 ONSC 2463, [2010] O.J. No. 1720, at para. 16, is that:

> No part of these costs should be borne by the respondent's neighbours who are blameless in this matter. The Corporation declaration provides that any owner is bound to indemnify the corporation for any loss occasioned by his or her action. For these reasons it is appropriate that the corporation's costs be on a full recovery basis.

[37] Mr. Chornobay submits that the remedial work would never have been done if the Corporation had not made this application. But that submission assumes that it was the respondent's responsibility to restore the wall to its original condition. I have found that it was not in the circumstances of this case. The absence of an order under section 134 means that subsection 134(5) has no application and the costs are not to be added specifically to the common expenses for the respondent's unit. The fairest outcome would be for all the other unit holders to absorb an aliquot share of the costs of this proceeding.

[38] For the reasons given, the application is dismissed with costs to the respondent. If the parties cannot agree on costs, then I will accept written submissions on a seven-day turnaround, starting with the respondent.

P.D. Lauwers J.

RELEASED: December 2, 2010