2017 ONSC 1372
Ontario Superior Court of Justice

Toronto Standard Condominium Corp. No. 1633 v. Toronto Standard Condominium Corp. No. 1809

2017 CarswellOnt 2860, 2017 ONSC 1372

TORONTO STANDARD CONDOMINIUM CORPORATION NO. 1633 (Applicant) and TORONTO STANDARD CONDOMINIUM CORPORATION NO. 1809 and BAGHAI DEVELOPMENT LIMITED (Respondents)

P.J. Cavanagh J.

Heard: January 26, 2017
Judgment: March 1, 2017
Docket: CV-10-411182

Counsel: Nedko Petkov, for Applicant
Carol A. Dirks, for Respondents

Subject: Civil Practice and Procedure; Property; Restitution

APPLICATION brought by condominium for declaration and order that adjacent condominium was responsible to share permanently costs of operation, maintenance, repair and replacement of shared laneway.

***P.J. Cavanagh J.*:**

P. J. CAVANAGH J.

1 This application came before me as a motion by the Respondent Toronto Standard Condominium Corporation No. 1809 ("TSCC 1809") for an order dismissing the application on various grounds related to allegations of delay on the part of the Applicant Toronto Standard Condominium Corporation No. 1633 ("TSCC 1633") in having the application heard on its merits.

2 At the hearing of this motion, counsel for both parties agreed that they would proceed with the hearing of the application on its merits, to be heard together with the motion brought by 1809 to dismiss the application. The submissions that were made orally were directed to the merits of the application.

3 For the following reasons, the application is dismissed. It is not necessary for me to separately decide the motion brought by TSCC 1809 to dismiss the application for delay.

Nature of Application

4 This application was brought by TSCC 1633 by Notice of Application issued on September 24, 2010 against TSCC 1809 and Baghai Development Limited ("Baghai"). Baghai was the real estate developer in respect of both of the TSCC 1633 and TSCC 1809 condominium developments. The Notice of Application was amended on February 22, 2012 and, under the Amended Notice of Application, additional relief was sought as against Baghai. The application, as against Baghai, has been settled and the application was discontinued against Baghai.

5 In the Amended Notice of Application, TSCC 1633 makes application for a declaration and order that TSCC 1809 is responsible to share permanently the costs of operation, maintenance, repair and replacement of the shared laneway in issue on the application (the "Shared Laneway").

6 The grounds stated in the Amended Notice of Application for the relief sought against TSCC 1809 are:

a. it enjoys the benefit of various easements, but no cost-sharing agreement was ever entered into as intended by the common declarant, Baghai;

b. it has not contributed towards the shared facilities, specifically the costs of operation, maintenance, repair and replacement of the Shared Laneway;

c. it refuses to accept responsibility towards costs related to the Shared Laneway;

d. it is refusing to execute a proposed easement and cost-sharing agreement with TSCC 1633;

e. as the lands in question are owned by TSCC 1633, TSCC 1809 is responsible for 23.3 percent of the cost to maintain and repair the Shared Laneway as per the engineer's opinion;

f. Baghai did not take responsibility for the operation of the shared facilities, but rather left this responsibility to TSCC 1633; and

g. TSCC 1633 relies upon sections 119, 133, 134 and 135 of the *Condominium Act*, *1998* (the "Act").

Background Facts

7 TSCC 1633 and TSCC 1809 are adjacent condominium developments registered by Baghai as the declarant. TSCC 1633 was registered in 2004 and is comprised of two high-rise buildings containing a total of 611 residential dwelling units and 10 retail units. TSCC 1809 was registered in 2006 and is comprised of two buildings containing 179 residential dwelling units and 22 commercial units.

8 The registered declaration which creates TSCC 1633 (the "TSCC 1633 Declaration") and the registered declaration which creates TSCC 1809 (the "TSCC 1809 Declaration") provide that TSCC 1809 has an easement over TSCC 1633's lands for the purpose of vehicular access, ingress and egress to the underground parking garage of TSCC 1809 (the "Easement").

9 Neither the TSCC 1633 Declaration nor the TSCC 1809 Declaration contains a reference to any cost-sharing or cost-sharing agreement to be entered into by the two corporations with respect to the Shared Laneway or the Easement.

10 Any vehicle entering or exiting the underground parking garage for TSCC 1809 must drive over a portion of the Shared Laneway which also services six of TSCC 1633's commercial units, including the visitors parking area for TSCC 1633's commercial units. Residential unit owners of TSCC 1633 do not use the Share Laneway for accessing their underground garage. No part of the Shared Laneway is owned by TSCC 1809.

11 The Disclosure Statement in respect of TSCC 1633 dated March 1, 2002 (the "1633 Disclosure Statement") states that Baghai, the declarant, proposes to develop the property by the construction thereon of either a single phase residential development of two multi-unit high-rise residential buildings and appurtenances, or a multi-phase residential development of two multi-unit high-rise residential buildings and appurtenances. The 1633 Disclosure Statement also discloses that the declarant proposes to construct one or more multi-unit high-rise building(s) and appurtenances adjacent and to the north of the north building of the single phase development (or "Building B" if the development proceeds in more than one phase). The building or buildings to be constructed to the north of the north building or Building B were described in the 1633 Disclosure Agreement as "Building C". Building C became TSCC 1809.

12 The 1633 Disclosure Statement states if the property is developed in more than a single phase, the Costs of Services and Easements shall be shared on specified terms, including that Baghai on its behalf and on behalf of the condominium corporation(s) to be created, shall enter into an "Easement and Cost Sharing Agreement" which shall be binding on

Baghai as the owner of the Building B lands and the Building C lands, and that the Easement and Cost Sharing Agreement shall provide that as a declaration and description is registered on the lands which are the subject of such agreement, thereby creating a condominium corporation under the Act, such newly created corporation shall execute a counter-part of the Easement and Cost Sharing Agreement pursuant to which such corporation shall assume its benefits and burdens under the Easement and Cost Sharing Agreement.

13 The 1633 Disclosure Statement states that the Easement and Cost Sharing Agreement shall describe and convey the various easements over various parts of the property and the Building C lands to the north, including for vehicular access, and shall establish the cost sharing mechanism with respect to the expenses of operating, maintaining and replacing the property of the various condominium corporations, to be used in the manner provided for in the Easement and Cost Sharing Agreement.

14 The Disclosure Statement in respect of TSCC 1809 dated February 9, 2004 (the "1809 Disclosure Statement") states that the property could be developed by the construction of either a single phase development or a multi-phase development (which would involve two corporations, instead of one corporation which would be created if the development proceeds as a single phase development). The 1809 Disclosure Statement states that if the property is developed in more than a single phase, the costs of services and easements shall be shared and that the corporations which have been created shall enter into an "Easement and Cost Sharing Agreement". The 1809 Disclosure Statement makes no reference to any cost-sharing, or any cost sharing agreement, with TSCC 1633 with respect to the Shared Laneway, the Easement, or otherwise.

15 The development that resulted in the creation of TSCC 1633 was not done in more than one phase.

16 No reciprocal agreement or cost-sharing agreement was entered into between TSCC 1809 and TSCC 1633 governing the use and maintenance of the Easement or the Shared Laneway.

17 TSCC 1633 tendered evidence of an engineering report stating that the wear and tear to which the Shared Laneway is subjected is exacerbated by the action of the wheels of vehicles turning into the parking garage which, according to the engineering report, resulted in the shifting of square pavers which, in turn, allowed water to penetrate beneath the laneway surface, washing away screenings and granular material, and shortening the lifespan of the waterproofing membrane which protects the garage roof slab. TSCC 1633 tendered evidence that the Shared Laneway sustained damage for the reasons noted in the engineering report and, as a result, a repair was necessary and TSCC 1633 had the required work done on or about July 9, 2016.

18 On March 1, 2010, TSCC 1633 provided to TSCC 1809 a draft cost-sharing agreement in respect of the Easement and advised that TSCC 1809's share of the costs was 23.3 percent according to an engineer's opinion that had been obtained. TSCC 1809 objected to the proposed cost sharing agreement and refused to enter into it. This application followed.

Analysis

19 TSCC 1633 relies upon four grounds in support of its application. Each will be addressed, in turn.

(a) Whether TSCC 1633 is entitled to a remedy founded in unjust enrichment

20 TSCC 1633 submits that, at its heart, this application is founded upon the doctrine of unjust enrichment. TSCC submits, citing *Garland v. Consumers' Gas Co.*, 2004 SCC 25 (S.C.C.), at para. 30, that it has established the three requirements for unjust enrichment, namely, (i) the existence of an enrichment of one party; (ii) a corresponding deprivation of the other party; and (iii) the absence of a juristic reason for the enrichment.

21 TSCC 1633 submits that it is accepted that the unit owners of TSCC 1809, and their respective tenants, visitors and suppliers, use the Shared Laneway for vehicular access, ingress and egress into TSCC 1809's underground garage and for support of that garage, as set out in the Easement. TSCC 1633 submits that, therefore, TSCC 1809 is saving

expenses and is being enriched accordingly. TSCC 1633 submits that, at the same time, it has experienced and continues to experience a corresponding deprivation through having to expend funds to defray the full cost of maintenance and repair of the Shared Laneway without contribution from TSCC 1809. TSCC 1633 submits that it has shown that there is no juristic reason for the enrichment.

22 TSCC 1633 relies upon the decision in *Middlesex Condominium Corp. 229 v. WMJO Ltd.*, 2015 ONSC 3879 (Ont. S.C.J.) in support of its submission based upon unjust enrichment. In *Middlesex*, the plaintiff sought a finding that the defendants are liable to contribute to the operating and maintenance costs of a private sewage system. Originally, the plaintiff had based its claim on a joint use and maintenance agreement that provided that it binds the successors and assigns of the parties to the agreement. The contracting party sold the property and one of the defendants was the successor in title. However, positive covenants in a contract do not run with freehold land either at law or in equity and, as a result, the plaintiff sought a remedy at the summary trial on the basis of unjust enrichment and, alternatively, on the basis that there was and is an expressed or implied agreement to the effect that parties jointly using facilities will share in maintenance and operating costs on a proportionate basis.

23 In *Middlesex*, the trial judge accepted the plaintiff's submission that the owner of the units receiving services from the plaintiff was bound by the terms of an unsigned services agreement on the basis of the principle that where a person has received services in circumstances in which a reasonable person ought to know that they are given in expectation of payment by him, the law will find an enforceable obligation based on contract: *Middlesex*, at paras. 113-117. The trial judge also decided that the remedy of unjust enrichment was available to the plaintiff.

24 TSCC 1633 submits that the distinction in the 1633 Disclosure Statement between a single-phase development and a multi-phase development is one of form rather than substance, and that this distinction should be disregarded when the reasonable expectations of TSCC 1633 are considered. On this basis, TSCC 1633 submits that this case is like *Middlesex*, where the trial judge concluded that the defendant was bound by contract to pay its proportionate share of the operating and maintenance costs, and was also liable based upon unjust enrichment. I disagree.

25 In my view, the decision in *Middlesex* is distinguishable. In *Middlesex*, the trial judge relied on evidence of a history of payments by the defendant of its proportionate share of operating and maintenance costs and held that, in the circumstances, there was a contract between the plaintiff and the defendant whereby the defendant agreed to pay for the shared services. The trial judge, having found that the defendant was liable in contract, did not accept the defendant's submission that the plaintiff had failed to show the absence of a juristic reason for the defendant's enrichment. In contrast, in this case, there is no history of payments by TSCC 1809 towards the costs of maintenance and repair of the Shared Laneway and TSCC 1633 does not assert that there is a contract by which TSCC 1809 agreed to share the costs of maintenance or repair of the Shared Laneway. The absence of a contract in this case is a crucial point of distinction with the decision in *Middlesex*.

26 In *Garland*, the Supreme Court of Canada described the two part approach to be taken to the juristic reason analysis. The claimant must first show that no juristic reason from an established category exists to deny recovery. If there is no juristic reason from an established category, then the claimant has made out a *prima facie* case under the juristic reason component of the analysis which, however, is rebuttable where the defendant can show that there is another reason to deny recovery. The established categories that can constitute juristic reasons include a contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory obligations: *Garland*, at pp. 650-651.

27 TSCC 1633 submits that none of the established categories applies in the circumstances of this case.

28 In my view, the grant of an easement which confers rights upon the grantee and creates obligations on the grantor could be a juristic reason for the grantee's enrichment (arising from its benefit from payment of repair and maintenance expenses by the grantor of the easement), absent a legal obligation on the part of the grantee pay all or a portion of the costs of maintenance and repair. Therefore, the original grant of the Easement in favour of TSCC 1809 could be a

juristic reason for TSCC 1809 to receive the benefits from the Easement without being subject to an obligation to share in the costs of maintaining and repairing the Shared Laneway, unless it is subject to a legal obligation to so share.

29 In order to decide whether TSCC 1633 has shown the absence of a juristic reason for the enrichment by TSCC 1809, I will need to consider whether TSCC 1809, the owner of the dominant tenement under the Easement, is, as TSCC 1633 submits, subject to a common law obligation owed to TSCC 1633 to maintain and repair the Shared Laneway.

(b) Whether TSCC 1809 is subject to a common law obligation owed to TSCC 1633 to maintain and repair the Shared Laneway

30 TSCC 1633 submits that it is well-established that the obligation to repair and maintain a right-of-way rests on the owner of the dominant tenement and that, based upon this principle, TSCC 1809 is responsible, at law, for maintaining and repairing the Shared Laneway.

31 In support of this submission, TSCC 1633 relies upon passages cited from two texts by Anne Warner La Forest, *Anger & Honsberger Law of Real Property*, Third Edition, (Toronto: Thomson Reuters, 2016), Volume 2, at pp. 17-21 and by Sir Robert Megarry and H.W.R. Wade, *The Law of Real Property*, Fifth Edition, (London: Stevens & Sons Limited, 1984), at pp. 900-901. TSCC also relies upon *West High Development Ltd. v. Veeraraghaven*, 2011 ONSC 1177 (Ont. S.C.J.), at para. 102.

32 The passages cited from these two secondary sources and the *West High Development* case do not support the existence of the principle of common law advanced by TSCC 1633. The passage cited from the *Anger & Honsberger* text states that "[t]he owner of the servient land is not required to construct or repair the right-of-way" and that "[t]he holder of a right-of-way may enter on the servient land to construct and repair it". The author also states that, "[a]lternatively, the owners of the dominant and servient lands may expressly agree, by way of a covenant between themselves, that the servient landowner is to construct or repair a right-of-way". In the passage cited from the *Megarry and Wade* text, the authors state that "[i]n the absence of contrary agreement, or special circumstances, it is for the grantee of a way, not the grantor, to construct the way and to repair it when constructed: the grantee may enter the servient tenement for these purposes".

33 These passages address the principle that the grantor of a right-of-way does not have an obligation to construct the way or repair it. It is for the grantee, who has received the benefit of the right-of-way, to construct or repair the way, and the grantee may enter the servient tenement for these purposes. The passages cited do not, however, state that there is a principle of common law that the grantee owes an obligation to the grantor to maintain or repair a right-of-way.

34 Similarly, in *West High Development*, the trial judge wrote at para. 102 that "[i]n most cases, the obligation to maintain and repair a right of way rests with the owner of the dominant tenement. After all, the right of way is for his or her benefit and use". This statement was only an observation by the trial judge of the arrangements with respect to maintenance and repair in most cases. The trial judge did not, however, hold that the owner of the dominant tenement was subject to such an obligation owed to the owner of the servient tenement as a matter of common law.

35 In response to the submission by TSCC 1633, TSCC 1809 cites the following passage from Charles Harpum, Stuart Bridge and Martin Dixon, *Megarry & Wade: The Law of Real Property*, 7th ed. (Sweet & Maxwell, 2008) at p. 1292:

> (c) *Construction and repair.* Liability construct or to repair the way once constructed primarily depends upon the terms of the grant or reservation. In the absence of express stipulation, or special circumstances, the following rules apply. There is no obligation on the grantor to construct the way, and the grantee may enter the servient land for purposes of construction if necessary to make the grant effective. Once the way exists, neither the servient owner nor the dominant owner is liable to maintain or repair it, but either owner is entitled to maintain and repair should they choose to do so. The dominant owner has the right to enter the servient land in order to carry out necessary repairs in a reasonable manner.

36 TSCC 1809 also cites the following passage from *Gale on Easements*, 13th ed.:

> Generally speaking, a dominant owner is not bound to keep the subject of his easement in repair. In *Taylor v. Whitehead* where the owner of a right-of-way unsuccessfully asserted a right to deviate upon the way becoming flooded, Lord Mansfield said, that by common law he who has the use of a thing ought to repair it; but this means that the servient owner is not bound to repair, and if the dominant owner wants the way repaired he must repair it himself.

The statements in the two secondary sources cited by TSCC 1809 are, in my view, consistent with the statements in the secondary sources cited by TSCC 1609 and refer to the common law principle that neither the dominant owner nor the servient owner is subject to an obligation owed to the other to maintain or repair a right-of-way.

37 TSCC 1809 submits that although TSCC 1633 does not have a common law obligation to maintain and repair the Shared Laneway, it has a statutory obligation to do so. The Act provides in subsections 89(1) and 90(1) that a condominium corporation has an obligation to repair after damage and maintain the common elements, subject to alteration of these obligations in the declaration as provided for in section 91 of the Act. The TSCC 1633 Declaration provides, at section 24, that TSCC 1633 "shall maintain and repair, after damage, the common elements". In the TSCC 1633 Declaration, the term "common elements" means all the property, except the units. The Shared Laneway is a common element to which this obligation applies.

38 I have concluded that the submission by TSCC 1633 that TSCC 1809 owes a common law obligation to TSCC 1609 to maintain and repair the Shared Laneway which is subject to the Easement is incorrect. There is no such obligation at common law.

39 Given this conclusion, I have also concluded that the grant of the Easement by TSCC 1633 to TSCC 1809 that conferred rights on TSCC 1809 and imposed obligations on TSCC 1633 is a juristic reason (under the established category of valid common law obligations) for the benefit that TSCC 1809 receives from the payment by TSCC 1633 of the costs of maintaining and repairing the Shared Laneway.

40 TSCC 1633 has not shown the absence of a juristic reason for the enrichment by TSCC 1809 and, therefore, it is not entitled to a remedy against TSCC 1809 based upon unjust enrichment.

(c) Whether TSCC 1809's refusal to contribute toward the costs of maintenance and repair of the Shared Laneway gives rise to a remedy under section 135 of the Act

41 TSCC 1633 submits that it is entitled to a remedy under section 135 of the Act on the basis that the refusal of TSCC 1809 to contribute to the costs of maintenance and repair of the Shared Laneway amounts to oppressive conduct under this statutory provision.

42 Section 135 of the Act provides:

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

(b) an order requiring the payment of compensation.

43 In determining whether an applicant is entitled to a remedy under section 135 of the Act, there is a two part test. The complainant must establish (i) a breach of his or her reasonable expectations; and (ii) that the impugned conduct amounts to oppression, or is unfairly prejudicial to or unfairly disregards the interests of the claimant. To unfairly disregard the interests of a complainant means to ignore or treat the interests of the complainant as being of no importance. Some prejudice or disregard of the complainant's interests is acceptable, provided that it is not unfair: *3716724 Canada Inc. v. Carleton Condominium Corp. No. 375*, 2016 ONCA 650 (Ont. C.A.), at paras. 29, 31.

44 TSCC 1633 submits that it had and has a reasonable expectation that TSCC 1809 would be contributing toward the costs of operating, maintaining, repairing and replacing the Shared Laneway and that this reasonable expectation is anchored in:

a. the provisions of the TSCC 1633 Disclosure Statement regarding a cost-sharing agreement;

b. the provisions of the 1809 Declaration which defines the property and common elements of TSCC 1809 as encompassing the Share Laneway and goes on to state that monies expended in the repair and maintenance of such property constitute part of the common expenses; and

c. the common law governing the obligation to repair a right-of-way easement which, TSCC 1633 submits, unequivocally puts that obligation upon the owner of the dominant tenement.

45 TSCC 1809 submits that there is no reasonable expectation of either TSCC1633 or TSCC 1809 that the parties would permanently share in the costs of operation, maintenance, repair and replacement of the Shared Laneway.

46 In *Ebrahim v. Continental Precious Minerals Inc.* (2012), 111 O.R. (3d) 110 (Ont. S.C.J. [Commercial List]), Brown J., as he then was, considered what is meant by "the reasonable expectations" of the stakeholders in the context of oppression claims, and wrote:

The reasonable expectations of specified stakeholders is the cornerstone of the oppression remedy. Fair treatment — the central theme running through the oppression jurisprudence -- is most fundamentally what stakeholders are entitled to "reasonably expect". The concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive -- the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue and the entire context, including the fact that there may be conflicting claims and expectations.

The onus lies on the claimant to identify the expectations that he asserts have been violated by the conduct at issue and establish that the expectations were reasonably held. Factors which a court may consider in determining whether a reasonable expectation exists include general commercial practice, the nature of the corporation, the relationship between the parties, past practice, steps the claimant could have taken to protect himself, representations and agreements, and the fair resolution of conflicting interests between corporate stakeholders.

TSCC 1809 submits that when the relevant factors are considered, TSCC 1633 has failed to meet its onus of proving that TSCC 1809 engaged in oppressive conduct.

47 In support of this submission, TSCC 1809 also relies upon the decision of the Court of Appeal in *Metropolitan Toronto Condominium Corp. No. 1272 v. Beach Development (Phase II) Corp.*, 2011 ONCA 667 (Ont. C.A.). In that case, the applicants were three condominium corporations that applied for relief under section 135 of the Act. The ground floor of each building that housed the condominium units was freehold space occupied by commercial and retail establishments. There was no agreement requiring the occupants of the ground floor to share the costs of the facilities and services they shared with the applicants. As a result, each time money was spent on a shared facility or service, the applicants were required to persuade the respondent, the entity that owned the freehold, to pay its fair share or litigate

the matter. The applicants sought a declaration that the respondent acted oppressively in not providing for a cost-sharing agreement and an order requiring the owner of the freehold to pay its share of operating costs of all shared facilities.

48 The Court of Appeal in *Beach* affirmed the decision of the application judge who rejected the applicants' argument that their reasonable expectations were not met primarily on the basis of the representations and agreements that accompanied the condominium unit purchase and sale transactions. The Court of Appeal wrote at paras. 9-10:

> The statutorily mandated proposed condominiums' governing documents, which are designed to detail what condominium purchasers should reasonably expect, make no reference to any cost-sharing agreement between the appellants and the declarants. While these documents specifically refer to the sharing of facilities and services, this reference alone does not support a finding that those who ultimately decided to purchase a condominium unit could reasonably expect that there would be a cost-sharing agreement when none was mentioned.
>
> As well, in our view, the application judge properly rejected the appellants' contention that commercial practice was such that buyers of condominium units would reasonably expect that there would be a reciprocal agreement. In addition to other difficulties this argument may have, it is clear that the existence of such a commercial practice was not supported by the evidence.

49 The Court of Appeal in *Beach* also concurred with the application judge's finding that there was no oppressive conduct, and wrote, at paras. 12-13:

> The evidence supports the finding that the decision that cost-sharing agreements would not be included in the mixed-use development was a considered business decision of the respondents and was fully disclosed in circumstances where the unit purchasers of the appellants were represented by counsel.
>
> Appellants' counsel forcefully argued that to leave the appellants at the mercy of the respondents and future costly litigation is, in itself oppressive. While we understand the appellants' concern about the choices available to them in terms of managing disputes over the costs associated with the shared facilities and services, we are of the view that the oppression remedy is simply not available as one of those choices. This is not a case of an oppressor utilizing a superior bargaining position to coerce unfavourable terms from a weaker party or acting behind the weaker parties' back. Rather, it is a case in which the appellants voluntarily purchased their condominium units in the full knowledge and disclosure of the rights and obligations associated with their transaction.

50 In its factum, TSCC 1633 seeks to distinguish the *Beach* decision on the basis that the shared facilities in issue in that case were not subject to a "well-established and clear rule such as the common law principle requiring right of way holders to maintain and repair the right of way which exists for their benefit". I have concluded that there is no common law principle that corresponds with the one urged upon me by TSCC 1633 and I therefore conclude that the basis upon which TSCC 1633 seeks to distinguish *Beach* is not applicable.

51 TSCC 1633 has also submitted that the reasonableness of its expectation that TSCC 1809 would share in the costs of maintaining and repairing the Shared Laneway is supported by the fact that the TSCC 1809 Declaration provides that the expenses associated with the maintenance and repair of TSCC 1809's property (which is defined to include interests appurtenant to the land described in the declaration, including the Easement) are chargeable to unit owners of TSCC 1809 as common expenses. I disagree. This statement in the TSCC 1809 Declaration does not shed light on the essential question that arises on this application, that is, whether TSCC 1809 is subject to a legal obligation to share in such costs. If TSCC 1809 is not subject to an obligation to share in such costs, then the costs are not chargeable to the unit owners of TSCC 1809 as common expenses. In my view, the statement referenced by TSCC 1633 from the TSCC 1809 Declaration has no bearing on the reasonable expectations of TSCC 1633.

52 Affidavit evidence was given on behalf of TSCC 1633 of the actual understanding and expectation of a unit owner and board member with respect to whether TSCC 1809 would enter into a cost sharing agreement with respect to the Shared Laneway (and of the actual understandings and expectations of other board members). Affidavit evidence was

also given on behalf of TSCC 1809 from the senior legal counsel for Baghai, who drafted the 1633 Disclosure Statement, of his understanding and intention concerning it. I consider this evidence given on behalf of TSCC 1633 and on behalf of TSCC 1809 to be evidence of the subjective understanding and intention of these witnesses that does not bear upon the reasonable expectations of TSCC 1633 which must be determined objectively. I have therefore disregarded this evidence.

53 In my view, TSCC 1633 has failed to establish that there has been a breach of its reasonable expectations through the conduct of TSCC 1809. The reasoning of the Court of Appeal in *Beach* is applicable to this case. There is nothing in the TSCC 1633 Declaration that refers to cost sharing with TSCC 1809, or a cost-sharing agreement to be entered into with TSCC 1809. Also, given that the development of the property that resulted in the creation of TSCC 1633 was by construction of a single phase development, there was nothing in the 1633 Disclosure Statement that would reasonably have caused a unit purchaser to expect that TSCC 1809 would be required to contribute to the costs of maintaining and repairing the Shared Laneway. As was the case with respect to the unit purchasers in *Beach*, the TSCC 1633 unit holders, viewed from an objective perspective, purchased their condominium units in the full knowledge and with disclosure of the rights and obligations associated with their transaction.

54 TSCC 1809 was lawfully entitled to take the position that it has taken in response to the demand by TCSS 1633 that it contribute to the costs of maintaining and repairing the Shared Laneway. TSCC 1809 did not coerce TSCC 1633 into accepting an unfair arrangement in respect of payment of the costs of maintenance or repair of the Shared Laneway. I conclude that TSCC 1633 has failed to establish that the refusal of TSCC 1809 to enter into a cost-sharing agreement or some other arrangement in respect of sharing of the costs of operating, maintaining, repairing and replacing the Shared Laneway amounts to conduct that is oppressive or that is unfairly prejudicial to or unfairly disregards the interests of TSCC 1633.

(d) Whether recent amendments to the Act providing for cost sharing support the relief sought on this application

55 In 2015, the Ontario Legislature passed Bill 106, *Protecting Condominium Owners Act*, *2015*, which enacts significant amendments to the Act. Among these amendments is the introduction of a requirement that two or more condominium corporations which share facilities enter into agreements in accordance with the legislative provisions. Specifically, section 21.1(1) provides:

> Subject to the regulations, if any [two or more condominium corporations] share or are proposed to share in the provision, use, maintenance, repair, insurance, operation or administration of any land, any part of a property or proposed property, any assets of a corporation or any facilities or services, they shall enter into an agreement that meets the prescribed requirements and shall ensure that it is registered in accordance with the regulations.
>
> The amendments are not now in force, and will come into force on a day to be named by proclamation of the Lieutenant Governor.

56 TSCC 1633 submits that this provision, upon coming into force, will apply to corporations which will, at the time of its coming into force, share the use of land. TSCC 1633 submits that, upon section 21.1(1) of the Act coming into force, TSCC 1633 and TSCC 1809 will be statutorily required to enter into an agreement to govern their use of the Shared Laneway. TSCC 1633 submits that this provision is an expression of the understanding that, as a matter of public policy, condominium corporations which share the use of land or facilities must do so in a fair manner and in accordance with a mutual agreement.

57 In response, TSCC 1809 submits that this provision is not yet in force, the regulations have not yet been released in draft form and, until the regulations are made, it does not know what its obligations will be under section 21.1(1) when it comes into force. TSCC 1809 submits that it will comply with the law.

58 The amendment was only passed long after the events giving rise to this application occurred and long after the application was commenced. When the amendment comes into force, this may affect the rights and obligations of TSCC

1633 and TSCC 1809 in relation to the subject matter of this application. In my view, however, this amendment to the Act, which is not yet in force, has no bearing on whether TSCC 1633 is entitled to the relief sought on this application.

Disposition

59 For these reasons, the application is dismissed.

60 If costs are not resolved between the parties, TSCC 1809 is directed to make written submissions with respect to costs within 30 days, not to exceed five pages, excluding the costs outline. TSCC 1633 may make responding submissions within 15 days thereafter, also not to exceed five pages, excluding the costs outline. TSCC 1809 may make reply submissions within 10 days thereafter, not to exceed two pages.

Application dismissed.

End of Document