CITATION: Middlesex Condominium Corp. No. 643 v. Prosperity 2014 ONSC 1406
COURT FILE NO.: 13-1578
DATE: 2014/02/28

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Middlesex Standard Condominium Corporation No. 643, Applicant/Responding Party

-and-

Prosperity Homes Limited, Respondent/Moving Party

BEFORE: A. J. GOODMAN J.

COUNSEL: R. Dowhan, for Middlesex Condominium Corp. No. 643

M. Arnold, for Prosperity Homes Limited

HEARD: February 19, 2014

ENDORSEMENT

[1] This is a motion brought by the respondent, Prosperity Homes Limited, ("Prosperity") for an order requiring the applicant, Middlesex Standard Condominium Corporation No. 643, ("the Condominium") to call a meeting of the owners to elect a new board of directors pursuant to s. 152(6) of the *Condominium Act, 1998,* S.O. 1998, c. 19 *("The Act")*.

[2] Prosperity also seeks an order that the Condominium provide it with copies of its records pursuant to a request for documents made on November 22, 2013 under s. 55(6) of the *Act.*

[3] For the reasons that follow, Prosperity's motion is granted in part.

Background:

[4] The Condominium consists of 33 units located at 1853 Blackwater Street, London, Ontario. Prosperity became the declarant of the Condominium when it registered a Declaration under s. 2 of the *Act* on December 28, 2006.

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[5] The condominium townhouse complex was constructed by Prosperity in three phases: Phase 1, consisting of 15 condominium units, was completed on December 28, 2006. Phase 2, consisting of 10 additional units was, completed on February 25, 2010. Phase 3, the last phase, consisting of 8 additional units, was completed on March 8, 2011. Upon the completion of each phase, the Condominium Declaration was amended and registered on title. There were two Declaration amendments and the second amendment restored Prosperity's majority of ownership of the condominium units in the complex. Prosperity was responsible for selling the units to the owners.

[6] In June 2011, the Condominium retained Coulter Building Consultants ("Coulter") to conduct a performance audit on the common elements. Coulter concluded that the weeping tiles that were installed on all four sides of each block of units had been infiltrated in varying degrees by silt because it was not properly designed for the soil conditions on the property.

[7] The Condominium notified Prosperity of the deficiencies in the weeping tile system. Initially, Prosperity refused to take steps to rectify the deficiencies. The board of directors authorized the Condominium's lawyers to file warranty claims with Tarion, but there was no warranty coverage for 25 of the 33 units.

[8] Upon being advised through the Coulter letters that there was "water leaks/penetration", Prosperity retained a firm of consulting engineers, EXP Services Inc., ("EXP") and it requested a proposal for the review of the foundation wall drainage system, reported the claim to its insurer and obtained an investigation report from EXP on or around November 4, 2011. Initially, EXP, agreed with the Condominium's engineers that a complete replacement of the weeping tile system was "the best technical solution" compared to any other solution that would "only be a short term measure". Eight months later, EXP modified its opinion and provided a scope of work for the 3-sided solution. EXP then indicated that a 4-sided solution was "not recommended" because of limited access to the front of the units since there was landscaping and garages at the front of the units. Prosperity argues that it was not provided with any reasonable opportunity to repair the leaks.

[9] In November 2011, the Condominium initiated an action against Prosperity and six other defendants for damages resulting from the deficiencies in the weeping tile system. The Condominium sought damages of $750,000 alleging negligence arising from building construction resulting in "water entry" and "leaks". There is a dispute as to whether there was, in fact, any "flooding".

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[10] The Condominium's engineers have maintained that the weeping tile system installed by Prosperity is defective on all four sides of the units. They have indicated that the 3-sided solution proposed by Prosperity is a "compromise solution", and does not meet the "requirements of the Ontario Building Code, and it has a "high probability of failure" over the coming years. Prosperity's engineers continue to recommend a 4-sided solution. The parties engaged in much discussion and posturing as to the appropriate approach, cost and manner of remediation of the problem.

[11] On July 23, 2013, the Condominium held its Annual General Meeting. Engineers attended on both sides to speak about foundation wall drainage issues. Greg Brophey, President of Prosperity also attended the meeting as Prosperity still retained ownership of 19 units representing 57% of the total number of units in the Condominium. Subsequently, a motion was brought seeking unit owner approval to borrow $500,000 to pay for the drainage repair that had been recommended by the Condominium's engineering consultant. Prosperity cast its 19 votes as unit owner against the borrowing by-law.

Position of the Parties:

Propserity/Moving Party:

[12] Prosperity submits that there is no limitation period applicable in this case. Prosperity argues that the defence of laches, acquiescence and estoppels cannot shield the condominium corporation from being required to call a meeting of unit owners. Prosperity submits that it is entitled, as declarant and majority unit owner, to call for the meeting pursuant to s. 152(6) of the *Act*. The Condominium is obliged to obey the statute notwithstanding Prosperity's January 2014 requisition of a meeting of the unit holders pursuant to s. 46(1) of the *Act*.

The Condominium/Responding Party:

[13] The Condominium submits that Prosperity's request for a meeting of the owners is statute-barred by the *Limitations Act, 2002,* S.O. 2002, c. 24 Sched. B *("Limitations Act 2002").* The condominium was created on December 28th, 2006. The final phase was added on March 8, 2011 and Prosperity became the majority owner of the units. Prosperity's right to demand a meeting of the owners under s. 152(6) of the *Act*, commenced on April 8, 2011. Greg Brophey, Prosperity's principal, attended the annual general meetings in June 2011, May 2012, and July 2013. His ability to demand a meeting under s. 152(6) was discussed at these meetings. He knew or ought to have known that Prosperity could call a meeting of the owners to elect new directors by June 2011 and yet

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he did not request the s. 152(6) meeting until two years later on November 26, 2013. Prosperity did not commence its application or bring this motion to enforce its statutory right until January 2014.

[14] The Condominium submits that the proceeding was commenced almost three years after Prosperity became the majority owner. The only reason Prosperity is seeking the meeting now is to elect a "Prosperity Board' so it can terminate the litigation between the parties on terms that are favourable to it.

[15] The Condominium denies that it has failed to provide the records requested by Prosperity.

[16] In sum, the Condominium submits that Prosperity's right to demand a meeting of owners is statute-barred by the *Limitations Act, 2002*, should not be recognized for equitable reasons, or is further evidence of its oppressive conduct and therefore the relief sought should not be granted.

Legal Principles:

[17] A condominium corporation is "a creature of statute" and its authority is set out in the *Act*.

[18] Section 152(6) of the *Act* provides:

> If, 30 days after the registration of the amendments to the declaration and description required for creating a phase, the declarant owns a majority of the units in the corporation, the board shall, at the request of the declarant, call a meeting of owners to elect a new board which shall hold office until a board is elected as required by subsection 43(1).

[19] Section 1 of the *Limitations Act, 2002* defines "claim" as:

> "claim" means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission.

[20] The basic limitation period for claims in Ontario is as set out in ss. 4 and 5 of the *Limitations Act, 2002*:

> 4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.
>
> 5. (1) A claim is discovered on the earlier of,

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(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

(3) For the purposes of subclause (1)(a)(i), the day on which injury, loss or damage occurs in relation to a demand obligation is the first day on which there is a failure to perform the obligation, once a demand for the performance is made.

(4) Subsection (3) applies in respect of every demand obligation created on or after January 1, 2004.

Discussion:

[21] As mentioned, this is a motion brought by Prosperity in its capacity as declarant of the condominium for an order that the Condominium call and hold a meeting of owners to elect a new board of directors pursuant to s. 152(6).

[22] I am advised that there has been no previous judicial interpretation of this section in the *Act* in Ontario with respect to the majority declarant's ability to call a meeting after the lapse of two years, nor as to whether the *Limitations Act 2002* or other estoppel principles are applicable.

[23] The Condominium submits that Prosperity's request for a meeting of the owners to elect new directors is a "claim" within the *Limitations Act*, 2002. It is no different than any other claim to enforce a statutory right or duty. It argues that the courts have held that limitation periods apply to proceedings brought to

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enforce statutory rights, including rights under the *Employment Standards Act, Business Corporations Act, Excise Tax Act,* and *Arthur Wishart Act (Franchise Disclosure),* 2000.

[24] Prosperity submits that the term "claim" does not apply to its request for a meeting of the owners to elect a new board as it is not pertaining to an "injury, loss or damage". Therefore, the *Limitations Act, 2002*, does not apply.

Does the declarant's request for a meeting under s. 152(6) of the *Condominium Act*, constitute a "claim" for the purpose of applicability of the *Limitations Act, 2002*?

[25] Since 2004, the limitations landscape in Ontario has changed dramatically. The new *Limitations Act, 2002* seems to be intended as a complete scheme encompassing all claims, whether they are statutory, common law, or equitable causes of action. The history of the legislative reform, starting in 1969 with the Ontario Law Reform Commission, continuing with ministry discussion papers, including the very brief debate in the Legislature in 2002, and ending in the language of the *Limitations Act*, 2002 itself, all indicates this intention.

[26] As indicated, s. 1 of the *Limitations Act 2002* defines a claim as "a claim to remedy an injury, loss or damage that occurred as a result of an act or omission". It appears that the vague definition of "claim" in s. 1 has seen little treatment in the case law as to its actual meaning. The majority of the cases simply treat the definition of "claim" in passing as met. The issue in most cases becomes the discoverability of the claim as laid out in the *Limitations Act 2002* under s. 5.

[27] However, a few cases and commentaries are worth pointing out. In *Guillemette v. Doucet*, 2007 ONCA 743, the Court understandably, found a client's request for an assessment to be conducted to be a "claim" to which the *Limitations Act 2002* applied, absent "special circumstances" as regards the *Solicitors Act,* R.S.O. 1990, c. S.15.

[28] In *Markel Insurance Co. of Canada v. ING Insurance Co. of Canada; Federation Insurance Co. of Canada v. Kingsway General Insurance Co.,* 2012 ONCA 218, the Court of Appeal confirmed that the *Limitations Act 2002* indeed applies to loss-transfer claims in that such claims fall within s. 1 ("loss").

[29] In *McConnell v. Huxtable*, 2013 ONSC 948, aff'd 2014 ONCA 86, the Superior Court reaffirmed that all claims under statute, equity, or the common law fall within the s. 1 definition of "claim" since it is "extremely broad" (see paras. 22, 71-72, 102). Such an interpretation was not possible under the old regime.

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[30] Since the coming into force of the *Limitations Act 2002* in 2004, there is a line of cases to the effect that a "claim" under s. 1 does not distinguish between a claim based in equity or one under the common law: *Schneider v. State Farm Mutual Automobile Insurance Co.,* 2010 ONSC 4734; *Bouchan v. Slipacoff,* 2010 ONSC 2693, at para. 9.

[31] In *Pirani v. Karmali*, 2012 ONSC 1647, Perell J. stated at para. 49: "If one, however, turns to the *Limitations Act, 2002*, it is arguable that unjust enrichment claims, constructive trust claims, knowing receipt, and knowing assistance claims come within the definition of 'claim' under the *Limitations Act, 2002."*

[32] In *Temple (Re),* 2012 ONSC 376, at para. 14, Newbould J. stated: "I do not think it can reasonably be said that a bankruptcy application is a proceeding in respect of a claim to remedy an injury, loss or damage that occurred as a result of an act or omission. Thus the *Limitations Act, 2002* is not applicable to a bankruptcy application." At para. 29, Newbould J. held: "Moreover, the fact that no suit has been brought on a debt owing to the applicant within two years of the date of the bankruptcy application is no defence to a bankruptcy application based on that debt as the debt continues to be owed."

[33] The Ontario Bar Association's *The New Ontario Limitations Regime: Exposition and Analysis* (Toronto: OBA, 2005), drew special attention to interpretive problems as regards "claim" under s. 1 when commercial loans are at issue: at p. 4 it stated "While an event of default under a credit agreement (or other loan document) will constitute an 'act or omission', not all events of default will automatically result in an 'injury, loss or damage'."

[34] In *Bell Canada Inc. v. White Admiral Ltd.*, 2011 ONSC 5857, Bell purchased and registered an easement over land on which it installed electrical instruments. The land was purchased by White Admiral and Bell sought a declaration that the easement was valid and an order directing the land registrar to rectify the registration. Justice Hambly of this court stated at para. 13: "Bell has suffered no 'injury loss or damage' for which it claims relief against White Admiral. ... In my view the *Limitations Act* does not apply."

[35] In *Toronto Standard Condominium Corp. No. 1703 v. 1 King West Inc.*, [2009] O.J. No. 4216 (S.C.–Master), it was disputed as to whether a "claim" in the legal sense was being pursued. When affirming that decision, the Divisional Court (2010 ONSC 2129) held at para. 28 that "Unlike an 'action on the case' it is not essential that a 'claim' under s. 1 of the Act 'sound in damages' or 'create a legal duty, the breach of which gives rise to a cause of action.'" It affirmed that

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there is indeed a distinction between a cause of action and a "claim" as found in the new *Limitations Act 2002*.

[36] In *Desmoulin v. Paul*, [2009] O.J. No. 1722 (S.C.), Smith J. stated at para 22: "[T]he limitation periods in the *Limitations Act* apply to claims to remedy an 'injury, loss or damage' that occurred as a result of an act or omission (s. 1). A claim for spousal support is not such a claim."

[37] Finally, the Court of Appeal in *Meady v. Greyhound Canada Transportation Corp.*, 2008 ONCA 468 stated at para. 11, that the definition of "claim" under s. 1 "focuses on particular acts or omissions, even if more than one act or omission by more than one party contributed to the same injury." At para. 29 of *Hare v. Hare*, [2006] O.J. No. 4955 (C.A.), the Court of Appeal remarked at how "[t]he language of the new *Limitations Act* is very different from that of the former *Limitations Act*" when s. 1 is of concern.

[38] Clearly, the definition of "claim" in s. 1 is extremely broad – "a claim to remedy an injury, loss or damage that occurred as a result of an act or omission". The courts have repeatedly stated that the *Limitations Act, 2002*, is a "comprehensive approach to the limitation of actions." The aim is to "balance the right of claimants to sue with the right of defendants to have some certainty and finality in managing their affairs": *York Condominium Corp No. 382 v. Jay-M Holdings Ltd.* (2007) 84 O.R. (3d) 414 (C.A.), at para 2. There is no longer an extension of a limitation period by the application of any common law doctrine. Thus, the phrase "injury, loss or damage" is not to be as narrowly construed as Prosperity suggests. The statutory scheme in the *Limitations Act, 2002*, is comprehensive and intended to encompass all claims that are not expressly removed from its application.

[39] Considering all of the above, as a matter of statutory interpretation, I conclude that Prosperity's request as the declarant for a meeting under s. 152(6) of the *Act*, is not a "claim" in the legal sense as defined under the *Limitations Act 2002*, despite the intended broad interpretation of s. 1. It cannot reasonably be said that Prosperity's request, to which it is entitled, is a proceeding in respect of a claim to remedy an injury, loss or damage that occurred as a result of an act or omission. There is no remedy being sought against another person in the traditional sense, despite the larger adversarial relationship between the parties.

[40] Section 152(6) does not have a limitation provision. While there are no reported cases with regards to this provision, the only commentary that provides some clarification is found in Professor Audrey Loeb's *The Condominium Act: A User's Manual* (Toronto: Carswell, 2013), at p. 395, which states that s. 152(6)

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means that "The developer is entitled to require the election of a new, developer-controlled board where it still owns the majority of the units (including original and new phase units) 30 days after registration of the new phase, to hold office until the majority of the units are sold and a new board is elected."

[41] The only relevant limitation provision in the *Act* itself appears to be s. 137(3):*Ontario Limitation Periods* (Toronto: Butterworths, 2001), at p. 79. In Professor Loeb's *The Condominium Act: A User's Manual*, at p. 376 it is stated that s. 137(3) "is a two-year limitation period on prosecutions, which runs from the date that the facts which gave rise to an offence are discovered. However, I reject any applicability of s. 137(3) to s. 152(6). Not only is a request under s. 152(6) not a "proceeding" *per se*, but s. 137(3) must be read in tandem with s. 137(1). A plain reading of the legislation provides that s. 137(3) only applies to potentially time-bar claims for *offences* committed in contravention of ss. 151(1) and (2) of the *Act—not* s. 152(6).

[42] As there is no precedent on point for this particular dispute, the modern prevailing view is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Re: Rizzo & Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27, at para. 21. However, as Graeme Mew writes at p. 36 of *The Law of Limitations*, 2d ed. (Toronto: Butterworths, 2004), "Where there is doubt as to the meaning or application of a limitation period, the plaintiff should be given the benefit of such doubt." Despite being the respondent in the actual application, in the current motion the declarant fills the shoes of the "plaintiff" seeking to enforce its right (especially when considering the non-permissive use of "shall" in s. 152(6)) to have the board "call a meeting of owners to elect a new board which shall hold office until a board is elected as required by subsection 43", providing the registration within the 30 days and the other procedural requirements are met.

[43] In endorsing the decision of Quigley J. in the case of *Toronto Common Element Condominium Corporation No. 1508 v. Stasyna,* 2012 ONSC 1504, Broad J. in *Waterloo North Condominium Corp No. 37 v. Silaschi*, [2012] ONSC 5403 stated "the proposition that questions of enforcement and compliance under the *Condominium Act* may be subject to the application of a limitation period is well recognized in the case law" At para. 16 of *Waterloo*, Broad J. goes on to state "[H]owever, as further pointed out by Quigley J. in *Stasyna* at para. 41, the cases that support that proposition do not relate to actions commenced to enforce compliance with the Act itself, but rather with internal governance documents. Where there is a breach of the statute itself, such as here, *the*

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Limitations Act, 2002 can have no application". I agree with my colleague's reference and his assessment of the legal principles.

[44] None of the case law referred to by the Condominium relates to actions to enforce compliance with the statute itself. Most of the cases referred to by the Condominium are all cases that were concerned with the failure of a condominium corporation to seek compliance with its internal governance documents – rather than the statute.

[45] I find that no statutory limitation, nor the *Limitations Act, 2002* apply to the right for the majority declarant to call a meeting pursuant to s. 152(6) of the *Act,* to elect a new board that shall hold office until a board is elected as required by s. 43(1). The wording of the *Act* demonstrates that the declarant's current request for a meeting to be called is a statutory right and cannot be time-barred.

Does the declarant's request for a meeting by way of a motion constitute a request for a "declaration" where "no consequential relief is sought"?

[46] During the course of oral submissions, the issue of whether Prosperity was actually seeking declaratory relief was canvassed. As a result of argument, the parties were invited to provide supplemental written submissions on the issue.

[47] Section 16(1)(a) of the *Limitations Act, 2002*, provides that no limitation period is applicable in a "proceeding for a declaration if no consequential relief is sought": *Thomas Gold Pettingill LLP v. Ani-Wall Concrete Forming Inc.*, 2013 ONSC 2182, at para. 97; *Pirani* at para. 34.

[48] I note that in any event, if the indicated procedural requirements are met, a declarant has the option of having the board call a meeting under s. 152(6), which the board then "shall" do if requested. However, the moving declarant here concedes at para. 1 of its factum that it is requesting "an order that the condominium corporation call and hold a meeting of owners to elect a new Board of Directors"; the respondent reiterates that the declarant is requesting an "order" at para. 5 of its supplementary submissions. Accordingly, on the face of the pleadings, it appears that a declaration is *not* being sought, which therefore notionally serves to dismiss outright the s. 16(1)(a) concerns.

[49] However, I find it odd that the declarant is requesting this Court to "order" the meeting to take place, considering doing so essentially strips its right to have the meeting called in its capacity as the declarant if its sees fit. It seems more logical that the declarant could seek a "declaration" to the effect that the request for the meeting is not a "claim" *per se* and therefore not subject to a time-bar,

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which would still serve to render the meeting permitted at the declarant's request, again, if it saw fit. Therefore, despite the parties' submissions, in my view it appears that declaratory relief would be the proper remedy here—but it does not look like that is the course being pursued by Prosperity.

[50] In any event, quick recourse should be had to how "declaration" is defined for the purpose of s. 16(1)(a) of the *Limitations Act, 2002*.

[51] There is no definition of "declaration" under the *Limitations Act, 2002*, but there are some cases considering s. 16(1)(a) that are helpful to highlight the distinction between declaratory and remedial relief. In *799168 Ontario Ltd. v. 1797066 Ontario Inc.*, 2013 ONSC 5557, at para. 26, Gilmore J. noted as regards s. 16(1)(a) that the plaintiffs submitted they were seeking "declaratory relief because they are simply asking the court to pronounce on a legal relationship, but do not seek any order which can be enforced against the defendant. No further legal proceedings are required to implement the declaration as the funds are held in trust and can be distributed without further legal proceeding or intervention of the court." The court eventually referenced extra-provincial appellate authority holding at para 43 that "the test for determining whether a remedy was declaratory or remedial should be viewed in the context of whether or not the plaintiff could enjoy the benefits of the declaration without further resort to the judicial process."

[52] Further, whether the meeting being held could be considered "consequential relief" is another interpretive issue that must be settled, and some case law examples are pertinent as to how this has been defined. "Consequential relief" has been held to mean "relief that has consequences": *799168 Ontario Ltd. v. 1797066 Ontario Inc.*, noted above, at para. 26, referencing Master Glustein in *Toronto Standard Condominium Corp. No. 1703*, at para. 117, aff'd 2010 ONSC 2129 (Div. Ct.).

[53] In *Kenzie v. Kenzie*, 2011 ONCA 53, at paras. 1-2, the Court of Appeal stated: "The appellant argues that he is entitled to declaratory relief, and that under s. 16(1)(a) of the *Limitations Act*, there is no limitation period barring his application. We do not agree with the appellant's argument. ... Implicit, if not explicit, in the appellant's application is his intent to seek a finding or findings that would be *res judicata* in other proceedings. In our view, that is consequential relief, which takes the appellant's application out of s. 16(1)(a) of the *Limitations Act*. Therefore, we agree with the application judge that this application as framed on this record is statute barred."

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[54] In *Bailey v. Canada (Attorney General)*, [2008] O.J. No. 4066 (S.C.), an application was brought for a declaration essentially challenging the validity of a property transaction. Justice Harvison Young stated at para. 13: "First, this is an application for declaratory relief without any consequential relief. ... the remedy is a discretionary one. If a declaration without consequential relief is available, it would not be statute barred under s. 16(1)(a) of the *Limitations Act*." But absent s. 16(1)(a), the limitation period for a direct attack on the property transaction had long expired. Harvison Young J. stated at para. 15: "In essence, a declaration would be moot, as no direct recourse would be available because of the passage of the limitation period." And at para. 16: "Second, and related to the first point, if the declaration were not moot, it could only issue in such a way as to provide relief of a remedial nature, bringing it outside of s. 16(1)(a) of the *Limitations Act*, and rendering it statute barred."

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[55] Considering my views on the principle question posed in this motion, I need only address this point briefly. I find it difficult to accept that the current motion is a "proceeding for a declaration if no consequential relief is sought", and therefore cannot accept that it would be immune from a limitation period as result of s. 16(1)(a). Even the moving party concedes that the relief sought is an order as opposed to a declaration; and even if the declarant was to reconstitute the relief sought as declaratory relief, it does appear that a declaration would be directly "consequential" in this case with the ominous cloud of litigation looming overhead, in that the meeting would most likely replace the board, and directly impact the action. I cannot consider this point without due regard to the totality of circumstances.

Does the application of estoppel principles apply in this case?

[56] The Condominium submits that Prosperity is precluded from requesting the meeting of owners because of the doctrine of laches. Greg Brophey was in attendance at every annual general meeting of the owners and he participated in those meetings and used his majority ownership to vote for directors. At no time did he indicate that he was dissatisfied with that process. The Condominium argues that Prosperity's ability to request the meeting was discussed at those meetings. It is submitted that the other owners were led to believe that Prosperity was satisfied with the governance of the property according to an arrangement with Greg Brophey. As a result, the directors did not call a meeting of the owners to elect new directors.

[57] The Condominium further submits that it would be unjust to grant Prosperity's request for the meeting at this juncture. Prosperity has acknowledged that its main reason for requesting the meeting at this juncture is

so that it can make the repairs to the weeping tile that it deems appropriate. It is an attempt to avoid the consequences of its negligence and frustrate the Condominium's attempt to recover damages for that negligence in the Action commenced against it. There is no guarantee that Prosperity will not have the Action dismissed or otherwise resolved on terms that are favourable to it and detrimental to the other unit owners. The 3-sided solution is not a full repair and will only lead to further problems for the unit owners in the future, once Prosperity has sold its units and moved on.

[58] It is not lost on me as to the impetus and driving forces behind Prosperity's request for a s. 152(6) meeting. Effectively, Prosperity wants to oust the current members of the board of directors in favour of replacing them with their own representatives who would likely be favourable to its position with respect to the remediation work required and the ongoing litigation.

[59] In *Stasyna* the respondent raised the issue of laches and acquiescence in response to the condominium's delay in enforcing the provisions of the *Act* against unit owners. Quigley J. considered the equitable defences raised by the respondent owners, including the doctrine of laches. He found that the facts did not support an equitable defence based upon the facts. I reach a similar conclusion in this case.

[60] On my review of the equitable principles applied to the circumstances of this case, I do not find any juridical reason why the majority declarant cannot call a meeting pursuant to s. 152(6). I do not find that Prosperity acted in a manner to delay their statutory entitlements or acquiesced in foregoing their rights.

[61] In the alternative, the Condominium seeks an oppression remedy to sustain their opposition to the relief sought here. Section 135 of the *Act* permits an owner, corporation, declarant or mortgagee to commence an application to the court for an order that the conduct of an owner, corporation, declarant or mortgagee of a unit is or threatens to be oppressive, unfairly prejudicial to the applicant, or unfairly disregards the interests of the applicant. The court may make "any order the judge deems proper", including an order prohibiting the conduct referred to in the application.

[62] The Condominium submits that this motion is a further example of the oppressive conduct of Prosperity toward the other unit owners. Greg Brophey acknowledged during his discovery examination that if the meeting is held he intends to elect directors to the board who will carry out his 3-sided solution. Once elected, it is argued that those directors could do irreparable harm to the other unit owners and the condominium as a whole. They could settle with

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Prosperity on whatever terms they deem appropriate. They could charge all of the costs back to the other unit owners. It is obvious that a significant conflict of interest will exist if Prosperity is able to control the Condominium's board. In response Prosperity submits that they will effect the 3-sided remediation with the provision of a five-year warranty and stay – not seek dismissal of the action.

[63] The test for oppression has two parts. The claimant must demonstrate that there has been a breach of its reasonable expectations and that the conduct complained of amounts to "oppression", or "unfair disregard" for the reasonable expectations of the claimant.

[64] Indeed, current members of the Board may be replaced, litigation may be stayed, and remediation efforts may proceed against the wishes of the minority. Nevertheless, while I am not adjudicating on the merits of the main action, I am not satisfied on the material filed that such control will result in further conduct that is oppressive, unfairly prejudicial, and disregards the other unit owners.

[65] Lastly, the Condominium claims that it has produced all of the records requested by Prosperity that it is required to produce. The Condominium has indicated that it will provide further copies of the audited financial statements, which were previously provided to Prosperity, upon payment of a reasonable fee for labour and copying charges. All of the minutes of meetings have been provided. Portions were redacted for legitimate reasons, predominantly pursuant to s. 55(4)(b) as records relating to actual or pending litigation involving the corporation. Understandably, much of the discussion at meetings revolves around the action against Prosperity. Some of the discussion contains privileged discussions with the Condominium's solicitors. Solicitor-client privilege is claimed over all portions redacted in the minutes. Thus, I do not see any justification at this stage of the action for disclosure of the privileged or un-redacted records.

Conclusion:

[66] The request for the s. 152(6) meeting ought not be an occasion for which a court proceeding should be necessary; in other words, the declarant should not have been forced to come to court in order to have the meeting called. As such, I disagree with the Condominium's contention that the request for the meeting in the current motion is like any other "claim" to enforce a statutory right. Accordingly, in my opinion there is no statutory or estoppel limitation in effect to bar the declarant's request for the s. 152(6) meeting.

[67] For all the aforementioned reasons, Prosperity's motion is granted in part. It is ordered that a meeting pursuant to s. 152(6) of the *Act* shall be called at the

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request of the moving party declarant no earlier than 30 days from the release of this decision.

[68] Prosperity's request for disclosure of records held by the Condominium as set out in the motion materials is denied.

[69] The issues in this case including that of the interplay of the declarant's rights under s. 152(6) of the *Act* and the provisions of the *Limitations Act, 2002,* other statutory provisions, or estoppel principles is novel. Given that there has been no previous judicial consideration of this particular issue, and considering the circumstances and relationship of the parties to this motion, it is my view that each side should bear its own costs.

"A. J. Goodman"

A.J. Goodman J.

Dated: February 28, 2014

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