

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**VITZ HOLDINGS INC.**

**V.**

**TORONTO STANDARD CONDOMINIUM CORPORATION NO. 1530**

February 14, 2017

J. Milgrom for Vitz Holdings Inc.

V. Yee for TSCC 1530

This is an application by the owner of a commercial condominium in TSCC 1529 for a declaration of rights associated with an easement granted by TSCC 1530 to TSCC 1529 and its owners. TSCC 1530 maintains that the Applicant is an “owner” of TSCC 1530 and therefore subject to the requirements of s.98 of the Condominium Act. Section 98, TSCC 1530 argues, trumps any rights under the Easement.

Background:

Mr. Weizblit is a registered dentist. He is the sole director of the Applicant. The Applicant owns Unit 1 in TSCC 1529, which is a commercial condominium. Mr. Weizblit proposes to establish a dental office in Unit 1.

The Applicant is also, as it happens, the owner of four “parking units” located in the parking garage of TSCC 1530.

TSCC 1530 granted an easement to the “owner(s)” of the commercial condominium (TSCC 1529), including the condominium corporation itself, to install drainage, sewer, water, insulation, electrical, telephone, cable, ventilation, air conditioning, fire protection, waste disposal and “similar systems or utilities”. The Easement extends to boring, crossing or penetrating all slabs, floor slabs, ceiling slabs, concrete, concrete block, masonry or drywall necessary to install the services.

The construction of the dental office in Unit 1 of TSCC 1529 requires boring through the floor/ceiling slab on a portion of TSCC 1530’s premises to install toilets and sanitary drains,

compressed air lines, vacuum lines, data and power wire conduit, heat tracing, pipe insulation and fire stopping.

The Respondent concedes, and I find in any event, that the work proposed by the Applicant falls within the scope of the Easement granted by TSCC 1530 to TSCC 1529.

The Applicant's plans have been vetted by TSCC 1530's consulting engineer. The plans have been approved with a number of recommendations for the prevention or amelioration of possible adverse impacts of the work on TSCC 1530's common elements.

The evidence is that the Applicant has agreed to incorporate all of these recommendations into the work performed.

### Disputed Issues

The TSCC 1530 Board will not agree to the Applicant conducting the proposed work without certain conditions. Principally, TSCC 1530 says that the Applicant must have TSCC 1530's consent and must comply with the provisions of Section 98 of the Condominium Act. Section 98 provides that an "owner" may only make alterations to common elements if the board has approved the alterations, there is an agreement allocating costs and setting out respective duties and responsibilities and notice has been sent to all unit owners in TSCC 1530.

TSCC 1530 says because the Applicant owns parking units in TSCC 1530, it is an "owner" for the purposes of Section 98.

TSCC 1530 takes the position that the Applicant is not a beneficiary of the Easement in any event.

Further TSCC 1530 argues that because the Applicant is only a parking unit owner, it has no right to make changes or alterations to any common elements not directly associated with the use and enjoyment of the parking units (Declaration, Section 3.04).

Finally, TSCC 1530 says that under a shared facilities agreement, the Applicant needs the written consent of TSCC 1530 to make any "Major Change."

### Section 98 of the Act

The main issue is Section 98. The sole question is whether, because the Applicant happens to own four parking units in TSCC 1530, it is an "owner" for the purposes of exercising Easement rights granted to TSCC 1529 owners over common elements of TSCC 1530. In my view, it is not.

The Applicant is an owner of Unit 1 in the commercial condominium, TSCC 1529. As such, it is entitled to exercise Easement rights granted to "owners" of TSCC 1529 units. It is solely in this capacity that the Applicant proposes to do work which will have an impact on certain common elements of TSCC 1530. It is entirely fortuitous that the Applicant happens to own four parking

units in TSCC 1530. This has nothing to do with the exercise of the Easement rights afforded to TSCC 1529 owners.

The fortuitous nature of this fact is illustrated by the concession, by TSCC 1530's counsel, that if Mr. Wiezblit owned the parking units in TSCC 1530, Section 98 of the Act would have no application to the Applicant.

For purposes of the development of Unit 1 in TSCC 1529 into a dental office, and the exercise of TSCC 1529 Easement rights to do so, the Applicant is not an "owner" with TSCC 1530. Section 98, in my opinion, has no application to the circumstances of this case. Although in a different context, a similar conclusion was reached by Lane J. in YCC No. 482 v Christianson 2003 Carswell Ont 6533 (SCJ) at paras. 23 and 24.

TSCC 1530 also argues that easements are subject to "reasonable rules and regulations" and that the transferee of any easement must act in a prudent and reasonable manner.

Purporting to require adherence to Section 98 when that section, in law, has no application to the Applicant, is not a "reasonable rule or regulation." Compliance with the TSCC 1530 engineer's recommendations is more like what is contemplated by this provision.

It has not been shown that the Applicant has failed to act prudently or reasonably. Indeed, I find the opposite is true. The Applicant has acted entirely reasonably. It is TSCC 1530 which has been overreaching.

#### Can the Applicant Rely on the Easement?

The Easement, by its terms, is in favour of the "owner(s)" of commercial condominium lands "including the condominium corporation." The very language of the Easement makes it clear, contrary to the TSCC 1530 argument, that the Easement is not restricted to the corporation itself but applies to any TSCC 1529 condominium owner. The Applicant is entitled to rely on the Easement.

#### As a Parking Unit Owner in TSCC 1530, the Applicant has Limited Rights?

This argument suffers from the same flaw as the Respondent's Section 98 argument. The Applicant is not exercising, or purporting to exercise, rights as a parking unit owner of TSCC 1530. It is asserting rights as an owner of Unit 1 in TSCC 1529. Section 3.04 of the Declaration of TSCC 1530 has no application to these circumstances.

#### The Shared Facilities Agreement

The Shared Facilities Agreement (SFA) was entered into between the developers of these two intermingled condominium projects.

It continues to bind the condominium corporations themselves.

Section 9.03 says that if a “Project Owner” purposes to make any “Major Change” to its structure, it has to give the other Project Owner plans and “obtain the written consent” of the other Project Owner.

In my view, the Applicant is not a “Project Owner.” The proposed work is not a “Major Change” within the meaning of the SFA.

The work the Applicant proposes to conduct pursuant to the Easement is also not on the “structure” of TSCC 1529 but on the common elements of TSCC 1530.

The SFA simply has no application to the facts of this case.

### Conclusion

For these reasons, the declarations sought in paragraphs 1(a) (b) and (c) of the Notice of Application are granted.

The Applicant is not required to comply with the requirements of Section 98 of the Act in connection with the proposed work necessary to develop Unit 1 of TSCC 1529.

The Applicant is entitled to the benefit of the Easement. There is no evidence the Applicant is acting imprudently or unreasonably. The SFA has no application to these circumstances.

### Costs

The Applicant seeks partial indemnity costs of \$13,237.17.

Had it prevailed, the Respondent would have sought full indemnity costs of \$8,646.84.

Mr. Yee appears to have invested about 30 hours into this dispute; Mr. Milgrom about 35 hours.

The Applicant also seeks recovery of another 12.5 hours put in by Mr. Rivait. It was not explained what Mr. Rivait did. The description merely says he met with the client, engaged in some correspondence and “read” the Respondent’s factum. This is scant basis for seeking to recover almost \$2,500.

The Applicant prevailed in these proceedings. It is entitled to its costs on a partial indemnity basis fixed in the amount of \$9,000 inclusive of all fees disbursements and applicable taxes.

“Penny J.”

[This Endorsement was originally released in handwritten form.]