Toronto Standard Condomunium Corp. No. 2130 v. York Bremner Developments Ltd., [2016] O.J. No. 4468

Ontario Judgments

Ontario Superior Court of Justice
F.L. Myers J.
Heard: June 21-23 and July 5, 2016.
Judgment: August 26, 2016.
Court File No.: CV-12-454751

[2016] O.J. No. 4468 | 2016 ONSC 5393

RE: Toronto Standard Condominium Corporation No. 2130, Applicant, and York Bremner Developments Limited, The Cadillac Fair View Corporation Limited and York Bremner Hotel Leaseholds Limited, Respondents

(291 paras.)

Case Summary

Construction law — Liability — Grounds — Defective workmanship — Negligence — Defences — Expiry of warranty or limitation period — Cross-motions by respondent developer and applicant condominium corporation for summary judgment on deficiency and negligence claims allowed in part — First action nullity due to lack of notice — Applicant had standing to sue on behalf of unit owners — Slow exit from parking garage not covered by NHWP and permitting tort liability would create permanent, ill-designed warranty contrary to public policy, inconvenience not compensable, and no traffic costs incurred — Many deficiency claims disallowed as outside warranty period/statute-barred; other claims allowed with assessment to follow -- respondent to reimburse applicant $39,098 for lint traps and $26,500 for fire alarms.

Contracts — Performance and breach — Performance — Incomplete performance — Action by condominium corporation against former property manager allowed in part — Complaint about expenses incurred for defendant's failure to leave contract information in place dismissed as plaintiff was soon able to cancel anyway — Defendant breached duty to maintain available and comprehensive insurance file, so to pay plaintiff $16,203 costs incurred following slip-and-fall as result — Defendant had no obligation to advise plaintiff with respect to potential parking garage claim — While defendant was owned by one of developer's owners, there was no conduct to justify punitive damages.

Contracts — Remedies — Damages — Amount — Consequences of breach — Action by condominium corporation against former property manager allowed in part — Complaint about expenses incurred for defendant's failure to leave contract information in place dismissed as plaintiff was soon able to cancel anyway — Defendant breached duty to maintain available and comprehensive insurance file, so to pay plaintiff $16,203 costs incurred following slip-and-fall as result — Defendant had no obligation to advise plaintiff with respect to potential parking garage claim — While defendant was owned by one of developer's owners, there was no conduct to justify punitive damages.

Real property law — Condominiums — Condominium corporation — Rights and obligations — Financial management — Management of corporate assets and property — Right to sue on behalf of unit owners — Declarations — Essential elements — Statement of proportionate contribution to common expenses — Developers — Rentention of board control — Disclosure statement — Mutual

use agreements — For managing shared facilities — Application by condominium corporation for oppression relief with respect to CRA, the mutual use agreement in place, allowed in part— Respondent was developer and declarant, retained ownership of remainder of facility, and appointed CFCL as its agent as Common Facility Manager — CRA only permitted termination of CFM for cause, and respondent and CFCL used powers under CRA to keep applicant in the dark on management decisions and basis for cost allocations — CRA facilitated oppressive conduct under ss. 113(1)(b) and 135 — CRA amended to permit applicant to terminate CFM, without cause, upon resolution and 60 days' notice.

Real property law — New home warranty plans — Builder — Warranty to purchaser — Quality of construction — Cross-motions by respondent developer and applicant condominium corporation for summary judgment on deficiency and negligence claims allowed in part — First action nullity due to lack of notice — Applicant had standing to sue on behalf of unit owners — Slow exit from parking garage not covered by NHWP and permitting tort liability would create permanent, ill-designed warranty contrary to public policy, inconvenience not compensable, and no traffic costs incurred — Many deficiency claims disallowed as outside warranty period/statute-barred; other claims allowed with assessment to follow -- respondent to reimburse applicant $39,098 for lint traps and $26,500 for fire alarms.

Application by the condominium corporation against the respondent developer for relief from oppression, summary judgment on deficiencies, and action against Whitestone, the former property manager, for breach of contract damages. Motion by the respondent for summary judgment dismissing the deficiency claims. The applicant owned two residential towers in a complex developed by the respondent. The respondent retained ownership of the remainder of the property. There was a mutual use agreement in place (CRA). The respondent was the declarant and appointed CFCL as its agent to be the Common Facilities Manager (CFM). Article 8.07 permitted the CFM to be discharged only for cause. The calculation of percentages of costs allocated was not explained. Only the applicant was required to maintain a reserve fund and submit audited financial statements. While the agreement made it sound as though there were four co-owners, there was really only the applicant and the respondent. When the applicant sought an explanation for the allocation of costs from the CFM, the CFM refused. With respect to deficiencies, the applicant had submitted many under the NHWP, and the parties had entered a settlement, but the applicant declared it terminated when the respondent insisted the settlement included other claims. It had been taking residents hours to exit the parking garage on game nights, which the applicant alleged was negligent design. MLSE had begun paying for police officers to direct traffic, but the applicant wanted $1,000,000 in case MLSE stopped paying. The applicant's claim against Whitestone was for failure to maintain proper records.

HELD: Application allowed in part; summary judgment motions both allowed in part; action against Whitestone allowed in part.

The respondent disclosed the CRA itself, but this did not meet its obligations under s. 113(1)(a). The respondent did not disclose the most important features of the CRA, which were that the respondent was the CFM and CFCL was its agent, the CFM had complete power over management of property, allocation of common costs and its own fees. The respondent, through CFCL, was completely uncooperative when the applicant wanted information, causing the applicant to pursue arbitration, which was ongoing. The respondent's actions in sending its counsel to speak directly to owners, not giving the applicant master keys without an arbitration order, and heavy-handed behaviour during settlement discussions were indicative of this unbalanced power structure. The applicant had a reasonable expectation the respondent would deal with it in good faith as an equal owner. The respondent used the CFM to maintain complete control and keep the applicant in the dark, and so oppressed was established pursuant to ss. 113 and 135.

Article 8.07 was amended to permit the applicant to terminate the CFM by resolution of its directors, with 60 days' notice. The settlement was properly terminated, so deficiency claims remained alive. The applicant's first action was dismissed due to lack of mandatory notice to unit owners. Its second and third actions proceeded notwithstanding ongoing conciliation with Tarion. The parking garage claim was not covered by the New Homes Warranty Plan, and to permit tort liability for safe but shoddy design would create a permanent, ill-defined warranty that was contrary to public policy. Inconvenience was not compensable, and the applicant had not incurred any costs for paid duty police officers. The other deficiency claims were assessed, and those that were past the warranty period or statute-barred were dismissed. The respondent was to reimburse the applicant $39,098 for lint trap replacements. There was a real and substantial risk caused by excessive false fire alarms, so the respondent was to reimburse the applicant $26,500 for repairs. Damages for the other deficiency claims allowed would be assessed. With respect to the Whitestone action, the applicant claimed to incur contract fees due to lack of information left by Whitestone, but it terminated the impugned contract within months without information. Whitestone breached its duty to maintain and leave a comprehensive insurance file, which cost the applicant $16,203 when a slip-and-fall occurred, so Whitestone was liable for those damages. Whitestone had no liability for not advising the applicant about its parking lot claim. While Whitestone was owned by one of the respondent's owners, there was no conduct warranting punitive damages.

Statutes, Regulations and Rules Cited

Administration of the Plan, R.R.O. 1990, Reg. 892, s. 15(2)(b)

Arbitration Act, 1991, S.O. 1991, c. 17, s. 10

Building Code,

CondominiumAct, 1998, s. 23(1)(a), s. 23(1)(b), s. 23(2), s. 44, s. 72, s. 73, s. 111, s. 112, s. 113(1), s. 113(1)(a), s. 113(1)(b), s. 113(3), s. 135(1), s. 135(2)(a)

Courts of Justice Act, R.S.O. 1990, c. C.43,

Law Society Act, R.S.O. 1990, c. L.8, s. 26.1

Legislation Act, 2006, S.O. 2006, c. 21, s. 92(1)(a)

Limitations Act, 2002, S.O. 2002, c. 24, s. 5

Municipal Act, 2001, c. 25, s. 44(1)

Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31, s. 13, s. 13(1)(a)(ii), s. 17(2)

Rules of Civil Procedure, Rule 2.01(1), Rule 14.05(1), Rule 14.05(1.1), Rule 20.01(3), Rule 20.04, Rule 38, Rule 39.03

Counsel

Richard Macklin, Ed Hiutin, and Neil Wilson for the Applicant.

Irvin Schein, Catherine Francis, and Mark A. Freake, for the Respondents.

REASONS FOR DECISION

F.L. MYERS J.

Introduction

1 Over the past decade, Maple Leaf Square has become a popular landmark destination in Toronto. Maple Leaf Square houses a chic hotel, bars, restaurants, offices, condominiums, and, of course, the Air Canada Centre. TheACC is the premier location for major rock music concerts in Toronto. It is also the home arena of the Toronto Rock, the Toronto Raptors, and the Toronto Maple Leafs. During Raptors' and Leafs' playoff games, the outdoor plaza in Maple Leaf Square fills with thousands of fans who come together to cheer for their team. Maple Leaf Square has quickly become an important, functioning social space in Toronto.

2 Sadly, Maple Leaf Square is also home to two dysfunctional residents. The applicant, TSCC 2130, is a residential condominium corporation with two towers housing 872 residential units located in the heart of Maple Leaf Square. It is part of the Maple Leaf Square complex developed by the respondent YORK BREMNER DEVELOPMENTS LIMITED ("YBDL"). YBDL or its affiliates continue to own the rest of the complex including the office building, the retail space, and the hotel property.

3 The parties are enmeshed in six lawsuits. In addition to resolving this application, these reasons also deal with motions brought by the parties in CV-13-0481057, CV-13-489723, CV-13-509896, CV-14-501296, and CV-15-524156.

The Background Facts

4 The following chronology is uncontested. I have drawn it principally from several of YBDL's factums for convenience.

5 Maple Leaf Square was developed by YBDL as a nominee on behalf of co-owners The Cadillac Fairview Corporation Limited ("CFCL"), Maple Leaf Sports & Entertainment Ltd. ("MLSE"), and Lanterra Developments Ltd. ("Lanterra"). The co-owners hold 37.5%, 37.5%, and 25% interests in YBDL respectively.

6 The non-residential components of Maple Leaf Square are owned by or on behalf of the co-owners. They consist of a hotel, an office building occupied by a single office tenant, a sports bar, a high-end restaurant, an LCBO, a bank, a Sport Chek store, and a Longo's grocery store.

7 There is a four-storey underground parking garage at Maple Leaf Square containing 455 residential parking stalls owned by condominium unit owners and 359 commercial stalls owned by YBDL. The commercial stalls are on the first two underground floors. The residential condominium parking stalls are on the third and fourth underground floors.

8 In July 2006, YBDL completed the purchase of the lands on which it ultimately developed the Maple Leaf Square complex. All 872 residential condominiums in Maple Leaf Square were pre-sold pursuant to standard-form agreements. All of those agreements contain an identical warranty that is in issue.

9 Unit owners began taking interim occupancy of their units in April, 2010. On December 24, 2010, YBDL registered the condominium declaration on title to formally create TSCC 2130. At that time, as declarant, YBDL controlled the board of directors of TSCC 2130.

10 YBDL commenced transferring title to the condominiums units to unit owners in February 2011. The transfers were completed in March 2011.

11 TSCC 2130 held a turnover meeting on May 30, 2011. At that time, the residential unit owners elected a new board of directors for TSCC 2130 and took over management and control of their condominium corporation from YBDL.

12 YBDL had appointed Whitestone Property Management Limited ("Whitestone"), an affiliate of Lanterra, as property manager of the residential towers. In January 2012, TSCC 2130's new board of directors gave notice to terminate the retainer of Whitestone and appointed Del Property Management Inc. ("Del") in its place. In April 2012, Shari Davidson commenced her position with Del as the principal property manager on the ground for TSCC 2130.

13 TSCC 2130, YBDL, and York Bremner Hotel Leaseholds Limited ("YBHLL") are parties to a shared use agreement for Maple Leaf Square dated December 24, 2010 known as the Complex Reciprocal Agreement ("CRA"). Broadly speaking, it deals with the relationships among the owners of the various components that make up the Maple Leaf Square complex in relation to the use of common spaces. YBHLL owns the hotel property. It is an affiliate of YBDL. The details of the relationship between YBHLL and the hotel operator are not germane to this proceeding.

14 The CRA appoints YBDL as the Common Facilities Manager ("CFM") to manage the sharing of common elements among the component owners. As YBDL is a mere nominee shell corporation, without an active business, it appointed CFCL as its agent to carry out the CFM role.

15 I pause to foreshadow that there are three principal streams of disputes before the court. All have overlapping facts to some degree:

a. TSCC 2130 alleges that there are a number of significant deficiencies in the design and construction of its premises. It has sued YBDL for compensation for breach of warranty and negligence in the construction of the buildings and, especially, the parking garage.

b. The fairness of annual allocation of costs of shared facilities among the owners of the various components under the CRA has been and will be the subject matter of ongoing arbitrations. In addition, in the application in which these reasons are styled, TSCC 2130 seeks remedies for oppression that it claims to have suffered due to the conflict of interest inherent in the structure of the CRA and the (mis)conduct of YBDL and CFCL in relation to their management of the common facilities. To restore a fair balance and to instill accountability in the Common Facilities Manager role under the CRA, TSCC 2130 claims that it should be entitled to terminate CFCL's (and YBDL's) role as CFM under the CRA without cause. It asks the court to amend the CRA pursuant to the statutory oppression remedies provided in the *Condominium Act, 1998*, *S.O. 1998, c. 19*.

c. Finally, TSCC 2130 sues Whitestone, its original property manager, for alleged failure to maintain proper documentary files and in relation to its alleged conflict of interest as an affiliate of Lanterra.

Application CV-15-524156 is Moot

16 On February 16, 2015, Arbitrator Banack delivered an award in one of the arbitrations between the parties under the CRA. In it, he ruled that there was insufficient evidence to lead him to change a certain allocation of common area costs as among the parties. TSCC 2130 subsequently argued that the relevant provision of the CRA required theArbitrator to go further and actually set a fair allocation rather than just dismissing its challenge to the allocation set by CFCL in its role as CFM under CRA. TSCC 2130 therefore moved before the Arbitrator to re-open the arbitration. On March 17, 2015 TSCC 2130 also brought an application to the court to set aside the impugned finding of the Arbitrator and to remit the matter back to him in case he would not re-open the matter himself.

17 Counsel for TSCC 2130 confirmed to counsel opposite and to me at case management conferences, that if the Arbitrator agreed to re-open the arbitration, then this application would be moot. He did. It is. Application dismissed.

18 TSCC 2130 argues that there is still an open issue before the Arbitrator as to the scope of the evidentiary record that is properly before him on the renewed hearing (which has already been held). If TSCC 2130 is dissatisfied with the result that may be rendered by the Arbitrator on that issue, it will have whatever relief that is open to it then. The dismissal of this proceeding is expressly without prejudice to any relief that may be sought by TSCC 2130 consequent upon the Arbitrator's holding on the scope of the evidentiary record before him in the re-opened arbitration proceeding. This condition is necessary as TSCC 2130 fears that absent some express protection, YBDL may argue later that although it claimed that this application was moot, the dismissal of the application somehow precludes later relief in relation to a decision of the Arbitrator that was not yet made at the time this motion was heard.

19 Counsel have since advised me that the Arbitrator has rendered his decision. I have declined a copy of the decision as it does not affect the outcome of the motion.

The CRA Produces a Result that is Oppressive to TSCC 2130

The Legal Framework

20 The *Condominium Act, 1998* contains provisions that protect unit owners from the risk that the declarant might have used its initial control of the condominium corporation's board of directors to bind the corporation to unfavorable contracts prior to the unit owners assuming control of their condominium corporation at the statutory turnover meeting. Sections 111 and 112 of the statute provide that for up to one year after the management of a condominium corporation is turned over to the owners, the condominium corporation may terminate unilaterally agreements that were entered into by the corporation while it was still under the control of the declarant. Those sections apply only to agreements between the condominium corporation and third parties.

21 By contrast, s. 113 of the *Condominium Act, 1998* provides a different regime for contracts concerning agreements between condominium owners and others for the mutual use of shared facilities. Under s. 113, a condominium corporation does not have the unilateral right to terminate mutual use agreements that were entered into prior to the turnover meeting. Rather, the statute allows the condominium corporation to come to court to seek a broad range of remedies if a declarant has foisted on a condominium corporation an oppressive mutual use agreement without clearly disclosing the terms of the agreement in advance.

22 The relevant provisions of s. 113 are:

> Mutual use agreements
>
> 113. (1) If a corporation and a person have entered into an agreement for the mutual use, provision or maintenance or the cost-sharing of facilities or services before the owners elected a new board at a meeting held in accordance with subsection 43 (1), any party to the agreement may, within 12 months following the election, make an application to the Superior Court of Justice for an order under subsection (3).
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> Court order
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> (3) The court may make an order amending or terminating the agreement or any of its provisions or may make any other order that the court deems necessary if it is satisfied that,

(a) the disclosure statement did not clearly and adequately disclose the provisions of the agreement; and

(b) the agreement or any of its provisions produces a result that is oppressive or unconscionably prejudicial to the corporation or any of the owners.

23 Counsel were not able to locate any cases in which s. 113 has been subject to judicial consideration or interpretation. I approach it from first principles therefore and consider the plain and ordinary meaning of the words used in relation to the purpose of the provision. The plain and ordinary meaning is discerned from reading the words "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." *Stubart Investments Ltd. v. The Queen*, *1984 CanLII 20* (S.C.C.), at p. 578.

24 Subsection 113(3) has two requirements to be met by a condominium corporation that challenges a mutual use agreement. First, it must show that the provisions of the agreement were not "clearly and adequately" disclosed in the statutory disclosure statement provided by the declarant. Second, it must establish that a provision of the agreement "produces a result" that is oppressive or unconscionably prejudicial to the corporation or any of the unit owners. Both requirements must be met before relief is available. Mr. Macklin argues that the section effectively grants a license to a declarant to oppress the condominium corporation and its owners provided that the declarant has sufficiently disclosed the oppressive agreement in advance. I do not have to go that far in this case. I would have concerns about the exercise of fiduciary duties by a board of directors of a condominium corporation that deliberately enters into an agreement that oppresses the corporation or its unit holders based simply on disclosure. Be that as it may, Mr. Macklin's argument informs the discussion on the potentially extreme nature of the circumstances under discussion. One would not expect the law to readily condone oppressive or unconscionably prejudicial agreements or conduct. But s. 113 is clear that where the oppressive provisions were sufficiently disclosed the section does not provide the condominium corporation relief against the mutual use agreement. It is vital then to identify the nature of the disclosure that will be sufficient to justify binding a condominium corporation and its owners to a contract whose terms result in oppression or unconscionable prejudice to the owners individually or collectively as the corporation.

25 While the *Condominium Act, 1998* is in places akin to consumer protection legislation, it is also understood that purchasing a condominium unit is a major investment for most people. The common law tradition of *caveat emptor* still reigns supreme in real estate transactions generally in Ontario. Due diligence is expected and required of people who make major real estate purchases. However, the *Condominium Act, 1998* and its predecessors changed the common law at least for the initial round of condominium purchases from the declarant. The statute recognizes and provides redress for the imbalance of information and bargaining power in inherent in those transactions. Condominium purchases involve much more complexity than searching title to a house. The statute therefore imposes a regime of disclosure and other regulatory standards to try to protect condominium buyers by restoring better balance and fairness in the market place. Sections 72 and 73 of the statute, for example, require a declarant to provide to potential buyers disclosure documentation covering a lengthy and specific list of points including certain foreseeable risks. The statute formerly imposed an adequacy standard by which the court could measure the quality of the disclosure made by a declarant. The statute was amended to replace the qualitative measurement with a very specific list of items that must be disclosed. Purchasers are entitled to rescind their purchases within ten days of receiving a disclosure statement in statutory form. The rules are fixed and certain for all parties.

26 Subsection 113(3)(a), by contrast, requires the applicant to establish that declarant did not "clearly and adequately disclose the provisions of the agreement." To preclude a challenge to an oppressive mutual use agreement under s. 113, the statute provides that the quality of the disclosure must be assessed. It is not enough just to ensure that the disclosure statement contains items on a specified list. Rather, the court will consider whether, on making diligent inquiries, a buyer will see (clearly) and understand (adequately) the provisions that may result in oppression or unconscionable prejudice into which she may be buying.

27 The Court of Appeal commented on the interpretation of a predecessor section to section 72 in *Abdool v. Somerset Place Developments of Georgetown Ltd*. *(1992), 10 O.R. (3d) 120* (C.A.). After noting the consumer protection purpose of this aspect of the statute, the court discussed its approach to interpreting the scope of the disclosure requirement as follows at p.136:

> In answering this question there are a number of factors to be kept in mind. These disclosure provisions must, of course, be given a construction consistent with their consumer protection objectives. However, in judging the adequacy of the disclosure for the purposes of deciding whether an agreement is binding, the rights of both parties to the agreement must be taken into consideration. The purchaser is clearly entitled to the information called for by the Act in order to make an informed decision about his or her condominium purchase. At the same time, however, once the ten-day period has expired, the vendor is entitled to assume that it has a binding agreement of purchase and sale and to rely on the certainty of that agreement in developing the project and conducting its business affairs.

28 At that time, the statutory disclosure was somewhat less defined than it is currently. Moreover, the old version of the statute required that the disclosure "fully and adequately" set out certain matters. Those adjectives are no longer present in s. 72. Section 113(3)(a) continues to require that disclosure be clear and adequate. Adopting the Court of Appeal's purposive approach as set out in *Abdool* above, in my view, the adequacy of disclosure is to be assessed in the context of the consumer protection purpose of the section, the wording of the statutory provision, and in the context of the provision measured against the statute as a whole.

29 *Abdool* provides further guidance regarding the basic ground rules for disclosure. In dealing with the general obligation of disclosure under the predecessor of s. 72, the Court of Appeal held at pp.137-138:

> In the absence of a standard form of disclosure statement or any legislative provisions prescribing its precise content, the answer to questions of this nature necessarily involves judgment calls by those responsible for drafting this document. The Act does not contemplate or indeed, in my view, permit a disclosure statement which simply reproduces the accompanying documents or sizable portions of them. Decisions have to be made as to what items should be included or omitted to satisfy the requirements of brevity, generality and significance imposed by s. 52. Given the absence of statutory guidelines on these matters, a broad and flexible approach must be taken in determining whether a particular statement is so incomplete in detail or lacking in content or, by the same token, so encyclopedic, as to defeat the aim of the section and render an agreement non-binding.
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> In making this determination, I am of the opinion that regard can be had to all of the information provided to the purchaser. The disclosure statement cannot be viewed in isolation from the other documents mandated by s. 52(6) and (7) but must instead be seen in the context of those documents. They form part of the disclosure material and are intended, along with all of the information required by s. 52(6) and (7), to assist a purchaser in making an informed decision on whether to go ahead with the outstanding agreement. It may be noted that cl. (g) of s. 52(6) requires that the disclosure statement "fully and accurately disclose. . . any other matters required by the regulations to be disclosed"; under s. 32 of Regulation 121, this includes copies of the declaration or proposed declaration, the rules or proposed rules, the by-laws or proposed by-laws, and any insurance trust agreement or proposed insurance trust agreement. The disclosure statement contemplated by the Act cannot possibly provide full details of these documents or make reference to all of their provisions. It can, however, assist purchasers in comprehending them by directing attention to certain of their provisions for a more comprehensive statement of their content. [Emphasis added.]

30 Bearing in mind that s. 72 now provides standard form disclosure, *Abdool* applies more directly to s. 113 as it is that section that continues to call for an assessment of the clarity and adequacy of disclosure. But the context under s. 113 is not the same as the context under s. 72. Section 113 does not seek simply to remedy the general informational imbalance suffered by a condominium purchaser who buys from a declarant as was the

case in *Abdool*. Rather under s. 113, the question involves an assessment of the sufficiency of disclosure for the purpose of bringing home to a purchaser a special type of agreement -- a mutual use agreement -- that might have oppressive or unconscionably prejudicial results. It is even more important in this context that the simple disclosure of the mutual use agreement itself in all of its legalistic glory cannot be sufficient for s. 113(3)(a). Including the agreement itself with fair direction to specific provisions certainly helps in the assessment of adequacy. Depending on the facts in issue and what was known or readily discernable by the declarant at the time, decisions have to be made as to what items should be included or omitted to satisfy the requirements of clarity and adequacy imposed by s. 113(3)(a).

31 The question then is what is the scope of disclosure required to support an unconscionable or oppressive agreement or one that results in oppressive or unconscionable circumstances? In that context, the words used "clearly and adequately disclose the provisions of the agreement" can be taken in their usual and ordinary meanings. The disclosure of the terms of the agreement must be clear i.e. not just discernable but apparent, transparent, not hidden. Mr. Macklin argues that the disclosure documents must disclose the actual oppression. I am not prepared to hold that such a strict approach is required. Subsection 113(3)(a) requires that the "provisions of the agreement" be disclosed clearly and adequately. But subsection 113(3)(b) provides that it is not just the provisions of the agreement that might be impermissibly prejudicial or oppressive. Rather, the subsection applies where an agreement or a provision of an agreement "produces a result" that is unconscionably prejudicial or oppressive. That is considerably wider than just considering the impugned provisions of the agreement on their face(s). In my view there may be unintended oppressive consequences resulting from provisions that appear harmless on their face(s). Requiring a declarant to disclose every possible oppressive consequence, whether anticipated or not, is too high a burden given the balancing required by the Court of Appeal in *Abdool*. The declarant should be entitled to disclose clearly and adequately the relevant provisions of the agreement and have as much certainty as possible that the provisions will remain enforceable.

32 In my view, the word "clearly" requires no more than the transparent explanation of the important terms of the agreement. It is the word "adequately" that brings more of a subjective component to the balancing.

33 Adequacy connotes a measure of the quality of something given or done to fulfill a purpose. Adequacy cannot be addressed in the abstract. It always relates to a purpose. What is adequate for one purpose may be grossly inadequate for another. The assessment of the adequacy of disclosure of the provisions of a mutual use agreement under s. 113(a), must consider whether the disclosure provided purchasers sufficient information about the provisions and their likely results to justify precluding the purchasers from terminating the agreement where it results in oppression or unconscionable prejudice.

34 Considering s. 113 in the context of the statute as a whole, it seems clear to me that the simple disclosure of the mutual use agreement and some of its terms in the initial disclosure statement required by s. 72 does not in and of itself suffice under s. 113(3)(a). As noted previously, s. 72 no longer contains adjectives to measure the quality of disclosure. The fact that s. 113(a) requires "clear" and "adequate" disclosure must be looking for something further than simple disclosure of listed items under s. 72. Moreover, in the context of the consumer protection purpose at play, adequacy for the purpose of authorizing oppression and unconscionability must, at minimum, be a sufficient degree of disclosure of what was known or readily foreseeable at the time of disclosure so as to put the purchaser on notice of the foreseeable risks being undertaken.

35 Therefore, where the risk of an oppressive result was not known to the declarant and was not reasonably foreseeable from the content of the provisions of the agreement read in their plain and ordinary meaning, then clear disclosure of those provisions ought to be adequate in most cases. Conversely, where the risk of an oppressive result was known or was reasonably foreseeable by the declarant, disclosure will not be adequate in my view unless it clearly notifies purchasers of the risk of that outcome. Where the oppressive result is caused by conduct of the declarant acting under the provisions of the agreement, then disclosure will also not be adequate unless it clearly notifies purchasers of the risk of that outcome. Where a declarant knows that it has

the power under the provisions of the agreement to impose a harsh outcome (no matter what the cause) the outcome is reasonably foreseeable and the declarant should clearly disclose its power to impose such a result at the outset. As with most legal assessments of human behaviour, a balancing is required based on an assessment of all of the relevant facts and factors including both the desirability of certainty to the declarant and the consumer protection purpose of the provision favouring owners.

36 I note as well that although this case has been presented principally under s. 113, in my view s. 135 of the statute equally or better assists TSCC 2130. Section 135 provides a more general remedy to a condominium corporation where "the conduct of...a declarant...is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant." YBDL argues that, in the context of its role as Common Facilities Manager under the CRA, it is not acting in the role as declarant and therefore s. 135 does not apply to it. Rather, it says, it is just a neighbour sharing some facilities with TSCC 2130, and its role as declarant was spent after the statutory turnover meeting. No case law was provided to support that view. Section 135 does not limit the liability of a declarant to the time before the turnover meeting. If that were the intent, the section would have little purpose as it is the declarant that controls the condominium corporation until the turnover meeting in any event.

37 YBDL plainly is the declarant as defined in the statute. Moreover, the issues in this part of the case involve an agreement that the condominium corporation entered into while it was under the declarant's control. Furthermore, the oppression alleged is related to and flows from the conflicting interests of YBDL as Common Facilities Manager and owner of the remaining components of the Maple Leaf Square complex. YBDL has not sold those other facilities to third parties. Rather, YBDL always intended to maintain its ownership of the other components of Maple Leaf Square and it is alleged to have used its position as declarant to require TSCC 2130 to enter into a one-sided contract that it uses to favour itself and to oppress TSCC 2130. The circumstances are infused with allegations against YBDL *qua* declarant. Oppression remedies are to be broadly interpreted to do justice between parties. Parsing the capacity of the parties may be more relevant to tailor remedial issues to the specific facts. But I know of no basis to impose a narrow precondition on the applicability of a section that applies on its face and is limited to cases of serious prejudice in any event. In my view, s. 135(2) provides a more direct and simpler route to relief in the event that the conduct of YBDL or its agent CFCL is found to have been oppressive, unfairly prejudicial, or unfairly disregarded the interests of TSCC 2130.

The Complex Reciprocal Agreement

38 As set out in the recitals to the CRA, the agreement governs the integrated, logical, and orderly use, operation, and maintenance of the properties of each of the four respective component owners (residential, hotel, office, and retail). It governs the sharing of costs of the shared facilities among the component owners. The CRA provides for sharing of facilities by means of complicated mutual easements and licenses allowing the component owners to use parts of each other's properties. In Article 8, the CRA provides for a Common Facilities Manager to maintain and operate the common facilities. The CFM provides all necessary common services. The CFM retains consultants to fulfill its functions under Article 8 as it sees fit. The CFM invoices the owners for their respective shares of common costs. There is no owners' committee to instruct the CFM. There is no regular reporting by the CFM to the component owners on operations of the shared facilities. There is no process for owners' feedback to be provided to the CFM on ordinary course operational or policy matters. The CFM is given complete authority in respect to the matters under its charge in the CRA. It is entitled to a fee for its services of 10% of the gross amount invoiced to each component owner inclusive of HST.

39 Article 8.05 requires the CFM to provide an annual budget for common expenses to the component owners. The aggregate budgets for common costs of the complex to date are in the order of $4.5 million per year. The budget documents provided by the CFM to TSCC 2130 under Article 8.05 are very general and consist of just a few lines on one page. The CFM is also required to provide an audited statement to each component owner

concerning the expenditure of its share of common costs. Owners are entitled to challenge these statements within 30 days of receipt.

40 Article 8.07 provides that the CFM can only be discharged for cause. If the parties do not agree that there is cause to terminate the CFM, then the issue is to be resolved through arbitration. If the CFM is discharged and the parties cannot agree on a new CFM, then that issue too goes to the Arbitrator.

41 The allocation of common costs among the component owners is set out in Schedule "D" to the CRA. Certain costs are first divided 75:25 with the 75% portion being absorbed by the retail and office component owners. The remaining 25% of those costs is then sub-divided among all four owners. Other costs are simply allocated across the four owners with no first-level subdivision. Nothing in the CRA or Schedule "D" indicates the basis upon which some costs are first divided 75:25 before the 25% portion is subdivided among all of the component owners. Similarly, no basis is provided for the various percentages either of the subdivided 25% portions or where the full 100% of other costs is divided among the owners without a preliminary split. For example, TSCC 2130 is required to pay 56.07% of all snow removal costs of the Maple Leaf Square complex. No reason for this percentage is provided. The costs of cleaning common areas are first divided 75:25 and TSCC 2130 then is required to pay a piece of the 25% totaling 14.02% of the total. There is no reason provided for either the 75:25 split or why TSCC 2130 is allocated 14.02%.

42 Article 9.01 requires the component owners to pay their allocated shares of costs as set out in Schedule "D." Article 9.04 provides that the CFM can unilaterally change the parties' respective shares or its own fee upon learning information that makes the current numbers unfair and unreasonable. A party may provide information to the CFM to show that a number is not fair and reasonable. If the CFM does not agree to change the allocation shares or its fee, as the case may be, then the challenging party can take the matter to arbitration.

43 Capital costs are also allocated in the percentages set out in Schedule "D" to the CRA.

44 TSCC 2130 alone is required to maintain a reserve for its obligations under the CRA. It is also required to provide its audited financial statements to the CFM annually. As a condominium corporation, TSCC 2130 is required to maintain reserves in any event. The other component owners, being business corporations, are not required by law to maintain reserves and may choose to prioritize their payments, or they may suffer financial issues, or even go bankrupt, without any reporting to the CFM or TSCC 2130. The CRA imposes no concomitant obligations on any of the other three component owners to disclose their financial statements or to maintain reserves to protect their counter-parties.

45 The CRA deals with several technical issues concerning matters such as insurance, future changes, expropriation, default, and arbitration procedures. While these issues are all likely necessary, in my view, they are not the meat of the obligations among the parties. They are largely details of the sharing of facilities rather than the key terms and conditions of the sharing itself.

46 The CRA defines the CFM as "the Retail Owner or the replacement manager appointed pursuant to Section 8.07." The Retail Owner is YBDL. So YBDL is the CFM unless it is removed for cause after one or possible two arbitration proceedings. (I do discount the likelihood of YBDL agreeing to remove itself for cause under Article 8.07.)

47 If the foregoing recitation has made it sound like there are four component owners sharing under the CRA -- the residential owner, the retail owner, the office owner, and the hotel owner-- that is misleading. In fact there are only two parties in interest-- TSCC 2130 and YBDL. YBDL is a shell and is co-owned by CFCL, MLSE, and Lanterra as discussed above. The co-owners own the rest of the complex. YBDL is represented by CFCL as CFM. Everywhere in the CRA that power is given to the CFM, the power is therefore given to YBDL and its co-owners. Everywhere in the CRA that obligations are imposed on TSCC 2130, the obligations benefit YBDL and its co-owners. Imbalances of information in the CRA favour YBDL and its co-owners. This is all by design.

YBDL did not Clearly and Adequately Disclosure the Provisions of the CRA

48 At para. 4.14 of the disclosure statement, YBDL properly introduced the CRA and rightly said that it deals with the costs of operating, maintaining, and repairing mutual use facilities and equipment. The disclosure statement then directs purchasers to the CRA itself. It continues:

> The Complex Shared Facilities Costs will be allocated between the owners of the Components of the Complex as provided for therein. The Residential Component will pay for only those Complex Shared Facilities Costs which are appropriately attributable to the Residential Component. The Condominium Corporation will also be required to contribute its share of the cost of capital improvements from time to time for the loading docks, receiving areas, garbage compaction, disposal and recycling facilities and parts of the ramps and driveways in the Complex Parking over which it has an easement. A reserve for these items has been incorporated in the budget.

49 YBDL went on to disclose the existence of easements, a possible connection to the P.A.T.H. system, a possible daycare facility, and the loading dock facilities in the complex. In the paragraph of the disclosure statement concerning the loading dock, YBDL disclosed:

> ...The Loading Facility is part of the Commercial Component and will be managed by the Common Facilities Manager as defined in the Complex Reciprocal Agreement... The Loading Facility will be subject to reasonable rules and regulations made from time to time by the Common Facilities Manager or the Commercial Component owners.

50 YBDL then disclosed issues concerning common insurance and that the draft CRA may change. YBDL concluded it disclosure of the CRA in the disclosure statement as follows:

> The budget accompanying this Disclosure Statement contains the Declarant's estimate of the Condominium Corporation's share of the Complex Shared Facilities Costs. From time to time, the Declarant and/or the Condominium Corporation, as the case may be, shall incorporate and/or integrate its share of the Complex Shared Facilities Costs in the Condominium's overall annual budget. Subject to the Act, the use of the Complex Shared Facilities by the Condominium and by the owners, residents and tenants (as well as invitees of said owners, residents and tenants) of the other Components of the Complex entitled to use same shall, at all times, be subject to and in accordance with the applicable provisions of the Declaration and the Complex Reciprocal Agreement. The Condominium Corporation's budget also contains a reserve for its share of repair costs of a capital nature for certain portions of the Complex which constitutes Complex Shared Facilities Costs.

51 The only reference at all to the CFM disclosed by YBDL in the disclosure statement was in connection with the CFM's power to make rules and regulations for use of the loading dock. YBDL made exactly zero disclosure in the body of the disclosure statement that (a) it was the CFM; (b) it intended CFCL to fulfill the role as its agent; (c) that the CFM was solely empowered to manage the shared facilities even those on TSCC 2130's premises; (d) only the CFM could set or change the annual allocation of common costs absent arbitration; (e) the CFM would be paid 10% of gross shared costs and has the power to unilaterally change its own fee; (f) there was no formal process for component owners to meet with and instruct the CFM on ongoing operational or policy matters of concern; (g) that if TSCC 2130 believed that its share of common costs was unfair and unreasonable it would have to arbitrate unless YBDL or CFCL agreed in circumstances where they were the parties who would have to bear the cost of any change in the allocation; (h) as CFM, YBDL had the unilateral power to appoint contractors to maintain and repair common facilities on TSCC 2130's land with no input by TSCC 2130 into the identity of the contractor or the cost of the construction; and (i) that no other component owner was required to provide audited financial statements or create a reserve for future common costs.

52 The CRA creates a powerful manager of all operations on shared facilities who is not neutral and who sets costs sharing subject only to arbitration. The CRA is structured so that the CFM is the retail owner i.e. YBDL

operating through its agent CFCL -- a co-owner of YBDL. The CFM is not a fiduciary under the CRA. YBDL cannot have adopted a duty of selflessness when it is allocating expenses between itself and TSCC 2130. The CRA anticipates and necessarily intends that the CFM will be in a conflict of interest position from day one. There is no requirement in law that all managers of shared ventures be neutral or fiduciaries. Parties generally are free to agree otherwise if they choose to do so. Under the CRA, the cost sharing allocations must satisfy objective conditions. They must be fair and reasonable. The appointment of an interested party to the position of CFM does not preclude it from fulfilling its responsibility to meet that requirement. Parties can build interests into agreements. An obvious example is that corporate meeting chairs are usually interested parties and are often a significant or majority shareholder who is also running for re-election as a director at the meeting that she is chairing: see *Blair v. Consolidated Enfield Corp.*, *1995 CanLII 76* (S.C.C.). There is nothing inherently illegal or oppressive about CFCL being a self-interested CFM. As noted by Arbitrator Banack, CFCL was also the manager of other facilities in the complex and there were synergies with having the same manager across the complex.

53 Former counsel to TSCC 2130 criticized CFCL for acting like an autocratic landlord and failing to appreciate that in dealing with component owners as CFM it was not functioning as a landlord dictating its demands to its tenants. Rather, the CFM operates facilities for a number of titled property owners of equal status at law who have agreed to share their properties and costs. Having said that, the terms of the CRA set out the role and powers of the CFM. An agreement to share costs that appoints an interested party as the empowered primary decision-maker may not appear to be an especially fair agreement, but it is for the parties generally to assess the risks and benefits of a proposed agreement prior to agreeing to be bound by it. That general statement of *laissez faire* common law is, of course, tempered by s. 113 and the discussion of ss. 113 and 135 above. If the agreement produces a result that is so unfair as to be unconscionably prejudicial or is oppressive then it can only be saved under s. 113 by the clear and adequate disclosure of its provisions by YBDL in its disclosure statement. Moreover, if YBDL has oppressed TSCC 2130 either under the CRA or otherwise, it is subject to a claim under s. 135.

54 There is no doubt that the CRA was disclosed in YBDL's disclosure statement. A draft of the entire agreement was contained in the first set of disclosures delivered to prospective purchasers. A near final draft was also in the final disclosure that was once again provided to purchasers near to closing. The evidence of Mr. Hanna, a board member of TSCC 2130, is that he read both sets of disclosure documents and read the CRA prior to closing. The disclosure statement contained two pages of text describing the CRA that I have summarized above. YBDL argues that disclosure was clear and adequate. YBDL's position is one of incredulity that any suggestion could be made that the provisions of the agreement were not clearly and adequately disclosed when the whole agreement was appended to the disclosure document not once but twice. *Abdool* rejected this approach. The statute requires more than just the disclosure of the document.

55 In its disclosure statement, YBDL disclosed its plans for daycare facilities and joining the P.A.T.H. but it did not bother to mention that it had arrogated to itself the power to manage the common facilities and to dictate TSCC 2130's share of common costs without significant input by TSCC 2130 and subject only to arbitration. In its initial introduction of the CRA in the first paragraph of section 4.14 of its disclosure statement, YBDL mentioned that the CRA covers both the use of common facilities and the sharing of the costs of the common facilities. But then YBDL ignored and did not disclose at all, let alone clearly, the terms under which the facilities are to be managed and operated and how the costs are to be shared under the agreement. In my view (and bearing in mind the factual narrative set out below to highlight the most important features of the CRA) YBDL did not clearly disclose the most important terms of the CRA in its disclosure statements. Absent clear disclosure of the provisions of the agreement, there cannot be adequate disclosure of those provisions. Moreover where an agreement provides for a conflicted manager with unilateral authority to operate the other's property, set its own fees, and to set the cost-sharing ratio between itself and the other party, the risk of unfairness, oppressive circumstances, and unconscionable prejudice arising from these key aspects of the agreement is reasonably

foreseeable. Disclosure of the CRA without disclosing the office of the CFM and its powers, including setting cost allocations, is not adequate for the purpose of s. 113(3)(a).

56 At para. 78 of their factum, YBDL's counsel lists a number of terms of the CRA that they say provide protections to TSCC 2130. I will deal with the substantive adequacy of those provisions below. At this stage it is sufficient to note that none of those terms are referred to in the disclosure statement either.

57 YBDL was required to make judgment calls to disclose the key terms of the CRA bearing in mind the purpose of the disclosure was to insulate itself from potential claims of oppression. It chose to disclose loading dock rules and plans for a daycare centre but not that it gets to set TSCC 2130's cost sharing percentage to the tune of a half a million dollars a year. One can trace the definition of CFM to the definition of "Retail Owner" to YBDL in the draft CRA appended to the disclosure statement. Moreover the delegation to CFCL was disclosed in the final version of Schedule "D" to the draft CRA. But the fact that YBDL was to be the CFM and intended to delegate its powers to its 37.5% owner CFCL was not disclosed in the disclosure statement itself. Whether Mr. Hannah or Ms. White read provisions of the draft CRA and actually knew and understood how the CRA worked is not the point. Neither does there have to be evidence from a unit owner saying that she did not understand the CRA. If YBDL wished to avoid the foreseeable risk of being called to account under s. 113 due to its conflicted and powerful role as CFM, YBDL was required to empower all purchasers, sophisticated and unsophisticated, to exercise meaningful due diligence prior to their purchases by making clear and adequate disclosure of the terms of the CRA in the disclosure statement itself. It chose not to do so.

58 In my view YBDL failed to make clear or adequate disclosure of the terms of the CRA in its disclosure statement. The next issue then is whether the CRA or its provisions have resulted in oppression or unconscionable prejudice to TSCC 2130 under s. 113(3)(b) of the *Condominium Act, 1998*.

The Provisions of the CRA Produced a Result that is Oppressive to TSCC 2130.

59 After being constituted at the statutory turnover meeting, the board of directors of TSCC 2130 retained counsel (not Mr. Macklin and Mr. Hiutin's firm). As early as December, 2011, TSCC 2130 began asking CFCL and YBDL to explain the bases for the allocations of common costs set out in Schedule "D" of the CRA. CFCL provided some information about the costs but neither YBDL nor CFCL would answer TSCC 2130's request to be told the basis upon which the common costs sharing percentages were arrived at in schedule "D" to the CRA. How were the sharing percentages for each listed type of cost derived?

YBDL and CFCL Impose a Catch-22 to try to Prevent Arbitration

60 By letter to CFCL dated March 30, 2012, TSCC 2130's former counsel clearly set out TSCC 2130's continued request for cost allocation information and he confirmed an agreement for a representative of TSCC 2130 to attend at CFCL's office to review records. By letter dated April 27, 2012, CFCL confirmed the invitation and recommended that TSCC 2130 send a representative to meet CFCL for an "initial meeting...to generally review and explain the allocations and the methodology used". This initial meeting, CFCL hoped, would allow TSCC 2130 to "select and advise in writing, the accounts and invoices they would like to review."

61 TSCC 2130's representative attended CFCL's offices in September 2012. In the post-attendance email from TSCC 2130's representative, it is clear that the attendance was just a preliminary meeting as set out by CFCL in its April 27th letter. TSCC 2130's representative was invited to look at documents to allow him to narrow TSCC 2130's future requests for more intensive review. After attending, TSCC 2130's representative noted a number of documents that he had asked to see were not available. He requested to review the audited general ledger for the first year of operation of the complex. He also expressly reiterated TSCC 2130's request for back-up "as to how the different percentages per schedule D of the agreement were calculated. This would allow us to understand the rationale for the resulting shares indicated on schedule D." He indicated the TSCC 2130's counsel would follow-up on this point.

62 In three letters each dated October 1, 2012, counsel for TSCC 2130 posed a significant number of questions to YBDL and CFCL about the management of the Maple Leaf Square complex and the CRA in particular. He once again expressly asked to be told the basis upon which the percentages applicable to the allocations of common costs among component owners set out in Schedule "D" had been set by YBDL. TSCC 2130 also advised that the six-line budget provided by the CFM did not contain sufficient detail for the condominium corporation to meet its fiduciary duties as steward of its own financial affairs on behalf of unit owners. Counsel sought information to unbundle the numerous costs that the CFM had aggregated into a few line-items in the budget statement. He made these requests so that TSCC 2130 could understand and fairly report to its owners where its half million dollars in shared facilities expenses were being spent by the CFM.

63 Counsel for TSCC 2130 had also commenced this application on May 29, 2012, the day before the first anniversary of the turnover meeting. It did so to meet the 12 month time limit set by s. 113. TSCC 2130 did not tell YBDL that it had commenced this proceeding. Counsel only advised YBDL and CFCL that he had started this proceeding in his October letters. Counsel noted that the six month period for service of the application was soon expiring and had to be complied with by TSCC 2130 to preserve its rights. However, he also expressed TSCC 2130's clear intention to try to resolve the issues "on a fair, friendly, commercially-reasonable and cooperative basis, having regard to a wish for a good working relationship among the Parties and successful operation of the MLS-CF."

64 CFCL responded by letter dated October 18, 2012. It provided some of the documents sought. It also advised that it was seeking counsel in respect of other matters asserted by the condominium.

65 CFCL's independent counsel (not Mr. Schein or Ms. Francis) responded by letter dated November 23, 2012. She took the position that CFCL was not a proper party to an application concerning the CRA. Despite saying that s. 113 did not apply to CFCL, she took the position that there had been clear and adequate disclosure of the CRA under s. 113 in any event. Counsel indicated that CFCL was prepared to engage in further discussions provided that it was not required to respond to the litigation in the interim. She then noted that TSCC 2130's representative had already attended at CFCL's premises to look at financial information. CFCL's counsel made no reference to the agreed upon preliminary nature of that visit or the follow-up requests for information made by TSCC 2130 as anticipated in the initial invitation from CFCL. I was told several times at the hearing of these proceedings that the one day meeting represented complete disclosure by CFCL. That was neither the intent nor the result of that preliminary review.

66 CFCL's counsel also made reference to the right of TSCC 2130 to arbitrate under Article 9.06 of the CRA if it was dissatisfied with financial disclosure. CFCL rejected outright a request by TSCC 2130 to be involved in the budget-setting process for common costs calling the request an attempt to "re-write the terms of the CRA." Rather than telling TSCC 2130 the basis upon which the common cost sharing percentages had been arrived at in the CRA, CFCL said that it was not the party who had established the percentages. While CFCL might not have set the percentages itself, did it not know the basis for them? It was the party intended to fulfill YBDL's role as CFM with an obligation to be satisfied with the fairness of the percentages each year. It was also a 37.5% owner of YBDL. CFCL offered to explain the methodology of the allocation of common costs under the CRA to TSCC 2130 in its April 27, 2012 letter. CFCL's position that it was declining to disclose the allocation methodology because it had not established the percentages was disingenuous at best.

67 Counsel went on to point to the terms of Article 9 of the CRA that require a party who has information that suggests that the sharing percentages are unfair to provide that information to the CFM as a precondition to requesting a reallocation of common costs. Rather than telling TSCC 2130 how the original sharing percentages were calculated, CFCL required TSCC 2130 to first show why the allocations were unfair. How was it supposed to determine if the allocations were fair if it did not know the basis upon which the costs percentages were set in the first place?

68 Ms. Francis responded to TSCC 2130's counsel on behalf of YBDL by letter dated November 23, 2012. She set out s. 113 of the *Condominium Act, 1998* and offered YBDL's willingness to assume that the notice of application that was issued May 29, 2012 was issued within the prescribed one year of the turnover meeting. However she made that assumption (that May 29 is within one year of the prior May 30) expressly "without acknowledging and reserving our client's rights in this regard." She went on to list the various disclosures of the draft CRA in YBDL's disclosure materials and opined that "there is no reasonable basis upon which a court could find that the provisions of the CRA were not adequately disclosed in the disclosure statement." She set out the provisions of the CRA that YBDL says protect TSCC 2130 and wrote that YBDL cannot be liable as "declarant" under s. 135 as I have dealt with above. Counsel then recited Article 9.04 of the CRA and said that arbitration of the allocation of common costs is available "[i]n the event -- and ONLY in the event -- that the parties fail to agree on the proposed reallocation" (emphasis in original). Like CFCL, she took the position that a reallocation first requires a party with information showing that the existing allocation is unfair and unreasonable to bring that information to the CFM. Rather than just telling TSCC 2130 the basis for the allocation in Schedule "D" so that TSCC 2130 could analyze its commercial reasonableness, she asks rhetorically, "[h]ave you provided any such information to the Common Facilities Manager?"

69 Without TSCC 2130 first providing information establishing that the existing allocations were unfair, YBDL implied that there could be no proposed reallocation for the parties to agree upon or to disagree on. Therefore, by withholding information that TSCC 2130 obviously needed to assess the fairness of the common costs allocations, YBDL was effectively telling TSCC 2130 that it could not meet the pre-condition to arbitrate under the CRA. If YBDL's interpretation of the CRA was correct, the agreement was drafted with a built-in "Catch-22" (a condition that cannot be met due to its own requirements). If YBDL is correct, the CRA let YBDL prevent TSCC 2130 from even arbitrating an unfair and unreasonable cost allocation set by the very parties who stood to benefit from the unfairness. I will now be the third judicial officer to tell YBDL that its interpretation is not correct.

TSCC 2130 brings Overlapping Proceedings

70 TSCC 2130 changed counsel in late 2012 and retained Mr. Macklin's firm. Mr. Macklin's first salvo was to deliver four legal proceedings to counsel for YBDL in May 2013. First, TSCC 2130 amended this application under ss. 113 and 135 of the *Condominium Act, 1998*. TSCC 2130 also commenced mediation and an arbitration under the CRA. It also sued YBDL for construction deficiencies. There is much overlap among the proceedings in light of TSCC 2130's uncertainty as to the correct manner of proceeding and anticipating (correctly) that YBDL would continue to erect roadblocks to TSCC 2130 trying to obtain the relief to which it claimed it was entitled. In his cover letter dated May 23, 2013, Mr. Macklin expressly acknowledged that the proceedings overlapped and invited discussions to try to resolve all issues in one forum.

71 In its Notice to Arbitrate, TSCC 2130 raised many issues including challenging the fairness of the shared costs allocated to it. It also sought disclosure of the information that it had been seeking about shared costs and the basis for the cost sharing allocation in Schedule "D" to the CRA.

72 YBDL challenged TSCC 2130's right to arbitrate the issues that it raised. It would not agree to appoint an arbitrator. Therefore, TSCC 2130 brought an application to the court to do so.

The Parties Talk about Talking

73 In the meantime, the parties discussed the possibility of holding discussions toward resolution. In an email dated August 8, 2013, Ms. Francis summarized those discussions. In response to Mr. Macklin's request for discussions toward an agreement on a single forum to resolve all issues, Ms. Francis had written a letter dated June 14, 2013 asking Mr. Macklin to lay out the jurisdictional basis for each claim asserted in this application and in the mediation and arbitration proceedings. On June 26, 2013, Mr. Hiutin responded requesting a telephone call to discuss the issues. Ms. Francis responded that day reasserting her request for details of the jurisdictional

basis of each of the matters in the proposed arbitration. TSCC 2130 did not respond until July 28, 2013. At that time, Mr. Hiutin advised that the time for mediation under the CRA had expired so that TSCC 2130 would be moving forward with its claims. Ms. Francis responded and this led Mr. Hiutin to provide a chart setting out TSCC 2130's assertions regarding the jurisdictional basis for its claims. Some discussions ensued.

74 Among the matters that came to light in those communications was that TSCC 2130 had failed to provide written notice to its unit owners prior to suing YBDL on their behalf as required by s. 23 of the *Condominium Act, 1998*. This led TSCC 2130 to send out a notice to unit owners and then to re-issue the identical claim in September 2013. The initial claim issued in May 2013, CV-13-0481057, and TSCC 2130's second statement of claim issued on September 30, 2013, CV-13-489723, are virtually identical. The only relevancy to the different pleadings is that if the first claim is a nullity, then the limitation periods will be measured from September 2013 instead of the prior May. YBDL also objected (and still objects) to the fact that this application was commenced without an affidavit being delivered with the Notice of Application.

75 After raising these procedural technicalities, Ms. Francis concluded her August 8, 2013 email as follows:

> What exactly do you want to discuss in this proposed call or meeting? It appears that your client is bent on pursuing litigation, regardless of how ill-founded or frivolous it may be. If your client doesn't like the CRA, it should get on with the Application. We can then deal with the adequacy of a Notice of Application with no supporting affidavit to stop the limitation clock. If you do not proceed with the Application or do not succeed in the Application, the CRA stands.
>
> If your client doesn't think the allocations are fair, then provide your proposed allocations.
>
> With regard to the myriad of claims supposedly being asserted by your client on behalf of unit holders, I would suggest that you withdraw these claim immediately since you and your client do not have the authority or standing to assert such claims, most or all of which are in any event statute-barred, having been brought well over two years after the unit owners took possession.

76 If it was not clear prior to that time, it became clear that YBDL was not interested in discussing the fairness of the CRA or the allocations of common costs with TSCC 2130. By then, it still had not told TSCC 2130 the basis upon which the sharing percentages were set in the CRA and it demanded that TSCC 2130 produce its own proposed fair allocations first (the Catch-22). YBDL has taken few positions on the actual merits of the claims brought by TSCC 2130. Rather, it made clear that it was relying on all manner of procedural arguments including its Catch-22 to preclude TSCC 2130 from moving forward with its concerns. Below, I will assess whether the notice requirement in s. 23 of the *Condominium Act, 1998* makes the first action a nullity; whether an application that is commenced without a set date or contemporaneous delivery of a supporting affidavit is sufficient to fulfill the 12 month limitation period referred to ins. 113 of the *Condominium Act, 1998*; whether this application is an abuse of process because it awaited the outcome of the initial set of arbitrations; whether the expert evidence proffered by TSCC 2130 is admissible; and a number of other procedural issues concerning a settlement agreement, the validity of causes of action asserted, and the applicable limitation periods.

Justice Matheson and the Arbitrator Reject the Catch-22

77 By Reasons for Decision dated January 8, 2014, Matheson J. granted the application of TSCC 2130 and appointed Arbitrator Banack to hear the arbitration commenced by TSCC 2130. At the hearing of the application, YBDL for the first time indicated its acceptance of the appointment of Arbitrator Banack and of the propriety of the process followed by TSCC 2130 to appoint the Arbitrator. However YBDL objected to the jurisdiction of the Arbitrator to decide any of the issues raised by TSCC 2130. Justice Matheson reviewed the amended Notice of Arbitration delivered by TSCC 2130 at the outset of the hearing. She acknowledged that there were overlapping claims in the arbitration, this application, and the two actions commenced by statements of claim. Justice Matheson accepted the position of TSCC 2130 that it was acting out of an abundance of caution to preserve limitation periods. She also noted that TSCC 2130's claims under s. 113 of the *Condominium Act, 1998* can only

be heard in court. Matheson J. rejected an argument by YBDL that TSCC 2130 was required to proceed with its court proceedings prior to the arbitration. She noted that YDBL had not waived its right to assert in the court proceedings that issues should be heard by arbitration. She concluded her procedural recitation as follows:

> Thus, [YBDL's] position appears to me to be tactical and delay-oriented. There is a particularly onerous clause in the [CRA] regarding common costs, one of the matters in issue, under which delay operates to the direct benefit of [YBDL].

YBDL also argued that the arbitration had to await hearing of TSCC 2130's application to void the CRA under s. 113 of the statute. It argued that since the arbitration is a creature of the CRA and since TSCC 2130 had called into question the validity of the CRAin this application, arbitration should await the determination of whether the CRA is valid. Justice Matheson refused to stay the arbitration, holding that proceeding with the arbitration was not oppressive, vexatious, or an abuse of process as required by the case law governing interlocutory stays of arbitration proceedings. As a result, for this and other reasons dealt with below, YBDL's current motion to dismiss this application as an abuse of process because it waited the arbitration must be dismissed. That was exactly the order of proceedings that Matheson J. allowed.

78 Justice Matheson listed the matters that were then in issue in the proposed arbitration proceeding. Justice Matheson considered only whether the fairness of the common cost allocation under the CRA could be arbitrated. She concluded that she only needed to find one issue where the Arbitrator had jurisdiction in order to uphold the amended Notice ofArbitration and send all of the matters to the Arbitrator for him to assess his own jurisdiction under the terms of the CRA in light of the competence-competence principle.

79 Justice Matheson then considered YBDL's Catch-22 argument that before TSCC 2130 can arbitrate, it must submit its own proposed reallocation despite the refusal of CFCL and YBDL to tell TSCC 2130 the basis for the existing shared cost allocations. Justice Matheson held:

> Further, among [TSCC 2130's] information requests are requests for information about the basis for the existing cost allocations. While [YBDL and CFCL] have provided some information, some requests in this area remain unsatisfied. Thus, even if [TSCC 2130] wished to make a proposal, it has been denied the information it needs to prepare one.

80 Matheson J. sent all of the issues to arbitration and ordered YBDL and CFCL to pay costs of $25,000 to TSCC 2130. Among her reasons for awarding costs, Matheson J. found, "While I agree that the issues were narrowed over the course of the application, as [YBDL and CFCL] submit, the history of the matter suggest to me that a more cooperative approach by [YBDL and CFCL] could have avoided substantial costs."

81 YBDL and CFCL appealed to the Court of Appeal to try to prevent the arbitration from proceeding. The Court of Appeal quashed the appeal and ordered YBDL and CFCL to pay costs of $20,000 to TSCC 2130.

82 YBDL then contested the jurisdiction of the Arbitrator at a motion before Arbitrator Banack on February 24, 2014. YBDL's continued to assert its Catch-22 argument despite the express finding of Matheson J. that YBDL and CFCL had denied TSCC 2130 the information it needed to prepare a proposed reallocation of common costs. At para. 39 of his Award, the Arbitrator held:

> Furthermore, [YBDL and CFCL] control the resources and information supporting the current allocation, which has only recently begun to be disclosed to the Applicant. [YBDL and CFCL] cannot control the flow of information on the one hand and yet allege that the Applicant has failed to provide the necessary details on the other. **These issues are clearly within my jurisdiction and are arbitrable**. [Emphasis in original.]

83 The Arbitrator ordered YBDL to pay costs of $28,822.77 to TSCC 2130 for its continued attempt to challenge the Arbitrator's jurisdiction. At para. 29 of his costs decision he held:

> Furthermore, considering the history between the parties, including the proceeding before Justice Matheson, I do not doubt that this matter may have been much less costly to all of those involved had the parties generally, and to echo Justice Matheson's comments, [YBDL and CFCL] specifically, been more cooperative. The Respondents had every right to oppose the jurisdiction to arbitrate this dispute, however part of the risk calculation to do so is the obligation to pay costs if unsuccessful.

84 YBDL has also appealed the Arbitrator's first decision on grounds of his jurisdiction. The appeal has yet to proceed.

85 The first substantive hearing before the Arbitrator occurred on May 1 and 2, 2014. The Arbitrator released reasons dated June 3, 2014. He held that on reviewing the CRA, it was the parties' intentions that CFCL, as a professional property manager, would fill the role of CFM as agent of the shell declarant YBDL. At para. 101 of his reasons, he wrote:

> Further, and to the extent that [TSCC 2130] maintains that the appointment of [CFCL] was not disclosed to the residential owners, it may pursue an application under section 113 of the *Condominium Act* if it thinks that the appointment is oppressive or unconscionably prejudicial to the TSCC 2130 or any of its owners.

86 That is, the Arbitrator too anticipated that the application that is currently before the court would proceed separately and later.

This Application is not an Abuse of Process

87 Although the facts underlying CFCL's appointment are common to both proceedings, as both Matheson J. and Arbitrator Banack acknowledged, relief concerning the CRA as an allegedly oppressive mutual use agreement under s. 113 of the *Condominium Act, 1998* must be brought before the court. YBDL argues that it is an abuse of process for TCC 2130 to have waited for the arbitration proceedings described above and then for several further days of arbitration hearings in January 2015 on the merits of the fairness of the shared costs allocations before proceeding with this application. If the CRA is terminated under s. 113, YBDL asks, what happens to the arbitrations that have been held and decided under the CRA's terms? TSCC 2130 got to wait and see if it was happy with the outcome of the arbitration before deciding whether to proceed with this application. It did not even deliver its supporting affidavit until 2015. YBDL says that this application has been conducted as an abuse of process. I do not agree.

88 The issue of what might become of prior arbitration decisions if the CRA is terminated no longer arises in this proceeding. The relief sought by TSCC 2130 deals with the removal of YBDL and its agent CFCL as CFM. The CRA will continue. This point has therefore become moot at this stage.

89 Rule 38 of the *Rules of Civil Procedure* governs applications to the court. It requires the notice of application to the court to list the evidence to be relied upon by the applicant. It also anticipates a date being set for the hearing. However, it does not explicitly require that the date be set prior to the commencement of the proceeding. Nor does it require the affidavit to be delivered with the notice of application. Here, TSCC 2130's notice of application made reference to an affidavit that did not yet exist at the time the notice was issued. While I do not need to decide the question, in my view, an interpretation that supports the efficiency of the summary application process likely would require the affidavit to at least exist if it is to be referred to in a notice of application. As I will discuss more fully below when considering limitation periods however, a breach of the *Rules* does not make the proceeding a nullity.

90 Technically speaking, s. 113(1) of the *Condominium Act, 1998* allows a condominium corporation to "make an application" under the section within 12 months of the election of the new board of directors at the statutory turnover meeting. Rules 14.05(1) and (1.1) of the *Rules of Civil Procedure* require only that a notice of application and an information form be filed in order to commence an application. In my view, commencing a

summary application by issuing a notice of application with no supporting affidavit, even if an irregularity, fulfills the requirement set out in s. 113. I was not referred to any case law to the contrary.

91 YBDL had the right to move for relief in respect of the breach of the *Rules* had it chosen to do so before now. It plainly knew of the procedural irregularity as Ms. Francis referred to it in herAugust 8, 2013 email. It also knew that CFCL had taken the position that as long as it was not called on to respond to the application it was prepared to engage with TSCC 2130. There is nothing wrong with commencing placeholder claims to toll limitation periods while other matters proceed. Matheson J. discussed the fact that TSCC 2130 had issued overlapping processes to ensure that it had covered all of its bases. The schedule for hearing of the many motions before me was arrived at through a case management process that commenced in Civil Practice Court in January 2015. I see no prejudice to YBDL from the manner and timing by which this application was brought before the court.

YBDL and CFCL Finally Disclosed the Bases for the Sharing Percentages

92 In the run up to the hearing before Matheson J., YBDL finally did disclose the basis for some of the allocations of common costs set out in the CRA. YBDL submits that it volunteered this information in its client's affidavit that was filed before Matheson J. In fact, CFCL's witness swore that "If the costs had been calculated on the basis of square footage, TSCC 2130 would be paying approximately 56% of the operating costs." I note the conditional "if." It was only during a cross-examination in that proceeding that Ms. Francis disclosed, during her own questioning of a witness, that many of the cost allocations were in fact based on the relative square footage of the component owners' respective premises. Despite two years of stonewalling by YBDL and CFCL, Ms. Francis also volunteered that the basis for allocations was obvious! If that was the case, why was it kept a state secret for two years? Why was the witness's affidavit expressed with the conditional "if"? CFCL had at first offered to disclose the methodology of the allocations to TSCC 2130 in April 2012 before its counsel and YBDL took the opposite approach in response to TSCC 2130's letters dated October 1, 2012. I find that they withheld disclosure for the best part of two years so as to advance the Catch-22 argument to try to prevent TSCC 2130 from arbitrating the fairness of the shared cost allocations under the CRA. The correspondence and proceedings fought over the Catch-22 had no substantive purpose. They were just procedural roadblocks erected to prevent or at least delay TSCC 2130 from challenging the allocation of common costs set by YBDL or CFCL in the CRA. Matheson J. noted that delay favours YBDL. As each year passes, TSCC 2130 is required to pay ongoing bills being sent by CFCL and to start a fresh arbitration. YBDL fought out the Catch-22 position before Matheson J., and then tried the same argument a second time before Arbitrator Banack and then tried before me to justify its Catch-22 position as an arguable position that is not indicative of oppression. I disagree.

The Arbitration of Fiscal 2013 Shared Costs

93 After Justice Matheson's decision and in preparation for the arbitration proceedings, YBDL and CFCL were compelled to disclose the rest of the underlying financial information concerning the fiscal 2013 allocation of common costs. This allowed TSCC 2130 to obtain an expert report by a quantity surveyor in June 2014 upon which it relied at the next arbitration hearing. By Award dated February 16, 2015, Arbitrator Banack dealt with TSCC 2130's claims that the allocations of common costs were not fair and reasonable for the fiscal year ending October 31, 2103. TSCC 2130 had some success in reducing its share of auditing expenses. Its expert had also discovered that CFCL had been charging a portion of its head office expenses to the component owners under the CRA. These charges were not disclosed as a line item in the six-line annual budget provided by CFCL. Moreover, the reporting of these costs was spread through a number of entries buried deep in the accounts maintained by CFCL. The Arbitrator held that those expenses were improper and ordered that TSCC 2130 be reimbursed in the amount of $23,187. TSCC 2130 spent much more than that for what might appear to be a fairly modest amount. TSCC 2130 notes that over decades, the adjustments that it obtained would amount to approximately $1 million in the aggregate. It is fair to note that when assessed over the expected long-term life of the CRA, TSCC 2130's victory, while not massive, was not as trivial as YBDL suggests.

Are Arbitrations Required for the Same Issues for 2014 and 2015?

94 As the Arbitrator's decision on head offices expenses was only made in February 2015, CFCL had by then delivered its accounts for the fiscal year 2014, which included an allocation for CFCL's head offices expense. TSCC 2130 has made four requests for resolution of this issue for 2014 without response from CFCL or YBDL. Moreover, requests for documents made by TSCC 2130 have yet to be provided. In addition TSCC 2130 has objected to CFCL's continuing to include a share of its head office expenses in the 2015 fiscal year common costs even after the Arbitrator's decision was released. TSCC 2130 has requested supporting documents for 2015 that have yet to be provided. Therefore TSCC 2130 has commenced arbitrations for fiscal years 2014 and 2015.

95 Rather than disclosing underlying documents to support the charges that it has invoiced to a component owner under the CRA, CFCL has asked for $100 per hour for administrative staff photocopying time plus 50 cents per page to reproduce documents for TSCC 2130 now. CFCL has not responded to a request for an estimate of the time and cost involved in providing the documents that TSCC 2130 seeks so as to understand the common expenses that it is being charged.

Three Specific Issues Relied upon by TSCC 2130

96 TSCC 2130 relies on another three issues to establish that it has been oppressed. In my view, TSCC 2130 makes too much of them. They strike me as irritants that do not, on their faces, amount to oppression under either ss. 113 or 135 of the *Condominium Act, 1998*. However, they are at least to some degree indicative of the contemptuous attitude that the conflicted and powerful CFM structure in the CRA has fostered. It is the one-sided, conflicted contractual structure that I find resulted in oppression and unconscionable prejudice to TSCC 2130 below. The following events are but examples of that result.

97 The first complaint made by TSCC 2130 concerns the events at its annual general meeting of unit owners held on June 23, 2015 ("AGM"). A principal of Lanterra, one of the co-owners of YBDL, owns a unit in the residential condominium and therefore was invited to attend the AGM. Mr. Mark Freake was enlisted to attend as the unit owner's proxy. Mr. Freake has filed evidence describing his involvement at the AGM. Mr. Freake is a litigation associate at Mr. Schein and Ms. Francis's law firm. They listed him on the Counsel Sheet as he attended at the motions before me although he made no submissions. Purportedly acting as an owner's proxy, Mr. Freake was instructed to attend the AGM to help ensure that TSCC 2130's unit owners understood YBDL's side of the story. He attempted to hand out a letter to unit owners that had not been submitted before he arrived at the meeting despite the fact that counsel for both sides had been discussing the AGM for several days. Mr. Freake was denied permission to hand out the letter at the meeting and there is conflicting evidence of whether he gave the letter to unit owners who asked for it in the meeting or out in the hallway. He was ultimately asked to leave the premises.

98 The letter was on CFCL's letterhead and was signed by both CFCL and YBDL. It expressed their concerns. CFCL made no effort to maintain any pretense of neutrality as CFM. Nor was it required to do so. The letter included a reference to the amount of money that TSCC 2130 had spent on legal fees to that time. YBDL and CFCL only knew that number due to the requirement in the CRA that TSCC 2130 provide its financial statement to the CFM. TSCC 2130 takes umbrage with the use of information it provided under the CRA for an improper purpose -- to undermine TSCC 2130's management before its unit holders.

99 While each lawyer is ultimately responsible for his or her own actions, Mr. Freake should never have been sent to the AGM. As a lawyer for YBDL, he should not have spoken directly to the ultimate parties opposite without the permission of counsel. Moreover, Mr. Freake is now both a witness and counsel in this matter. Furthermore, there is case law that was relied upon at the hearing of the motions before me that expresses the court's disapproval of efforts by defendant's counsel to go behind plaintiff's counsel to communicate directly to the plaintiffs in a class action (which is quite akin to the representation of unit owners by a condominium

corporation under s. 23 of the *Condominium Act, 1998*). Lanterra's unit owner was free to attend the AGM and to have a proxy attend. He was not free to hand out a document at the meeting that had not been submitted to the chair in advance. Presenting it to the chair at the outset of the meeting was poor form to say the least. Nor was the CFM authorized to use information provided by the condominium corporation to the CFM under the CRA or to have YBDL's litigator try to undermine the litigation position of management of TSCC 2130 or of his professional colleagues who act for TSCC 2130. It was inappropriate, heavy-handed, and has ethical overtones. It was perhaps a one-hour issue but one which speaks to YBDL's and its co-owners' disdain for TSCC 2130 and its counsel.

100 The second matter relied upon as oppressive by TSCC 2130 is the handling of master keys to service units owned by YBDL that are on TSCC 2130's premises. Arbitrator Banack ruled that TSCC 2130 was entitled to a master key for all units on its premises under the express terms of the condominium's declaration. However he also held that CFCL was entitled to impose a protocol limiting use of the keys to emergencies and requiring TSCC 2130 to report any use of the master keys to CFCL. TSCC 2130 says that CFCL delayed the finalization of the wording of the protocol for a year. YBDL says that TSCC 2130 improperly took a set of master keys and will not return them in breach of Arbitrator Banack's award. How can it be that the parties had to go to arbitration over TSCC 2130's entitlement to master keys that is set out in the formal declaration? I am not making any findings of wrongdoing against any party in this matter. Rather, the fact that CFCL would not give TSCC 2130 keys as required by the declaration without arbitration in the first place is indicative of its approach to its exercise of the power of its position. The fact that events played out poorly over far too long a period was just another symptom of the negative relationship among the parties.

101 Finally, TSCC 2130 relies upon the conduct of YBDL at a meeting in June 2014 as evidence of oppression. After TSCC 2130 had analyzed the financial documents disclosed by CFCL and YBDL in the arbitrations and had delivered its expert's report, the parties agreed to meet without prejudice to try to settle the allocation of costs issues. The parties agreed that the meeting would be between the clients without the lawyers present. YBDL was represented at the meeting by a senior officer of Lanterra who is a non-practising lawyer. CFCL was represented at the meeting by its general counsel. TSCC 2130 objects to YBDL and CFCL sending two lawyers to a non-lawyers' meeting. It also objects to statements allegedly made by YBDL and CFCL representatives at the meeting which TSCC 2130 perceived to be another effort by YBDL and CFCL to undermine TSCC 2130's relationship with its counsel. In my view, the parties were represented by senior officers with executive authority for their respective parties. No one attended from the external law firms whom the parties had engaged. Many business people may have law degrees. Perhaps CFCL could have sent someone other than its GC. However, he may well have been the executive with principal carriage of the matter within CFCL. I will not assess the content of the matters said at a without prejudice meeting. Whatever was said did not seem to have its desired result if settlement was the goal of the meeting. In my view, TSCC 2130's objection is best seen as anger at what it perceives to be another heavy-handed tactic.

Identifying the Oppressive result of the CRA

102 All of these events simply reinforce that as CFM under the CRA, CFCL was not a neutral or a fiduciary to TSCC 2130. It aligned itself clearly and completely with YBDL as one of its major co-owners. Although TSCC 2130 claimed against CFCL, it was acknowledged by Arbitrator Banack that the cost allocation disputes were between and among YBDL and TSCC 2130. He recited that CFCL was a party to the arbitrations with its consent. A neutral manager would have been neutral as between the component owners. A neutral manager would not have put YBDL's position on its letterhead and then tried to spring a one-sided advocacy document on TSCC 2130's unit owners at its AGM. A neutral manager would fulfill its obligations without having its independent counsel write a letter that adopts the declarant's position and effectively say "if you don't like it, arbitrate." These are all functions of the fact that the CRA does not contemplate a neutral manager. YBDL is the named manager and CFCL was its intended delegate. When will an agreement that contemplates an interested manager result in oppression?

103 I note that s. 135 of the *Condominium Act, 1998* is drafted in the same language as the oppression remedies set out in the corporate statutes. Section 113 however, talks about provisions of an agreement resulting in oppression or unconscionable prejudice to a condominium corporation or any of its unit owners. While an assessment of oppression may be different under the two sections that may address two different matters, I do not think it necessary to so find for the purposes of this case.

104 The oppression remedy protects a party's reasonable expectations. *B.C.E. Inc. v. 1976 Debentureholders*, *2008 SCC 69* (CanLII). The most obvious sources of reasonable expectations are the law and the formal legal documents produced by the party opposite. In addition, small harassments can indeed add up to unfairly prejudicial conduct. *Dyke v. Metropolitan Toronto Condominium Corporation No. 972*, *2013 ONSC 463* (CanLII), at para 23.

105 The Supreme Court of Canada described the oppression remedy in *B.C.E. Inc*. as follows:

> [89] Thus far we have discussed how a claimant establishes the first element of an action for oppression -- a reasonable expectation that he or she would be treated in a certain way. However, to complete a claim for oppression, the claimant must show that the failure to meet this expectation involved unfair conduct and prejudicial consequences within s. 241 of the CBCA. Not every failure to meet a reasonable expectation will give rise to the equitable considerations that ground actions for oppression. The court must be satisfied that the conduct falls within the concepts of "oppression", "unfair prejudice" or "unfair disregard" of the claimant's interest, within the meaning of s. 241 of the *CBCA*. Viewed in this way, the reasonable expectations analysis that is the theoretical foundation of the oppression remedy, and the particular types of conduct described in s. 241, may be seen as complementary, rather than representing alternative approaches to the oppression remedy, as has sometimes been supposed. Together, they offer a complete picture of conduct that is unjust and inequitable, to return to the language of *Ebrahimi*.
>
> [90] In most cases, proof of a reasonable expectation will be tied up with one or more of the concepts of oppression, unfair prejudice, or unfair disregard of interests set out in s. 241, and the two prongs will in fact merge. Nevertheless, it is worth stating that as in any action in equity, wrongful conduct, causation and compensable injury must be established in a claim for oppression.
>
> [91] The concepts of oppression, unfair prejudice and unfairly disregarding relevant interests are adjectival. They indicate the type of wrong or conduct that the oppression remedy of s. 241 of the CBCA is aimed at. However, they do not represent watertight compartments, and often overlap and intermingle.
>
> [92] The original wrong recognized in the cases was described simply as oppression, and was generally associated with conduct that has variously been described as "burdensome, harsh and wrongful", "a visible departure from standards of fair dealing", and an "abuse of power" going to the probity of how the corporation's affairs are being conducted: see Koehnen, at p. 81. It is this wrong that gave the remedy its name, which now is generally used to cover all s. 241 claims. However, the term also operates to connote a particular type of injury within the modern rubric of oppression generally -a wrong of the most serious sort.
>
> [93] The CBCA has added "unfair prejudice" and "unfair disregard" of interests to the original common law concept, making it clear that wrongs falling short of the harsh and abusive conduct connoted by "oppression" may fall within s. 241. "Unfair prejudice" is generally seen as involving conduct less offensive than "oppression". Examples include squeezing out a minority shareholder, failing to disclose related party transactions, changing corporate structure to drastically alter debt ratios, adopting a "poison pill" to prevent a takeover bid, paying dividends without a formal declaration, preferring some shareholders with management fees and paying directors' fees higher than the industry norm: see Koehnen, at pp. 82-83.

> [94] "Unfair disregard" is viewed as the least serious of the three injuries, or wrongs, mentioned in s. 241. Examples include favouring a director by failing to properly prosecute claims, improperly reducing a shareholder's dividend, or failing to deliver property belonging to the claimant: see Koehnen, at pp. 83-84.

106 In my view, TSCC 2130 had a reasonable expectation that the YBDL and CFCL would deal with it lawfully, in good faith, as an equal owner sharing its property, and in accordance with the terms of the constating documents of the condominium corporation. As CFM, YBDL and CFCL were obliged to implement fair and reasonable common cost sharing allocations. The fact that they were interested parties who profited from every dollar allocated to TSCC 2130 was always part of that structure. But that does not give them the right to use the power of the CFM's office to insulate themselves from fair reporting and review of their use of TSCC 2130's funds. They used the CFM's office to prevent TSCC 2130 from obtaining the financial information which it required to carry out its own stewardship of its own funds. It took a court proceeding, an appeal, and an arbitration, which together took more than a year and cost more than $74,000 in cost awards, to get YBDL and CFCL to disclose the basis for the allocations which CFCL had first offered to disclose in its April 27, 2012 letter. Any commercially reasonable manager acting in good faith towards it principals ought to have disclosed this information voluntarily on day one. YBDL and CFCL still have an appeal outstanding from Arbitrator Banack's decision taking jurisdiction.

As I noted above, it is not illegal to have a one-sided contract or even one where parties agree that a party with a financial interest will have power. But lack of disclosure of financial information is an indicia of oppression. So too is self-dealing i.e. exercising powers so as to prefer oneself rather than fulfilling the objective fairness and reasonableness standard. *Ford Motor Co of Canada v OMERS*, *2006 CanLII 15* (Ont. C.A.), at paras. 92, 95, and 97. *Millar v McNally*, *1991 CarswellOnt 140*, at paras. 16, 17, 29. *Bury v Bell Gouinlock Ltd (1984), 48 O.R. (2d) 57* (H.C.), at pp. 59-60.

107 I agree with the submission of TSCC 2130 that the top-down imposition by the YBDL as declarant of the non-arm's length CFM, by way of pre-turnover contract, resulted in oppression of the post-turnover corporation's rights. It did not have to be so. CFCL and YBDL could have made fair disclosure of financial information. CFCL and YBDL could have adopted positions that enabled TSCC 2130 to have meaningful input into how its funds were spent and reported to it. Even if they insisted on maintaining the CRA in its current form, they could have taken steps to cooperate to have disputed matters resolved by arbitration or in this proceeding. I am not making any finding that the allocations imposed were unfair or unreasonable beyond the findings of Arbitrator Banack. However, the imposition of a powerful, conflicted CFM, coupled with their determinations to use the contractual power of the CFM's office to delay or prevent the assessment of the fairness and reasonableness of allocations as required of the CFM under the CRA shows that the provisions of the agreement created a structure that was capable of being used oppressively and that was used oppressively. The conflicted CFM used its unbalanced contractual terms, coupled with non-disclosure, and heavy-handed self-dealing to favour YBDL (and itself as co-owner of YBDL) instead of ensuring the fairness and reasonableness of the allocations of shared costs. These findings flow more from the terms of the CRA and the litigation findings of Matheson J. and Arbitrator Banack than from the three discrete issues regarding the AGM, the master keys and the no-lawyers meeting. However, as noted above, CFCL's participation in those events is consistent with the one-sided approach of YBDL and CFCL to the CRA.

* At para. 78 of its factum YBDL points to the following provisions of the CRAthat it says protect TSCC 2130 from oppression:

* Article 8.05 provides for budgets and reports

* Article 8.07 deals with failure by the Common Facilities Manager

* Articles 9.03 and 9.04 provide a mechanism for any party to challenge allocations through arbitration

        * Article 9.06 provides a mechanism for any party to challenge the accuracy of its common expense allocation
        * Article 9.07 provides for a consultative process with respect to capital costs estimated in excess of $100,000
        * Article 20.01 contains default provisions, including the right of each party to bring proceedings in the nature of specific performance, injunction or other equitable relief
        * Article 20.03 provides for a suspension of rights of a defaulting party
        * Article 21.03 provides that it is a condition of any mortgage that the mortgagee or chargee enter into a form of assumption agreement attached as Schedule "G" to the CRA
    * Article 22 contains arbitration provisions
        * Article 24.01 states that the provisions run with the land

108 The simple answer to that submission is that even with all of those protections, YBDL and CFCL were able to stonewall TSCC 2130 for two years, before disclosing the most basic information. YBDL and CFCL have acted to prevent TSCC 2130 from being able to test the fairness and reasonableness of the cost allocations to which it is entitled under some of the very sections of the CRA relied upon in the list above. Two more arbitrations continue to be needed and arbitrations will continue each year until information starts to flow. CFCL's demand for $100 an hour to pay for a minimum wage clerk at a copy shop plus 50 cents per page for photocopying with no limit or estimate in order to provide financial information to TSCC 2130 is just another example of similar use of the CFM's powers under the CRA. CFCL inconsistently says at the same time that (a) it provided everything needed by TSCC 2130 in the preliminary meeting in September 2012; and (b) the information sought by TSCC 2130 is too granular so that the cost of photocopying is disproportional. It ignores that it is spending other peoples' money while exercising powers in a manner that favours itself and shields itself from the enforcement of its obligation to be fair and reasonable in its decision-making concerning that spending.

109 If YBDL and CFCL were satisfied that their cost allocations were fair to TSCC 2130, why adopt all the oppressive tactics? Why not just prove it with timely and fulsome disclosure and go to a quick arbitration if required? CFCL has nothing to hide. It is a very substantial, highly credible, important Canadian enterprise. Arbitrations can be quick and inexpensive or they can be every bit as protracted and expensive as civil litigation. CFCL could have just arbitrated the fairness of the allocations in a straightforward manner to set the ground rules going forward.

110 Having reviewed all of the contemporaneous correspondence and proceedings, I have no hesitation finding the YBDL, through its agent CFCL, oppressed TSCC 2130 under s. 135 of the *Condominium Act, 1998*. Moreover, the CRA, a pre-turnover mutual use agreement, has produced a result that is oppressive or unconscionably prejudicial to TSCC 2130. I have already found that YBDL did not clearly or adequately disclose the CRA to prospective condominium purchasers in its formal disclosure statement. As a result, under s. 113(3) of the *Condominium Act, 1998* (and the broad remedial flexibility of s. 135) "the court may make an order amending or terminating the agreement or any of its provisions or may make any other order that the court deems necessary."

The Remedy - Amending the CRA

111 I am hesitant to restructure the bargain between the parties. My first inclination was that the court is best to terminate the agreement and leave it to the parties to re-build their relationship as they see fit. However, I decline to take that step for a number of reasons. First, TSCC 2130 asks me not to do so. Terminating the agreement would leave a void and there is not yet a basis to think that the void can be filled by the parties acting commercially toward one another. Moreover, I agree with Arbitrator Banack that there are synergies available with having CFCL as CFM given its management roles in other components of the Maple Leaf Square complex.

The oppression is not just that CFCL is CFM. Rather, it is that the contractual structure allowed the conflicted manager to use one-sided contractual powers harshly so as to shield itself from enforcement by TSCC 2130 of the fairness and reasonableness of the cost sharing allocations. It is that oppressive result that should be addressed by the remedy.

112 I am also mindful of the statutory differences between ss. 111 and 112 of the *Condominium Act, 1998* as compared to s. 113 of the statute. In the former two sections, a condominium corporation is given the unilateral power to terminate pre-turnover agreements that do not tickle its fancy. Mutual use agreements are dealt with in a much more limited way under s. 113. That is, the Legislature recognized that there are multiple interests at play in mutual use agreements that limit the fairness of simple termination by one party. The legislation gives the condominium corporation no relief unless an agreement results in oppression. The declarant has the right to impose terms up to the point of oppression (or unconscionable prejudice). In my view therefore, despite the possible breadth of the remedial powers set out ins. 113, I am inclined to do as little as possible to address only the source of oppression and otherwise leave in place the structure imposed by the declarant.

113 Therefore, this court orders that the Complex Reciprocal Agreement dated December 24, 2010 is hereby amended by inserting the following after Article 8.06 of the agreement:

> 8.06.1 Removal of Common Facilities Manager
>
> (a) Subject to subsection 8.06.1 (b) the Residential Owner may, by resolution of its Board of Directors, remove the Common Facilities Manager by giving at least 60 days notice in writing.
>
> (b) n the event of a removal of the Common Facilities Manager under Section 8.06.1(a) a third party facilities manager (the "Replacement Manager") shall be appointed in accordance with Section 8.07 in the same manner as would apply if the Common Facilities Manager had been replaced under Section 8.07 with necessary modifications.

114 This amendment, as sought by TSCC 2130, gives it a right to terminate YBDL (and its agent CFCL) as CFM without cause on 60 days' notice. TSCC 2130 does not seek the immediate removal of YBDL or CFCL as CFM. It only seeks the *right* to remove them so as to balance the bargaining table going forward. This remedy also appears fit under s. 135 of the statute. It is tailored towards the wrongdoing of CFM *qua* declarant in its imposition of the CRA that resulted in a structure that oppressed and unfairly prejudiced TSCC 2130.

115 Schedule "D" to the CRA provides that the initial 75:25 allocation of common costs that is set out in many of the costs headings in Schedule "D" to the CRA may cease to apply if YBDL is removed as CFM. TSCC 2130 says that YBDL has raised this as a threat in the event that TSCC 2130 succeeded in obtaining the relief that it sought. I can only note that YBDL and CFCL must have been satisfied that the 75:25 first level allocation was fair and reasonable if they continued to apply it after the first year. However, if it disappears, the parties will have their remedies whether under s. 135 of the statute or by arbitration or perhaps both.

The Deficiencies Actions

116 I have previously mentioned that TSCC 2130 has sued YBDL for construction deficiencies and negligence in the design and construction of the Maple Leaf Square complex. YBDL moves for summary judgment to dismiss all of these claims. Analyzing these issues requires a brief review of the New Home Warranties Plan regulatory scheme in Ontario. It also requires the assessment of the status of a settlement agreement that was entered into by the parties as part of that regulatory process. YBDL also denies that TSCC 2130 has standing to raise tort claims on behalf of unit owners or any claims regarding the parking garage. YBDL argues that TSCC 2130 can only sue on contractual claims that are common to all owners and it is common ground that not all unit owners own parking spots in the parking garage. YBDL also denies that a cause of action exists against a condominium developer for negligence in the design or construction of the condominium unless the negligence has led to physical danger. The Supreme Court of Canada has expressly left open that very question. YBDL

says that all of the claims made are too late and are barred by the *LimitationsAct, 2002,* S.O. 2002, c. 24, Sched. B. YBDL also attacks the admissibility of the expert evidence delivered by TSCC 2130 on construction deficiencies.

117 For its part, TSCC 2130 has moved for an extension of time to allow it to file some of its evidence late. It also moves for "boomerang summary judgment" i.e. summary judgment in its favour although summary judgment was initially sought by YBDL. The Court ofAppeal has now made abundantly clear that this is a proper plea. *Meridian Credit Union Limited v. Baig*, *2016 ONCA 150* (CanLII) (Ont. C.A.), at para. 17 citing, *King Lofts Toronto I Ltd. v. Emmons*, *2014 ONCA 215* (CanLII), *40 R.P.R. (5th) 26*, at paras. 14-15; and *Kassburg v. Sun Life Assurance Company of Canada*, *2014 ONCA 922* (CanLII), *124 O.R. (3d) 171*, at paras. 50-52.

118 While YBDL relies on some unsworn expert documentation that was exchanged between the parties during the New Home Warranties Plan process, it has chosen not to file independent expert evidence of its own. TSCC 2130 says that it is entitled to judgment at least for liability and in many cases for damages which it has proven on these motions in the absence of any evidentiary response from YBDL. The nature of the burden in summary judgment motions is very much in issue.

Summary Judgment

119 As mentioned previously, I have been case managing the steps leading to the hearing of these proceedings. An issue arose as to what exactly was being sought by YBDL in moving for summary judgment. In discussions, it appeared that YBDL was raising discrete issues like limitation periods, standing, and whether TSCC 2130 had proper causes of action. But in its formal positions, YBDL was clear that it was intending to put all issues on the table and would seek judgment on any issue where there was no serious issue requiring a trial. TSCC 2130 recognized that this would require it to adduce evidence on not just the few, discrete issues, but on the merits of all of the construction deficiencies on which it claims.

120 In Case Conference Memo #3 dated July 15, 2015, I described the situation as follows:

> [2] The defendant(s) have been clear as to what their motions are intended to seek. But they were equally clear in Ms Francis's email of April 28, 2015 that they yield nothing and leave every issue open. Therefore, Mr. Macklin has responded with equal caution. He has served placeholder claims to preserve rights. He determined in the May 12 Case Conference that in light of the defendant's position keeping all of its options open, practically speaking he had to respond with a full evidentiary record on the merits of the deficiencies although it does not appear that the merits are likely to be all that relevant on the narrow issues propounded by Ms Francis. Mr. Macklin fears that if he does not ensure that he has shown a serious issue to be tried on every conceivable issue, then Ms Francis will be able to attack any loose end and rely on her April 28 email as justification.

121 So it has been clear for over a year that all issues were on the table. In Case Conference Memo #4 dated September 28, 2015, I invited the parties to try to narrow the issues and to bring a motion for directions to provide for gating or ordering of the hearings to see if efficiencies might be obtained by separating some narrow issues from the full hearing of the merits of all of the claims. I also noted that Mr. Macklin had advised that his client was having difficulty meeting the scheduled time limits for delivering all of its expert evidence. I did not amend the timetable at that time.

122 The Case Conference held on October 14, 2015 is important. It was held immediately before the parties were set to commence cross-examinations. Case Conference Memo #5 discussed the parties' apparent reluctance to join and narrow issues and how summary judgment might play out in the circumstances:

> [6] Here both parties are playing chess but they are stuck in a process of moving their pieces around and around the board in response to each other's moves rather than moving forward with a strategy to get to the end game. Justice Farley used to say that every case should have a strategy; but tactics are

> unwelcome. Here, there are multiple claims and placeholder claims and court allegations that overlap with arbitration proceedings and arbitration proceedings that overlap with court proceedings. Viewed individually, each step is perfectly clever and defensible from a viewpoint of ensuring that no possible option is ever foreclosed and that no risk is ever taken that the other side might get a leg up on an issue. But at some point, the issues are supposed to be joined and resolved. Is not the whole purpose of the process to take what is in issue and determine who is correct and who has to pay? If so, then what are the issues? The corollary question is: what is not in issue?
>
> [7] The defendant has moved for judgment dismissing many of the plaintiff's claims on a number of bases. There is no burden on the defendant to lead evidence. It is perfectly appropriate for a defendant to say that there is no genuine issue requiring a trial on one or more points and leave it to the plaintiff to respond to establish that a claim exists. The defendant who moves and leads no evidence will be deemed at the motion to have led all evidence that it has on the issue (i.e. none). *2313103 Ontario Inc. et al. v JM Food Services Ltd. et al., 2015 ONSC 4029* (CanLII) at para. 40. The plaintiff will then have an evidentiary burden to show that a claim exists. In response to the defendant's motion, the plaintiff may not rest on its pleadings and must lead evidence to establish a claim. See Rule 20.02(2). If there are facts in issue or a legal issue raised, the moving party will bear the ultimate burden of establishing that there is no serious issue requiring a trial under Rule 20.04(1).

123 TSCC 2130 might argue that I reversed the onus of proof in summary judgment. Rule 20.01(3) of the *Rules of Civil Procedure* requires that a defendant that wants summary judgment "move with supporting affidavit material or other evidence." Moreover, under Rule 20.04, the moving party is required to satisfy the court that there is no genuine issue requiring a trial. How can it meet this burden except by delivering evidence on the merits? However, there is another burden at play--the legal burden in the claim. It is the plaintiff, TSCC 2130, that bears the ultimate burden of proving its case on the merits. Can a defendant not traverse or simply deny a claim? What of a defendant who just says, "I do not believe that the plaintiff has any claim against me?" It may actually have no relevant evidence to adduce. In that case, should the plaintiff not have to show that it has something capable of meeting the legal burden that will be upon it at trial?

124 In *Sanzone v. Schechter, 2016 ONCA 566* (CanLII) the Court of Appeal held that dentists who were sued for negligence by a self-represented plaintiff were not entitled to summary judgment just because the plaintiff had not delivered an expert report. In moving for summary judgment in that case, the dentists did not file any evidence on the merits. Even though the ultimate legal burden is on the plaintiff and case law is clear that medical malpractice cases cannot succeed unless the plaintiff delivers an expert report, the Court of Appeal required the defendant dentists to deliver their own evidence on the merits and face cross-examination as a condition of obtaining summary judgment. My ruling would appear to be contrary to the Court of Appeal's decision on its face.

125 However, few things are ever that clear. The Court of Appeal made a significant point that the plaintiff was a self-represented party. If summary judgment could be granted without the defendant dentists even putting forward evidence, the plaintiff could be denied the most basic opportunity to face her powerful adversary. The same result would occur at trial as the case would be non-suited before the defendant ever took the witness stand. But in that case, the plaintiff would at least have had a chance to sit across from the dentists at discovery and ask her questions. Summary judgment is not intended to be a pleadings motion. It is an assessment of the merits of a case or at least a part of a case. While the plaintiff in *Sanzone* had the right to summon the defendant dentists to appear for cross-examination at the motion for summary judgment even if they did not deliver an affidavit, she was self-represented and would not be expected to know that. The Court of Appeal expressly discussed the court's duty to assist self-represented parties who are unfamiliar with the process to present their cases.

126 Of the greatest significance for this case is the discussion by the Court of Appeal concerning case management. At para. 35 of *Sanzone,* Brown J.A. wrote:

> [35] Where no pre-trial conference date has been set, it is open to a party to accelerate the exchange of expert reports by requesting under rule 50.13(1) a case conference which can be scheduled "at any time." At a case conference, a judge may give directions for any procedural step, including setting a timeline for the exchange of expert reports: rules 50.13(5)-(6). In crafting those directions at a case conference where the parties can raise all outstanding procedural issues, the judge can fairly balance the interests of both parties and establish a procedural roadmap for the balance of the proceeding tailored to the circumstances of the case and the abilities of any self-represented party. Single-judge case management, which addresses all the steps in a proceeding, not just the preparation of a single motion, offers a powerful tool by which judges can discharge their duty to accommodate self-represented parties' unfamiliarity with the litigation process to enable them to present their case to the best of their abilities.
>
> [36] Although the parties had attended two case conferences before masters prior to the respondents launching their summary judgment motion, no timetable had been set for the exchange of expert reports. The timetables set by the masters had focused on the respondents' motion for security for costs. Accordingly, when the respondents brought their summary judgment motion, the appellant was not in default of her obligations under the rules regarding the delivery of an expert's report. By resorting to rule 20 to compel the self-represented appellant to deliver an expert report, without meeting their own evidentiary obligations as moving parties under the rule, the defendants used the rules in a procedurally inappropriate manner.

127 These paragraphs suggest that had the parties attended more comprehensive case conferences, the presiding judge could have set timetables for the delivery of reports that would have taken into account the ability of the self-represented party to present his case to the best of his ability. If appropriate, the judge could have advised the plaintiff about the right to examine by summons to witness under Rule 39.03 of the *Rules of Civil Procedure*. Brown J.A. found expressly that the defendants in *Sanzone* had "used the rules in a procedurally inappropriate manner" by effectively accelerating the timetable for the plaintiff to deliver an expert report without getting to face the defendant and without a judge balancing fairly the self-represented party's status.

128 *Sanzone* is distinguishable from this case. While one might argue that YBDL's use of Rule 20 of the *Rules of Civil Procedure* has inappropriately put TSCC 2130 to the proof of the merits without evidence from YBDL, these issues were addressed expressly at no less than three case conferences. I determined that this was a case where a defendant could appropriately traverse or simply deny the claims leaving the plaintiff to establish them. Most significantly, YBDL was warned in Case Conference memo #5 that if it led no evidence it was at risk of being deemed to have none. Boomerang summary judgment was always a real issue. If I reversed the burden of proof, it is TSCC 2130 that bore the prejudice of putting forward its case on the merits in response to YBDL's express demand that it do so. But now having done so, it is entitled to try to show that its claims, or any of them, are ripe for summary judgment in its favour.

The New Home Warranties Plan

129 Section 13 of the *Ontario New Home Warranties Plan Act*, *R.S.O. 1990, c. O.31* deems the vendor of condominium projects to warrant that the building:

(i) is constructed in a workmanlike manner and is free from defects in material,

(ii) is fit for habitation, and

(iii) is constructed in accordance with the *Ontario Building Code*.

130 Warranty claims under this section must be made within a period of one year from the registration of the condominium corporation's declaration. There is a narrower set of warranties provided in the regulations promulgated under the statute that extend for a second year.

131 Section 44 of the *Condominium Act, 1998* requires each new condominium corporation to conduct an audit in its first year effectively to look for warranty claims under the New Home Warranties Plan. Claims under the statutory plan are made to Tarion Warranty Corporation as administrator of the New Home Warranties Plan.

132 The vendor is provided a period of eighteen months to satisfy valid claims under the first year warranty. It is also entitled to a period of six months to satisfy claims under the second year warranty. In that way, the compliance periods for both types of warranty claims have the same outside end date. The process then provides for the parties to engage in conciliation with Tarion. Tarion works with the parties for a number of months and ultimately is empowered to make binding determinations if the parties cannot settle themselves. There is an appeal right to a tribunal provided under the statute.

133 With the help of professional engineers, TSCC 2130 conducted first year and second year audits. It filed extensive first year warranty claims with Tarion on November 23, 2011 and second year warranty claims on December 24, 2012. There were almost 900 first year warranty claims. This is expected in the ordinary course. The warranties cover items large and small. Tarion lists and tracks the parties' progress of resolving all recognized warranty claims on a website that it maintains for the parties. As repairs were performed and signed off by the engineers for TSCC 2130, they were noted as completed on the website.

The Pleadings are Adequate in Action No. CV-13-481057.

134 As noted earlier, TSCC 2130 commenced a number of proceedings in May, 2013. It claimed on the construction deficiencies in both its proposed arbitration and by statement of claim inAction No. CV-13-481057.

135 In its first statement of claim, the plaintiff sought damages for a number of construction deficiencies. It also sought mandatory orders requiring YBDL to create a second exit from the parking garage and to reverse the designation of the garage floors so that residents could have the upper two floors and members of the public who use the commercial parking spaces would use the lower two floors. TSCC 2130 also sought a mandatory order requiring YBDL to replace the life safety systems (fire alarms) in its building.

136 As will become more apparent, the issue involving the parking garage was the issue that perhaps more than any other underlies the disputes between the parties. The parking garage exits into Maple Leaf Square right outside the ACC. On game nights, it can take literally hours to exit from the parking garage. During the playoffs it exits right beside Jurassic Park. There is nothing wrong with the construction of the garage. It is common ground that it meets the applicable municipal planning standards and it was built as per its plans and specifications. The problem is that the thousands of pedestrians walking by to attend or leave the ACC will not let cars exit the parking garage.

137 TSCC 2130 claims that the developer should have planned the garage better, perhaps with an exit onto Lakeshore Blvd. YBDL says that unit owners bought next to the ACC. The location was a major aspect of the allure of the site. It is obvious that there will be traffic at a professional sports and rock concert venue on game nights. But who enjoys sitting in their car in a parking garage for over an hour? Whitestone, the initial manager of TSCC 2130, characterized the parking garage issue as the single biggest problem facing TSCC 2130 and Maple Leaf Square almost from day one.

138 In para. 5 of its first statement of claim, TSCC 2130 pleaded the statutory warranties. In paras. 6 and 7 it pleaded the legal test for a duty of care in negligence. In para. 8 it pleaded that YBDL owed boilerplate duties of care to supervise construction, to detect deficiencies, and the like. Paras. 8(f) and (h) it pleaded:

(f) the plans and specifications prepared by or on behalf of the defendant for the construction of the buildings were inadequate and allowed for improper design contrary to good building practice and contrary to the relevant building codes and standards.

(h) the plaintiff states that the Properties have not been constructed in full conformance with relevant Ontario Building Code or reference standards, professional design specifications, manufacturer's requirements or acceptable construction practices. The defendant had an obligation and a duty of care to ensure that all work was completed in a good and workmanlike fashion, free from defects in material, fit for habitation, in accordance with the applicable building codes and proper plans and specifications, and in accordance with proper construction standards, free of major structural defects and without risk of danger to health, safety, or the environment, or of damage to other properties.

139 In para. 9 of its statement of claim, TSCC 2130 incorporated by reference the particulars set out in Schedule "A" to the statement of claim. These included particulars alleging ongoing booster heater failures, chilled water temperatures being too high to cool the building on hot days, the garage door did not comply with the *Building Code*, continuous failure of the life safety system and false alarms. There were 21 specific items listed.

140 The problem with slow exit from the parking garage was not listed in Schedule "A". Rather, in paras. 11 and 12 of the statement of claim, TSCC 2130 pleaded:

11. The occupants of TSCC 2130 are routinely stuck in the garage waiting for non-occupants to exit at levels one and two. Frequently, wait times to exit the garage range between 30 to 45 minutes.

12. TSCC 2130 states that the garage, the designation of the floor levels and creation of the entrance and exit routes, were negligently designed by the defendant, without satisfactory regard to the interests of the occupants of TSCC 2130.

141 TSCC 2130 pleads that it seeks damages for the cost to repair of pleaded deficiencies in the final few paragraphs of the statement of claim.

142 YBDL argues that the statement of claim is insufficient on pleadings grounds. TSCC 2130 is no longer seeking mandatory orders requiring YBDL to build a new exit or to switch the floor access for owners and the public. The parking units on the bottom two floors are owned by unit owners. YBDL has no entitlement to just up and move them. Instead, TSCC 2130 now accepts that pedestrian traffic is adequately controlled by paid duty police officers who are able to direct traffic to allow for a reasonable time for exit from the building on game nights. MLSE, the owner of the ACC and 37.5% owner of YBDL, is also the manager of the parking garage. It has apparently been paying for police officers to attend and keep traffic flowing out of the parking garage. TSCC 2130 says that it has no assurance that MLSE will continue to provide this service. Therefore it seeks damages equal to the cost of providing paid duty police officers to keep traffic moving in perpetuity. TSCC 2130 has filed unchallenged expert evidence that the present value of the perpetual cost to provide paid duty police is approximately $1 million.

143 YBDL argues that TSCC 2130 cannot proceed with its claim for damages as it is not pleaded. YBDL relies upon the Court of Appeal decision in *Rodaro v. Royal Bank of Canada*, *2002 CanLII 41834* (ON CA). At para. 61 of the decision, the Court wrote:

> By stepping outside of the pleadings and the case as developed by the parties to find liability, Spence J. denied RBC and Barbican the right to know the case they had to meet and the right to a fair opportunity to meet that case. The injection of a novel theory of liability into the case via the reasons for judgment was fundamentally unfair to RBC and Barbican.

144 In *Rodaro*, the judge adopted a new theory of liability in his reasons for judgment without the parties knowing in advance or being able to speak to it. That is not at all the case here. TSCC 2130's claims have evolved over time to be sure. At the outset, TSCC 2130 blamed the commercial parking for slowing owners' exit from the garage. Once YBDL disclosed its documents however and TSCC 2130 retained an expert to review them, it discovered something else --that a traffic sub-contractor retained by YBDL had not accounted for arena traffic in making his calculations. He looked at traffic at 4:00 pm instead of 10:00 p.m. when 20,000-plus people would foreseeably be exiting the ACC into Maple Leaf Square over 150 nights a year. Here, YBDL knew the argument being advanced by TSCC 2130 and had every opportunity to respond. The pleadings direct YBDL to the cause of action and the facts and events with particularity. YBDL argued the issue of the availability of the damages now sought by TSCC 2130 before me. YBDL knew the case it had to meet and responded to it as it saw fit. There is no prejudice to YBDL by TSCC 2130 changing its damages theory once it received YBDL's documents. Were leave to amend required, I would have no alternative but to grant leave under the mandatory terms of Rule 26 of the *Rules of Civil Procedure* in the absence of prejudice in any event.

The Agreements of Purchase and Sale

145 All of the agreements of purchase and sale between YBDL and the individual unit holders included a clause that limited the warranties granted by YBDL to only those provided under the New Home Warranties Plan.

> 14. The Vendor represents and warrants to the Purchaser that the Vendor is a registered vendor/ builder with the Tarion Warranty Corporation ("Tarion" or the "Warranty Program"). The Vendor covenants that on completion of this transaction a warranty certificate for the Unit will be requested by the Vendor from Tarion. The Vendor further covenants to provide the Corporation with a similar warranty certificate with respect to the common elements. These shall be the only warranties covering the Unit and common elements. The Purchaser acknowledges and agrees that any warranties of workmanship or materials, in respect of any aspect of the construction of the Condominium including the Unit, whether implied by thisAgreement or at law or in equity or by any statute or otherwise, shall be limited to only those warranties deemed to be given by the Vendor under the ONHWPAand shall extend only for the time period and in respect of those items as stated in the ONHWPA, it being understood and agreed that there is no representation, warranty, guarantee, collateral agreement, or condition precedent to, concurrent with or in any way affecting this Agreement, the Condominium or the Unit, other than as expressed herein.

146 The scope of the contractual warranty is dealt with below. At this stage it is sufficient to note that nothing in the warranty itself or in the full text of the agreements of purchase and sale prohibit or limit the existence any applicable duties of care at common law. In other words, the contracts do not prevent a purchaser from suing for negligence if it has grounds to do so at common law.

The Settlement

147 Both before and after TSCC 2130 delivered its warranty claims to Tarion, Lanterra worked extensively with TSCC 2130 to correct the hundreds of deficiencies for which YBDL acknowledged responsibility. Lanterra and CFCL dealt with TSCC 2130 and its engineers and whittled the remaining issues down to a few. In November 2013, the deadline of the Tarion conciliation process was soon to be reached leading to the possibility that Tarion would make unilateral decisions on disputed matters. Without lawyers, the parties decided to settle the remaining deficiencies. In essence, YBDL agreed to fix a number of specifically enumerated deficiencies in exchange for a release of all other, non-listed deficiencies still being claimed by TSCC 2130 at the time. YBDL also agreed to pay TSCC 2130 $120,000 without TSCC 2130 proving the cost of repairing the released deficiencies.

148 The parties knew that some of items that YBDL agreed to fix would take time. Parts had to be ordered. Installation in individual units had to be scheduled in some cases. Warm weather was required for some of the

agreed-upon work. Lawyers were then brought in. They exchanged and amended drafts and the parties signed the settlement agreement on November 27, 2013.

149 Under the terms of the written settlement agreement, YBDL was required to pay $120,000 to TSCC 2130 "concurrently with the signing" of the document. YBDL was also obliged to complete the listed repairs "in good faith and subject to approval by a certified engineer or other professional mutually agreed to by both parties." The release language in the settlement provides:

> In consideration of the payments and agreements set out herein, [TSCC 2130] on its own behalf, and on behalf of the unit owners hereby releases [YBDL] in respect [of] any and all claims in respect of the first and second year performance audits.

150 TSCC 2130 had initially made a warranty claim to Tarion in respect of the parking garage problem. Claim #657 on Tarion's listing of its first year audit claims says "There is insufficient means of egress for vehicular traffic from the parking. There is only one exit currently for over 800 parking spots." However, earlier in the process, Tarion had determined that this claim was not a proper claim under the New Home Warranties Plan because it involved no faulty workmanship, faulty materials, or breach of the *Building Code*. The parties both accept now that the parking garage was not an outstanding warranty claim as at November 27, 2013 and it was not intended to have been a matter released by the settlement.

151 Would that YBDL had said this at the time. Instead, YBDL delivered its statement of defence to the first statement of claim (CV-13-481057) on December 11, 2013 just two weeks after the settlement was signed. Not being willing to give up an opportunity to make a conditional statement where a simple declarative statement was due, YBDL pleaded in para. 5 of its statement of defence:

> To the extent that the Plaintiff alleges that the design of the Parking Garage represents a construction defect or deficiency or that the Parking Garage was not built in accordance with the plans, drawings or specifications filed with the City of Toronto, the Defendant pleads that this claim has been fully disposed of by the settlement and release [dated November 27, 2013].

152 TSCC 2130's counsel was plainly alarmed by the claim that the parking garage design claim might have been included in the settlement and release. It is a potential $1 million claim and the most important issue to the unit owners. It was not TSCC 2130's intention to release that claim for the $120,000 received for releasing numerous minor matters. Fast and furious positioning ensued.

153 The parties' people on the ground continued about the tasks of finalizing various agreed upon repairs and discussing the scheduling of repairs to take place in future. For example, on December 18, 2013, TSCC 2130's engineer acknowledged that complaints regarding two circulation heaters were resolved.

154 On November 27, 2013, TSCC 2130's property manager wrote to CFCL saying that she looked forward to the receipt of the $120,000 "in the next couple of weeks." She noted that it was important to TSCC 2130 to receive the funds by its upcoming fiscal year end. The settlement required that the funds be paid "contemporaneously" with signing. This is a good example of parties removing "time of the essence" by their conduct. It is clear that TSCC 2130 did not expect payment on the date stipulated in the contract as a fundamental condition of the settlement.

155 Payment of the settlement funds fell through the cracks at YBDL or CFCL. They advised TSCC 2130 that the cheque was coming on January 13, 2014. By email dated January 16, 2014, Mr. Hiutin advised Ms. Francis that YBDL "has not complied with its obligations under the Release" and that TSCC 2130 was considering its position. TSCC 2130 gave no notice of default. It did not provide any particulars of the nature of the breach alleged or set a time period for a cure. Ms. Francis responded by indicating that the cheque was ready and inquired as to what the problem was. The parties continued their scheduling of work. Coils and diverters were ordered for later delivery. A proposal was exchanged for recommissioning the chillers in the warm weather. On

February 10, 2014, YBDL workman attended at TSCC 2130 to commence some scheduled repair work and they were asked to leave by the property manager. The property manager advised that TSCC 2130 had returned the settlement cheque that YBDL had delivered in the interim and had declared the settlement cancelled.

156 By letter dated February 12, 2014, Mr. Macklin set out in plain language his client's concern that YBDL had pleaded that the parking garage issue was released in the settlement. He called it a "large damages item" that was not included in the $120,000 payment. He asserted that if YBDL believed that it had settled the parking garage and life safety systems issues in the settlement then there was no meeting of the minds between the clients. He offered YBDL an opportunity to rescind the settlement. He went on to assert that YBDL had also breached the settlement by failing to deliver its cheque concurrently with the release document and by failing to commence repair work on a timely fashion. Finally, he stated that in the absence of a settlement, the deficiencies issues would proceed either at Tarion or in the lawsuits. The parking garage and life safety system matters were part of the lawsuits as well. But, he noted that all of it needed to await the Arbitrator's first ruling on his jurisdiction discussed above. He also offered to meet or to discuss any issues.

157 By letter dated February 14, 2014, Ms. Francis declined to accept the rescission of the settlement. YBDL denied having repudiated the settlement. Ms. Francis denied that deficiency issues could be dealt with in the arbitration and she denied TSCC 2130's standing to assert the parking garage and life safety system matters for owners. Ms. Francis characterized Mr. Macklin's professed willingness to meet as "ironic" given that it came at the end of a letter repudiating a settlement arrived at in good faith,

158 Ms. Francis did not deny that YBDL was taking the position that the parking garage and life safety system disputes were settled. She said nothing on the meaning YBDL's pleading or to answer Mr. Macklin's concern. The one point that she could have made to assuage TSCC 2130 was left unsaid. Hence YBDL's conditionality continued.

159 YBDL plainly conceded in its factum for this motion and during the hearing before me that the parking garage and life safety systems were not part of the settlement. But that was not its prior position. In his affidavit sworn March 20, 2015, Lanterra's representative at the November 2013 settlement discussions swore at para. 11:

> [11] TSCC 2130 did not advise during the settlement negotiations leading to the SettlementAgreement that it would be continuing to pursue its parking garage claim as a warrantable deficiency item.

160 Yet at paras 30 and 31, he swore:

> [30] With respect to the deficiency items that TSCC 2130 is seeking to pursue in this action, attached hereto and marked as Exhibit "K" to this my affidavit is a chart comparing the schedule of deficiencies with the items identified by TSCC 2130 in the first and year second year performance audits.
>
> [31] The Settlement Agreement was intended to finally resolve all of these claims.

161 The parking garage and life safety systems claims are not listed in Exhibit "K." So YBDL continued to hedge its bets. What was the point of para. 11 of the affidavit (TSCC 2130 never said it was continuing the parking garage claim as a warrantable deficiency) if not to leave open an argument that the parking garage was included in the settlement? What was the point of pleading that if the parking garage and life safety systems issues were warranted deficiencies then they were released by the settlement, if not to argue that the were included in the settlement? This was a binary issue. Matters were included in the settlement or they were not. YBDL chose consistently and tactically to ride the ambiguity of both horses until at a cross-examination for this motion on October 30, 2015 Ms. Francis agreed that YBDL was no longer asserting that the parking garage and life safety issues were released as part of the settlement.

TSCC 2130 Properly Accepted YBDL's Repudiation of the Settlement

162 There is no evidence that YBDL failed to commence repairs in a reasonable time as alleged by Mr. Macklin. If the settlement cheque was late, TSCC 2130 did not take appropriate steps to give notice to YBDL to re-assert time of the essence. TSCC 2130 was trying to take advantage of circumstances that YBDL presented to cancel the settlement without having to take the risk that the parking garage and life safety systems issues might be held to be included in the settlement. It didn't work.

163 In addition, I am not satisfied that the requirement that the parties agree on an engineer to assess the completion of warrantied work prevents the settlement from being a final agreement. The parties' agreement was complete. No major item was left to be agreed upon. The scope of work required was agreed. If TSCC 2130 was of the view that the work did not meet the standard required, then that is an issue of enforcement of the agreement. While it is not perfectly clear if the engineer is supposed to function as an independent expert or if she is supposed to listen to the parties and decide the issues on what they put before her, in my view the role is akin to an arbitrator. The engineer will be called upon to determine if facts meet an agreed upon contractual standard. That is what judges and arbitrators do. If the parties had intended for the engineer to perform a different role, they would have said so. Accordingly, as the parties recall from Justice Matheson's decision in this very case, where an arbitral agreement provides no procedure for appointing the arbitral tribunal, the court has the authority to appoint one for them under s. 10 of the *Arbitration Act, 1991*, *S.O. 1991, c. 17.* The possibility that the parties might not agree in future then does not leave the position unfilled.

164 That leaves the issue of the parking garage and the life safety system deficiencies.

165 In *Remedy Drug Store Co. Inc. v. Farnham*, *2015 ONCA 576* (CanLII) the Court ofAppeal found that a party breaches a settlement agreement by claiming that it settles a matter that the parties had not agreed to settle. At paras. 52 and 72, Epstein J.A. writing for the Court, held:

> [52] The authorities are therefore clear. The conduct in this case -- insistence on a new contractual term -- can amount to an anticipatory repudiation, but only if the term is of such importance that the party seeking to rely on the term can be said to have exhibited an intention not to be bound by the contract.
>
> * * *
>
> [72] Although insistence on a new contractual term can amount to repudiation, this will not always be the case, "especially when it can be demonstrated that the other party is seizing upon small points to get out from under its contractual obligation": *AIC Ltd. v. Infinity Investment Counsel Ltd.* (1998), *1998 CanLII 7783* (FC), *147 F.T.R. 233* (F.C.), at para. 42.

166 Similarly, in *AIC Limited v. Infinity Investment Counsel Ltd*., *1998 CanLII 7783* (F.C.), Rothstein J. (as he then was) held at para 42:

> Of course, it is not every attempt to change a contract that will be characterized as repudiation. In the case of changes to an agreement already reached, it is only where one of the parties insists on the exclusion of terms agreed upon or the inclusion of terms not agreed upon that repudiation may arise. [Emphasis added.]

167 The facts of this case are the opposite of those in *Remedy Drugs* case. In that case, a party was not allowed to seize upon a minor issue to deny a settlement of major issues. Here, YBDL claimed that a major issue was included in a settlement consisting of seemingly more minor issues. As YBDL has now confirmed, that was not the deal that the parties reached. It is clear that TSCC 2130 read para. 11 of YBDL's statement of defence as creating an ambiguity that was inconsistent with the binary nature of the issue. It raised the issue at the time and asked for clarification. YBDL did not respond and maintained its conditional, ambiguous position for about two and one-half years. In my view, YBDL repudiated the settlement in a material way by maintaining an argument

that the parking garage and life safety system issues were settled by the settlement agreement. It was telling TSCC 2130 that is was free to argue that the settlement included the parking garage and life safety system issues when they knew that it did not and they knew that at least the parking garage was a vital issue for TSCC 2130. There would have been no settlement had YBDL demanded that it include the parking garage and life safety systems for $120,000. Therefore by asserting that those claims were settled, YBDL repudiated the settlement. As a party faced with repudiation of a contract, TSCC 2130 properly terminated the settlement in February, 2014. It made its election to accept the repudiation and terminate the agreement within a reasonable time.

Accordingly, the deficiencies are not settled and are alive. I do not know if the New Home Warranties Plan will still respond to them now. The question for me however is how the law deals with the claims asserted.

TSCC 2130's First Action No. CV-13-0481057 is a Nullity

168 Section 23 of the *Condominium Act, 1998* provides:

> 23. (1) Subject to subsection (2), in addition to any other remedies that a corporation may have, a corporation may, on its own behalf and on behalf of an owner,
>
> (a) commence, maintain or settle an action for damages and costs in respect of any damage to common elements, the assets of the corporation or individual units; and
>
> (b)commence, maintain or settle an action with respect to a contract involving the common elements or a unit, even though the corporation was not a party to the contract in respect of which the action is brought.
>
> Notice to owners
>
> (2) Before commencing an action mentioned in subsection (1), the corporation shall give written notice of the general nature of the action to all persons whose names are in the record of the corporation maintained under subsection 47 (2) except if,
>
> (a) the action is to enforce a lien of the corporation under section 85 or to fulfil its duty under subsection 17 (3); or
>
> (b) the action is commenced in the Small Claims Court

169 In *York Condominium Corp. No. 46 v. Medhurst, Hogg & Associates Ltd. Et al.*, *1982 CanLII 2149* (Ont. H.C.), affirmed *1983 CanLII 1970* (Ont. C.A.) the Court of Appeal upheld the dismissal of an action where a condominium corporation failed to give the mandatory notice to unit owners prior to commencing its action as required by s. 23(2). YBDL therefore argues that the initial statement of claim in Action No. CV-13-481057 is a nullity.

170 The decisions at first instance and on appeal in *Medhurst* are very brief but very clear. They held the proceeding a nullity but they contain no analysis of the question of whether the failure to give notice under s. 23 ought to render a proceeding a nullity as opposed to an irregularity that might be fixed. The Supreme Court of Canada considered the distinction between lawsuits that are nullities and those which are just irregular prior to the *Medhurst* decision in *Public Trustee v. Guaranty Trust*, *1980 CanLII 52* (S.C.C.). In that case, the Court plainly favoured interpretations that avoid classification of actions as nullities where some discretion might otherwise be available. Estey J. writing for the majority of the Court held at pp. 954-955:

> If on policy we adopt structured, invariable rules which frequently lead to harsh results for no demonstrated purpose, the effectiveness and the quality of judicial service is inevitably impaired. If the courts have here a free choice between these alternative dispositions of the claim, there is no doubt in my mind that fairness, justice and judicial administration all favour the conclusion of irregularity and

> not nullity. As Pigeon J. said, speaking for a unanimous Court in *Vachon v. Attorney General of the Province of Quebec* at p. 563, *[1979] 1 S.C.R. 555*:
>
> Except in the case of a nullity enacted by a specific statutory provision allowing the courts no power to remedy it, the Supreme Court of Canada never hesitates to intervene to reverse a decision which dismisses an action on the merits for a formal defect. To show how this is regularly done in cases from the common law provinces as well as from Quebec, the following examples may be cited: *Basarsky v. Quinlan; [1972] S.C.R. 380*, Ladouceur v. Howarth; *[1974] S.C.R. 1111*, Witco Chemical v. Oakville; *[1975] 1 S.C.R. 273*, Leesona v. Consolidated Textile Mills et al.; *[1978] 2 S.C.R. 2* Pont-Viau v. Gauthier Mfg.*[1978] 2 S.C.R. 516* [Footnotes omitted]. [Emphasis added.]

171 This policy, to avoid classifying lawsuits as nullities, was carried into Rule 2.01(1) of the *Rules of Civil Procedure*. The *Rules* expressly provide that the failure to obey a provision of the *Rules* is an irregularity that is curable. TSCC 2130 urges me to find an interpretation that saves the validity of the first action to meet the limitation periods as at the date it was issued. It refers to *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, *2013 ONSC 3271* (CanLII). In that case, the court held that where an action was commenced without compliance with a mandatory pre-condition and the legislation granted the court discretion to allow the claim, the action was not a nullity. In that case the plaintiff was not required to commence a new action after obtaining leave to proceed.

172 Section 23 of the *Condominium Act, 1998* provides no similar discretion. The words used in s. 23(2) "[b]efore commencing an action mentioned in subsection (1), the corporation shall give written notice" are clear, express, and mandatory. What can the words "before" and "shall" mean if not that the notice must be provided at time earlier than the commencement of the lawsuit? This is clear language requiring notice as a precondition before a lawsuit is commenced. No discretion is provided for me to relieve against it.

173 I see no purpose in holding the first claim a nullity. TSCC 2130 acted when it did and the limitation period should be measured against that act in my view. I see no reasons why YBDL should be able to take advantage of a notice provision in favour of owners. But, breach of a mandatory statutory precondition to commencing an action has long been held to result in an action being regarded as a nullity. The formerly notoriously strict mandatory notice period for claims against municipalities under s. 44(10) of the *Municipal Act, 2001*, *S.O. 2001, c. 25* has been amended to provide a discretion to the court to avoid the harshness of the nullity rule. The Legislature must be deemed to know the rule and to know how to avoid its strictures when it so desires. It has not done so here. Where the Legislature speaks clearly it must be taken at its word.

174 In my view, I am not entitled to ignore the clear holding of the Court of Appeal in *Medhurst* that is binding on me. It does not mention the *Guaranty Trust* decision cited above. But I cannot say it is was decided *per incuriam*, when the mandatory provisions of the *Condominium Act, 1998* seems to fit squarely into the passage that I emphasized above written by Estey J. If an interpretation is to be found to save the first action, it will have to be by the Court of Appeal or the Supreme Court of Canada.

175 TSCC 2130 argues that s. 23 only applies to contract actions in any event so that its tort claims in its first statement of claim are not lost. Section 23 gives the condominium standing to bring claims for any damage to common elements on behalf of itself and unit owners and to bring contact actions on behalf of owners where the condominium corporation is not itself a party to those contracts. TSCC 2130 argues that the corporation's right to sue in tort flows from its corporate capacity rather than from s. 23. See, for example, s. 92(1)(a) of the *Legislation Act, 2006, S.O. 2006, c 21, Sched.* F. However, the condominium corporation is not the owner of the common elements. The unit owners own the common elements as tenants in common. The condominium corporation has power to manage common elements and obligations to take care of common elements. While this may be sufficient to give it standing to sue in tort for damage to common elements at common law, s. 23 is designed to remove any doubt. It also gives the corporation the power to bring tort claims for owners in respect of the common elements. Its basic corporate capacity does not give it that power. Subsection 23(2) requires that

the condominium corporation give notice before it commences any action under s. 23(1). That includes actions concerning the common elements under s. 23(1)(a) and not just contract actions under s. 23(1)(b). The purpose of the notice requirement is to ensure that unit owners know that their corporation is about to sue in respect of common elements that they own or on contracts to which they are parties. Subsection 23(1)(a) makes no differentiation as to what causes of action are relied upon by a condominium corporation when it proposed to sue in respect of the common elements. In my views. 23(2) must apply to all claims brought by a condominium corporation in relation to common elements under s. 23(1)(a). Therefore, like the contract claims, the tort claims in the first action are also nullities and incapable of satisfying the limitation period.

The Second Action is Not a Nullity

176 YBDL argues that the second action (CV-13-489723) was commenced in breach of the spirit of s. 23 and yet another notice requirement. TSCC 2130 commenced the second action on September 30, 2013 after having given notice to unit owners as required. TSCC 2130 amended this action on February 3, 2014 to add Schedule "A" from the first claim that was missing from the second statement of claim when it was issued.

177 Subsection 17(2) of *Ontario New Home Warranties Plan Act, R.S.O. 1990 c. O.31* provides:

> (2) Where there is a dispute between a vendor and an owner arising out of the contract, neither party shall commence any proceeding in respect thereof until after fifteen days after the party notifies the Corporation of the dispute for the purpose of giving the Corporation an opportunity to effect conciliation.

178 TSCC 2130 provided notice to Tarion of its disputes with YBDL. But, YBDL notes that TSCC 2130 gave both of the statutory notices while Tarion was still carrying out it conciliation efforts with the parties. YBDL argues that the notice dated September 23, 2013 that TSCC 2130 gave to its owners under s. 23 of the *Condominium Act, 1998* failed to make any reference to the conciliation process. Similarly, as the purpose of the s. 17 notice is to ensure that Tarion has an opportunity to conciliate for the parties, YBDL argues that together the notices should be read to prevent a party from suing altogether while Tarion conducts the conciliation.

179 I do not read the sections that way. A statutory stay of litigation is a known process. These notice provisions have no language suggesting that there is a legislative intention to stay litigation once notice is provided to unit owners under s. 23 of the *Condominium Act, 1998* and the 15 day period has passed under s.17(2) *Ontario New Home Warranties Plan Act* to allow Tarion to consider conciliation. In fact, the opposite intention appears from s. 17 in my view. The requirement to give notice to Tarion is recognition that there is concurrent jurisdiction in the court and under the New Home Warranties Plan in respect of deficiencies. The legislation favours Tarion getting involved to try to effect conciliation but no more. Subsection 17(2) is only needed because litigation may ensue before conciliation has even been attempted let alone finished. Accepting YBDL's argument would leave the limitation periods running against the home purchaser for potentially lengthy time periods while the New Home Warranties Plan process unfolds. That prejudice is prevented by recognizing that the warranty holder is entitled to sue after it gives appropriate notice. If the vendor/builder wishes to seek a stay of the litigation in favour of conciliation, it is free to approach the warranty holder to seek a consensual stay or to bring a motion under s. 106 of the *Courts of Justice Act*, *R.S.O. 1990, c. C.43*.

TSCC 2130 has standing to advance all claims relating to common elements and contract claims for owners of parking spaces

180 In *1420041 Ontario Inc. v. 1 King West Inc.*, *2012 ONCA 249* (CanLII), the Court of Appeal held that just by granting standing to sue to a condominium corporation, s. 23 of the *Condominium Act, 1998* does not take away individual owner's rights to sue for damage to the common elements of a condominium. Blair J.A., writing for the Court, discussed the meaning and scope of s. 23 as follows at para 18 of his decision:

> Consistent with this intention, courts have given the condominium corporations power to sue under s. 23(1) and its predecessor, s. 14(1) and (2), a generous scope. In *York Condominium Corp. No. 420 v. Deerhaven Properties Ltd*. (1982), *1982 CanLII 2227* (ON SC), *40 O.R. (2d) 106*, *[1982] O.J. No. 3592* (H.C.J.), at p. 109 O.R., Griffiths J. said:
>
> In my view, s. 14(2) as remedial consumer legislation should not be rigidly or narrowly construed to the extent it confers on the condominium a right to sue. On that principle, I conclude it is reasonable to interpret the section as conferring on the corporation an unlimited right to sue with respect to common elements, and further extending that right by providing that an action in contract may be maintained by the corporation even though it was not a party to the contract. [page247]
>
> As I view s. 14 generally it seems to me that the obvious intention of the Legislature was not to restrict the broad power to sue previously held under s. 9(18) but rather to extend those powers by providing under s. 14(1) a right to sue and recover damages and costs in respect to not only the common elements but with respect to the assets and individual units of the corporation as well. By s. 14(2) as I have found the Legislature intended to confer a right to sue on contracts to which the corporation was not a party.

181 It is apparent that TSCC 2130 has full rights to sue in respect of common elements regardless of the cause of action. Blair J.A. went on to note that the purpose of s. 23 was to enhance the condominium corporation's ability to sue for injuries suffered by owners as a group or as a whole rather than to any individual. He also went on at para. 23 to state, "As mentioned above, it is true that the courts have given the condominium corporations powers to sue under s. 23 a liberal interpretation in recognition of the need for an effective remedy on behalf of the owners as a group and in recognition of the important managerial responsibilities imposed upon the corporation in relation to the common elements." That is, although the unit owners own the common elements as tenants in common, the primary responsibility to maintain, repair, insure, and manage the common elements lies with the condominium corporation. On this basis s. 23 is interpreted broadly to aid the condominium corporation carry out its authority and its obligations to the owners.

182 The only deficiency where the TSCC 2130's standing is seriously in issue is with respect to the parking garage delay issue. All of the deficiencies with respect to chillers and heaters, fire alarms, garbage chutes and the like deal with common elements. The parking garage is partly made up of common elements that are managed by MLSE. It also includes 455 parking stalls that are owned by individual owners. YBDL says that damage to the 455 owners is not damage to the owners "as a whole" and therefore TSCC 2130 has no entitlement to sue for them in breach of contract or in tort.

183 In my view YBDL reads s. 23 and the decision of Mr. Justice Blair decision too narrowly. The Court ofAppeal was not called upon to consider a circumstance where a common element overlapped with privately owned units held by a subset of the residential unit owners. As I find below that any contractual causes of action held by TSCC 2130 concerning the parking garage are statute-barred, I do not need to go further in this analysis. I do so in case a court later disagrees with my holdings concerning the applicable limitation periods. In *1 King* Blair J.A. found that s. 23 did not prevent individuals for suing on common elements. His comments regarding the policy favouring the entitlement of the condominium corporation to act for the owners as a whole were in no way limiting. Rather they supported his recognition, quoted above, of the desirability of adopting a broad and liberal interpretation of s. 23. Subsection 23(1) does not have any words prohibiting the corporation from suing unless damage is caused to 100% of the unit owners. In fact, it expressly entitles the condominium corporation to sue for contractual causes of action related to, "common elements *or a unit*." It would be the rare lawsuit concerning a contract involving a single unit that could be said to affect 100% of the other owners. Moreover, where there is an identified subset of owners who are all affected by a contractual breach, it seems to me that recognizing the corporation's entitlement to sue for them all is completely consistent with the discussion in *1 King* of the policy favouring the broad interpretation of s. 23 so as to fulfill the consumer protection policy of the statute.

184 In addition, the tort claim for negligent design of the parking garage is not just limited to the parking stalls. The parking garage as a unit is claimed to be dysfunctional due to negligence for which YBDL is responsible. In my view, the tort claim involves both the privately owned parking stalls and the common elements of the parking garage. Accordingly, TSCC 2130 has standing to bring the tort claim under s. 23(1)(a).

Any Applicable Warranties are Limited to the Statutory Warranties by the Terms of the Contracts

185 I have set out the terms of s. 14 of each of the unit owner's agreements of purchase and sale at para. 148 above. I have already noted that they do not preclude tort liability. The contractual terms contain an ambiguity in that at the same time as they purport to exclude any other warranties from arising they also provide that any warranties that may arise "whether implied by this Agreement or at law or in equity or by any statute or otherwise" are limited to the scope and time limits of the statutory warranties under the New Home Warranties Plan. So can there be implied warranties or not? Mercifully I do not have to resolve the ambiguity to determine if common law warranties can or ought to be implied into the agreements. The Court of Appeal has already done so.

186 In *Metropolitan Toronto Condominium Corporation No. 1352 v. Newport Beach Development Inc*., *2012 ONCA 850* (CanLII), the Court of Appeal considered a warranty clause that contained identical wording to the clause in issue. At paras. 96 and 97, Laskin J.A. wrote for the Court:

> [96] The motion judge rejected Newport's submission, at para. 50 of her reasons:
>
> This clause limits the warranties given by the vendor to the purchaser of the units to those expressed in ONHWPA. It does not exclude or limit a party's liability for negligence, breach of contract, breach of a statutory duty or breach of a fiduciary duty. It deals solely with warranties of workmanship and materials. In my view this clause does not preclude an action by the Condominium Corporation against the defendants for breach of contract, negligence or breach of fiduciary duty.
>
> [97] I agree with this paragraph.

187 Even if I could distinguish the decision otherwise on its facts, I am still bound by the direct holding on the interpretation of the relevant contractual clause. Having said that, while recognizing that causes of action exist, the Court of Appeal was not called on to consider the scope of the warranties that might be implied at common law in *Newport Beach*. In my view, the contract deals expressly and unambiguously with that issue. The contract provides that any implied warranties, "shall be limited to only those warranties deemed to be given by the Vendor under the ONHWPA and shall extend only for the time period and in respect of those items as stated in the ONHWPA." Therefore, while TSCC 2130 is correct that the agreements did not exclude common law implied warranties, those warranties are co-extensive with the warranties already provided by YBDL under the statutory scheme.

Although the statutory and contractual warranties have the same scope of coverage and time limits, they are not enforced in the same way. TSCC 2130 argued the motion as if its filing of warranty claims with Tarion satisfied the limitation period applicable to each warranty claim in court proceedings to enforce the contractual warranties. I disagree. TSCC 2130 rightly had two different paths optionally available for it to follow. If it wished to sue on the contractual warranties, then it must have launched its lawsuit within the time prescribed by the *Limitations Act, 2002*.

188 Section 14 of the agreements of purchase and sale subjected the contractual warranties to the time periods available under the New Home Warranties Plan. In my view, a contract that sets out a defined period for warranty coverage does not affect the limitation period. Mind you, the parties can agree not to sue each other after set time periods if they wish to do so. However, here, I read the contractual warranty incorporation of the statutory time periods as nothing more than setting an end date for warranty coverage. My car may have a five

year warranty. That says nothing about how I sue or how long I have to sue once I discover a breach of the warranty. Similarly here, the contract incorporated the statutory warranty periods so that contractual warranties lasted for one year or two years depending on the nature of the deficiency alleged. A lawsuit to enforce the warranty still needs to be commenced in court within two years of discovery or discoverability of the breach of the warranty (i.e. within two years of the discovery of a warranted deficiency that arose within one or two years of the registration of the condominium corporation as the case may be).

The Scope of Liability of a Condominium Developer in Negligence to the Condominium Corporation, the Initial Unit Owners, and Subsequent Purchasers?

189 In *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co*., *1995 CanLII 146* (S.C.C.), La Forest J. stated:

> [35] In my view, it is reasonably foreseeable to contractors that, if they design or construct a building negligently and if that building contains latent defects as a result of that negligence, subsequent purchasers of the building may suffer personal injury or damage to other property when those defects manifest themselves. A lack of contractual privity between the contractor and the inhabitants at the time the defect becomes manifest does not make the potential for injury any less foreseeable. Buildings are permanent structures that are commonly inhabited by many different persons over their useful life. By constructing the building negligently, contractors (or any other person responsible for the design and construction of a building) create a foreseeable danger that will threaten not only the original owner, but every inhabitant during the useful life of the building.

190 The Supreme Court of Canada held that builders can be held liable for economic loss incurred to repair defective structures before physical breakage or injury occurs. Justice La Forest reasoned that to hold otherwise would create an incentive for parties to wait for catastrophe before incurring the cost of repair: see para 37. The Court expressly left open the question of whether the cost to repair negligent work that does not threaten physical harm to property or bodily injury should also be recoverable in tort. Justice La Forest wrote that he found very persuasive the dissenting view of Laskin J. (as he then was) in *Rivtow Marine Ltd. v. Washington Iron Works*, *[1974] S.C.R 1189*, *1973 CanLII 6* (S.C.C). Justice Laskin held that expanding tort recovery to "safe but shoddy" work risked creating indeterminate tort liability in a field best left to be dealt with by the parties by way of contractual warranties. Accordingly the Court left open for another day the question of whether condominium developers can be sued in negligence for pure economic loss in the absence of a threat of harm to property or persons. The question is whether the developer is liable for the cost of repair of "safe but shoddy" work.

191 TSCC 2130 submits that the day of reckoning has arrived. It asks the court to decide the question left open and find that TSCC 2130 may claim in negligence for the shoddy design of the parking garage even absent any risk of physical harm. This is a case of pure economic loss. There is no reasonably foreseeable physical harm to the parking stall owners or their premises by having to wait a very long time to get out of the parking garage on game or concert nights. TSCC 2130 has not claimed or submitted any evidence to support a claim that any owner has suffered compensable nervous shock or been hurt by foreseeable road rage.

192 In assessing the viability of the cause of action (as opposed to the quality of the evidence on summary judgment) I see there being two questions before the court. First, can TSCC 2130 or its unit owners sue in tort for "safe but shoddy" design of the parking garage? If they can, is the potential future cost of paid duty police officers if MLSE stops paying for them, a properly recoverable head of damages?

193 I cannot find my way to answer either question in the affirmative. I agree with Chief Justice Laskin in *Rivtow* that there are important reasons to limit tort liability under the second branch of the test from *Anns v. Merton London Borough Council*, [1978] A.C. 728 (U.K.H.L) to cases where physical harm to goods or people is foreseeable. UK and US courts have limited tort recovery for pure economic loss. Economic losses are

insurable. The place where parties balance the economic risks that they are prepared to undertake, whether intending to insure or to self-insure, is in their contracts. Justice Posner is quoted in Linden and Feldthusen, *Canadian Tort Law* (Tenth Ed.) Butterworths, 2015 in *Miller v United States Steel Corp*. 209 F. 2d 573, at p. 574 (7th Cir. 1990) as follows:

> Tort law is a superfluous and inapt tool for resolving purely commercial disputes. We have a body of law designed for such disputes. It is called contract law. Products liability law has evolved into a specialized branch of tort law for use in cases in which a defective product caused, not the usual commercial loss, but a personal injury to a consumer or bystander.

194 I recognize that legal compartments are rarely so neat. The existence of a contract is not a reason to negate a concurrent duty of care in tort law. However, it is also not the source of such a duty. If commercial matters are the subject of contract law and physical injury is the subject matter of products liability law, into which pigeonholes do residential condominium purchases fit? They are major real estate transactions to which the law of *caveat emptor* traditionally applies. They can be investments or consumer purchases. Condominiums can be bought with a parking spot or without. They can be bought by people who very much want the benefits of proximity to nearby services or structures (such as subway or, here, the ACC) or others who might just want a roof over their heads for themselves or to rent to others. Ontario has the benefit of a New Home Warranties Plan that already protects purchasers of new properties from defective materials, defective workmanship, and breaches of the *Building Code*. TSCC 2130 argues that the New Home Warranties Plan may also cover some aspects of design although it is common ground in this proceeding that the parking garage design is not covered. In my respectful view, opening up tort claims based on "safe but shoddy" work runs a truckload of indeterminate liability through the New Home Warranties Plan. As I will deal with below, the limitation periods for contract and tort claims are not necessarily the same. The scope and duration of coverage of the builder/vendor's obligations will be unknowable in advance. Tort liability for "safe but shoddy" building is equivalent to a permanently assignable, ill-defined warranty well beyond the statutory warranties. It will undermine the primacy of the statutory scheme and create incentives to sue for unlimited and often subjective, aesthetic, and economic concerns.

195 It is easy to feel sorry for drivers stuck in a parking lot for hours. Although some will question what else they expected when they decided to move in beside the ACC. In my view, absent a contractual warranty, they have no cause of action against the developer. The place for parties to balance benefits and burdens and assess their economic risks for their commercial expectations is in their contracts.

196 Even if there could be sufficient proximity to support tort liability, as the condominium corporation and the parking stall owners are quite readily within the contemplation of the developer as people who might be injured by its neglect, the damages sought in this case cannot be recoverable. TSCC 2130 originally thought that the delays were being caused by retail parkers on the floors above. They asked for the assigned floors to be switched or for a new exit to be built. Now they have learned that the delays are caused by pedestrian traffic. Moreover, the problem has been controlled by MLSE paying for police to control the flow of traffic. The owners' inconvenience and anxiety is not compensable absent nervous shock. TSCC 2130 cannot suffer anxiety. Its loss now is claimed to be the cost to keep traffic moving in future if MLSE does not keep paying for paid duty police officers. In other words, it has not incurred any compensable loss as yet. I do not know the basis upon which MLSE has been paying for police to date. Presumably it has an interest in keeping the commercial traffic on the upper two floors moving even if TSCC 2130 might fear that MLSE may be less motivated by the concerns of owners on the bottom two floors. That is an issue for negotiation and resolution among the component owners and the common elements managers in the complex. There was no basis put forward in argument or case law before me to hold that such uncertain, possible but not probable, future economic loss is reasonably foreseeable or compensable.

Contractual and Tort Limitation Periods

197 TSCC 2130 argues that even if the contractual warranty given to owners does not cover the design of the parking garage, YBDL is liable on the warranty of fitness that the common law implies into the owners' agreements of purchase and sale. TSCC 2130 provided me with the factums in the *Newport Beach* case and it does appear that common law implied warranties were argued before the Court ofAppeal in that case. Relying on the "officious bystander" test, TSCC 2130 says that had anyone sought to ask a person on the Scarborough LRT (Toronto's Clapham omnibus perhaps) whether in its agreements of purchase and sale, YBDL was implicitly promising to build a parking garage that did not keep people waiting for hours to get out on game nights, the obvious answer would have been "yes." Even if I had not already held that the any implied warranties are limited to the scope and duration of the warranties covered by the New Home Warranties Plan, and even if the "officious bystander" test was the correct test for implied terms (rather than asking if a warranty concerning parking garage exit times was necessary to give business efficacy to the agreements of purchase and sale), there would still be a problem with this argument. If TSCC 2130 is correct that there is an implied contractual warranty that the parking lot exit times should be reasonable when did the cause of action for breach of warranty arise? If it was patently obvious to John Q. Public that long waits were a breach of an implied term of the agreements of purchase and sale, then the breach was discovered the first time a long wait occurred or was reported to TSCC 2130. Unit owners started to occupy the building in April, 2010. The ACC was already operating well before then. TSCC 2130 conceded that this issue was known right away. The two year limitation period under the *Limitations Act, 2002*, expired for owners in 2012, well before even the first statement of claim was issued.

198 But, TSCC 2130 argues that it cannot be required to commence an action against the developer before the turnover meeting. Although it is the same corporate entity before and after management responsibility has been handed off from the developer to the owners, it cannot be taken to have known prior to the takeover meeting that litigation against the developer would be an appropriate remedy under s. 5(1)(a)(iv) of the *Limitations Act, 2002*. Were it otherwise, the developer would just stall the takeover meeting for two years to insulate itself from liability. While it may be that different considerations would apply where the developer has the same legal interest as the unit owners for a claim or potential claim against a third party, I agree with TSCC 2130 that the causes of action for claims against the developer are not discoverable until the turnover meeting. Prior to that time, TSCC 2130 did not know that proceeding against the developer was appropriate. It was still controlled by the developer until the turnover meeting on May 30, 2011.

199 Had the first action not been a nullity for want of notice, TSCC 2130's claims under warranties would have been brought in time even if the owners' individual limitation periods had expired by then. Nothing in s. 23(2) of the *Condominium Act, 1998* limits or even links the rights of the condominium corporation to those of the unit owners. Rather, it is given its own right to sue although it is not privy to the agreements on which it is suing. However, as I have found the first action to be a nullity, the second action was commenced more than two years after the turnover meeting and therefore, it was too late for the causes of action like the parking garage delay issue that were known at or before the date of the turnover.

200 For completeness alone I note that had I found that a cause of action arose in negligence, I accept that there was no way for TSCC 2130 to know that the delayed exit from the parking garage was caused or contributed to by a sub-contractor retained by or on behalf of YBDL taking traffic measurements at the wrong time of day in breach of the standards of his profession. The evidence from TSCC 2130 is that it first understood that it had a cause of action for negligent design in November 2011 around the time it filed its first year warranty claims with Tarion with the advice of its professional consultants. Whereas a breach of contract was obvious immediately, simply on seeing that parking garage exit was unreasonably slow, the fact that cause of the delays included actionable negligence was not. It required document review and expert opinion.

201 Under the terms of the contractual warranties, express or implied, all warranty claims must have arisen within one year of the registration of the condominium corporation (or two years for those deficiencies listed in the regulations). They must fit within the scope of the New Home Warranties Plan warranties. In addition, the

statement of claim must have been issued within two years of the later of the turnover meeting or the first discovery of the deficiency. I note that many warranty claims were contained in both the first and second year audits. In that case, for litigation purposes, the limitation issue will be based on when the defect was first discovered or discoverable.

202 There is a very narrow window for discovery of actionable warranty claims therefore. The second statement of claim was issued on September 30, 2013. Therefore warranty claims that were discovered before September 30, 2011 are statute-barred. There is no first year warranty remaining for claims discovered after the first anniversary of registration of the condominium on December 24, 2011. So first year warranty claims in the second statement of claim are only actionable if discovered between October 1 and December 24, 2011. The second year warranty expired December 24, 2012. Second year warranty claims that arose after October 1, 2011 but before December 24, 2012 will not be statute-barred therefore if claimed in the second statement of claim.

203 Negligence claims remain available against the developer for claims that are not "safe but shoddy" pure economic loss claims. Where negligence is relied upon for claims against the developer, involving physical loss or injury to distinct property or to third parties or their property, that has been suffered or is reasonable foreseeable, the statement of claim would have to have been issued within two years of the later of the discovery of the cause of action under s. 5 of the *Limitations Act, 2002* or the turnover meeting. The second statement of claim was therefore too late for negligence claims discovered or discoverable before October 1, 2011.

TSCC 2130's Expert Evidence

204 TSCC 2130 delivered sworn expert evidence of qualified professionals who duly delivered the required certification of independence in accordance with the *Rules*. YBDL criticizes TSCC 2130's evidence because it did not call as witnesses the engineers whom it used at the time of the first and second year audits. But the court proceeding is not an extension of the Tarion conciliation. Expert witness independence is good thing. If an expert has his or her facts wrong and YBDL wished to call the prior engineers, it was free to issue summonses last year.

205 YBDL also criticizes TSCC 2130's principal engineering expert for relying on work done by members of his own firm. Must every junior in an engineering firm who touches a file be paraded before court to provide the inputs that support the expert witness's opinion? Provided that the witness has been duly informed to the degree that he or she is capable of forming an opinion under the standards of his or her profession, it is not objectionable for an expert to rely on work performed under his lead or on which he has been adequately briefed. If the expert has no firsthand knowledge of a matter that could certainly go to weight. The time for YBDL to test the experts' knowledge was during cross-examination. The transcripts of the cross-examinations of as many of TSCC 2130's experts as YBDL asked to cross-examine are before the court. I am perfectly satisfied with the admissibility of all of the expert evidence adduced by TSCC 2130. I will deal with the weight of evidence when and if it arises.

Leave to Deliver Evidence Late

206 TSCC 2130 has sought leave to deliver four affidavits after the time set in case management schedules had expired. As mentioned above, counsel for TSCC 2130 properly alerted the court and counsel opposite that it was having difficulties meeting the time limits well in advance. TSCC 2130 delivered two of the late affidavits prior to the commencement of cross-examinations. It delivered a further expert report and an affidavit of its property manager during or after cross-examinations.

207 TSCC 2130 and its engineering expert initially budgeted for a project expected to take 185 hours. In the end almost 600 hours were invested in the expert's evidence. That is an adequate explanation for the delay for the expert's reports. In the first of TSCC 2130's property manager's two affidavit, she raises an issue with lint traps

in just two paragraphs. She was correcting an oversight on a fairly modest matter. The property manager's second affidavit responds to matters raised in cross-examination and deals with a flood that only happened shortly before the evidence was delivered.

208 Considering the matter contextually, including the broad scope of issues before the court, the explanations for the delays, the fact that YBDL was able to challenge the late evidence by cross-examination, and, most importantly, the lack of any tangible prejudice caused by the lateness, I have no difficulty exercising my discretion to allow the late filings.

209 This motion should not have been opposed in my view.

Summary Judgment on Deficiencies in the Second Action No. CV-13-489723

210 The roof anchor system claim set out in para. 40 of TSCC 2130's factum in Action No. CV-13-489723 is statute-barred. This claim sounds in negligence as well as contract as it involves repairs to defects where it is reasonably foreseeable that personal injury may occur in the absence of repair. However, warranty issues and potential threats to safety were discovered prior to October 1, 2011. I am satisfied that dealing with this matter summarily is fair and just. My findings are based on the evidence of TSCC 2130. A trial would not change the facts or outcome.

211 The systemic booster heater failure claim set out in para. 41 of TSCC 2130's factum in Action No. CV-13-489723 is not statute-barred. While the first heater failed in 2011, subsequent failures disclosing the systemic nature of the problem occurred after October 1, 2011. The failure was noted in time to be claimed in the second year warranty claim so its meets the time limit in the regulations if it is a valid claim. This claim involves delivery of hot water so it is not one where it is reasonably foreseeable that personal injury may occur in the absence of repair. The tort of negligence does not lie for these repair costs.

212 YBDL has chosen not to sworn deliver expert evidence contrary to the expert evidence delivered by TSCC 2130. Its first position is that the warranty claim was "signed off" by TSCC 2130 on Tarion's website. That might satisfy Tarion's administrative process. I do not know if Tarion views "sign off" on its website as binding. I see no relevancy to that issue. It is not a defence to a breach of contract claim. No release has been provided by TSCC 2130 and the statute prevents contracting out.

213 YBDL also relies on law that prevents an owner from claiming against a builder when the owner refuses to let the builder attend to make repairs. However, in 2015, TSCC 2130 asked YBDL if it would see to this deficiency while the proceedings moved forward. By letter dated September 28, 2015 Ms. Francis advised that YBDL was not prepared to conduct repairs absent a release covering a complete package of deficiencies and repairs. YBDL has subsequently sought information relating to the booster heater issues. Accordingly, I do not find the refusal by TSCC 2130 to allow work in February 2014 to have been a repudiation of the agreements of purchase and sale or a refusal to mitigate. TSCC 2130 took a position in order to be consistent with its termination of the settlement agreement that I have upheld. Not only was YBDL able to go in and make repair thereafter, it did install a by-pass for one of the heaters. The resulting flood left unit owners with no elevator service for a period of time and reduced service for 10 days. YBDL's demand for an all-encompassing deal with a release as a condition of making repairs is inconsistent with the argument that TSCC 2130 has refused it permission to make repairs.

214 I note that damage caused foreseeably by the repair itself, like a localized flood, is not sufficiently independent damage to unrelated property or persons to support tort relief in my view.

215 I am satisfied that dealing with this matter summarily is fair and just. The expert evidence led by TSCC 2130 leaves no issue that this matter is a deficiency in breach of the contractual warranties given by YBDL. While YBDL takes the position that the heaters are not deficient and were picked by their consultant from appropriate

specifications, it led no admissible evidence to raise an issue requiring a trial on the point despite knowing that it would be deemed to have put its best foot forward if it failed to respond to TSCC 2130's expert evidence on the merits.

216 It is important to hold parties to their tactical choices in summary judgment motions. It was YBDL that insisted that the merits of deficiencies were part of its motions.

217 Unsworn reports prepared for YBDL for reasons other than this litigation that are attached to a layperson's affidavit without expert attestation and certification are not admissible. In discussing the evidentiary requirements applicable to expert evidence on a motion for summary judgment in *Sanzone, supra*, Brown J.A. wrote at para. 16, "[a] party can file either an affidavit from the expert containing his or her opinion or an affidavit from the expert with the report attached: *Danos v. BMW Group Financial Services Canada, a division of BMW Canada Inc.*, *2014 ONSC 2060* (CanLII), *[2014] O.J. No. 1802*, at para. 29, aff'd *2014 ONCA 887* (CanLII)."

218 It would be wholly unfair and inappropriate for YBDL to put TSCC 2130 to the substantial expense of these motions and then claim a "do-over" because it might now want to file its own expert evidence. I made this point expressly in *Paramandham v. Holmes et al.*, *2015 ONSC 1903* (CanLII), at para. 40, as follows:

> Counsel for the plaintiff made strategic choices, perhaps cost based, or not, as to how to respond to this motion. The court will hold parties to those choices. See: *ThyssenKrupp Elevator (Canada) Limited v. Amos*, *2014 ONSC 3910* (CanLII) at para. 44. The alternative would indeed be a slippery slope in which counsel are encouraged to withhold their trump cards for trial. Trial by ambush tactics are the antithesis of efficient, affordable, and proportionate procedures.

219 However, I am not satisfied that I understand the damages that are claimed for this deficiency. I will convene a case conference to determine if damages are proven on the record or if a further hearing will be required as discussed below.

220 The issue of fan coil accessibility referred to in para. 46 of TSCC 2130's factum in Action No. CV-13-489723 is a proven deficiency in breach of Tarion warranty provisions as incorporated in the unit owners' agreements. The matter was discovered and advanced in TSCC 2130's second year warranty and there is no indication that it is statute-barred. I do not find YBDL's argument that the issue was signed-off on Tarion's website raises an issue requiring a trial. Moreover, based on the clear evidence of TSCC 2130's expert and the lack of responding evidence by YBDL, I am satisfied dealing with this matter summarily is fair and just. Damages will be determined at a process to be established at a case conference as discussed below.

221 The issue of steam condensation referred to in para. 47 of TSCC 2130's factum in Action No. CV-13-489723 is statute-barred. TSCC 2130 claims for invoices involving the issue from as early as May 2011. There is no evidence that there is reasonably foreseeable damage to property or persons arising from this defect. Accordingly, TSCC 2130 has no claim in negligence. I am satisfied dealing with this matter summarily is fair and just. The outcome is based upon TSCC 2130's own invoices and expert evidence.

The only big ticket item is the claim with respect to replacement of fan coil units that are part of the chilled water system. This claim is said to involve damages in the seven to ten million dollar range. The claim relates to the insufficiency of the chilled water system to sufficiently air condition units on upper floors. There is no evidence that there is reasonably foreseeable damage to property or persons arising from this claimed defect. Accordingly, TSCC 2130 has no claim in negligence. TSCC 2130 says it discovered this claim in 2012. That may be when it discovered the negligent cause of the deficiency. The contractual warranty being enforced is that the unit would be fit for habitation under s.13(1)(a)(ii) under the *Ontario New Home Warranties Act* as incorporated into the agreements of purchase and sale. But the defect was discovered as soon as upper units could not be cooled in the summer months. TSCC 2130 pleads in schedule "A" to its third claim, Action No. CV-14-509896, that "the ambient temperature in the residential units is not sufficiently cool in the spring and summer months."

The cause of the system failure was discovered well after the warranty period expired. However, as the claim does not sound in negligence, it is only the warranty claim that is in play. Like the parking garage, once unit holders started occupying their units in 2010 and determined that they could not cool their units, they knew or ought to have known that YBDL had breached its warranties to provide habitable units.

222 Had I not found the claim statute-barred, I would have been satisfied that the failure to use the correct chilling units for upper floor water flow was a breach of warranty. The fact that the precise cause was only discovered later would not prevent the breach of warranty claim from being recognized. YBDL's defence that the system just needed to be recalibrated was not supported by evidence and was rejected by TSCC 2130's expert in cross-examination. It is true that the lack of calibration (or recommissioning as the parties referred to it) was not brought to the expert's attention at the outset by TSCC 2130. This could have been a significant issue in the weight to be given to the expert's opinion. However, when the issue was brought to his attention, his response was cogent, convincing, and not disputed in evidence.

223 I would have required further submissions as to how to deal with the assessment of damages on this claim.

224 I find that it is fair and just to deal with this matter summarily. There is no contest in the evidence or credibility issues requiring a trial. Moreover, it would be inapt for YBDL to now be allowed to bolster its evidentiary record for the reasons discussed above.

225 TSCC 2130 concedes in its factum that the mirror issue set out in para. 54 of its factum in Action No. CV-13-489723 was not discoverable until May 2013. It is therefore out of time for warranty coverage. As noted above, the common law implied warranties, if any, have the same duration as the statutory warranties in accordance with the express terms of section 14 of the agreements of purchase and sale. As mirror finishes do not raise an issue of foreseeable injury to property or persons, there is no claim in negligence for this matter. I find that it is fair and just to deal with this claim summarily given that TSCC 2130's evidence as set out in its factum resolves the issue.

226 The exact same result as the mirror claim applies to the floor sealing claim set out in para. 56 of TSCC 2130's factum in Action No. CV-13-489723. In para. 57, TSCC 2130 concedes that the issue was not discoverable until May 2013. Therefore it is out of warranty. There is no liability in tort for this claim as there is no foreseeable injury to property or persons at issue.

227 TSCC 2130 claims for the cost of replacing defective lint traps in para. 58 of its factum in Action No. CV-13-489723. Failure of the lint traps is a fire hazard and therefore negligence will lie for this claim. However, there is no evidence that YBDL failed to meet any applicable standard of care in choosing or installing the particular model of traps that were used. While the lint traps may not meet the contractual warranty, that does not, without more, mean that YBDL did something negligent in allowing the installation of those traps. Prior to the breakdown of the settlement agreement, YBDL had replaced 50 of the lint traps for TSCC 2130. The claim was first made in the second year audit and it therefore falls within the warranty coverage period. I am troubled making a decision on this claim solely based on the evidence before the court. However, under Rule 20.04(2.1)(3), the court is empowered to draw inferences of fact in appropriate cases. In my view, the fact that it was willing to recognize its liability to replace these parts in the settlement, leads me to conclude that there is no triable issue but that the supply of these defective lint traps amounts to a breach of warranty. I do not see where there is a likely dispute or credibility issue requiring a trial. Rather, I can resolve the dispute on this claim fairly and justly by drawing an inference and I am inclined so. This claim is modest and cannot support more procedure in a proportionate proceeding. Moreover it would be inapt to allow YBDL to deliver further material on the merits at this stage as discussed previously.

228 There is no dispute that TSCC 2130 paid $39,098.00 to purchase replacement lint traps. It has therefore proven its entitlement to damages in that amount.

229 The plumbing elbows, tub diverter, and related pipe deficiency claimed by TSCC 2130 in para. 61 of its factum in Action No. CV-13-489723 first arose in November, 2011 according to TSCC 2130's incident tracker system. It was raised in the second year audit. The defect claimed falls within s. 15(2)(b) of the *Administration of the Plan,* R.R.O. 1990, Reg. 892, which is a regulation under the *New Home Warranties Plan Act*. The defect is therefore within the scope of the second year warranty. This action was commenced within two years of the discovery of the defect. There is no evidence challenging the expert opinion of TSCC 2130's engineer that the plumbing, piping, and installation were defective. I have already rejected YBDL's arguments that the settlement agreement is effective to release claims and that TSCC 2130 either repudiated the agreements of purchase and sale or failed to mitigate when it terminated the settlement in February 2014.

230 I find that it is fair and just to deal with this matter summarily. Prior to the settlement being cancelled, YBDL was planning to replace the diverters. It offered no evidence on the substance of this claim. It would be inapt for YBDL to now be allowed to bolster its evidentiary record for the reasons discussed above. However, I am not yet satisfied that I can deal with damages and leave that to a subsequent case conference as discussed below.

231 Garbage chute diverter system deficiencies are claimed by TSCC 2130 in para. 63 of its factum in Action No. CV-13-489723. The deficiency claim was made in the second year audit. I cannot see a basis for this claim under s. 15 of the regulation mentioned above. There is no evidence that the claim was discovered or made in the first year so as to be covered by s. 13 of the Act. This claim does not involve reasonably foreseeable damage to property or persons so no tort remedy lies. TSCC 2130 was required to and did put its best foot forward. Its evidence does not amount to a breach of the warranties provided by the agreements of purchase and sale. There is no triable issue as the finding is made on TSCC 2130's own evidence. There are no disputes on credibility requiring a trial. Therefore, I find that it is fair and just to deal with this matter summarily.

232 TSCC 2130's claim for $5,000 for 9th floor door repairs discussed by TSCC 2130 in para. 67 of its factum in Action No. CV-13-489723 was discoverable prior to October 1, 2011 and therefore it is statute-barred.

233 The claim for handicap accessible entrances from the parking garage discussed by TSCC 2130 in para. 66 of its factum in Action No. CV-13-489723 was discoverable prior to October 1, 2011 and is therefore statute-barred. The claim was made in the first year audit and TSCC 2130's expert recites being told by TSCC 2130 that the issue was known in 2011. The lack of power door openers was discoverable on merely looking at the doors any time after occupancy began in 2010. There is no foreseeable damage to property or persons associated with this claim and therefore no tort remedy lies. It is fair and just to deal with this matter summarily as there is no disputed evidence or credibility issue requiring a trial.

234 The claim for slow exit from the parking garage discussed by TSCC 2130 in para. 68 of its factum in Action No. CV-13-489723 has already been rejected above. I simply note here that had I allowed the claim, I would have required the question of damages to be discussed at a case conference to determine whether further process is required to resolve that question. I do not accept that the payment of one million dollars, as the present value of the future cost of paid duty police, is a fitting remedy where TSCC 2130 is not paying for the service now and it is not clear that it will ever have a legal right or responsibility to do so in future.

235 The claim for faulty life safety systems discussed by TSCC 2130 in para. 78 of its factum in Action No. CV-13-489723 has resolved to a modest claim. TSCC 2130 says that there have been too many false alarms in the fire alarm system and its expert reports that false alarms create the foreseeable "boy who cried wolf" hazard in future. I agree with TSCC 2130 that a finding of foreseeable danger does not have to come from the equipment itself and can be made up of foreseeable use of the equipment. I accept the evidence of TSCC 2130's expert that there is a real and substantial risk to lives caused by excessive false alarms. The science shows that faced with false alarms, people start to ignore the alarm system and this leads to reasonably foreseeable, predictable deaths. Therefore, TSCC 2130 has a negligence claim available to it in addition to warranty claims for this issue. Although malicious alarm pulls seem to be the predominant cause of the false alarms that too is foreseeable in the industry. On expert's advice, TSCC 2130 installed alarm covers and this

seems to have sufficiently dissuaded the miscreants. TSCC 2130 incurred $26,500 to fix the problem. Its expert says that another $20,000 should be spent to provide an additional annunciator panel available to TSCC 2130's staff. While that might be a helpful addition, the expert does not suggest that there is negligence if it is not provided. In fact, the existing system met regulatory standards. But the failure of YBDL to install pull safety covers, initiate safety meetings, and facility staff training led to as many as 28 false alarms in 2013. The false alarms started in 2011. However, it only became a repetitive and hence systemic issue in 2012 and beyond. In my view, this readily falls within the duty of care identified by the Supreme Court of Canada in *Winnipeg Condominium* above.

236 It is fair and just that this matter be resolved summarily. The issue has been completed and it is too small to justify further procedures. YBDL chose not to deliver expert evidence. It cannot challenge the fundamental point that starting in 2012, the system it installed produced almost 10 times the allowable number of false alarms per year and thereby risked endangering peoples' lives. The fact that the cure implemented by TSCC 2130 worked proves that they properly identified the cause of the problem -- a lack of alarm covers and training.

Summary Judgment on Deficiencies in the Third Action No. CV-14-509896

237 Why is the sky blue? How does the moon know to shine at night when it's dark and we need the light? Are we there yet, Daddy? There are just some questions that admit no simple answer. To that brief list I add: why did TSCC 2130 start a third claim on August 7, 2014? Tradition? No. Band-Aids.

238 In para. 2 of its factum in its third action, TSCC 2130 explains:

> CV-14-509896 includes claims in which the defendant has made "Band-Aid" efforts to repair systemic failings. Thus, contrary to the assertions of the defendant, TSCC 2130 can sue on these deficiencies. Warranty claims were made within the statutory warranty period, but continuing damage related to the original warranty deficiencies was discovered after the warranty period.

239 TSCC 2130 has completely conflated the New Home Warranties Plan process with its lawsuits. The right to sue flows from the existence of a cause of action and commencement of a lawsuit in court within the applicable limitation period. It is correct that the cause of action under the contractual warranty is bounded in scope and duration by the terms of the statutory warranties in this case. The fact that a claim to Tarion was made within the warranty period may help establish when the cause of action was discovered and that the claim relates to a period during which the warranties still applied. But that is all. Where a claim is already made in a lawsuit and continuing damage accrues, one does not generally need a new lawsuit. But it is certainly not correct to assert that just because a claim was made to Tarion and YBDL made some Band-Aid repairs, "TSCC 2130 can sue on these deficiencies."

240 The principal defences claimed by YBDL are that the pleadings are insufficient, the settlement has resolved the bulk of the claims, there is no cause of action in negligence, the claims for warranty coverage are too late, and a third claim for the same topic is an abuse of process. I have dealt with all but the last issue already. While I question the need for repetition of existing claims in the new claim, it did add a few claims that had not been the subject of earlier lawsuits. The matters came under case management shortly after the new claim was made. Therefore other than possibly some costs wasted early on by inefficiency, there is no prejudice to YBDL by TSCC 2130 having proceeded as it did. It follows that I do not find the third claim to be an abuse of process.

241 I have already dismissed the claims brought on the chilled water system set out in para. 8 of TSCC 2130's factum in Action No. CV-14-50989. Commencing a new claim a year later exacerbates the limitation period problem.

242 I have already dismissed the claims brought on the steam pressure issue set out in para. 25 of its factum in Action No. CV-14-50989. TSCC 2130 concedes in its factum that the steam pressure issue that it raised in its third claim in 2014 is the same issue it raised in its second claim in 2013.

The claim concerning a hot water balancing valve set out in para. 26 of TSCC 2130's factum in Action No. CV-14-50989 was advanced as a second year warranty claim. YBLD says that it was work that it agreed to perform as part of the settlement. There is no denial of the clear evidence of TSCC 2130's expert that a review of the plans shows that the valve was supposed to be installed but it was not done. This was a timely claim within the scope of the warranties and brought by an action commenced within two years of discoverability. YBDL raises no defence on the merits and as such there is no issue requiring a trial. I am satisfied that it is fair and just to decide this matter summarily. There is no competing evidence and it would be inappropriate for YBDL to file evidence on the merits at this stage. The process for determining the damages applicable to this claim will be discussed at a case conference as set out below.

243 The claim concerning a backflow prevention valve set out in para. 28 of TSCC 2130's factum in Action No. CV-14-50989 was advanced as a second year warranty claim. There is no denial of the clear evidence of TSCC 2130's expert that a review of the plans shows that the valve was supposed to be installed but it was not done. This was a timely claim within the scope of the warranties and brought by an action commenced within two years of discoverability. YBDL raises no defences on the merits and as such there is no issue requiring a trial. I am satisfied that it is fair and just to decide this matter summarily. There is no competing evidence and it would be inappropriate for YBDL to file evidence on the merits at this stage. The process for determining the damages applicable to this claim will be discussed at a case conference as set out below.

244 The claim concerning a glycol system fluid loss set out in para. 30 of TSCC 2130's factum in Action No. CV-14-50989 was advanced as a second year warranty claim. YBDL says that repairs were signed off on Tarion's website so that "[i]f this relates to some other glycol loss, it is out of warranty." According to the expert evidence adduced by TSCC 2130, the glycol system is a closed system. It should not be losing glycol. Losses were claimed in a timely way once discovered in November 2012. There is no evidence supporting YBDL's conditional hypothesis that there might be more than one leak. If some repair was done previously, I infer that it did not work. YBDL chose not to deliver any evidence to rebut the clear expert evidence delivered by TSCC 2130 that I accept that this is a systemic defect that requires repair. I am satisfied that it is fair and just to decide this matter summarily. There is no competing evidence and it would be inappropriate for YBDL to file evidence on the merits at this stage. The process for determining the damages applicable to this claim will be discussed at a case conference as set out below.

245 TSCC 2130's claim concerning chilled water pumps not resetting after a generator test is set out in para. 32 of its factum in Action No. CV-14-50989. It was claimed as item 141 in the second year audit. The claim falls within s. 15(2)(b) of the *Administration of the Plan* regulation as a claim of faulty workmanship concerning the electrical system. YBDL simply denies that the claim is actionable and it seizes on a typo in which counsel for TSCC 2130 initially said that the claim was item 141 of the first year audit rather than the second year audit. At para. 89 of its factum YBDL submits, "[t]here is no reference to a deficiency with the emergency generator in the first or second year performance audits." In fact the issue is set out at item 141 of the second year audit although it is in technical language. There is no genuine issue requiring a trial that the claim is a breach of the second year warranty that arose within the duration of the warranty. There is no limitation issue raised on this claim. YBDL chose not to deliver any evidence to rebut the clear expert evidence delivered by TSCC 2130. I am satisfied that it is fair and just to decide this matter summarily. There is no competing evidence and it would be inappropriate for YBDL to file evidence on the merits at this stage. The process for determining the damages applicable to this claim will be discussed at a case conference as set out below.

246 TSCC 2130's claim concerning the building automation system is set out in para. 35 of its factum in Action No. CV-14-50989. At item 142 of the second year audit, TSCC 2130 claimed for a missing back-up battery for the building automation system. That is not the claim it is making now however. It now is claiming that when the commercial side of the complex ran a test on its generator in April 2014, interference was caused with the HVAC system on the residential side. TSCC 2130's expert says that TSCC 2130 should have its own controls for its HVAC. No personal injury or property damage is reasonably foreseeable as a result of this defect. Therefore

there is no tort recovery for TSCC 2130. The issue arose well after the second year warranty terminated in December 2012. Therefore, TSCC 2130 has no remedy under the agreements of purchase and sale for this issue. I am satisfied that it is fair and just to decide this matter summarily. The resolution comes from TSCC 2130's own evidence.

247 I have already dealt with TSCC 2130's claim concerning booster heaters set out in para. 38 of its factum in Action No. CV-14-50989.

248 TSCC 2130 concedes in Schedule "A" to its statement of claim in Action No. CV-14-50989 that the swimming pool cracks that are the subject of its complaint were discovered in April 2014. There is no damage to property or persons reasonably foreseeable from that claim so that no tort remedy lies for TSCC 2130. As the warranties expired December 24, 2012 at the latest, the claim is out of time. Therefore, TSCC 2130 has no remedy under the agreements of purchase and sale for this issue. I am satisfied that it is fair and just to decide this matter summarily in that the resolution is from TSCC 2130's own pleading.

249 TSCC 2130 concedes in its particulars that the claim set out in Schedule "A" to its statement of claim in Action No. CV-14-50989 concerning pressurization issues were discovered in October 2013. There is no damage to property or persons reasonably foreseeable from that claim so that no tort remedy lies for TSCC 2130. As the warranties expired December 24, 2012 at the latest, the claim is out of time. Therefore, TSCC 2130 has no remedy under the agreements of purchase and sale for this issue. I am satisfied that it is fair and just to decide this matter summarily in that the resolution is from TSCC 2130's own pleading.

250 I have granted judgment one way or the other on all of the deficiencies' claimed and found no issues requiring a trial on liability. Damages, interest, and costs will be discussed and scheduled as appropriate at an upcoming case conference. I request counsel to contact myAssistant to try to book a two hour appointment with me in the next several weeks. Counsel should be prepared to argue all outstanding damages issues on the record as it is and be prepared to make submissions as to any outcome or process that might be appropriate to resolve any damages issue if it cannot be resolved on the existing record.

Whitestone Property Management Limited Action No. CV-14-501296

251 TSCC 2130 retained Whitestone as its professional property manager before the turnover meeting. TSCC 2130 was still controlled by YBDL then. Whitestone was wholly owned by Lanterra at the time.

252 After the turnover meeting, the new board of TSCC 2130 elected by the unit owners decided to terminate all contracts with third parties that had been entered into by the corporation before the turnover meeting. As mentioned above, TSCC 2130 had a statutory right, within one year of the turnover meeting, to terminate unilaterally all third party contracts entered into prior to the meeting.

253 TSCC 2130 gave notice to Whitestone in January 2012 that its services would not be required after March 31, 2012. TSCC 2130 retained Del Property Management as replacement manager. The senior employee on site for DEL commenced her work with TSCC 2130 in early April 2012. An employee of Whiteside was retained by Del to provide some continuity.

254 On April 2, 2014, two years and two days after terminating Whitestone's services, TSCC 2130 sued Whitestone. But it did not tell Whitestone, Lanterra, or YBDL that it had done so until it sent a copy of the claim to YBDL's counsel by email on October 7, 2014, as a result of the court issuing a notice of intent to dismiss the claim for delay. If email counted as good service, TSCC 2130 was still a few days past the six month mandatory time for service of a statement of claim.

255 In July 2014, Lanterra sold Whitestone to a third party. Lanterra did not know that TSCC 2130 had started a lawsuit against Whitestone at the time. Whitestone has authorized YBDL to act for it in this matter. Whitestone

then declined to accept the late service of the pleading arguing it was prejudiced. The case came before me in the case management process in common with all of the foregoing matters. The parties agreed to regularize the pleadings without prejudice to Whitestone's entitlement to argue the late service issue as part of these motions.

256 If late service is allowed, Whitestone also moves for summary judgment of the claims that TSCC 2130 makes against it. There were a large number of claims made, many of which overlapped with the deficiency claims dealt with above. However, TSCC 2130 has now agreed to limit its claims to four discrete matters.

257 Whitestone argues that the claims are statute-barred and have nothing to do with Whitestone or its duties. However, it put forward an affidavit of an officer of Lanterra who has no knowledge of the bulk of the issues.

258 Neither Whitestone nor Lanterra have put forward any evidence that they suffered prejudice by the late delivery of the claim. There is no evidence that Lanterra or Whitestone are in any worse position now than they would have been in had the statement of claim been served earlier. But, Whitestone argues that the conduct of TSCC 2130 in making a scattergun of allegations, holding documents back to the last second, amending claims, waiving claims, making new claims, and the like is vexatious. Whitestone argues that it has no business being brought into the claims between TSCC 2130 and YBDL and asks for the claim to be dismissed as an abuse of process.

In my view, absent prejudice, the timing of service is a non-issue. The goal is to have a fair hearing on the merits unless a party will be prejudiced in a manner that cannot be cured. As Whitestone has suffered no prejudice apart from the fact of the lawsuit, as opposed to the timing of service, I therefore validate service. The question of whether the lawsuit is an abuse really turns on whether TSCC 2130 has valid claims against Whitestone. Complaints about whether the process has been efficient or cumbersome are best dealt with in a costs argument.

Where was the Guardtek Contract?

259 When Del took over as property manager from Whitestone in April 2012, Del was charged with the task of terminating all remaining third party contracts before the one year period from the turnover meeting expired at the end of May. TSCC 2130 knew that each month Whitestone had been paying approximately $10,000 to a company called Guardtek pursuant to arrangements made by YBDL when it ran TSCC 2130. Del says that it did not then know what services Guardtek was providing. It looked in its files and did not find any Guardtek contract. Del was concerned that for $10,000 a month, Guardtek must have been doing something important. So it was afraid to terminate the agreement without investigating further. There was an employee from Whitestone now working for Del. There is no evidence as to whether Del ever asked him about Guardtek. Del also never called Whitestone to ask about Guardtek. Del tried to call Guardtek and was ignored. Del and TSCC 2130 let the May 30th deadline come and go and kept paying Guardtek.

260 Del enlisted TSCC 2130's counsel to try to engage Guardtek but Guardtek ignored counsel too. In the fall of 2012, TSCC 2130 cancelled Guardtek's contract and sued Guardtek to get back the $215,000 it paid over the life of the contract to that time. Guardtek has launched a counterclaim and claims another $50,000 from TSCC 2130. That lawsuit is ongoing.

261 It was in discovery in the Guardtek action that TSCC 2130 obtained a copy of the contract under which it was paying Guardtek. The contract is formally in Lanterra's name but it is plainly noted on the face of the agreement that it is for services to be provided to the residences at Maple Leaf Square. It deals with services that Guardtek was supposed to provide that have to do with computer supported electronic communications among units in the residential building.

262 TSCC 2130 says that as manager, Whitestone was obliged to have and leave in place files that contained all major contracts. Part of a manager's role is to ensure that the condominium corporation pays what is due and

only what is due. TSCC 2130 alleges that Whitestone failed to adequately maintain records so that TSCC 2130 could know its obligations and discern what it should pay and what it should cancel.

263 TSCC 2130 has delivered expert evidence concerning condominium management. I do not find it compelling. An expert is supposed to provide inferences to the court that are not available to a layperson without special education or experience. Without in any way meaning to denigrate the witness's expertise, the subject matter of a contractual management relationship is not one that requires special expertise to understand. The court is quite able to understand the words of the management agreement and discern from the facts whether the obligations of the manager were fulfilled. Moreover, in my view the expert has opined on the ultimate question rather than providing inferences to the court. While no longer a basis to render an opinion inadmissible, such bald opinions are just not helpful. No objection was taken to the admissibility of the expert evidence. However I give it no real weight.

264 In the management agreement governing the terms of Whitestone's role for TSCC 2130, Whitestone agreed, "to manage the property on behalf of the Corporation in a faithful, diligent and honest manner." Section 5(f) of the agreement provided that Whitestone was required to:

> Keep accurate accounts of the financial transactions involved in the management of the property and render the board quarterly statements of income and expenditures with respect thereto and keep such accounts open for inspection by the Board at all reasonable times.

265 Whitestone's witness accepts in his affidavit that he has no information about this whole issue. Whitestone argues that in the statement of claim TSCC 2130 mischaracterized the claim. Schedule "A" to the statement of claim provides:

> At the initial turnover meeting on May 30, 2011, the Board passed a resolution to cancel all existing contracts entered into by the developer. Whitestone did not disclose a contract with a company called Guardtek, so this contract was not cancelled. As a result, TSCC 2130 may have a liability under this contract in the sum of $215,000.

266 Mr. Schein argues that the failure to cancel the contract in May 2012 only led TSCC 2130 to keep paying for a few more months before it cancelled the agreement itself. Therefore, he says that the claim in relation to the full $215,000 is an abuse. Moreover, since parties are bound to their pleadings, TSCC 2130 cannot make any other non-pleaded claim.

267 In my view the facts are sufficiently pleaded to put Whitestone on notice of what is claimed against it. The fact that it may succeed in reducing the quantum of damages claimed does not undermine the validity of the claim.

268 But there is a fundamental problem with the claim. Del did not want to cancel the contract before it knew more about it in case it was important. But it cancelled the contract in the fall before Guardtek ever responded to it and before it even saw the Guardtek contract. There is no evidence of what Del discovered to satisfy it or TSCC 2130 to cancel when it did or why it could not have done so in May. Moreover, TSCC 2130 put forward no evidence from the former Whitestone employee who stayed on staff with Del. TSCC 2130 put forward no evidence of the investigations undertaken by Del prior to deciding to cancel the agreement. Del never called Whitestone to inquire as to the whereabouts or substance of the contract. Del also did not call YBDL or Lanterra to ask about what the monthly $10,000 expense.

269 Even if I was satisfied that Whitestone failed to keep adequate records, I still do not see how Whitestone can be blamed for the decision-making process as among Del and TSCC 2130 for all of April and May. In other words, even if there was a breach of contract by Whitestone, TSCC 2130 cannot show that any act of Whitestone caused it to suffer damages. It was able to terminate the contract as of right for two months and as far as I can tell it took no steps to exercise any reasonable due diligence before that period expired. It was able

to obtain information that led it to terminate the agreement, sight unseen, in the fall, after its statutory right to do so without cause had expired. That is, TSCC 2130 was able to satisfy itself that that contract was not too important and that it had good cause to terminate the contract without speaking to Whitestone or YBDL or Guardtek. TSCC 2130 has not favoured the court with the information that it learned that gave it the resolve to act in the fall when it did. I infer from its silence that there was no reason why it could not have called Whitestone or done whatever it did to learn whatever it learned before May 30, 2012. There is no reason to expect this evidence to get better at trial. TSCC 2130 was obliged to and did put its best foot forward. I am satisfied that it is just and reasonable to draw an inference under Rule 20.02(2.1)3.

270 I therefore agree with Whitestone that there is no genuine issue requiring a trial on the Guardtek agreement. TSCC 2130 has its claim against Guardtek on the merits. So it still may obtain compensation if it has been wronged.

Where was the Insurance Policy?

271 Kandapillai Pathmanathan suffered a slip and fall injury on January 8, 2011 at Maple Leaf Square on York Street. Mr. Pathmanathan sued the City of Toronto, CFCL, and YBDL. YBDL's insurer took the position that at the time of the slip and fall the land had already been sold to TSCC 2130 and therefore TSCC 2130 should be added as a defendant. In July 2013, Mr. Pathmanathan moved to add TSCC 2130 to the litigation. TSCC 2130 duly notified its insurance broker who responded that the insurance placed through his firm only became effective January 11, 2011 or three days after Mr. Pathmanathan's slip and fall.

272 YBDL was still in control of TSCC 2130 in January 2011 and Whitestone was its property manager. TSCC 2130's files do not include the insurance policy that was in place prior to January 11, 2011.

273 The following chronology is borrowed form TSCC 2130's factum. It is drawn from unchallenged evidence. Mr. Pathmanathan would not agree to adjourn his motion to add TSCC 2130 to give it time to try to figure out if it had insurance to respond to the claim. TSCC 2130 sent counsel to court and argued successfully to adjourn the matter to January 2014. Thereupon Mr. Hiutin wrote to Mr. Peter Heisey, counsel for YBDL in the slip and fall, inquiring whether YBDL's insurer would assume carriage of the matter for TSCC 2130 failing which TSCC 2130 would be forced to bring a duty to defend application against YBDL's insurer. Mr. Hiutin made three separate written requests to Mr. Peter Heisey. Peter Heisey did not respond to any of the three written communications from his professional colleague. On December 18, 2013, Mr. Hiutin's colleague, Mr. Daniel McConville, requested a copy of any prior policies from Mr. Heisey. Mr. McConville also advised that he would be delivering the duty to defend materials shortly. Again Mr. Heisey failed to respond to professional correspondence. By email sent on January 8, 2014, Mr. McConville again asked for a copy of any insurance policies YBDL/Lanterra had in place on the date of loss. Yet again Mr. Heisey did not respond to correspondence from a professional colleague.

274 TSCC 2130 delivered a duty to defend application and factum returnable January 22, 2014. After delivery of the duty to defend materials, Mr. Hiutin and Mr. McConville were contacted by Saul Arias of Intech, the external insurance and risk manager for YBDL/Lanterra advising that there was in fact an insurance policy in place for TSCC 2130 covering the date of the accident, and provided a copy of the policy by email.

275 Whitestone did not leave the policy in the corporate records of TSCC 2130.

276 The duty to defend application was withdrawn on consent with costs of $3,750 payable by YBDL to TSCC 2130. TSCC 2130 says that had Whitestone left the insurance policy in its files, it would not be out of pocket the further sum of $16,203.57 that it spent for counsel to chase Mr. Heisey and bring a completely unnecessary duty to defend proceeding. That amount is net of the $3,750 received as costs.

277 Whitestone led no evidence on the merits of this claim. Its defence is that all of these events happened more than two years after its services were terminated by TSCC 2130. That does not raise a triable issue in my view. The breach, if one occurred, was discoverable under s. 5 of the *Limitations Act, 2002* only in July 2013, when TSCC 2130 needed its insurance policy from January 2011. Prior to that time, it had no reason to look to see if Whitestone had kept the insurance files in proper order or to consider bringing proceedings against Whitestone on this issue.

278 In addition to the duties in the management contract set out above, Whitestone also agreed to perform a specific duty set out in s. 5(e)(ii) of its management agreement with TSCC 2130 to "arrange and pay for insurance in accordance with the provisions of the Declaration and By-laws in amounts directed by the board." This clause does little more than to highlight the obvious; that maintaining valid insurance is a vital management duty in any business.

279 I find that Whitestone's failure to maintain and leave a comprehensive insurance file violated its duty to maintain accurate accounts and to keep them available for the board at all times. Its duties included paying proper insurance amounts, recording the amounts, and that required it to have proper back-up documents, i.e. the policies, available.

280 Unlike the Guardtek situation, causation here is clear. TSCC 2130 exercised ample diligence in seeking to find the applicable insurance. YBDL is representing Whitestone in this proceeding. As a result Whitestone cannot and has not blamed YBDL for TSCC 2130's inability to find its insurance policy. Whitestone and YBDL can make a separate peace if they choose to do so (if they have not done so already). But as between Whitestone and TSCC 2130, it is clear that but for Whitestone's breach, TSCC 2130 would not have suffered the loss that it suffered.

281 Therefore Whitestone is liable to pay TSCC 2130 damages of $16,203.57 plus prejudgment interest. It is just and fair to resolve this matter summarily. No further expenditure in a claim for $16,000 is proportionate. Whitestone chose to advance no evidence on the merits and it would be inappropriate for it to attempt to do so now.

Whither the Parking Lot and the False Alarms

TSCC 2130 claims against Whitestone for failing to warn it in the event that its claim concerning the parking garage or for false alarms were time-barred. TSCC 2130 succeeded in its claim for false alarms. I have found that TSCC 2130 had no claim in negligence for the parking garage. I found that its first claim was brought in time on the parking garage except that it did not give the mandatory statutory notice prior to suing and that resulted in the claim being a nullity. Therefore this claim cannot succeed. The premise of this claim is that it applies if TSCC 2130 lost its two claims due to limitation periods. It did not lose either on that basis.

282 In any event a property manager cannot be liable for not giving advice on limitations periods. TSCC 2130's expert calls the manager the "eyes and ears" of the corporation and says that it was duty bound to bring problems to the attention of the board. The board knew of both the parking lot and false alarm issues. Mr. Hanna's evidence is clear on that point. The issue is not whether the board knew about the problems but whether the board had legal advice as to the limitation periods. There is no duty on a property manager to give legal advice. TSCC 2130 could not point to any term of the management agreement or to any case law suggesting the contrary. TSCC 2130 had legal counsel at all material times. Whitestone would have been a violating s. 26.1 of the *Law Society Act*, *R.S.O. 1990, c. L.8*, had it provided legal advice without a lawyer's license.

283 Accordingly this claim cannot succeed and is dismissed. It is just and fair to resolve this matter summarily. The issues are principally issues of law. There are no disputed facts requiring a trial.

Punitive Damages

284 The common theme to all of the foregoing claims is TSCC 2130's *coup de grace*. It says that Whitestone was favouring its owner Lanterra or YBDL ahead of the interests of TSCC 2130. TSCC 2130 argues that Whitestone improperly paid TSCC 2130's money on the Guardtek contract that was in Lanterra's name. Its neglect helped YBDL try to foist costs on TSCC 2130 in connection with the slip and fall. And TSCC 2130 says that Whitestone never told it to sue YBDL on the parking garage and the false alarms. Therefore, TSCC 2130 seeks punitive damages against Whitestone for showing loyalty to its owner ahead of its loyalty to its principal.

285 To add colour to the claim, TSCC 2130 pleads that YBDL did not disclose to TSCC 2130 that Whitestone was a wholly owned subsidiary of Lanterra until after the turnover meeting. Even if true, there was nothing wrong with TSCC 2130 using a related property manager before the turnover meeting. After the turnover meeting, TSCC 2130 board members conceded that they knew about the relationship. So the suggestion of nefariousness lacks substance in my view.

286 Paras. 21 and 22 of TSCC 2130's statement of claim provide:

> 21. Whitestone is a related company to YBDL. In failing to comply with its obligations under the [management agreement] and duties as set out above, it preferred the interests of YBDL over TSCC 2130, which was a contravention of the [management agreement]. Whitestone also failed to properly advise TSCC 2130 about Whitestone's conflict.
>
> 22. Whitestone's position of conflict and failure to advise TSCC 2130 in this regard constitutes an independent actionable wrong warranting an award of punitive, exemplary and aggravated damages in the sum of $500,000.00 or some other sum to be proven at trial.

287 I see no pleading of any basis for which punitive damages might be available at law or on the underlying, unchallenged facts. Whitestone disputes the characterization of the facts as amounting to disloyalty. The only independent wrong that might have been pleaded would have been breach of fiduciary duty. As a manger and agent, Whitestone was likely in a fiduciary relationship in respect of performing its duties at least. It is trite that not everything done by a fiduciary involves its fiduciary character. Even an express trustee is allowed to be paid with the trust's funds despite owing the highest duty of selflessness to the trust for example. In my view the pleadings allege a contractual duty of loyalty and not a breach of fiduciary duty. The "independent actionable wrong" is left to creative minds to discern.

288 Assuming that punitive damages can lie for breach of contract under *Whiten v. Pilot Insurance Co*., *2002 SCC 18* (CanLII) or breach of fiduciary duty in this case, I do not see anything close to warranting an award of punitive damages on the unchallenged facts proven by TSCC 2130. I have ruled that two of its three alleged wrongs were not actionable wrongs at all. Whitestone's breach was that it failed to keep a two-year-old insurance policy in the files when it left resulting in $16,000 in damages largely because YBDL misbehaved and that lies at Whitestone's feet in this proceeding. Even assuming that Whitestone owed fiduciary duties to carry out its management duties selflessly and loyally as a fiduciary, although that is not pleaded, I still see no breaches of a fiduciary character that are so reprehensible as to warrant punitive damages being considered. The same applies for breach of contract. There was no independent, actionable, reprehensible wrong committed by Whitestone. In view of the paucity of pleading and proven facts, I find it just and fair to resolve this matter summarily.

Result

289 Orders shall issue in each of the proceedings as follows:

(a) Application No. CV-15-524156 is dismissed.

(b) In this application, No. CV-12-454751:

(i) the court declares that YBDL oppressed TSCC 2130 under s. 135 of the *Condominium Act, 1998*;

(ii) The court declares that the CRA, a pre-turnover mutual use agreement, has produced a result that is oppressive or unconscionably prejudicial to TSCC 2130; and

(iii) Under ss. 113(1) and 135 of the *Condominium Act, 1998* this court orders that the Complex Reciprocal Agreement dated December 24, 2010 is hereby amended by inserting the following after Article 8.06 of the agreement:

8.06.1 Removal of Common Facilities Manager

(a) Subject to subsection 8.06.1 (b) the Residential Owner may, by resolution of its Board of Directors, remove the Common Facilities Manager by giving at least 60 days notice in writing.

(b) In the event of a removal of the Common Facilities Manager under Section 8.06.1(a). a third party facilities manager (the "Replacement Manager") shall be appointed in accordance with Section 8.07. in the same manner as would apply if the Common Facilities Manager had been replaced under Section 8.07 with necessary modifications.

(c) Action No. CV-13-481057 is a nullity and therefore is dismissed.

(d) In action No.CV-13-489723:

(i) The roof anchor system claim set out in para. 40 of TSCC 2130's factum is dismissed;

(ii) Summary judgment is granted holding YBDL liable in damages to TSCC 2130 on the systemic booster heater failure claim set out in para. 41 of TSCC 2130's factum. The process for determining the quantum of damages is dealt with below;

(iii) Summary judgment is granted holding YBDL liable in damages to TSCC 2130 on the fan coil accessibility claim set out in para. 46 of TSCC 2130's factum. The process for determining the quantum of damages is dealt with below;

(iv) The steam condensation claim set out in para. 47 of TSCC 2130's factum is dismissed;

(v) The claim for replacement of fan coil units that are part of the chilled water system set out in para. 48 of TSCC 2130's factum is dismissed;

(vi) The claim for mirrors set out in para. 54 of TSCC 2130's factum is dismissed;

(vii) The claim for floor sealing set out in para. 56 of TSCC 2130's factum is dismissed;

(viii) YBDL shall pay TSCC 2130 damages in the amount of $39,098 for the cost of replacing defective lint traps as set out in para. 58 of TSCC 2130's factum;

(ix) Summary judgment is granted holding YBDL liable in damages to TSCC 2130 on the plumbing elbows, tub diverter, and related pipe deficiency claimed by TSCC 2130 set out in para. 61 of its factum. The process for determining the quantum of damages is dealt with below;

(x) The claim for garbage chute diverter system deficiencies set out in para. 63 of TSCC 2130's factum is dismissed;

(xi) The claim for 9th floor door repairs set out in para. 67 of TSCC 2130's factum is dismissed;

(xii) The claim for handicap accessible entrances from the parking garage set out in para. 66 of TSCC 2130's factum is dismissed;

(xiii) The claim for slow exit from the parking garage set out in para. 68 of TSCC 2130's factum is dismissed; and

(xiv) YBDL shall pay TSCC 2130 damages in the amount of $26,500 for the cost of remedying the faulty life safety systems set out in para. 78 of TSCC 2130's factum.

(e) In Action No. CV-14-509896:

(i) The claim for replacement of fan coil units that are part of the chilled water system set out in para. 8 of TSCC 2130's factum is dismissed;

(ii) The claim for steam condensation set out in para. 25 of TSCC 2130's factum is dismissed;

(iii) Summary judgment is granted holding YBDL liable in damages to TSCC 2130 on the claim for a hot water balancing valve set out in para. 26 of TSCC 2130's factum. The process for determining the quantum of damages is dealt with below;

(iv) Summary judgment is granted holding YBDL liable in damages to TSCC 2130 on the claim concerning a backflow prevention valve set out in para. 28 of TSCC 2130's factum. The process for determining the quantum of damages is dealt with below;

(v) Summary judgment is granted holding YBDL liable in damages to TSCC 2130 on the claim concerning a glycol system fluid loss set out in para. 30 of TSCC 2130's factum. The process for determining the quantum of damages is dealt with below;

(vi) Summary judgment is granted holding YBDL liable in damages to TSCC 2130 on the claim concerning chilled water pumps not resetting after a generator test as set out in para. 32 of TSCC 2130's factum. The process for determining the quantum of damages is dealt with below;

(vii) The claim concerning the building automation system set out in para. 35 of TSCC 2130's factum is dismissed;

(vii) The claim concerning booster heaters set out in para. 38 of its factum has already been granted in para. (d)(ii) above. This claim is therefore dismissed as a duplicate;

(viii) The claim in Schedule "A" to TSCC 2130's statement of claim in Action No. CV-14-50989 concerning swimming pool cracks is dismissed; and

(ix) The claim in Schedule "A" to TSCC 2130's statement of claim in Action No. CV-14-50989 concerning pressurization issues is dismissed.

(f) In Action No. CV-14-501296 Whitestone Property Management Ltd, shall pay to TSCC 2130 the sum of $16,203.56. All remaining claims are dismissed except claims for prejudgment interest and costs.

(g) In Action No. CV-13-489723, Action No. CV-14-50989, and Action No. CV-14-501296 a case conference is to be held to consider the process for resolving the issues of damages, interest, and costs on applicable claims. Counsel shall contact my Assistant to try to book a two hour appointment in the next several weeks.

(h) TSCC 2130 is granted leave to file evidence late as sought in prayers for relief (a), (b), and (c) of its notice of motion dated February 22, 2016.

290 I should make the point that in granting summary judgments I have considered the appropriateness of doing so in relation to the litigation as a whole. The oppression application was an application rather than summary judgment. In any event, it is factually very distinct from the three deficiency actions and the

Whitestone action. There was little overlap among the individual deficiency claims set out in the three actions. Each individual deficiency claim tells its own discrete chapter of a construction story. Even if one or two pieces had to go to a further hearing or even to trial, I do not see a circumstance where granting summary judgment on other pieces would still leave the same facts to be heard at trial in any event. Each of the claims is distinct. The same is true of the Whitestone claim. The Guardtek, the slip and fall insurance, and the parking lot limitation period advice claims are all factually distinct so that granting judgment on one resolves that piece and does not leave the same facts going to trial. Only the claim for punitive damages turns on which of the other claims might be allowed although one might readily question if punitive damages could ever be seen to be a realistic remedy in any or all of those claims.

291 Finally, I am indebted to counsel for their efforts in simplifying the vast amount of material filed. Their chronology and compendiums were very convenient and helpful. I should note that having all of the material electronically in searchable pdf format -- some with indexing -- was a great time saver that made the physical tasks of accessing and moving through mounds of material exponentially lighter, quicker, and easier.

F.L. MYERS J.