2005 CarswellOnt 8949,

H

2005 CarswellOnt 8949

Metropolitan **Toronto Condominium** Corp. No. 545 v. **Stein**

Metropolitan **Toronto Condominium** Corporation No. 545, Applicant and Beulah **Stein**, David **Stein**, Suzanne Drucker and Syed Rizwan Warsi, Respondents

Ontario Superior Court of Justice

Spies J.

Heard: June 23, 2005
Judgment: June 29, 2005
Docket: 05-CV-289432PD2

Proceedings: affirmed *Metro Toronto Condominium Corp. No. 545 v. Stein* (2006), 2006 CarswellOnt 3768 (Ont. C.A.)

Counsel: Jonathan H. Fine, for Applicant

Robert A. Spence, for Respondents

Subject: Property; Contracts

Real property --- Condominiums — Condominium corporation — Miscellaneous

Applicant condominium corporation board received report that there was mould contamination in heating and cooling system in condominium units — Corporation was concerned about heath risks to residents of building and required unit owners to remediate with most effective remediation method which was also most expensive — Responsibility to pay for work was that of unit owners and corporation agreed that owners could make own arrangements for work provided that protocol for remediation be in accordance with protocol of corporation's preferred engineers — Respondents used own contractor, R, who was much less expensive, to do work and admitted that they had not complied with protocol demanded by corporation — Corporation did not inspect work done by R and applied for order permitting entry into respondents' units to carry out mould remediation, and order requiring respondents to indemnify corporation for cost of work — Application dismissed — Pursuant to s. 117 of Condominium Act, onus was on corporation to prove dangerous condition in unit before it had right to enter unit, and it had not done so — Corporation had not inspected work done by R and there was no evidence that respondents' units currently had mould contamination — Corporation could not impose particular method to remediate to exclusion of other methods where it could not establish that method chosen by respondents had not dealt with problem — R was experienced contractor in mould remediation — Accordingly, corporation had no statutory right to do further remediation — Also, corporation had not

acted reasonably in that it had not kept open mind to other ways of dealing with problem and had tried to compel respondents to use recommended approach — This was particularly so where, as in case at bar, there was no risk of damage spreading from one unit to another.

Real property --- Condominiums — Practice and procedure — Miscellaneous

Applicant condominium corporation board received report that there was mould contamination in heating and cooling system in condominium units — Corporation was concerned about heath risks to residents of building and required unit owners to remediate with most effective remediation method which was also most expensive — Responsibility to pay for work was that of unit owners and corporation agreed that owners could make own arrangements for work provided that protocol for remediation be in accordance with protocol of corporation's preferred engineers — Respondents used own contractor, R, who was much less expensive, to do work and admitted that they had not complied with protocol demanded by corporation — Corporation did not inspect work done by R and applied for order permitting entry into respondents' units to carry out mould remediation, and order requiring respondents to indemnify corporation for cost of work — Respondents claimed that corporation had to resort to mediation before it could make application for entry — Failure of corporation to proceed to mediation was not legal impediment to bringing application — Corporation was very careful to limit relief claimed to ss. 117 and 19 of Condominium Act and dispute was limited to dispute over these provisions of Act — Dispute was not with respect to declaration, by-laws or rules — Accordingly, corporation did not have obligation to proceed to mediation.

Cases considered by *Spies J.*:

McKinstry v. York Condominium Corp. No. 472 (2003), 2003 CarswellOnt 4948, 68 O.R. (3d) 557, 15 R.P.R. (4th) 181 (Ont. S.C.J.) — considered

Metropolitan Toronto Condominium Corp. No. 776 v. Gifford (1989), 6 R.P.R. (2d) 217, 1989 CarswellOnt 594 (Ont. Dist. Ct.) — referred to

Statutes considered:

Condominium Act, 1998, S.O. 1998, c. 19

Generally — referred to

s. 1(1) "property" — considered

s. 17 — referred to

s. 19 — referred to

s. 37 — referred to

s. 37(1) — referred to

s. 37(3) — referred to

s. 90 — referred to

s. 90(2) — referred to

s. 91 — referred to

s. 92 — referred to

s. 92(1) — referred to

s. 92(3) — referred to

s. 117 — considered

s. 119 — referred to

s. 132 — referred to

s. 132(4) — referred to

s. 134 — referred to

s. 134(1) — pursuant to

s. 134(2) — referred to

s. 135 — referred to

s. 135(2) — referred to

APPLICATION by condominium corporation for order permitting entry into respondents' residential condominium units to carry out mould remediation work and for order requiring respondents to indemnify corporation for work done.

***Spies J.*:**

Nature of the Application

1 The applicant, the METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO.545 (the "Corporation"), brings this application pursuant to s. 134(1) of the Condominium Act, 1998, S.O. 1998 c.19, (the "Act"). The Corporation seeks an order permitting entry into the respondents' residential condominium units ("Units") in order to carry out mould remediation of the fan coil units ("FCUs") in the Units. FCUs provide heating and/or air conditioning to the units in the building. The building consists of 231 units and each unit has 2 or 3 FCU's located in the unit.

2 The position of the Corporation is that the remedial work done by a contractor retained by the respondents was inadequate and that further remediation is necessary to remediate a dangerous situation within the meaning of section 117 of the Act. The Corporation also asks for an order requiring the respondents to indemnify the Corporation for the costs incurred for this further remediation work. It is the position of the respondents that they have acted reasonably and have complied with their obligation to remediate any mould in the FCUs in their Units.

Facts

3 The Corporation received a report dated May 13, 2004, from George White ("White"), a mycologist, that there was mould contamination in the FCUs in the building based on a random sampling of 13 FCUs. White's report states that it is difficult to actually assess the risk related to mould exposure but it can safely be assumed that there is an increase in risk associated with any increase in exposure.

4 The risk identified by White was "occupant risk" in that spores could be disseminated into the "local environment when the unit is operating". This is clearly a reference to individual units. There is no suggestion the White report that there is any danger of mould from the FCUs in one residential unit dispersing to another unit.

5 In addition to the health risk, White states that there are also "risks to property value and reputation if the issues are not handled in a sensible and timely fashion". This aspect of White's opinion is not explained but I note he presumes there is a concern with respect to property value if the issue is not handled "sensibly".

6 According to White's report, mould in FCUs is a very common problem and "from a practical perspective, the level of risk from this issue is probably lower that the numbers themselves would suggest" He points out that surprisingly there are relatively few occupant complaints from individuals living with such units and so the link to health concerns is unclear. Nevertheless, in his opinion, in many cases it is more prudent to eliminate the risk factor than to determine what the acceptable level of risk actually is. He notes however, that this approach "is not always cost effective and runs a risk of overreacting in some settings".

7 White suggested three different remedial options to deal with the situation. The first option, which includes removal of the contaminated insulation, is the most effective but also the most expensive. Option two is described as a risk reduction strategy which involves removing most of the mould contamination with HEPA vacuums and disinfectants but White suggested that this may not be feasible and that consultation with "someone in the industry" could determine if this is feasible. The third option is described as a combination of the first two, as needed, according to the degree of contamination present. White recommended that an engineering firm be retained to develop specifications for remediation. He concluded that "this situation has been ongoing for more than a decade and this building is by no means unique".

8 Upon receipt of this report the Board of the Corporation was concerned about health risks for the residents of the building. The evidence of Janet Valianes, the Condominium Manager (the "Manager") and Sidney Starkman, the President of the Corporation, ("Starkman") confirm this. It is also clear from their evidence that they were concerned that mould "will spread throughout our whole building again" This concern however, is not supported by the experts and may be why the Board ultimately decided to require unit owners to remediate with what was probably the most effective remediation method but also the most expensive.

9 Although it is the evidence of Starkman that the Board considered all options "very thoroughly", there is in fact no evidence that the less expensive options suggested by White were considered and if so what the conclusion was. Starkman did not know of any report that the Corporation obtained that examined the merits and drawbacks of each of the three options suggested by White.

10 The Corporation retained Jeff Jeffcoatt, a professional engineer, who opined, in a letter to the Corporation dated June 2, 2004, that the maintenance and repair of the FCUs within each unit is the responsibility of the unit owner. He also stated that the FCU "serves only that particular unit where it is installed with integral ductwork it is considered part of the unit".

11 A special meeting of residents of the building was held on June 28, 2004 with White in attendance. Someone prepared minutes on behalf of the Corporation and although they are not signed and there is no evidence that they were approved, I find that I can rely on them as they were prepared for the Corporation. There is no evidence filed that

challenges the accuracy of the minutes.

12 The minutes state that White reassured the owners that the mould contaminant is not transferred from one suite to another, that fungal exposure and symptoms have not been scientifically linked and that long term health effects are presently unknown. In response to a question from one of the respondents, the minutes record that White stated that people had been exposed to this "as long as they have been living in the building" and that it was important to have a "balanced and reasonable approach". These statements in the minutes attributed to White are consistent with his report.

13 By letter dated August 26, 2004, the Manager, sent a letter to all residents on behalf of the Corporation, advising the unit owners that the Corporation had received a legal opinion that "repair and maintenance of fan coil units and exhaust fans should be the responsibility of the owners". The letter continued with a "list of contractors who do these repairs" which included Reliable Fan Coil Maintenance ("Reliable"), the contractor that the respondents ultimately used to repair their FCU's. The letter stated that the list of contractors "in no way constitutes a referral or recommendation".

14 Notwithstanding the position of the Corporation that it was up to each unit owner to remediate the FCUs in their units, the Corporation undertook to research and investigate the problem. Construction Control Inc., consulting engineers and building scientists, were retained to prepare specifications for mould remediation.

15 At a meeting of unit owners on September 28, 2004, Starkman advised those in attendance that although unit owners were free to make their own arrangements for mould remediation of their FCUs, it would be on the condition that the protocol for remediation be in accordance with the protocol set by the Corporation's engineers.

16 By letter dated October 14, 2004, the Manager on behalf of the Corporation sent a further letter to the residents/unit holders confirming the responsibility of an owner to maintain the FCUs at the owner's expense. The letter advised the unit holders that after the usual tendering process the Corporation had pre-approved Dry Coil Limited ("Dry Coil") as the contractor authorized to carry out the remediation work and that a special bulk price had been negotiated on behalf of the owners for the required maintenance. A contract for each owner with Dry Coil was attached.

17 The letter also included frequently asked questions and answers. The answers included information to owners that status certificates must disclose the presence of mould to prospective purchasers, which could cause a purchaser to ask for a price reduction to compensate for the cost of the work, but that "not one sale has failed to proceed since this problem was discovered and disclosed to prospective purchasers".

18 The information enclosed with this letter also included a statement that all work would be done in accordance with the "New York Protocol", although that was not explained in terms of what that entailed. The information included a statement that if an owner "refused to maintain or decontaminate their fan coil units", the Act gives the Corporation authority to enter into the non-complying unit and carry out the necessary repairs and all costs would be assessed to the non-compliant homeowner There was no statement however that the work had to be done by Dry Coil.

19 When asked to sign contracts with Dry Coil, each of the respondents advised the Manager that they wanted to use their own contractor. Apparently the difference in cost is significant. Counsel for the Corporation advised that the cost per FCU of the Dry Coil approach was $1500 versus $100 for the Reliable work. All of the other unit owners proceeded with the remediation using the Corporation's preferred contractor, Dry Coil.

20 The Manager sent a letter to each of the respondents in mid November 2004, advising of certain conditions that the Corporation demanded that the respondents comply with, at their expense, before commencing remediation. These conditions include pre-remediation air quality tests, that the remediation be conducted in accordance with the "New

York Protocol, Leve15B" and post-remediation air quality tests. These letters also stated that a note would be placed in each unit file requiring periodic inspections of the FCUs in each unit to ensure that there is no mould and that if a status certificate was issued, it must disclose the circumstances of the remediation of the respondents' suites.

21 The solicitor for the respondents, who at that time only represented two of them, sent a response by letter to the Manager, dated November 24, 2004 objecting to the Corporation's conditions.

22 The Manger responded by letter dated November 25, 2005 advising that the Board "had been governing itself according to Section 37" of the Act and that the conditions in her letter had been vetted by the Corporation's solicitor. She went on to state that the requirements were identical to those being followed by Dry Coil. This letter was only vetted by the Corporation's solicitor and not its engineers.

23 The respondents allege that the conditions are onerous and discriminate against them in that the cost is to be borne by each of the respondents and not the Corporation. The position of the Corporation is that these costs are part of the "package" paid for by the other owners that retained Dry Coil to remediate.

24 By letter dated December 13, 2004, Peter Adams, P.Eng ("Adams") sent a letter to the Board on behalf of Morrison Hershfield Limited ("MHL") setting out his opinion regarding the mould remediation of the FCUs and White's report and in particular whether or not Dru Coil was following the cleaning protocol submitted to the Corporation as well as current industry guidelines for mould remediation and cleaning.

25 In this letter Adams states that there are no regulations or laws regarding mould remediation but that there are guidelines and that one widely used guideline is the New York Protocol. He states that *because of the potential for mould distribution, remediation in HVAC systems is normally treated as a "high level mould remediation* to minimize the chance of dispersion during and after the work has been completed" (emphasis added).

26 Counsel for the applicant advised that "high level" means Level 5 although that is not stated in the letter. According to the evidence of the Manager, the New York Protocol itself indicates that work on HVAC units requires a Level 5 remediation. It is significant however, that there is no evidence from Adams that this "high level" approach was necessary because of the potential for mould dispersion from one unit to another in the building in question. I note that consistent with the evidence of Starkman, this report does not review any remediation options but the "high level" remediation referred to.

27 The respondents did not accept or comply with the conditions demanded by the Corporation. Their solicitor formally advised the Corporation of this by letter dated December 21, 2004. They did not make Reliable aware of these conditions.

28 The solicitor for the Corporation responded that if the respondents chose to use their own contractor, they would have to provide written confirmation from the contractor that the scope of work as provided by the Manager, and recommended by the Corporation's engineers, had been fulfilled. It was also his position that the Corporation's engineers test and inspect the work before, during and after remediation at the respondents' cost.

29 The respondents proceeded to have the remediation work done by Reliable. The remediation performed by Reliable was a Level 1 remediation, which the respondents say is sufficient.

30 The respondents, Suzanne Druker and Syed Warsi ("Warsi") advised the Manager that they would provide "appropriate documentation upon completion of such work". Similarly David Stein advised that he would provide the "proper report" to the Corporation.

31 The respondents did not provide reports following the remediation at that time. By letters dated April 18, 20

and 29, 2005, counsel for the respondents advised the Corporation that it could have its engineers and contractor inspect the work when it was done, but at the Corporation's expense. He also advised that the respondents refused to have the Corporation's contractor enter the Units to do any further work apart from the inspection.

32 In a letter dated May 2, 2005, the Corporation's solicitor demanded that the respondents provide a detailed written report setting out exactly, on a step by step basis, the scope of work actually carried out the respondents' contractor and that if the specified report was not provided that the Corporation would proceed to court.

33 In the exchange between counsel that followed, there was a stand off. Counsel for the respondents took the position that the expense of such a report was unnecessary in that the "fastest and cheapest way" was for the Corporation's contractors to attend at the Units and see the work, particularly as they were in the building on a regular basis. Counsel for the Corporation took the position that there would only be an inspection after receipt of the respondents' report.

34 The Corporation has not inspected the work done by Reliable. Instead, it has commenced this application. It is the position of counsel for the Corporation that an inspection is unnecessary since there is no dispute that Reliable did not conduct a Level 5 remediation. In fact counsel took the surprising position that it does not matter whether or not there is presently mould in the FCUs in the Units, rather it is the risk of future mould problems that constitutes the dangerous condition within the meaning of section 117 of the Act.

35 The explanation from Starkman for efusing to inspect the work done by Reliable is that the respondents

> did not follow one thing of our instructions of how to do it. After counsel's letter and letters from out lawyer asking them to come and speak to us, they never did, and I personally feel if they went behind my back to save 50, $60.00, I don't want to even discuss it. It has got to be done the proper way. The board approved it. 228 people approved this method.

36 On cross-examination, the Manager admitted that she did not have any knowledge as of that date that the situation in the Units is dangerous "because no testing has been done". For the reasons set out below, in my view this is a very important admission.

37 The Corporation intends to set up an ongoing inspection program by a professional mycologist who will be able to determine if any mould appears in the future in any units including the respondents' Units.

38 The respondents have filed affidavits from Reliable and an environmental consultant to attest that the mould has been effectively remediated, although not in the same way as was done by the Corporation's preferred contractor. The affidavit of Bill Beatty ("Beatty"), on behalf of Reliable, attests that the method used to remediate the FCUs in the respondents' Units was the same treatment used at neighbouring condominium buildings. He states that "in simple terms, our work involved disinfecting of the fan coil units, the cleaning of them and the application of anti-microbial paint which prevents mould and comes with a ten-year guarantee for its performance". Beatty also opines that the process Reliable used is effective in mould treatment

39 According to Beatty, the FCUs in each unit blow air into that suite only and air pressure causes air to go into the unit, not out. This is the best evidence confirming that any mould problem if a FCU is only an issue for the residential unit where the FCU is located.

40 The respondents also rely on the evidence of Art Robinson ("Robinson"), the President of Sick Building Solutions Corporation, who provides consulting services for environmental problems in buildings, including mould issues. It is his evidence that based on the information given to the residents showing the extent of the problem, it is known as a "Level 1 problem in accordance with the New York Protocol" and that the work done by Reliable was done

efficiently and competently and was more than adequate to fully address all "Level 1 mould problems in accordance with the New York Protocol".

41 Robinson is the only witness who gives evidence on the issue of what specific kind of problem exists in this case, in terms of Level 1 versus Level 5. The evidence of Adams, that generally speaking a high level approach is used for HVAC systems, is a general statement that does not differentiate between different types of HVAC systems and more importantly does not specifically deal with the FCUs in this case. As noted below, Adams acknowledges the existence of a Level 1 remediation as being identified in current guidelines.

42 Robinson tested the FCUs in Warsi's unit following Reliable's work and in particular took mould samples and samples of air and insulation. He states that to date no mould had been detected (the affidavit was sworn June 7, 2005) but there is still a further incubation period of three days for the tests to be completely finalized. There is no evidence from Robinson updating these tests. As discussed further below, it is the position of counsel for the Corporation that I should draw an adverse inference from the failure of the respondents to provide updated information.

43 Also on June 7, 2005, the Corporation produced a report from Adams commenting on the equivalency between the scope of work used in cleaning the FCUS by Reliable as compared to Clean Coil (presumably Dry Coil). The work done by Reliable is described as Level 1 remediation "as identified in current guidelines".

44 Without setting out each comparison in detail, it is important to note that generally there are a number of statements that aspects of the Reliable work are "unknown", which presumably is as a result of the fact that Adams has not inspected the work done by Reliable. Nevertheless, the report states with respect to the Reliable work that any remaining mould "remains sealed" and that existing insulation "may have mould material sealed inside". In order to determine the potential for re-growth, Adams states he would need to verify "coating thickness and coverage" presumably referring to the coating used by Reliable. This inspection was not done.

45 Adams also states that the remaining mould that is sealed within the FCUs, using the Reliable procedure, "remains a potential liability for future considerations" but this statement clearly applies to the individual Units (as opposed to other units in the building). He does not explain the nature of this liability other than to say that it may be considered during resale of the Units.

46 There is a reference in Adams' report to what appears to be an assumption (since he states it is an unknown), that Reliable did not correct the drip pan slope to remove the chance of overflowing and future water damage, which was done by Dry Coil and "resulted in the additional benefits of more efficient operation, easier maintenance, and peace of mind". As a result the FCUs remediated by Dry Coil are in "near new" condition.

47 Although there is some suggestion in Adam's report that overflowing can contribute to mould growth in the vicinity of the FCU in question, there is no statement in his report that this can pose a risk for mould contamination to other residential units in the building, as opposed to water damage. Furthermore there is no evidence that the respondents' FCU's have ever overflowed in the past. On the evidence therefore, there is no basis to find that it would be reasonable to compel the respondents to incur the additional expense of these "additional benefits".

48 Adams concludes in his report that:

> performing the work as per the Reliable scope results in an increase in the risk for mold exposure and future growth and is not considered as careful or as complete an approach compared to the Clean Coil scope of work. The two items of greatest concern are the volume of dust and mould material that remain in the units, and that the drip pans were not repaired to ensure a proper slope to drain. The Reliable procedure resulted in a partial solution that covered the problem and did not address the significant issue of overflowing drip pans,

(emphasis added).

49 Robinson was examined on June 7, 2005, after receipt of this report by Adams, and he testified that there is no viable mould remaining in the FCUs remediated by Reliable based on his testing of the FCUs in Mr. Warsi's Unit. He also stated that because any existing mould had been "encapsulated" by the product used by Reliable "it would be very unlikely if not impossible to have any re-growth in that mould".

50 It is the position of the Corporation, that Robinson's opinion should be given no weight because there is no evidence that Robinson has any professional qualifications such as a professional engineer like Adams. Robinson admitted that he has no experience in the actual remediation of FCUs. In my view this is not significant as his company provides consulting services to evaluate the work done by others.

51 The Board was not satisfied with Robinson's report because it is the Corporation's position that his company has no engineering experience, and as far as they know no mould experience. The Corporation also relies on the fact that Robinson only inspected the FCUs in the Unit owned by the respondent Warsi. In this regard Robinson had previously reported that the FCUs in that Unit had obvious mould growth before the work was done by Reliable and so in my view that is not an issue as there is no evidence that the method used by Reliable differed among the respondents' units.

52 The Corporation therefore takes the position that it must carry out the remedial work but the respondents have refused to permit entry to their Units to allow such work and refuse to pay for it.

53 With respect to evidence of an adverse impact from the alleged failure of the respondents to properly remediate the mould problem, during the course of argument, counsel for the Corporation suggested that there could be an impact of the sale of other units in the building and that the issue with respect to the respondents' Units would have to be disclosed on all status certificates, not just those issued with respect to the Units owned by the respondents. I was referred to the cross-examination of the Manager (at questions 336-340). It is unclear in this evidence of the Manager as to whether she was referring to all units or just the Units in question.

54 Having regard to the other evidence referred to above, and in particular the questions and answers in the letter from the Manager to the unit owners dated October 14, 200, the letters sent by the Manager to the respondents setting out conditions demanded by the Corporation and the evidence of Adams. I find that the only status certificates that may be affected in terms of future sales are the status certificates for the Units in question. There is no evidence however that this will affect the actual sale of these Units and in fact based on the letter from the Manager to the owners dated October 14, 2004 the evidence is to the contrary. In any event there is certainly no evidence of possible financial impact on the other unit owners. I note that this is also consistent with the evidence that the mould contamination does not spread from the FCUs in one unit to another.

Analysis

55 This application is brought pursuant to section 134 of the Act, which gives the court wide powers to enforce compliance with any provision of the Act, the declaration, the by-laws, or the rules governing the Corporation. Granting relief is discretionary. The parties have asked the Court to decide this matter on the basis of affidavit evidence, including cross-examinations on those affidavits, notwithstanding that there are factual disputes on the evidence.

Threshold Question

56 There is a threshold question to be determined, before I consider the merits of this application. Section 134(2) provides that if the mediation and arbitration process described in section 132 of the Act is available, the Corporation

can only bring this application if it has failed to obtain compliance through using those procedures. There is no dispute that there has been neither mediation nor arbitration of the matters in dispute on this application.

57 It is the position of the Corporation that this dispute is with respect to the interpretation of the Act, and in particular the rights of the parties pursuant to section 117 (dangerous conditions) and section 19 (entry) and that section 134(2) of the Act does not require disputes regarding the Act to go to mediation and arbitration.

58 Counsel for the Corporation relies on the decision of *McKinstry v. York Condominium Corp. No. 472* (2003), 68 O.R. (3d) 557 (Ont. S.C.J.) , a decision of Juriansz J., as he then was, where the court held:

> The legislature's objective in enacting s. 132 is to enable the resolution of disputes arising within a condominium community through the more informal procedures of mediation and arbitration. To attain this objective, the phrase "with respect to the declaration, by-laws or rules" in s. 132(4), which applies to disagreements between owners and the condominium corporation, should be given a generous interpretation. It applies, in my view, to disagreements about the validity, interpretation, application, or non-application of the declaration, by-laws and rules. It must be noted that s. 132(4) does not require owners and condominium corporations to submit disagreements with respect to the Act to mediation and arbitration (at para. 19, emphasis added).

59 Although as counsel for the respondents pointed out, in this case the court was considering an application pursuant to section 135 of the Act, which does not have a precondition of mediation, the observation of Juriansz J. is consistent with the plain wording of section 132(4), which makes no reference to the Act per se.

60 In oral argument counsel for the Corporation was careful not to make any reference to the Corporation's declaration but the factum filed on behalf of the Corporation does do so. For example, the factum refers to Article XII, paragraph 1(a) and (b), which provide for a right of entry to the Corporation. As set out below, sections 91 and 92 of the Act cross-reference the declaration.

61 Although there does not appear to be a comparable provision in the declaration to section 117 of the Act, there may well have been sufficient scope within the provisions of the declaration concerning an owner's obligation to maintain his or her unit, to have this issue mediated and if necessary arbitrated in reliance on the terms of the declaration, and perhaps this application could have been avoided.

62 However, because the Corporation has very carefully limited its relief to sections 117 and 19 of the Act, I find that the failure by the Corporation to proceed to mediation is not a legal impediment to the bringing of this application, in that the dispute as presented to the court is limited to a dispute over these provisions of the Act.

63 Had there been evidence that mediation had been requested by the respondents and rejected by the Corporation, which is not the case here, I leave open the question of whether a failure to mediate, where there is an overlap between the relevant provisions in the declaration and the Act, would be a reason for the court to exercise its discretion against granting relief. I certainly do not want my decision on this threshold issue to be seen as approving of the Corporation's obvious strategy of restricting its relief to a consideration of various provisions of the Act in order to avoid what would otherwise be a clear obligation to proceed to mediation and arbitration.

The Merits of the Application

64 It is the Corporation's position that a dangerous condition existed in the units and that although unit owners were permitted to engage their own remediation contractor, they could only do so on the condition that certain mandatory remediation requirements, as established by the Board on the advice of its consultants, be met. The Corporation relies on the admission by the respondents that they did not remediate the mould condition in the FCUs in their Units in the manner required by the Corporation and that therefore a dangerous condition persists in these Units. The

Corporation submits that it has the statutory right to do the work if the unit owner fails to comply and that in this case, the cost is to be borne by the respondents.

65 Pursuant to section 117 of the Act: "[n]o person shall permit a condition to exist...in a unit...if the condition is likely to damage the property or cause injury to an individual". This is the section of the Act that the Corporation asserts has been breached by the respondents.

66 The definition of property is set out in section 1(1) of the Act. Property means "the land, including the buildings on it" and includes "all land and interests appurtenant to land that are added to the common elements". By virtue of the reference to the buildings it appears that the definition of property includes not only the common elements but also the units owned by the unit owners.

67 The Corporation also relies on its statutory duties as set out in section 17 of the Act to "manage the property" and "control, manage and administer the common elements" and a duty to take "all reasonable steps" to ensure that the unit owners comply with the Act, the declaration, the by-laws and the rules of the Corporation.

68 Counsel for the respondents however, points to section 90 of the Act, which provides that the Corporation shall maintain the "common elements" and that each owner shall maintain the owner's unit. Subsection 2 provides that this obligation includes repair after normal wear and tear but does not include the obligation to repair after damage.

69 Section 91 of the Act provides that the declaration may alter the obligation to maintain or to repair after damage. In this case the declaration does provide for such an obligation In Article VII paragraph 1, each owner "shall maintain his unit" and "repair his unit after damage". Where the owner fails to do so the Corporation "shall make any repairs that an owner is obligated to make".

70 Although I accept the submission of counsel for the respondents that the initial thrust of the Act is to give the Corporation authority over only the common elements, the Corporation does obtain authority to act with respect to management of individual units in certain circumstances. In particular, section 92(1) of the Act provides that if the declaration provides, as it does here, that the owner has an obligation to repair after damage and the owner fails to carry out the obligation within a reasonable period of time after damage occurs, the corporation shall do the work necessary to carry out the obligation,

71 Although not relied upon in the Notice of Application, counsel for the Corporation also referred to section 92(3) of the Act which provides that if an owner has an obligation to maintain the owner's unit and fails to do so and "if the failure presents a potential risk of damage to the property or ... potential risk of personal injury to persons on the property, the corporation may do the work necessary to carry out the obligation". In my view this language is comparable to section 117 of the Act.

72 Pursuant to the terms of the declaration and section 119 of the Act, all unit owners are bound to comply with the terms of the declaration and the Act and by taking title to their unit agree that the Act, the declaration, the by-laws and any other rules and regulations are deemed and taken to be covenants running with the unit and binding on the owner.

73 Section 19 of the Act provides that on giving reasonable notice, the corporation may enter a unit to "perform the objects and duties of the corporation or to exercise the powers of the corporation". The Corporation's declaration also contains provisions giving the Corporation the right to enter any unit on proper notice for "remedying any condition which might result in damage to the property".

74 The issue to be considered therefore is whether or not the Corporation has established, on a balance of probabilities, that a condition currently exists in the Units owned by the respondents that is "likely to damage the property

or cause injury to an individual", within the meaning of section 117 of the Act.

75 In my view the Corporation has not satisfied its onus to prove this alleged dangerous condition as required by section 117 of the Act for the following reasons.

76 The Corporation does not have evidence that the respondents' FCUs currently have any mould contamination. As set out above, the Manager admits that they do not know whether or not the FCUs of the respondents currently have mould because they have not tested.

77 The respondents however have led evidence that the method used by Reliable has resulted in elimination of the mould in the respondents' FCUs, namely the evidence of Robinson as to the tests he conducted on the FCUs in Warsi's unit, which was known to have mould contamination before Reliable did its work. Although the Corporation challenges Robinson's opinion because he is not a professional engineer, there is no evidence that he is not qualified to take samples to determine the existence of mould.

78 In this regard I do not accept the submission of counsel for the Corporation that I should draw an adverse inference from the respondents' failure to update the evidence of Robinson. The evidence of Robinson cannot be reasonably construed as being tantamount to an undertaking. The onus is on the Corporation to prove the dangerous condition. Counsel for the Corporation cross-examined Robinson and could have asked for an undertaking to provide further test results and failed to do so. Furthermore, the Corporation failed to accept an offer from counsel for the respondents to do its own inspection, which could have included such testing. There is no evidence that the respondents' FCUs currently have mould contamination.

79 Counsel for the Corporation however, argues that it is immaterial whether or not there is mould in the FCUs in the respondents' Units now, because it is admitted that the respondents did not remediate to a Level 5 remediation and that therefore they have permitted a dangerous condition to exist. It is his position that the unit owners have to remediate the mould problem for the "long term" and that what he described as a "band aid" solution is not acceptable. In the language of section 117 of the Act, the Corporation must establish that the remediation by the respondents has left a condition that is "likely" to damage the property or cause injury to an individual.

80 In considering this submission, the first question is whether the Corporation has proven that the method used by Reliable to remediate the mould in the respondents Units is inadequate.

81 The duty to repair and maintain is the obligation of the unit owners in the first instance, in accordance with sections 90 and 92 of the Act. If the Board decides to research the options for the unit owners, as it did in this case, it cannot impose a particular method to remediate to the exclusion of all others where it cannot establish that the method chosen by the respondents has not reasonably dealt with the problem.

82 I accept the submission of counsel for the respondents that if Adams, the expert retained by the Corporation, was of the view that the approach used by Reliable was not reasonable; he would or at least should have said so. Adams does not say that the work done by Reliable or Reliable's method leaves a dangerous condition or poses an unacceptable level of risk. Instead, reading his report as a whole, it is clear that he is only of the view that the Reliable work is "not as careful or complete" as the work done by the Corporation's preferred contractor. Futhermore, this opinion is not based on an inspection of the work, but rather is based on a comparison between Reliable's scope of work (Level 1) as compared to Dry Coil's (Level 5).

83 Significantly, Adams does not say that a Level 1 remediation is not sufficient to address the problem for the FCUs in this building. Also there is no evidence that a Level 5 or "high level" remediation is needed in this specific case. As already stated, the White report stated that there was more than one option to deal with the problem and referred to the fact that eliminating all risk of mould contamination would not be cost effective and could be "over-

reacting".

84 Counsel for the respondents asserts that the approach used by Reliable was in fact the second option referred to by White. I was not referred to evidence to support that proposition nor is it necessary to make such a finding. White clearly contemplated that there could be three options available. Reliable asserts that the method employed was effective for the FCUs in question and that assertion is credible given their experience with this method in other neighboring buildings. Furthermore the Corporation's engineers do not directly contradict that evidence.

85 I also find the uncontradicted evidence of Beatty, from Reliable, that the method that he used to remediate the respondents' FCUs is the same as the method used by Reliable in neighboring buildings to be compelling. There is no dispute that Reliable is an experienced contractor in mould remediation. The Corporation listed the firm early on as a contractor owners could consider.

86 Counsel for the respondents argues that the Board was less concerned about the health risks to occupants of the building than its own liability and adopted a "high level" approach to remediation because it would do the most to alleviate any risk to the directors of the Board as a result of the operation of section 37 of the Act. Section 37(3) of the Act provides that a director shall not be found liable for a breach of the duty mention in subsection (1) if the director relies in good faith upon a report or opinion of, among other professionals, an engineer. It is not necessary, in my view, to determine to what extent if any the Board was motivated to protect its own liability. The issue here is whether or not the Corporation has established the elements of a dangerous condition as set out in section 117 of the Act.

87 The Corporation chose the most comprehensive approach and I find that it failed to consider other reasonable alternatives. This is particularly significant given the fact that there is no evidence that the mould from one unit can contaminate other units.

88 Accordingly I find that the Corporation has not proven that Reliable's method used to remediate the mould in the respondents' Units was not reasonable. In coming to this conclusion I have not relied on the opinion of Robinson concerning the potential for re-growth of mould. It is not necessary since I have found that the Corporation has not met its onus to establish on a balance of probabilities that the Reliable method is not effective for the mould contamination in this case. I do not accept however that the lack of professional qualifications is determinative in deciding the credibility of expert opinion. The law is clear that expertise can be gained by experience. In this case however I am not aware of evidence concerning Robinson's experience in evaluating mould remediation work.

89 Even if there is an issue with the method used by Reliable, the onus on the Corporation pursuant to section 117 of the Act is to prove that the risk of further mould contamination is "likely". Adams, the Corporation's expert does not give this evidence. Rather it is his opinion that there is "an increased risk" but the level of risk is not quantified.

90 The courts have held that the "general message" must be that enforcement or compliance with the declaration and by-laws will be expected, that exceptions will be rare and that where the Board acts reasonably in carrying out its duty to enforce the by-laws and declaration, the Board will be supported by the Court. (see for example *Metropolitan Toronto Condominium Corp. No. 776 v. Gifford* (1989), 6 R.P.R. (2d) 217 (Ont. Dist. Ct.)).

91 The relief sought is discretionary and before the court will grant relief it must be established that the Corporation has a statutory right (given that in this case it was not argued that the declaration or the by-laws gives it any greater rights), and that the Corporation is acting reasonably. I have already found that the Corporation does not have a statutory right to do further remediation in this case. Even if I had found that the Corporation had met the test in section 117, however, it would still have been necessary to consider whether the Corporation was acting reasonably.

92 In this case, counsel for the Corporation points to the voluminous material generated by the Corporation's investigation of the matter and urges the court to find that the Corporation must be acting reasonably because it is

following the advice of two sets of experts.

93 In my view however, the Corporation has not acted reasonably in that it has not kept an open mind to other ways of dealing with the problem that even White contemplated. Once the Corporation decided to do a "high level" remediation, it put its blinders on and decided that any remediation short of this "high level" remediation was inadequate. If there had been a real risk of harm to units beyond the respondent's Units, such an approach might have been warranted. In this case however, given that there is no evidence of harm to other units, in trying to compel the respondents to follow its recommended approach, in my view the Corporation acted unreasonably, notwithstanding what was clearly a very serious attempt on its part to research the problem and advise the unit owners.

94 I do not accept the submission of counsel for the Corporation that it is at all relevant that all of the other unit owners accepted the approach presented by the Board. That does not mean that the respondents' approach is not a reasonable alternative and certainly does not assist the Corporation in meeting its onus pursuant to section 117 of the Act.

95 Furthermore, although I accept that the scope of section 117 of the Act contemplates the likelihood of damage to property which would include individual units, I do find it to be significant that notwithstanding the evidence of both Starkman, the President of the Corporation and the Manager of the Corporation that the Board is concerned about what it believes is the dangerous condition of the respondents' Units, there is no evidence from the experts retained by the Corporation that any remaining issue with respect to the issue of mould in the Units owned by the respondents could harm anyone but the occupants of the units owned by the respondents. In fact the evidence is to the contrary.

96 Although I have found that the Corporation has not met the test in section 117 of the Act in any event, in my view the fact that there is no evidence of a likelihood of harm outside the Units owned by the respondents is significant. Given that the respondents each own their Units, in my view section 117 should not be interpreted to give authority to a corporation to act where there is no evidence of potential damage to anyone other than the Unit owners, i.e. their unit, themselves or their guests. In such circumstances in my view a court could conclude that the corporation is not acting reasonably and decline to grant relief.

97 It is the respondent's position that the conduct of the Corporation in demanding compliance with a "heavy-handed" list of conditions was "oppressive". Pursuant to section 135(2) of the Act, if the court determines that the conduct of a corporation is or threatens to be oppressive or unfairly prejudicial, "to the applicant", the court may make an order to rectify the matter. There is no cross application by the respondents however and so they cannot invoke the court's jurisdiction in this regard even if I was satisfied the test had been met. I am asked to use this language in the section as a factor in deciding this case.

98 In my view, not only is the section not directly applicable, but the respondents do not have to establish that the Corporation's conduct is oppressive. As stated in the Gifford case, supra, the message of "general enforcement" presumes that the Corporation is acting "reasonably". I have found in this case that even if the Corporation could establish that the respondents had not reasonably remediated the mould in their FCUs, and therefore have permitted a dangerous condition to persist contrary to section 117 of the Act, that the Corporation would not be acting reasonably if it insisted that the respondents use the approach the Corporation preferred, without considering the alternatives referred to by White, which would be less expensive. In other words, the Corporation does not act reasonably when it does not consider less expensive options, particularly where there is no risk of damage spreading from one unit to another or from one unit to the common elements.

99 Accordingly, for these reasons. I do not accept the position of counsel for the Corporation that because the respondents did not remediate to a Level 5 remediation that the respondents did not act reasonably in fulfilling their duty to properly maintain the FCUs in their Units. I find that the Corporation has not proven the existence of a dangerous condition as required by section 117 of the Act, in order to obtain the relief that it seeks and that it has not acted

reasonably in that it has not considered other alternatives to deal with the problem.

Disposition

100 For these reasons the application is dismissed. The parties have not been able resolve the issue of costs, and so they may make written submissions on the appropriate disposition. The respondents' submissions are to be filed within 15 days of the release of these reasons and the applicant's response is to be delivered within 10 days thereafter. No reply submissions are to be filed without leave. The submissions should include the necessary bills of costs or equivalent information that will allow me to fix the costs of the motion should I decide that costs are to be awarded.

Application dismissed.

END OF DOCUMENT