CITATION: Wentworth Condominium Corporation No. 198 v. McMahon, 2009 ONCA 870
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COURT OF APPEAL FOR ONTARIO

Goudge, MacPherson and Blair JJ.A.

BETWEEN:

Wentworth Condominium Corporation No. 198

Applicant (Appellant)

and

Jim McMahon

Respondent (Respondent in Appeal)

Erik Savas, for the appellant

Harvin Pitch and Daniel Resnick, for the respondent

Heard: November 10, 2009

On appeal from the judgment of Justice J.R. Henderson of the Superior Court of Justice dated March 10, 2009.

MacPherson J.A.:

A. INTRODUCTION

[1] The essential feature of a condominium corporation is its mix of private residential units and common space. In the *Condominium Act*, S.O. 1998, c. 19, s. 1(1), the common space is called "common elements" which means "all the property except the units".

[2] Typically, the common elements of a condominium corporation are divided into two categories – areas which can be used by all of the owners (for example, lobbies, driveways, garages and guest facilities) and areas reserved for the use of only one owner (for example, the patio or lawn area immediately contiguous to a unit).

[3] Section 98(1) of the *Condominium Act* requires that an owner obtain the approval of the condominium corporation's board of directors if the owner seeks to "make an addition, alteration or improvement to the common elements" of the corporation. The respondent, Jim McMahon ("McMahon"), the owner of a unit in the appellant condominium corporation, installed a hot tub on his backyard patio. He did not obtain the approval of the appellant's board. The appellant brought an application seeking the removal of the hot tub.

[4] The application judge agreed with McMahon. Justice Henderson concluded that a hot tub was not an addition, alteration or improvement within the meaning of s. 98(1) of the *Condominium Act.* The correctness of this interpretation is the principal issue posed by this appeal.

B. FACTS

(1) The parties and events

[5] The appellant, Wentworth Condominium Corporation No. 198, is a condominium corporation located in Waterdown and is comprised of 31 town-house style residential condominium units.

[6] The respondent, Jim McMahon, is a 73-year-old retiree who has owned unit 27 since 2001.

[7] Each unit in the condominium complex contains a back yard that forms part of the common elements of the corporation. Each owner has exclusive use of their common element back yard.

[8] In late 2007, McMahon applied for approval from the board of directors to install a hot tub on his back patio. The board did not grant the approval.

[9] On December 7, 2007, McMahon installed a hot tub on the back patio. The hot tub is six feet wide, seven feet long and four feet high. It is a one-piece unit that weighs about 300 lbs. without any water in it. It was installed by two delivery men. It is filled by a garden hose and holds 1000 litres of water weighing 1000 kilograms. The hot tub occupies about 25 per cent of the common element back yard of unit 27.

[10] The hot tub is hard-wired to unit 27. A three-wire electrical cable was installed that runs from the electrical panel located in McMahon's basement and outside to the hot tub, where it is connected to the hot tub with three screws.

(2) The application

[11] The condominium corporation made an application seeking, *inter alia*, the permanent removal of the hot tub. The application judge considered the matter in the context of s. 98(1) of the *Condominium Act*. He reviewed relevant case law and dictionary definitions of "add", "alter" and "improve". This led him to define the pivotal words of s. 98(1) in this fashion:

> Therefore, I find that the word "addition" means something that is joined or connected to a structure, and the word "alteration" means something that changes the structure.
>
> I find that the word "improvement" means the betterment of the property or enhancement of the value of the property. I also accept that an "improvement" refers to an improvement or betterment *of the property*. That is, to be an improvement there must be an increase in the value of the property. If the item increases the enjoyment of the property, but does not increase the value of the property, I find that the item is not an improvement. [Emphasis in original.]

[12] Applying these definitions to McMahon's hot tub, the application judge reached these conclusions:

> The hot tub is not an addition as it is not something that sensibly can be seen as being joined to or connected to the structure. It is connected by an electrical cable, but the

> purpose of the electrical cable is to supply power to the hot tub, not to fix the hot tub to the structure. Furthermore, even though it may take a half-hour and two men to move, the hot tub is still designed to be removed from the property. It is not a permanent fixture on the property.
>
> The hot tub is not an alteration as it does not change the structure of the property. The hot tub may alter the landscape, but any such alteration does not cause any permanent change to the structure.
>
> The hot tub is not an improvement as it does not increase the value of the condominium unit. It is not a fixture that is so attached to the property that it becomes a part of the property. Thus, it cannot increase the value of the property.

[13] Accordingly, the application judge concluded that "McMahon does not require the approval of the board to place the hot tub in the exclusive use common element area on his patio." He dismissed the condominium corporation's application.

[14] The condominium corporation appeals.

C. ISSUES

[15] The appellant raises three issues:[1]

(1) Did the application judge err in his interpretation of s. 98(1) of the *Condominium Act*?

[1] In its factum, the appellant raised a fourth issue – the application judge's costs award of $3400 to the respondent. The appellant, appropriately, did not pursue this issue at the appeal hearing.

(2) Did the application judge err by not determining that the installation of the hot tub contravened s. 8(d) of the corporation's Declaration?

(3) Did the application judge err by not determining that the installation of the hot tub contravened ss. 116 and 117 of the *Condominium Act*?

D. ANALYSIS

(1) Section 98(1) of the *Condominium Act*

[16] This is the principal issue in this appeal.

[17] Section 98(1) of the *Condominium Act* provides:

> 98.(1) An owner may make an addition, alteration or improvement to the common elements that is not contrary to this Act or the declaration if,
>
> > (a) the board, by resolution, has approved the proposed addition, alteration or improvement;....

[18] The application judge concluded that the hot tub was not an addition, alteration or improvement within the meaning of this section. The appellant contends that his interpretation is flawed for three reasons.

[19] First, the appellant submits that the application judge did not apply the grammatical and ordinary sense of the words "addition", "alteration" and "improvement".

[20] I disagree. The application judge's starting point for determining the meaning of these words was the dictionary. In my view, this is precisely where he should have started. Indeed, this is where Cory J.A. started his analysis when he had to define the words "maintenance" and "repair" in a previous version of the *Condominium Act*: see *York Condominium Corp. No. 59 v. York Condominium Corp. No. 87* (1983), 42 O.R. (2d) 337 (C.A.), at p. 341.

[21] Second, the appellant contends that the words "addition", "alteration" and "improvement", at least as they are used in s. 98(1) of the *Act*, have a shared or common meaning – namely, a change of the original condition of some physical thing or matter. As expressed in its factum: "If one adds some thing to another thing or matter, the pre-existing condition of the latter is changed. If one alters some thing or matter, the pre-existing condition of the latter is changed. If one improves some thing or matter, the pre-existing condition of the latter is changed." The application judge, says the appellant, should have concluded that the legislature likely intended by its use of the words "addition", "alteration" and "improvement" to signal that any act of an owner that changes the pre-existing condition of the common elements of the condominium property requires the consent of the board of directors.

[22] The application judge rejected this submission, saying that "each of the three words has a separate and distinct meaning." I agree. In my view, the differences are readily apparent from the dictionary definitions cited by the application judge. An addition

builds on or supplements what is already there. An alteration can add to or subtract from what is already there. And an improvement introduces a qualitative factor into the analysis, one not required by the words "addition" and "alteration".

[23] There is another and, in my view, crucial flaw in the appellant's attempt to lump together the three words in s. 98(1) of the *Act.* The equation of "addition", "alteration" and "improvement" with "change" creates a result that is far too broad. Barbecues, picnic tables, small inflatable swimming pools, children's toys and thousands of other ordinary articles that are regularly found on backyard patios would constitute "changes" to the common elements of the condominium property under the appellant's definition because they would "make different the pre-existing condition of the common elements".

[24] Indeed the barbecue analogy relied on by the respondent strikes me as particularly apt. Both the barbecue and the hot tub are placed somewhere on the patio stones. Both are connected in a limited sense to the condominium unit, the barbecue by a gas line and the hot tub by an electrical cable. Yet, as the application judge observed, the condominium corporation has not required any owner to seek approval to install a barbecue on the patio common elements of the condominium property.

[25] The appellant's third submission is that the application judge did not examine the *Condominium Act* as a whole. If he had done this, says the appellant, he would have recognized that the Act focuses on the integrity and condition of the common elements

and that these have primacy over what the appellant calls "the whims of the individual owners to use them or change them as they might desire."

[26] I do not accept this submission. The application judge did not limit his analysis to just the dictionary definitions of the words "addition", "alteration" and "improvement". Rather, he stated that "I must expand on each definition because each of the three key words in s. 98 must be interpreted in the context of the condominium property."

[27] It is true that the integrity of the common elements of a condominium complex is an important feature of the structure and content of the *Condominium Act*. However, an equally important feature of the *Act* is the rights of the owners. This twin focus of the *Act* was well-described by Finlayson J.A. of this court in *Re Carleton Condominium Corp. No. 279 and Rochon et al.* (1987), 59 O.R. (2d) 545 at 549-50:

> The *Condominium Act* was passed to permit individuals to be owners of the freehold estate in residential units in a building as opposed to tenants in an apartment building. This means that they have disposable real property which is an investment and not simply an expense. Its purchase can be financed by mortgage or lien in the same manner as any piece of real estate. The unit owners are tenants in common and have all the rights of any owner of land within the description of their unit (s. 1(1)(*q*) and (*z*)). By the nature of the building, there are certain "common elements" which are defined by s. 1(1)(*g*) as "all the property except the units". It is therefore necessary that there be detailed agreements with respect to the maintenance, operation and occupation of these common elements so that the responsibilities and privileges of each unit owner are clearly established.

[28] In my view, the application judge's interpretation of s. 98(1) of the *Act* strikes an appropriate balance between the rights of individual owners and the rights of the owners collectively speaking through their board of directors. The appellant's definition of the three key words of s. 98(1), anchored in the shared thread of "change" is, as discussed above, both semantically unpersuasive and overly broad. The application judge's interpretation, linking "addition" and "alteration" to connections or changes to the structure of the condominium unit and linking "improvement" to bettering the value, not just the enjoyment, of the property, strikes me as a balanced interpretation of the provision consistent with this court's description of the *Act* in *Rochon*.

[29] That is not to say that the application judge's definition of "addition", alteration" and "improvement" can resolve every case where a s. 98(1) issue arises. Indeed, the application judge recognized this: "I note that it is possible for a large freestanding item to become an addition, alteration or improvement if it were so large and so difficult to move that it becomes a permanent part of the property, but that is not the case here."

[30] In my view, the application judge's definitions of the three key words in s. 98(1) of the *Act* provide a valuable starting point that should focus the inquiry and resolve most cases. It resolves this case – both visually and legally, the hot tub is similar to the barbecue and picnic table. If the approval of the board of directors is not required for the barbecue and picnic table, then it should not be required for the hot tub.

[31] However, there will be cases where the application judge's definition will not work. The size and difficulty of moving an object, as mentioned by the application judge, might lead to a different result. To this I would add the possibility that a qualitative assessment of an object an owner might want to place on the patio might also lead to a different result – for example, an owner could not hope to store scores of disused and ugly tires, or ugly rusting equipment or vehicles, or a giant ugly billboard of the New York Yankees World Series team on his patio without obtaining the approval of the board of directors of the condominium corporation.

[32] In the end, each case will have to be decided on its own facts. For now, though, I would say that the application judge's interpretation of the key words of s. 98(1) of the *Condominium Act* is a good one. It will resolve most, but not all, cases. It resolves this case.

(2) Section 8(d) of the condominium corporation's Declaration

[33] The appellant contends that the application judge erred in not finding that the installation of the hot tub was contrary to s. 8(d) of the corporation's Declaration, which provides:

> 8(d) No owner shall make any structural change or alteration in or to his unit including the removal and installation of toilet, bath tub, wash basin, sink, heating, air condition, plumbing or electrical installation contained in or part or his unit; or alter the exterior design or colour of part of his unit where such change, alteration, decoration or painting

> is normally visible from the exterior thereof or make any change to an installation upon the common elements, or maintain, decorate, alter or repair any part of the common elements, except for the maintenance of those parts of the common elements which he has the duty to maintain without the prior consent in writing of the Board, which may attach any reasonable condition to its consent or which may in its discretion withhold its consent.

[34] The appellant submits that the installation of the hot tub was contrary to s. 8(d) of the Declaration in two respects: first, it caused an alteration of an electrical installation contained in McMahon's unit by hard-wiring the hot tub to the electrical panel in his basement; and second, it caused an alteration to his common element back yard.

[35] The application judge did not discuss this issue in his reasons. I suspect that is because the first argument was almost invisible at the hearing (it appears to have been mentioned only in a footnote in paragraph 71 of the appellant's factum) and because the second issue, anchored in the word "alteration", traversed the same ground as the *Condominium Act* s. 98(1) issue.

[36] In any event, I do not accept the appellant's submissions on this issue. There is insufficient evidence to determine whether the very minor electrical adjustment necessary to hook up the hot tub amounts to a "structural change or alteration" of the electrical system in the unit. Moreover, the evidence was that barbecues are permitted, without the approval of the board of directors, in the condominium complex. Some of the barbecues would require minor adjustments to the unit to connect the gas line. I do not see a difference between this permitted alteration and the alteration required to hook up the hot

tub. Finally, with respect to the appellant's second argument on this issue, I see no reason to interpret the phrase "alter ...any part of the common elements" in s. 8(d) of the Declaration different from the phrase "alteration ...to the common elements" in s. 98(1) of the *Condominium Act.*

[37] I make one other comment on this issue. There is, potentially, a different route open to a condominium corporation to make some of the difficult balancing choices in a condominium complex. Section 58(1) of the *Condominium Act* provides:

> 58.(1) The board may make, amend or repeal rules respecting the use of common elements and units to,
>
> > (a) promote the safety, security or welfare of the owners and of the property and assets of the corporation; or
> >
> > (b) prevent unreasonable interference with the use and enjoyment of the common elements, the units or the assets of the corporation.

[38] Acting pursuant to this provision, the appellant has promulgated *Rules and Regulations respecting the Units*. These rules, in their current form, prohibit absolutely, or permit but only with the approval of the board of directors, the placement of a wide variety of items on the common elements of the condominium complex – debris, refuse or garbage; coal or any combustible or offensive goods; motor vehicles (other than a private passenger automobile or station wagon), camper vans, trailers, boats, snowmobiles, mechanical toboggans, machinery or equipment of any kind; buildings,

structures, tents or trailers; bicycles, tricycles, barbecues and toys when not in use; animals, livestock, fowl, birds, insects, reptiles or pets of any kind; fencing or landscaping. Without passing judgment on whether the prohibition of hot tubs from the common elements of a condominium complex would, if challenged, be held to come within s. 58(1) of the *Act*, I simply observe that s. 58(1) and a board of director's rule-making power provide a potential route to strike the desired balance with respect to usage of the common elements of a condominium complex.

(3) Sections 116 and 117 of the *Condominium Act*

[39] The appellant contends that the application judge erred by not concluding that the installation of the hot tub contravened ss. 116 and 117 of the *Condominium Act*, which provide:

> 116. An owner may make reasonable use of the common elements subject to this Act, the declaration, the by-laws and the rules.
>
> 117. No person shall permit a condition to exist or carry on an activity in a unit or in the common elements if the condition or activity is likely to damage the property or cause injury to an individual.

[40] The appellant submits that the installation of McMahon's hot tub was an unreasonable use of the common elements because there were no other hot tubs in the condominium complex. The appellant also submits that the installation was a dangerous

activity because the hot tub was hard-wired to McMahon's electrical panel by a person who was not an electrician.

[41] The application judge did not discuss these submissions in his reasons. Again, I suspect that is because the submissions were almost invisible at the hearing, being raised in a single paragraph with one footnote containing unsubstantiated factual assertions.

[42] In any event, I do not accept the appellant's submissions on this issue. If it is not unreasonable to have barbecues or patio furniture on owners' exclusive use common elements, then there is no reason why a hot tub should be regarded as unreasonable. There is also nothing in the record to support a contention that the installation of McMahon's hot tub created a dangerous condition or activity.

E. DISPOSITION

[43] I would dismiss the appeal.

[44] The parties agreed that the question of costs should be left until the result of the appeal was known. The respondent shall file his costs submission within seven days of the release of these reasons. The appellant shall file its response within a further seven days.

RELEASED: December 9, 2009

"J.C. MacPherson J.A."
"I agree S.T. Goudge J.A."
"I agree R.A. Blair"