CITATION: Harvey v. Elgin Condominium Corporation No. 3, 2013 ONSC 1273
COURT FILE NO.: 5007/10
DATE: 2013/03/04

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
DOUGLAS FREDERICK HARVEY	)	Self-represented
Plaintiff	)	
- and -	)	
ELGIN CONDOMINIUM CORPORATION NO. 3	)	Robert W. Dowhan and Michelle Kelly, for the Defendant
Defendant	)	
	)	**HEARD:** February 25, 26 and 27, 2013

LEACH J.

[1] The plaintiff Mr Harvey owns and lives in a unit of the defendant condominium corporation, ("ECC"), located in Port Stanley.

[2] This judgment follows a three day trial, during which Mr Harvey advanced numerous complaints against the ECC.

[3] Those complaints are detailed at length in his statement of claim.

[4] Generally, however, they focus on the allegedly oppressive manner in which the ECC is said to have embarked on work which Mr Harvey characterizes as "substantial change" without requisite unit owner voting approval. In particular, he challenges ongoing work done on the

garage roof decks of ECC units, funded by corresponding "special assessments" levied against unit owners.

[5] Mr Harvey wants that work stopped, and the corresponding levies reversed.

[6] He seeks punitive damages, as well as damages for harm allegedly done to his credit rating when the ECC enforced its special assessment levies against him by way of lien.

[7] He also requests general orders compelling ECC director compliance with the requirements of the *Condominium Act, 1998*, S.O. 1998, c.19, and requiring all ECC directors to take certain specified training in relation to that legislation.

[8] For the reasons that follow, I find that there is no adequate basis for his complaints, and that his action must be dismissed accordingly.

Evidence and Facts

[9] At trial, Mr Harvey and his spouse, Francie Dennison, (who lives with Mr Harvey in the same ECC unit), gave evidence on behalf of the plaintiff.

[10] The defendant called evidence from Douglas Simpson, (a former ECC property manager), and from James Todd, (another ECC unit owner and current president of the ECC board of directors).

[11] The parties also filed a good deal of documentary evidence, most of it on consent. (I made a *voir dire* ruling excluding, on various grounds, some of the documentation Mr Harvey wanted to tender in evidence. This included documentation which had not previously been disclosed through the mandated discovery process, much of which also was either not relevant to the pleaded issues, or impermissible hearsay, the reception of which was not justified by any demonstrable necessity or circumstantial guarantee of trustworthiness.)

[12] Although the parties clearly dispute certain facts and, more importantly, the proper characterization in law of certain matters, many of the events leading to the present impasse are not really in dispute.

[13] The 51 residential units underlying the ECC were built approximately 23 years ago, and the corporation's declaration and description, (filed in evidence), were registered pursuant to the *Condominium Act, 1998, supra*, on December 31, 1990. Like many condominium corporations, its board of directors consists of numerous unit owners who consent to election or interim appointment, pursuant to the corporation's by-laws.

[14] The ECC units are arranged in "town house" form, with each deliberately designed to have a uniform aesthetic appearance consistent with that of the entire complex. Each has a garage located on the ground floor, (at the front of each unit), above which is a roof deck accessed from "patio" style doorways opening to the exterior from the second floor.

[15] As originally constructed, the garage roof areas generally were covered by galvanized metal pans, (to prevent water entry), above which were placed diagonally-cut leveling crossbeams ("sleepers") made of wood, onto which wooden decks comprised of floor boards or planks were fastened. The resulting deck areas were surrounded by wooden railings. Generally, the wood was pressure-treated lumber.

[16] Mr Harvey purchased and moved into his unit, (no.12), in 2001.

[17] By 2005, the ECC board of directors was confronted with numerous apparent building construction deficiencies that had emerged over time.

[18] In particular, prompted by complaints of water leaking into at least 3-4 different units, in or near the units' garage roof decks, the board took steps to investigate with the assistance of professional contractors (Crocker Construction Inc.) and engineers (VDP Engineering). The investigations included completion of a "pilot project", whereby these professionals deconstructed and examined the garage roof deck on one of the affected units. It so happened that the unit chosen, (no.14), belonged to Nikki Booker, a member of the board and one of Mr Harvey's immediate neighbours.

[19] The pilot project revealed extensive construction design and implementation flaws that seemed likely to have been replicated throughout the complex, and which already were resulting in obvious problems destined to become worse over time. These included the following:

a. The roof was sloped in the wrong direction. Instead of an incline directing precipitation away from the units, the slope directed water back towards the buildings where it would accumulate and "pond", and in turn promote saturation of building material as well as corrosion and ultimate failure of the galvanized metal pans.

b. The underlying sleeper beams had been nailed to the roofing through the metal pans, resulting in multiple punctures and water penetration points, thereby enabling water leaks and accelerating metal pan corrosion.

c. The floorboards and underlying sleeper beams of the wood deck were facilitating excessive accumulation of debris on the entire surface area beneath the decks, which in turn was causing further inhibition of drainage.

d. Flashing coverage in the area of the decks was insufficient, and caulking inadequate, to direct water away from exposed walls and wooden deck areas, with further resulting saturation of building material.

e. In the result, continuous saturation of the decks had resulted in obvious leaks into interior areas, (confirmed by water stains on interior floor joists and insulation), as well as mould formation. It also was promoting obvious and widespread wood rot and deterioration, threatening not only the exterior deck material but also structurally important support beams located immediately below the upper storey patio doors leading to the roof decks. The surface of the existing wooden decks, (already too

high in relation to the elevation of the patio door base sills), also had dropped noticeably in certain areas.

[20] The professionals retained by ECC advised that remedial action was necessary, and recommended two alternative options to address and correct the deficiencies and resulting leakage problems.

[21] Both remedial options contemplated removal of all existing deck and roofing material, repair of all damaged substrate, and correction of the slope with new sheathing. After that was done, the deck then would be finished by either:

a) construction of new wooden decks and railings; or

b) vinyl decks applied directly to the rubber membrane, coupled with aluminum railings.

[22] Although aesthetically different, both options would result in upper garage roof decks and railings of the same dimensions, in the same location, and with the same configuration.

[23] To the extent there was any minor variation in resulting elevation or in thickness of deck or railings, this stemmed entirely from the selection of building materials to be used.

[24] Of the two remedial options presented, the professionals retained by ECC recommended the one involving vinyl and aluminum as the preferred option, as it offered a number of comparative advantages.

[25] In particular, new and properly designed/installed wooden decks would cost more, deteriorate rapidly in appearance, have an elevation well above the patio door sills, present the same debris accumulation and drainage inhibition problems, and make it impossible to service and maintain the underlying membrane.

[26] In contrast, the vinyl deck and aluminum railings were more cost effective, easily serviced and maintained, avoided elevation and drainage problems, and employed material that was either guaranteed or of commercial grade, (thereby lasting longer while facilitating periodic membrane replacement pursuant to the applicable guarantees). These advantages were offset slightly by the need for increased care not to puncture the vinyl coating and underlying membrane; e.g., through movement of sharp-edged snow shovels or furniture, or by improper satellite dish installation.

[27] Presented with these findings and recommendations, the ECC board determined that remedial action definitely was required, and made a decision to proceed accordingly.

[28] The board nevertheless also decided to inform unit owners of the reasons for the decision, as a prelude to then soliciting owner input as to the preferred option. To that end, the engineering firm and contractor were asked to present their findings and recommendations at the

ECC's annual general meeting ("AGM") in May of 2005. They did so, using various photographs to illustrate the problems that had been detected.

[29] Like other unit owners, Mr Harvey attended that AGM in May of 2005. He says it was then that he learned, for the first time, of the supposed leakage problems and the board's decision to take corrective measures. He voiced his disagreement.

[30] For various reasons, Mr Harvey was very skeptical about the indicated construction deficiencies and water leakage problems, and strongly disagreed with the need for remedial action on the scale being suggested. In particular:

a. As a retired journeyman electrician, familiar with various building projects in the construction industry, he feels he has "a pretty good sense or feel for what's worthwhile or not".

b. The garage in Mr Harvey's unit had leaked in 2001, but he determined that the leak was coming from an exterior power outlet, and that the problem was easily and inexpensively addressed by caulking. No further leak problems had been experienced in relation to his unit, despite numerous activities on the roof deck involving water, (such as plant potting).

c. Mr Harvey thought the mould depicted in the photographs was not extensive, and that the depicted water stains near windows likely were the result of poor caulking rather than anything to do with the deck.

d. Mr Harvey and Ms Dennison had observed Ms Booker making earlier changes to the garage roof deck at Unit 14. They felt that work, (along with Ms Booker's perceived lack of maintenance, allowing for debris accumulation), were more likely causes of the supposed problems detected by the pilot project, rather than any original construction deficiencies. They also suspected that Ms Booker was promoting remedial work simply to lower the elevation of her deck to the level of her patio door sill.

e. Mr Harvey generally was dubious of the professionals retained by ECC to make the presentation. He emphasized that the engineer had not applied his professional stamp to the pilot project report, and felt the contractor simply was "pushing hard" to "sell us stuff".

[31] Mr Harvey's skepticism may have been sincere, but I find that it was not well founded.

[32] It certainly was belied by subsequent developments and findings, all of which reinforced the concerns outlined by the already compelling results of the pilot project investigation.

[33] In that regard, Mr Simpson and Mr Todd gave effectively unchallenged evidence that the number of units with similar leakage and visible damage began to escalate significantly after

2005, to the point where almost every unit in the complex was confirmed by owner complaints and/or unit inspections to have similar problems, with increasing signs of visible and progressive damage. Such damage included obvious and widespread staining and water leakage, mould, extensive rotting of wood, (including support beams), sagging and "spongy" interior bedroom floors, and dry wall falling from interior garage ceilings.

[34] In my opinion, all of this gave rise to the board's legitimate perception of health and safety concerns, indicated a real and substantial threat of further imminent harm to property and/or persons if left unchecked, and justified the board's decision to take corrective action.

[35] In the face of professional investigations, findings and advice, and such evidence of widespread problems and damage common to so many units, it is simply unreasonable to persist, (as Mr Harvey does), with suggestions that the concerns identified by the pilot project were somehow isolated, idiosyncratic or manufactured in pursuit of ulterior motives, or that the concerns did not warrant serious attention and widespread corrective action.

[36] In particular, I reject Mr Harvey's suggestion, (expressed repeatedly during comments and complaints conveyed to the ECC over the course of the parties' dispute, and again at trial), that work on the garage roof decks was required only in relation to a small minority of isolated units, but was then unnecessarily extended to all units "whether or not they needed it, in order to keep them all looking the same", "for the benefit of a few at the expense of all".

[37] The circumstances clearly required corrective measures, and the ECC board acted in a timely way to address the situation, and bring it to the attention of unit owners.

[38] As noted above, the ECC board had decided to take corrective action before informing unit owners of the decision during the AGM in May of 2005.

[39] However, it also had decided to receive further input from unit owners, (after allowing for a period of consideration and reflection), as to the preferred method of addressing the problems. To that end, a further general meeting of unit owners was arranged for July of 2005.

[40] That next meeting originally was planned for July 12, 2005, and the relevant notice to owners indicated and confirmed that the sole purpose of the meeting was "to discuss and vote on the style of deck that *will* replace the existing ones above the garages *when* we move forward with this project". [Emphasis added.] The notice also mentioned that the contemplated work "could result in a significant change in the exterior appearance of the units".

[41] When the meeting subsequently had to be rescheduled for July 27, 2005, the additional notice confirmed that the sole substantive item on the agenda would be "presentation and *style* of deck replacement for upper front decks above garages". [Emphasis added.]

[42] To me, these notices provide clear confirmation that the board already had determined to proceed with remedial action to replace the existing decks, (i.e., that the board did not believe it required formal unit owner consent or approval to proceed with the contemplated work), and that the focus of the further meeting in July of 2005 was limited to receiving unit owner input as to

the preferred method of doing so, having particular regard to the aesthetic differences between the two options.

[43] In particular, I reject Mr Harvey's suggestion that the notices represent an acknowledgment by the ECC board that it needed unit owner approval before embarking on the contemplated work. I also reject his suggestion that the reference to a possible "significant change" in exterior appearance was an acknowledgement by the ECC board that the contemplated work would represent a "substantial change" to the common elements of the corporation, within the meaning of the *Condominium Act, 1998, supra*.

[44] At the further general meeting held on July 27, 2005, votes on the two recommended remedial options were cast by 24 of the 51 unit owners. Mr Harvey voted in favour of the option involving new wooden decks. However, a clear majority, (20 to 4), voted in favour of the option involving use of a vinyl coating applied directly to the protective rubber membrane, along with the installation of aluminum railings.

[45] The ECC board then decided to proceed accordingly, using the method of remedial work apparently preferred by most of the unit owners.

[46] Between July of 2005 and May of 2009, the ECC and its board of directors continued to discuss and deal with the garage roof deck issue. Developments in that regard, during this period, included the following:

a. The matter apparently was raised at each and every AGM and at each and every meeting of the ECC board of directors, (which seem to have occurred on a near monthly basis).

b. The ECC board moved forward with steps to solicit and accept tenders for the required work, and proceed with its execution. Initially, (in 2006), the board contemplated completion of the work at the rate of two unit decks per year, with additional measures taken to ensure that units were selected and prioritized pursuant to ongoing investigations and recommendations from the ECC's professional advisors. (As emphasized by Mr Todd, the board acted in strict accordance with these priority recommendations in order to avoid any possibility or suggestion that board members giving their own units priority, in terms of the contemplated remedial work.) Work on successive units proceeded as contemplated. However, escalating complaints and inspection results made it clear that progress of the remedial work needed to be accelerated, and in 2008 the board formally decided to revise its plans accordingly, (such that remedial work to all units would be completed in or about 2013).

c. Although the ECC initially contemplated funding of the remedial deck work through its normal "Reserve Fund" arrangements, (using accumulated portions of annual condominium fees set aside for that purpose), and also pursued litigation against the municipality for off-setting compensation, (on the basis the municipality had failed in its duties to ensure proper inspection and compliance during construction of the

units), it became clear that this would not be sufficient to fund all of the remedial work required – especially if that work necessarily was accelerated. (Settlement of the litigation eventually generated only $70,000.00 in net proceeds, and this was to be directed not only to work on the garage roof decks work but also remediation of building deficiencies discovered in relation to attic firewall separation.) Nor was the ECC's bank prepared to lend the corporation funds to carry out the work. With reluctance, the ECC board therefore decided in 2009 that the necessary work would have to be funded by special assessments levied against the unit owners. The total of such special assessments would be approximately $10,000.00 per unit owner, (which was equivalent to the per unit cost of completing the necessary work).

d. Having regard to the recessionary economic climate, and recognizing that not all unit owners would have the same ability to finance payment of the special assessments, the ECC board provided unit owners with various methods of paying the assessments by installment. These options were modified over time. (For example, they initially contemplated "front loaded" annual payments, with larger initial installments that would decrease in quantum over time. The "loading" then was reversed to allow for smaller initial payments, effectively allowing unit owners more time to come up with the payments required.) However, by way of formal notices commencing in 2009, it was made clear to unit owners that they would be responsible, over time, for payment of all the special assessments required to fund the remedial work.

e. Communications concerning the remedial work, and notices of related meetings, were disseminated equally to all unit owners, including Mr Harvey.

[47] Between May of 2005 and May of 2009, Mr Harvey continued to be very unhappy about the decision to proceed with work on the garage roof decks, and the method chosen. However, throughout this period, his "belief in democracy" was such that he nevertheless bowed to the perceived will of the majority, and accepted that he "had lost".

[48] In that regard, Mr Harvey repeatedly acknowledged having received all documentation circulated to all the unit owners, and that he had an equal opportunity to attend all relevant meetings, voice his views and ask questions, (although he feels no one was listening).

[49] He also acknowledged that he could have stood for election to the ECC board, or tried to marshal support from other unit owners to oppose the action being taken in relation to the garage roof deck repairs. He consciously thought about doing so, and discussed the possibility with Ms Dennison.

[50] He nevertheless decided that all such efforts would be useless, as opinion amongst the ECC board members and unit owners was "too lop-sided" against him, and there was no way to "stop it from happening" once the "machine was going".

[51] Mr Harvey's views in that regard and his approach to the situation changed dramatically in May of 2009. This followed a conversation he and Ms Dennison had with another unit owner

and neighbour, (Mr Barendreght), about a recently received notice of special assessment from the ECC relating to the work being done on the garage roof decks.

[52] In the wake of that conversation between lay individuals, (in the sense that none were lawyers), Mr Harvey formed some very definite opinions and understandings concerning the proper interpretation of the *Condominium Act, 1998, supra*, and its application to the affairs of the ECC.[1]

[53] In particular:

a) He now firmly believes that the work being done to the garage roof decks represents a "substantial addition, alteration, or improvement to the common elements" of the ECC, within the meaning of s.97(4) of the legislation, such that it should not have proceeded unless and until owners of more than two-thirds of the 51 units had voted in favour of approving the work, (which in turn means that the special assessments to fund such work never should have been levied).

b) He feels the same characterization and perceived failure to apply proper procedure can be said of other work authorized and pursued by the ECC directors; e.g., work done in relation to retaining walls, removal of a tennis court, and replacement of playground equipment.

c) Having regard to these and other concerns, (including allegations of delayed response to the attic fire separation deficiencies, delayed disclosure of details concerning the outcome of litigation against the municipality and use of resulting funds, and behavior Mr Harvey views as unresponsive, "appalling" and "cavalier"), he also firmly believes the circumstances warrant mandatory orders compelling the ECC directors to complete various forms of training in condominium law, and the appointment of an administrator to henceforth operate the ECC instead of its elected directors.

[54] Consistent with his new understanding of the *Condominium Act, 1998, supra*, Mr Harvey sent a letter, (dated May 14, 2009), to the Attorney General of Ontario, the Law Society of Upper Canada and the Ontario Ombudsman, outlining his concerns and requesting an investigation into the affairs of ECC and the conduct of its legal counsel.

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[1] In his evidence and submissions, Mr Harvey repeatedly indicated that he allowed many years to pass, before actively opposing the ECC's conduct, only because he was unaware of the provisions of the *Condominium Act, 1998, supra*, and its suggested implications. In other words, despite knowledge of all relevant underlying facts, he delayed commencement of his formal claim, for more than two years after many of the underlying decisions and events, because of professed legal ignorance. He says this ended after a conversation with his friend and neighbour in 2009, which enlightened him. Although the defendant's statement of defence included reliance on the provisions of the *Limitations Act, 2002*, S.O. 2002, c.24, counsel for the defendant indicated in final submissions that the ECC was no longer relying on that defence. I therefore express no further opinion in that regard.

[55] When that letter failed to generate a desired response, Mr Harvey followed up with a letter to the ECC, (sent November 23, 1999), reiterating his concerns and making it clear that he would not pay any of the "illegally" imposed special assessments outlined in notices circulated by the ECC board to unit owners.

[56] On December 8, 2009, the ECC responded by sending a lengthy letter to Mr Harvey, disputing his various allegations and the merits of his stated interpretation of the *Condominium Act, 1998, supra.*

[57] While respectful, the ECC letter to Mr Harvey also indicated its intention to take whatever formal steps might be required to ensure his payment of the special assessments, in order to ensure equal treatment of all unit owners. (Mr Harvey's earlier correspondence already had indicated his awareness that failure to pay the special assessments might result in lien proceedings.) Although it had no obligation to do so, the ECC voluntarily extended the time for Mr Harvey's payment of the special assessments required to date.

[58] When Mr Harvey failed to respond by January of 2010, the ECC served formal notice of its intention to file a lien against his unit, pursuant to s.85(4) of the *Condominium Act, supra.*

[59] When Mr Harvey persisted in his refusal to pay the required special assessments, the ECC filed the contemplated lien against his unit, and advised him accordingly, on January 29, 2010.

[60] By February 26, 2010, Mr Harvey still had not paid the required special assessments, and the ECC formally indicated its intention to enforce the lien through power of sale proceedings.

[61] On March 5, 2010, Mr Harvey responded by service of his statement of claim, commencing this action against the ECC. At the time, he understood, (incorrectly), that commencement of such a claim automatically would suspend any obligation he otherwise might have to make payments to the condominium corporation, or any further enforcement proceedings.

[62] In April of 2010, (primarily in response to concerns expressed by his banker that its mortgage on Mr Harvey's unit was being compromised by the lien proceedings), Mr Harvey realized that he could not escape payment of the special assessments prior to resolution of the litigation.

[63] He accordingly now has paid all special assessments levied to date, albeit under protest, pending resolution of the litigation.

[64] In the meantime, remedial work on the garage roof decks has continued, and the ECC anticipates that it will be completed, in relation to all units, by the end of 2013. It believes this effectively will bring the related concerns to an end. (The unchallenged evidence of Mr Simpson and Mr Todd is that there have been no further reports or observations of leakage or damage in relation to any of the units where the remedial work has been completed.)

[65] While Mr Harvey's unit is one of the remaining few in respect of which remedial work is still pending, he acknowledges that this likely stems from his express indication, (following a number of failed attempts by the ECC to schedule an inspection appointment), that his unit "doesn't need to be fixed", and they should "just leave it".

[66] In cross-examination, however, Mr Harvey acknowledged that the same remedial work now soon will be done on his unit.

Analysis

[67] I agree with counsel for ECC that many of Mr Harvey's formal complaints and claims effectively collapse at the outset as a result of his failure to lead any evidence capable of supporting them.

[68] In that regard, I begin with the numerous requests in Mr Harvey's statement of claim for an "Oppression Remedy"; a label he applies to the various orders he seeks to terminate work on the garage roof decks, reverse the special assessments, direct reimbursement of funds paid to date, require ECC directors to take training, and appoint an Administrator to operate the ECC.[2]

[69] Although not expressly cited by Mr Harvey in his pleading, it seems clear that he relies on section 135 of the *Condominium Act, 1998, supra*, which reads as follows:

> **Oppression remedy**
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> 135. (1) An owner, a corporation, a declarant or a mortgagee of a unit may make an application to the Superior Court of Justice for an order under this section.
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> **Grounds for order**
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> (2) On an application, if the court determines that the conduct of an owner, a corporation, a declarant or a mortgagee of a unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant, it may make an order to rectify the matter.
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> **Contents of order**
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> (3) On an application, the judge may make any order the judge deems appropriate including,
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> (a) an order prohibiting the conduct referred to in the application; and
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> (b) an order requiring the payment of compensation.

[2] These are set out in subparagraphs 1(a), 1(b), 1(c), 1(e), 1(f) and 1(g) of the statement of claim's prayer for relief.

[70] Apart from the possible implications of Mr Harvey's allegation that the corporation has failed to comply with the requirements of s.97(4) of the legislation, requiring special majority approval required for "substantial change" to common elements, (an allegation to which I will return later in these reasons), I see nothing in the evidence before me to establish the prerequisite grounds for an oppression remedy required by s.135(2).

[71] Although Mr Harvey understandably has been guided by his lay reading of this provision, (e.g., feeling subjectively that the conduct of the ECC has been "oppressive", "unfair" and "prejudicial"), the terms employed by s.135(2) have been assigned particular objective meanings in law which do not necessarily conform with such lay usage.

[72] These were summarized by Justice Harvison Young in *Walia Properties Ltd. v. York Condominium Corporation No. 478*, [2007] O.J. No. 3032 (S.C.J.), affirmed [2008] O.J. No. 2283 (C.A.), at paragraphs 22-23:

> Section 135 allows a unit owner to apply to the court for relief from conduct that is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant. The section came into effect in 2001. While this is a new concept for Ontario condominium corporations, Canadian courts have dealt with the oppression remedy for many years in the context of corporate law. Corporate law principles regarding oppression are, therefore, applicable in determining what constitutes conduct that is oppressive, unfairly prejudicial or unfairly disregards the applicant's interests in the context of condominium law: see *Niedermeier v. York Condominium Corp. No. 50* (2006), 149 A.C.W.S. (3d) 708, [2006] O.J. No. 2612 (S.C.J.).
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> In the corporate law context, oppressive conduct requires a finding of bad faith, while conduct that is unfairly prejudicial or that unfairly disregards the interests of the applicant does not: see *Brant Investments v. Keeprite Inc.* 1991 CanLii 2705 (ON CA), (1991), 3 O.R. (3d) 289 (C.A.) at 305-306. Oppressive conduct has been described as conduct that is burdensome, harsh and wrongful. Unfair prejudice has been held to mean a limitation on or injury to a complainant's rights or interests that is unfair or inequitable. Unfair disregard means to unjustly ignore or treat the interests of the complainant as being of no importance: see *Niedermeier, supra*, and *Consolidated Enfield Corp. v. Blair* (1994), 47 A.C.W.S. (3d) 728, [1994] O.J. No. 850 (Gen.Div.) at para. 80. Loeb suggests that in the context of condominium law:
>
> > ... "unfairly prejudicial" more appropriately describes deception, or different treatment for what may seem to be similar categories, whether financial or otherwise. "Unfairly disregards", however, may more accurately describe an alleged failure to take into account a legitimate minority interest or viewpoint: see Audrey M. Loeb, *Condominium Law and Administration*, looseleaf (Scarborough, Ontario: Thomson Carswell, 1998) at 23-23.

[73] I see nothing to warrant a finding of bad faith on the part of the ECC. To the contrary, the well documented conduct and communications of the ECC seem extraordinarily open and candid. Moreover, the measures being implemented seem scrupulously designed to ensure that, to the fullest extent possible, (apart from considerations of timing, which in turn have been addressed and determined in an objective manner), each and every unit owner will incur exactly the same burden in exchange for exactly the same benefit.[3] The obligation on each unit owner to help fund the necessary remedial work understandably may be unwelcome and unpleasant, but it this is equally true for each unit owner. In the result, I find it impossible to discern any requisite bad faith, or any disparate impact that is "burdensome, harsh and wrongful", in the sense required to justify a finding of "oppressive" conduct by the ECC.

[74] For similar reasons, there is no evidence of any "unfairly prejudicial" conduct, in the sense required. In particular, all unit owners received equal treatment, and there is nothing to suggest that Mr Harvey's rights were limited in any differential way. (If anything, Mr Harvey arguably received more favourable treatment in some respects, insofar as the ECC was willing to accept his payment of special assessment levies at a later date than the deadline faced by other unit owners.) Nor do I see any evidence of "deception". Although Mr Harvey suggested in his various written complaints that the ECC had been guilty of non-disclosure in numerous ways, (e.g., in relation to particulars of the ECC Reserve Fund, the results of the litigation against the municipality, or the purpose of the special assessments), his allegations in that regard frankly are belied by the documentation before me. At best, Mr Harvey apparently was not paying sufficient attention to the documentation being circulated to all unit owners, or to the information being discussed at meetings called on appropriate notice.

[75] Finally, (as far as section 135 of the legislation is concerned), I see no basis for any finding that Mr Harvey's views were "unfairly disregarded". These matters understandably are very important to him, and he clearly feels that the ECC has paid insufficient attention to his concerns and questions. However, there is an important distinction to be made between "disregard" and "disagreement". In the case before me, the evidence indicates that the ECC consistently has tried to solicit the views of all unit owners, including Mr Harvey, even in circumstances where that may not have been necessary. Mr Harvey repeatedly acknowledged that he received notice of all meetings, that he had an equal opportunity to voice his views, and that he exercised that opportunity both verbally and in writing. The ECC directors and other unit owners may not have agreed with Mr Harvey's views, for principled reasons outlined during the

[3] Mr Harvey resents, in particular, the fact that Ms Booker sold her unit following completion of the remedial work done on her garage roof deck, but prior to imposition of the related special assessments. He suggests that this represents a differential benefit received by Ms Booker, at his expense. I disagree. To the extent any particular unit owner might have remedial work completed, and sell his or her unit prior to payment of anticipated assessments to fund the work, this does not result in any deprivation or hardship to the remaining unit owners, as the assessment obligations for the unit being sold will be assumed by the new owner. Moreover, as a practical matter, the vendor of such a unit usually will not enjoy any special benefit through the timing of sale, given disclosure obligations and the probability that pending assessment obligations will be reflected in the negotiated and correspondingly discounted price of sale. However, even if that should not happen, and the unit vendor somehow enjoys a windfall at the purchaser's expense, there is no inherent detrimental impact on other unit owners, all of whom still will pay exactly the same assessments, levied equally in relation to each unit. Mr Harvey accordingly was not harmed, in any way, by the interim sale of Ms Booker's unit.

meetings and in correspondence. However, this does not mean his views were unfairly ignored or "disregarded" in the sense required.

[76] Leaving aside the possible implications of Mr Harvey's arguments relating to s.97(4) of the *Condominium Act, 1998, supra*, his various claims for "Oppression Remedy" relief pursuant to section 135 of the legislation must be dismissed.

[77] For similar reasons, I reject Mr Harvey's claim for punitive damages.

[78] In that regard, even if I assume (without deciding) that condominium unit owners may in certain circumstance establish an independent actionable wrong giving rise to claims for punitive damages, the circumstances before me would not merit an award of punitive damages.

[79] In particular, I see nothing in the evidence to justify a finding that the ECC's conduct has been "harsh, vindictive, reprehensible and malicious", or "extreme in its nature such that by any reasonable standard it is deserving of full condemnation and punishment", and it therefore lacks the character necessary to warrant imposition of punitive damages.[4] At worst, I think, the ECC's conduct merely reflects a principled difference of opinion.

[80] That leaves, for consideration and determination, Mr Harvey's main argument: that the ECC has embarked on a program of "substantial change" to the common elements without following the mandated procedures for securing appropriate unit owner approval.

[81] Mr Harvey's remaining claims all relate to that argument, and therefore stand and fall on its merits.

[82] In support of the argument, Mr Harvey seizes on ss.97(4), 97(5) and 97(6) of the *Condominium Act, 1998, supra*, which read as follows:

> **Approval of substantial change**
>
> 97. (4) Despite subsection (3), the corporation shall not make *a substantial addition, alteration, improvement to the common elements*, a substantial change in the assets of the corporation or a substantial change in a service that the corporation provides to the owners *unless the owners who own at least 66 2/3 per cent of the units of the corporation vote in favour of approving it*.
>
> **Meeting**
>
> (5) The vote shall be taken at a meeting duly called for the purpose of subsection (4).
>
> **Meaning of substantial change**

[4] See *Honda Canada Inc. v. Keys*, [2008] 2 S.C.R. 362, at paragraph 68.

(6) For the purposes of subsection (4), an addition, alteration, improvement or change is substantial if,

(a) its estimated cost, based on its total cost, regardless of whether part of the cost is incurred before or after the current fiscal year, exceeds the lesser of,

(i) 10 per cent of the annual budgeted common expenses for the current fiscal year, and

(ii) the prescribed amount, if any; or

(b) the board elects to treat it as substantial.

[Emphasis added.]

[83] Mr Harvey contends that the "new" garage roof decks should be viewed as a "substantial addition, alteration or improvement" to the common elements, within the meaning of the legislation.

[84] In that regard, he relies in particular on the concept of substantial "alteration". He emphasizes that the decks post-remediation are different in appearance and elevation, and lack a protective wood covering that results in new restrictions on use, (to avoid punctures to the vinyl membrane). He therefore feels the owners have been or will be "short changed", in the sense they all will be provided with "less" of a garage roof deck in comparison to what they previously enjoyed.

[85] In support of his characterization of the new decks as a substantial alteration, Mr Harvey also points to the deeming provision of s.97(6). In that regard, he emphasizes that the relevant deck work will cost approximately $10,000 per unit, for a cumulative total of $510,000; a figure well in excess of the annual budgeted common expenses for any given fiscal year of the ECC.

[86] The provisions relied upon by Mr Harvey must nevertheless be read in their proper context, with regard to the manner in which applicable authorities have interpreted the underlying legislative intent.

[87] To begin with, the particular subsections relied upon by Mr Harvey self-evidently do not stand alone. They are components of section 97 which, read in its entirety, clearly qualifies and restricts the possible scope and meaning of the "addition, alteration and improvement" concept employed in ss.97(4) and 97(6).

[88] In particular, s.97(1) reads as follows:

97. (1) If the corporation has an obligation to repair the units or common elements after damage or to maintain them and the corporation carries out the obligation using materials that are as reasonably close in quality to the original as

> is appropriate in accordance with current construction standards, the work *shall be deemed not to be an addition, alteration or improvement to the common elements* or a change in the assets of the corporation *for the purpose of this section.*
>
> [Emphasis added.]

[89] If the remedial work done by the ECC falls within the description set out in s.97(1), it accordingly can not and will not constitute an "addition, alteration or improvement", (let alone a substantial one), for the purpose of any part of section 97, including the provisions of 97(4) and 97(6) relied upon by Mr Harvey.

[90] Whether the remedial work undertaken by the ECC falls within the s.97(1) description requires examination of a number of incidental questions, namely:

a. Do the garage roof decks form part of the "common elements" of the ECC?

b. Does the ECC have an obligation to repair common elements after damage, or to maintain them?

c. Does the remedial work carried out by the ECC in relation to the garage roof decks constitute "repair" or "maintenance"?

d. Was the remedial work carried out "using materials that are as reasonably close in quality to the original as is appropriate in accordance with current construction standards"?

[91] In my opinion, the answer to all these questions is "yes", thereby bringing the remedial work within the ambit of s.97(1), which in turn displaces Mr Harvey's suggested application of s.97(4) and 97(6).

[92] In that regard:

a) Pursuant to s.1(1) of the *Condominium Act, 1998, supra*, the term "common elements" means all property of a condominium corporation except its "units", which in turn are defined as meaning that part of the property designated as a unit by the description and boundaries set forth in the corporation's condominium declaration. In this case, Schedule "C" of the ECC declaration indicates that the boundaries of the individual units do not extend beyond the surface layer of each unit's interior walls, ceilings, floors, windows and doors. All aspects of the garage roof decks of the ECC accordingly form part of the "common elements". (This conclusion was not disputed at trial.)

b) A condominium corporation's board of directors has a statutory duty to "manage the affairs of the corporation"[5], and this includes a general "duty to control, manage and administer the common elements" of the corporation.[6] Moreover, unless the corporation's declaration says otherwise, the corporation also has a duty to "maintain the common elements"[7], (which includes an obligation "to repair after normal wear and tear"[8]), as well as a duty to repair the common elements after damage[9], (which includes an obligation "repair and replace after damage or failure").[10] In this case, Article 5.2 of the ECC's condominium declaration confirms and reinforces the above statutory duties by expressly stipulating that the corporation "shall maintain and repair the Common Elements".

c) The terms "repair" and "maintenance" are not defined in the *Condominium Act, 1998, supra*, but they have been interpreted by binding appellate authority, which has adopted and applied certain meanings for the terms. In particular, "repair" means "to restore to good condition renewal or replacement of decayed or damaged parts or by refixing what has given way; to mend", and "maintain" means "to keep in repair". See *York Condominium Corp. No. 59 v. York Condominium Corp. No. 87*, [1983] O.J. No. 3088 (C.A.), at paragraph 14.[11] In this case, because of the original building construction deficiencies and the passage of time, the existing garage roof decks clearly required "mending" or restoration to good condition through renewal, (e.g., installation of a new protective membrane), replacement of decayed or damaged parts, (e.g., perforated and corroded metal pans, and rotting wood in the deck system and support structure), or "refixing" of what had given way, (e.g., the existing metal pans, wood, flashing and caulking). On any objective view, I think the remedial work carried out to the damaged garage roof deck areas by the ECC therefore constituted "repair". Alternatively, to the extent the remedial work prevented the building construction deficiencies from inflicting further threatened damage, it constituted "maintenance", (to keep the decks in good "repair").

d) In effecting such repairs and maintenance, the ECC was not obliged to replicate the arrangement and appearance of the decks prior to their remediation; i.e., to start again down a path that demonstrably would lead

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[5] *Condominium Act, 1998, supra*, s.27(1).
[6] *Condominium Act, 1998, supra*, s.17(2).
[7] *Condominium Act, 1998, supra*, s.90(1).
[8] *Condominium Act, 1998, supra*, s.90(2).
[9] *Condominium Act, 1998, supra*, s.89(1).
[10] *Condominium Act, 1998, supra*, s.89(2).
[11] For an earlier definition to similar effect, see *Dyer v. York Condominium Corp. No. 274*, [1980] O.J. No. 152 (HCJ), which at paragraph 10 construed "maintenance" as, *inter alia*, "to keep or keep up", or "to keep in a certain condition".

> directly back to the same problems and damage. To avoid such outcomes, the wording of s.97(1) understandably contemplates a degree of latitude appropriate to the circumstances, and evolving construction knowledge and methods. Not surprisingly, our courts therefore repeatedly have held that replacement of "old", "defective" or "worn out" common elements with "new", "improved" or "upgraded" material, equipment or designs still constitute "repair" and "maintenance", and this is so even when the result has a different, more contemporary, aesthetic appearance. See, for example: *Laidis v. MTCC No. 727*, [2005] O.J. No. 726 (S.C.J.), at paragraphs 18-19; *Little v. Metropolitan Toronto Condominium Corp. No. 590*, [2006] O.J. No. 3294 (O.C.J.), at paragraphs 4-6 and 9-11; and *Perper v. York Region Condominium Corp. No. 860*, [2012] O.J. No. 2594 (S.C.J.), at paragraphs 24-25 and 31. I think similar considerations apply to the remedial work done by the ECC in this case. It resulted in a slightly different elevation and modified appearance to the decks, and a slightly differential approach to maintenance. However, this stemmed entirely from the use of new deck and railing material that was as reasonably close as possible to the original, having regard to what was now appropriate in the circumstances, in light of current construction standards reflected in the recommendations of the professional engineers and contractors retained by the corporation.

[93] In my opinion, subsection 97(1) therefore applies, and this is sufficient to undermine and defeat Mr Harvey's claims based on alleged operation of ss. 97(4) and (6), which accordingly have no application in the circumstances.

[94] Moreover, even if the remedial work could be characterized as an "addition, alteration or improvement to the common elements" not covered by s.97(1), in my opinion it then would fall, according to the evidence[12], within the ambit of s.97(2)(b) of the legislation, which reads in part as follows:

> 97. (2) A corporation may, by resolution of the board and without notice to the owners, make an addition, alteration or improvement to the common elements ... if,
>
> (b) in the opinion of the board, it is necessary to make the addition, alteration, improvement or change to ensure the safety or security of persons using the property or assets of the corporation to prevent imminent danger to the property or assets.

[95] Like subsection 97(1), operation of subsection 97(2) inherently displaces application and operation of subsection 97(4). In particular, if the statute expressly authorizes an "addition, alteration or improvement" in such circumstances by mere board approval, *without notice* to the

[12] See paragraph 34 herein, *supra*.

owners, special majority unit owner approval at a meeting necessarily called *on notice*, pursuant to s.97(5) and the procedures applicable to such meetings, cannot also be required.

[96] In either case, the ECC board was entitled, (and indeed obliged, pursuant to its statutory duties of repair and maintenance), to embark on the garage deck remedial work without the need for unit owner notice or approval, let alone approval by the special majority vote contemplated by s.97(4).[13]

[97] The board was entitled, in turn, to finance that remedial work by appropriate and necessary special assessments, which all unit owners, including Mr Harvey, were obliged to pay.

[98] Mr Harvey accordingly has no claim for any damage sustained as a result of the lien proceedings properly taken to enforce his obligations.

[99] Nor has there been any demonstrated board non-compliance with the legislation warranting compliance orders, mandatory training of ECC directors, or appointment of an Administrator.

[100] Mr Harvey's action therefore must be dismissed in its entirety.

Costs

[101] Because my decision was reserved, the parties were unable to make any submissions regarding costs. If the parties are unable to reach an agreement in that regard:

a. The ECC may serve and file written cost submissions, not to exceed five pages in length, (not including any bill of costs), within two weeks of the release of this decision;

b. Mr Harvey then may serve and file responding written cost submissions, also not to exceed five pages in length, within two weeks of service of the ECC's written cost submissions; and

c. The ECC then may serve and file, within one week of receiving any responding cost submissions from the Respondents, reply cost submissions not exceeding two pages in length.

[102] If no written cost submissions are received within two weeks of the release of this decision, there shall be no costs of the action.

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[13] While not the focus of his claim, in my view a similar analysis would apply to the other instances of supposed s.97(4) contravention cited by Mr Harvey; i.e., replacement of the old playground equipment, restoration of failing retaining walls, and removal of the old tennis court. The unchallenged evidence from Mr Simpson and Mr Todd confirmed that the playground equipment dated back to the time of building construction, with missing pieces and exposed nails that clearly raised health and safety concerns. The retaining wall was bulging and in danger of collapse, raising similar concerns. The tennis court also dated back to the time of the complex creation, and had deteriorated over time to a point where its surface was entirely uneven, hazardous, and rarely unused.

"Justice I. F. Leach"
Justice I. F. Leach

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