

Case Name:

Little v. Metropolitan Toronto Condominium Corp. No. 50

Between

R. Marcus H. Little, Applicant, and
Metropolitan Toronto Condominium Corp. No. 50,
Respondent

[2006] O.J. No. 3294

Court File No. 06-CV-310928PD2

Ontario Court of Justice

F.N. Marrocco J.

Heard: August 14, 2006.

Judgment: August 15, 2006.

(18 paras.)

Counsel:

Mark H. Arnold, for the Applicant

Patricia M. Conway, for the Respondent

ENDORSEMENT

¶ 1 **F.N. MARROCCO J.**— This application is dismissed with costs.

¶ 2 The applicant, a unit owner at Metropolitan Toronto Condominium Corp. No. 590, in essence seeks an order requiring the respondent to reimburse its (the Respondent's) Reserve Fund for \$230,000 that the applicant claims were wrongfully expended from that fund. The applicant argues that inappropriate Reserve Fund expenditures were made on the following items:

- (1) Security system upgrades,
- (2) the purchase of exercise equipment
- (3) replacement of the entrance canopy,
- (4) lobby renovations, and
- (5) design fees.

SECURITY SYSTEM UPGRADES

¶ 3 The security system had a 15-year life cycle. It was scheduled for replacement in 2002. Security systems evolve over time. When systems are replaced, sometimes enhancements are affected. In this case new security cameras were installed in the front foyer. New lenses were installed in all cameras. The system was updated to record images using digital technology.

¶ 4 Section 97(1) of the *Condominium Act*, 1998, S.O. 1998, c. 19 (the "Act") provides that the corporation has an obligation to maintain the common elements. It is a notorious fact that technology becomes outdated and in order to be maintained must be replaced. Replacing a 15-year-old security system with a modern one clearly involves maintaining the security system and therefore the common elements. That is all that happened here.

¶ 5 Section 97(2)(b) of the Act provides that the Board may make improvements or changes to the common elements to ensure the safety or security of persons using the property. Changing the security system by replacing it with a more modern version ensures the safety or security of persons using the property.

THE PURCHASE OF EXERCISE EQUIPMENT

¶ 6 The expenditure on exercise equipment involved replacing a 1974 rowing machine with a newer used model. The weight machine was replaced because no parts were available to put it back into safe operating condition. The word "maintain" as it appears in s. 97(1) of the Act is not defined. Furthermore the English language is not an instrument of mathematical precision. Determining that the exercise equipment was maintained by replacing old equipment with new equipment does no more than recognize the obvious, namely, that it is impossible for the Legislature to foresee the manifold sets of facts which can arise in any area which is the subject of legislation. Finally, I note that, according to the President's Report, the repairs were well received. The following appears in the Minutes of the Annual General Meeting (April 25, 2002) "the renovation of the exercise facility had been completed. The area is larger and usage had increased." (Respondent's Record at p. 60)

REPLACEMENT OF THE ENTRANCE CANOPY

¶ 7 The canvas canopy, at the entrance of the building, was scheduled for replacement in 2003. The Board determined to address the absence of eaves-troughs at the location of the canopy. The absence of eaves troughs led to water pouring onto the concrete at the front of the building thereby creating a hazard. The Board also determined to address the absence of handicapped access.

¶ 8 A new glass and granite canopy, which updated the look of the front of the building, was installed to replace the old canvas canopy. Eaves-troughs were installed and handicapped access provided. During the course of the canopy replacement it was discovered that water had been entering the outer foyer of the lobby and that the concrete in that area was badly deteriorated. The front doors, threshold and outer foyer floor had to be taken up and replaced.

¶ 9 The change from a canvas canopy to a glass and granite canopy was simply the substitution of a modern canopy for what had once been a modern canopy. The canvas canopy was at one time stylish. Today, one modern equivalent is a canopy made of glass and granite. There is nothing in s. 97(1) of the Act that suggests that it was intended to be a cultural straitjacket. The canopy that was at the entrance was simply replaced by a more contemporary version.

¶ 10 The decision to provide handicapped access reflects no more than a desire to ensure that persons under a physical disability will be able to safely use the property and is in accordance therefore with s. 97(2) of the Act.

¶ 11 There's no suggestion that the repairs to the outer foyer were anything but an attempt to reverse the effects of years of water damage. The Corporation had an obligation to make such repairs and I find based on the evidence that the repairs were made using materials that were reasonably close in quality to the original and thus are deemed by s. 97(1) of the Act not to be an addition, alteration or improvement to the common elements or a change in the assets of the corporation.

LOBBY RENOVATIONS

¶ 12 The Board determined that the owners wanted a lobby redesign, which would project the same high-end image for the building as, had existed when the building was first marketed and built. The owners were able to agree on a new design. The Board determined that of the total projected cost of \$70,000 constituted an improvement to be funded by an existing operating surplus of \$35,000 and a special assessment of \$35,000.

¶ 13 The Corporation decided that a vote of the owners was required. Approval was sought at the Annual General Meeting to be held on April 25, 2002. At the meeting there were not enough unit owners present to obtain the consent of the necessary two-thirds of the unit owners (i.e. 80 unit owners). There were 45 unit owners present 44 of whom voted in favour of the renovation. The meeting resolved to leave the vote open for a period of 120 days to allow the Board to solicit proxies and thereby get the approval of the required 80 unit owners. The

Board obtained proxies from 36 unit owners who were not present at the Annual General Meeting. These 36 proxies plus the votes from the 44 unit owners who were present at the Annual General Meeting, in the Board's opinion, gave it the required approval from 80 unit owners.

¶ 14 The Board conducted itself in a manner that contravened s. 97(5) of the Act. Specifically, the votes of 80 unit owners were not taken at a meeting duly called for the purpose of approving a substantial addition to the assets of the corporation.

¶ 15 Section 134(1) of the Act provides that a unit owner may make an application for an order enforcing compliance with the Act. Section 134(3) provides me with the discretionary authority to make a compliance or other remedial order.

¶ 16 I decline to make such an order. I based my decision upon the following factors:

- (1) the changes were fully disclosed to the unit owners prior to any construction taking place,
- (2) the required number of unit owners did approve the Lobby Renovations (i.e. "addition, alteration or improvement to the common elements or a change in assets of the corporation" to use the language of section 97(3)) albeit not at a meeting called for that purpose,
- (3) I find and the respondent agreed that the decision of the Annual General Meeting to delay the vote and solicit proxies was taken in good faith,
- (4) the Lobby Renovations were carried out in a fiscally responsible way creating no deficiency in the Corporation's Reserve Fund or finances generally.

DESIGN FEES

¶ 17 None of the evidence tendered on this application was directed to the appropriateness of Design Fees, in the amount of \$8,000, being paid out of the Reserve Fund. The issue was raised for the first time in argument. I am not persuaded that the payment of Design Fees out of the Reserve Fund was inappropriate.

¶ 18 Accordingly this application is dismissed with costs.

F.N. MARROCCO J.

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