CITATION: Weir v. Peel Condominium Corporation No. 485, 2017 ONSC6265
COURT FILE NO.: CV-16-1469-00
DATE: 2017 10 20

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
DORRETT WEIR	)	Nan Zheng, counsel for the Applicant
	)	
	)	
	)	
Applicant	)	
	)	
- and -	)	
	)	
	)	
PEEL CONDOMINIUM CORPORATION NO. 485	)	Jonathan Fine, counsel for the Respondent
	)	
	)	
Respondent	)	
	)	
	)	
	)	**HEARD:** August 14, 2017

REASONS FOR JUDGMENT

PETERSEN, J.

OVERVIEW

[1] This is an Application pursuant to s.135 of the *Condominium Act*, S.O. 1998, c.9.

[2] The Applicant Dorrett Weir is the owner of a residential penthouse unit (the "Unit") in a high-rise condominium property in Mississauga. The Respondent Peel Condomium Corporation No. 485 ("the Corporation") is a non-profit corporation created for the purpose of controlling, managing and administering the condominium property and assets.

[3] The factual trajectory of the litigation commenced in June 2015, when Ms. Weir began to experience water pooling on the floor of the solarium in her Unit after heavy rainfall. She notified the Corporation, which initially advised her that the problem was her responsibility to address, but subsequently took steps to investigate the source of the water leak and attempt to rectify it.

[4] The problem persisted for almost two years, despite extensive investigation and attempts at remediation. During that time, Ms. Weir was unable to use her solarium. She hesitated to go out when it was raining for fear that water would seep into the solarium unabated. If she was out when it began to rain, she would stop what she was doing and rush home. In addition to these interruptions in her plans, she was inconvenienced repeatedly by frequent entries to her Unit by Corporation representatives, contractors, and engineers who were attempting to identify the source of the water. On three occasions, her Unit was accessed by the Corporation while she was not home and without her consent.

[5] Ms. Weir alleges that, throughout this period of time, the Corporation dismissed her concerns, violated her privacy, was either unresponsive to or unreasonably slow to respond to her complaints, was incommunicative or insufficiently communicative about the status of its investigation and its plans to address the problem, thwarted her efforts to have her own engineer investigate the source of the water leaks, attacked her credibility, wrongfully accused her of being responsible for the leaks, and was harsh and abusive in its dealings with her.

[6] In her Application (as amended), Ms. Weir claims that the Corporation's conduct and attitude interfered with her enjoyment of her Unit and caused her significant stress and anxiety. She seeks the following remedies:

a) Declaration that the Corporation's actions were oppressive, unfairly prejudicial, or unfairly disregarded her interests;

b) an Order that the Corporation direct all engineers and professionals involved with her Unit to complete the necessary repairs to the common elements within the next 60 days;

c) an Order that the Corporation not dismiss the problems as resolved until its engineers and, if necessary, an independent

engineering firm, confirm that the defects within the common elements are repaired;

d) an Order for compensation in the amount of $8,000, for the ongoing loss of enjoyment of her unit and the mental distress resulting from the oppressive conduct of the Corporation;

e) an Order for reimbursement from the Corporation of monthly common expenses commencing from June 2015 until the problem is resolved;

f) an Order for reimbursement from the Corporation of monthly property taxes paid for the Unit commencing from June 2015 until the problem is resolved; and

g) an Order for reimbursement from the Corporation of $1,773.39 from the Respondent, representing the amount paid to the Respondent's engineering firm (Brown & Beattie).

[7] The source of the leaks was never conclusively identified, but the problem ceased in the spring of 2017, after roof repairs and exterior sealant repairs were completed above and around the solarium of Ms. Weir’s Unit.

[8] This Application was heard on August 14, 2017, approximately three and half months after the last reported leak. Both parties agreed at the hearing that the problem appeared to have been fixed.

LAW

[9] Section 135 of the *Condominium Act* states:

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

[10] In order to establish entitlement to a remedy under s.135, a claimant must satisfy a two-prong test. She must show that (i) the respondent failed to meet her reasonable expectations and (ii) the respondent's conduct was or threatened to be oppressive or unfairly prejudicial to her or unfairly disregarded her interests. See *Metropolitan Toronto Condominium Corp. No.1272 v. Beach Development (Phase II) Corp.*, 2011 ONCA 667, at para.6; *3716724 Canada Inc. v. Carleton Condominium Corporation No.275*, 2016 ONCA 650, at para.29; and *Ryan v. York Condominium Corporation No.340*, 2016 ONSC 2470 (S.C.J.), at

para.76. Proof of a reasonable expectation may be linked to one or more of the concepts of oppression, unfair prejudice, or unfair disregard of interests such that the two prongs of the test effectively merge. See *Couture v. Toronto Standard Condominium Corp. No.2187*, [2015] O.J. No.6356, at para.60 and *B.C.E. Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560, at para.90.

[11] A distillation of the jurisprudence produces the following definitions: “Oppression” is conduct that is coercive, harsh or an abuse of power. “Unfair prejudice” is conduct that limits or adversely affects a party's rights and constitutes inequitable treatment relative to others. “Unfair disregard” means to ignore without cause or treat the legitimate interests of the claimant as being of no importance. See *Hakim*, *supra*, at paras.33-35 and *Ryan*, *supra*, at para.78.

[12] The three concepts of oppression, unfair prejudice and unfair disregard of interests do not represent watertight compartments. They often intermingle and overlap. See *Couture*, *supra*, at para.60, and *BCE Inc.*, *supra*, at para.91.

[13] The legislative intent behind the enactment of s.135 is to balance the legitimate interests (i.e., the objectively reasonable expectations) of individual unit owners with a condominium Board's ability to exercise judgment and secure the safety, security and welfare of all owners and of the condominium's property and assets. A condominium corporation's actions must always be measured against its responsibility to balance the private and communal interests of the unit

owners. In reviewing a corporation's impugned conduct, the Court must be mindful of the need to defer to reasonable business decisions undertaken by the corporation. See *Hakim v. Toronto Standard Condominium 1737,* 2012 ONSC 404, at paras.38 and 40, and *Courthouse Block Inc.* v. *Middlesex Condominium Corp. No. 173*, [2011] O.J. No.3179 (S.C.J.), at paras.26 and 29.

[14] With this legal framework in mind, I now turn to the case before me.

ISSUES

[15] The Corporation denies that its conduct was oppressive or unfairly prejudicial to Ms. Weir or that it unfairly disregarded her interests. This is the central issue in dispute.

[16] The Corporation raises a number of additional issues. First, it argues that an oppression remedy is not available to Ms. Weir because the water leakage problem in her Unit has been rectified. It takes the position that s.135(2) of the *Condominium Act* limits the Court's jurisdiction to rectification of *ongoing* situations in which one party's conduct "is or threatens to be" oppressive (in the present tense). It submits that Ms. Weir's remedial claims are moot.

[17] Ms. Weir argues that the Court can make a finding of oppression based on the Corporation’s prior actions and can make any remedial order that it deems

proper, including an order for compensation for past loss of enjoyment of her Unit and mental distress.

[18] The Corporation also challenges the Court's jurisdiction under s.135(3) of the *Condominium Act* to grant the orders requested by Ms. Weir for reimbursement of monthly common expenses and property taxes. It argues that these remedies would not be appropriate, even if the Corporation's conduct were found to be oppressive, because there is no nexus between them and the alleged misconduct. It also relies on s. 84(3) of the *Condominium Act* as a bar to relief from contribution to common expenses.

[19] Before considering the parties' submissions with respect to the limits of the Court's remedial jurisdiction, I will first determine the threshold issues of whether Ms. Weir's expectations were reasonable and, if so, whether the Corporation's conduct failed to meet her legitimate expectations in a manner that was oppressive, unfairly prejudicial to her, or unfairly disregarded her interests. Unless I make an adverse finding against the Corporation on these threshold issues, Ms. Weir is not entitled to any remedy under s.135 of the *Condominium Act* and it will not be necessary for me to decide the other issues in dispute.

[20] On the threshold issues, the Corporation submits that it responded to Ms. Weir's complaints of water leaks in a reasonably prompt, diligent and professional manner. It retained an engineer and relied on that engineer’s expert

advice. It incurred considerable expense to pay engineers and contractors to investigate and rectify the leakage. During oral submissions, Mr. Fine argued that the Corporation "bent over backwards". He acknowledged that the Corporation encountered difficulties resolving the problem, but submitted that "difficulty does not equal oppression". He argued that the Corporation did all that it could reasonably do in the circumstances.

[21] The Corporation's conduct must be assessed, and the reasonableness of Ms. Weir's expectations must be determined, in the full context of all the relevant facts and circumstances in this case. See *Hakim*, *supra*, at para.43, *Courthouse Block*, *supra*, at para.27, both citing *B.C.E. Inc.*, *supra*, and *Metro Toronto Condo. Corp. No. 1272* v. *Beach Development (Phase II) Corp.*, [2010] O.J. No.5025 (S.C.J.), at para.19 (appeal dismissed, 2011 ONCA 667). A proper contextual approach to the issues necessitates a review of the voluminous record and a summary of the key events giving rise to the litigation.

CHRONOLOGY OF EVENTS

[22] The problems began in June 2015 when, on two separate occasions four days apart, Ms. Weir noticed water pooling on the floor of the solarium in her Unit after heavy rains. On both occasions, she immediately notified the Corporation and the acting superintendent visited her Unit the same day. On the second occasion, on June 12, 2015, he attended with the new superintendent,

who advised Ms. Weir that a contractor would check the Unit for the source of the leak.

[23] When no further action was taken, she emailed the on-site property manager on June 16, 2015, who responded that a contractor would come by her Unit on June 19, 2015. There was no visit by a contractor on that date.

[24] On June 22, 2015, Ms. Weir made a written complaint to the Corporation's Property Management company about the lack of follow-up to address the problem. The on-site manager responded that “the issue pertaining to a leak within your unit falls under the responsibility of the owner."

[25] Ms. Weir continued to experience leaks and continued to complain to property management. On June 27, 2015, after another heavy rainstorm, the building superintendent and the President of the Corporation attended her Unit to observe the pooling water. Pursuant to their direction, a portion of the drywall in her solarium was cut out and removed. Ms. Weir later deposed that the "drywall had a black colour, consistent with the presence of mould." The next day, the President verbally assured her that the problem would be fixed.

[26] The following day, the regional and on-site property managers attended her Unit and advised her that they would have window cleaners check the

caulking on the outside of her solarium windows. On July 2, 2015, Ms. Weir noticed that fresh caulking had been applied to the windows.

[27] On July 8, 2015, the superintendent advised Ms. Weir that a contractor would be coming to her Unit the following day to patch up the opening in the drywall. She wrote to the on-site manager that "an environmental check for mold and mold spores is required." He responded, "There was no concern raised by the contractor so the corporation wouldn't undertake a mould inspection."

[28] On the morning of July 9, 2015, she spoke to the on-site manager and asked when the contractor would arrive. She was told that a time frame could not be provided. She cancelled a morning appointment in order to stay home. At 1:45 PM, she emailed the on-site manager, advised him that she would be away from her Unit between 2:00 and 4:00 PM and stated, "No one should enter my unit in my absence. ONLY IN CASE OF EMERGENCY. Please advise me for future appointments." The manager responded, "The contractor can't give you an exact time. He's only here for today. If you don't want him to enter the unit then it's not going to get done." Ms. Weir then cancelled her afternoon appointment so that she could be present. A contractor attended her Unit that afternoon and repaired the drywall.

[29] At that point, the parties believed that the new window caulking had corrected the water leakage problem, but unfortunately it persisted. During a

heavy rainfall on July 19, 2015, Ms. Weir reported water ingress from under a baseboard in the solarium. The superintendent came to her Unit with a fan and took photographs. Ms. Weir emailed the on-site manager and requested that “professionals” (as opposed to window cleaners) be retained to investigate and resolve the problem.

[30] Ms. Weir was away from her home during the last weekend in July 2015. Upon her return on Sunday July 26, 2015, she discovered a "Notice of Suite Entry" from the superintendent, indicating that he had entered her Unit to "check window" on July 24, 2015 at 11:00 AM. Ms. Weir considered this to be an unlawful entry. The next morning, she spoke to the on-site manager about it. He informed her that her window had been left open. She then wrote to the property management company on July 28, 2015, stating, "There was no emergency for this to occur. This was an absolute invasion of privacy.... Any future checks regarding the damage should only be carried out in my presence with prior notification." The on-site manager responded on July 29, 2015 that "the entry was approved by the Board." There is no evidence in the record of when or on what basis the Board approved this entry to Ms. Weir's Unit.

[31] On August 4, 2015, Ms. Weir sent the on-site manager a letter dated August 3, 2015 from a contractor who had visited and inspected her Unit. The contractor remarked that the water appeared to be coming into the solarium

because of a caulking failure on the exterior of the building and not due to any open windows.

[32] On August 10, 2015, after another rainfall, water ingress into the solarium occurred again. Ms. Weir emailed the on-site manager and Board, requesting immediate attention to the problem. On August 14, 2015, she was advised that engineers would be attending to examine her Unit.

[33] In the ensuing weeks, the Corporation's engineers (Brown & Beattie) made several visits to Ms. Weir's Unit to assess the problem. They attended on August 18, September 2, 3, 4, 11, and 14, 2015 to inspect the property and carry out water testing. When the engineers required access to Ms. Weir's Unit, she was given same-day notice of their arrival by the on-site manager via email. She was required to cancel appointments in order to be present.

[34] During the early September visits to her Unit, the Corporation's engineers noticed some failed sealant around the solarium. A contractor was retained by the Corporation to carry out exterior caulking and sealant repairs. The engineers returned in mid September to conduct further water testing after the repairs were completed.

[35] On August 24, 2015, September 22, 2015 and September 29, 2015, Ms. Weir inquired about the status and outcome of the engineers' investigation

and any repairs being conducted. The President verbally advised her that "it's done" and that the work had cost the Corporation $8,000.00.

[36] In her correspondence during this period, Ms. Weir requested that the Corporation repair the floor in her solarium, which had sustained water damage. She did not receive a response to that request.

[37] There was a rainfall on September 29, 2015. Ms. Weir arrived home in the evening to discover a pool of water in her solarium. She notified the on-site manager, who attended the Unit and advised that he would contact the Board. Ms. Weir emailed the manager and the Board on October 2, 2015, remarking that "whatever exterior work was done did not bring a resolution". She reiterated "that there is a mold issue in an area of the baseboard" and requested that the Board of Directors give the matter their "rapt attention". She did not receive a response to this email message.

[38] Ms. Weir then retained a lawyer, Nan Zheng, who wrote to the Board, the regional manager and the new on-site property manager on October 19, 2015. Ms. Zheng complained about the Corporation's lack of communication, the unresolved water leakage issue, and the presence of mould in Ms. Weir's Unit. She requested that these issues be addressed immediately, failing which Ms. Weir would proceed with legal action.

[39] The regional manager responded on October 21, 2015, stating that the initial findings of the investigation into the first reported water in the unit was that Ms. Weir "had left the window open during a rain storm". He advised that an engineering firm had undertaken extensive water testing at a cost of $21,000 but "has so far not found the alleged leak". He asserted that the "Corporation may be in a position to seek all costs against your client but is reserving this decision until final test can be conducted". He added that the Corporation was waiting for Ms. Weir "to report the next water incident in her suite so that further review can be undertaken by the engineers at the time of the actual water ingress."

[40] In her reply, Ms. Zheng expressed surprise at the Corporation's suggestion that it might seek to recover its expenses from Ms. Weir, reiterated Ms. Weir's position that the water had been seeping into her Unit on days when her windows were "firmly shut", and requested that the problem be immediately addressed to avoid litigation.

[41] The regional manager wrote to Ms. Zheng again on October 23, 2015, explaining that a timeline could not be established for further testing because it was "weather dependent". He emphasized the need for Ms. Weir's cooperation,

> Your client must report the next water ingress incident for the engineering firm to complete their investigation. It is hoped that there hasn't already been a failure to report water ingress as rain has occurred since our last communication. Please note that failure of your client to report water ingress when it is raining outside may result in this matter being referred to the corporations (sic) solicitor and the cost may be a charge back to the unit.

[42] On October 26, 2015, the on-site manager wrote directly to Ms. Weir, confirming that there had been substantial rainfall on October 24, 2015, but that no leak was reported by her, so the Corporation assumed that there was no leak to report. He reminded Ms. Weir of the Corporation's request to report every leak immediately.

[43] Ms. Zheng responded to this letter on November 2, 2015, explaining that "water seepage only occurs to [Ms. Weir's] unit when there is heavy rainfall approaching from a south-eastern direction. Thus, light rainfall, such as that which occurred on October 24, 2015, did not result in water leakage." She inquired about the anticipated timetable for the conclusion of the engineers' testing, the commencement of repairs, and the replacement of some drywall and insulation that had been removed from Ms. Weir's Unit. Ms. Zheng also requested that the Corporation attend a mediation session, the costs of which would be split by the parties.

[44] The regional manager responded that the Corporation "is undertaking all actions necessary to resolve this matter" and that Ms. Weir should contact her insurance regarding any damage to her Unit. Ms. Weir's request for mediation was not addressed.

[45] In mid-November 2015, the on-site manager advised Ms. Weir that the Corporation's engineers would be commencing a second round of testing. The

engineers attended on November 23, 24, 25 and 26 to inspect the exterior of the property. They identified failed sealant on concrete-to-concrete joints, recommended replacement of the sealant, and then supervised a contractor who performed the repair work. On December 15, 2015, they returned to carry out water testing on the sealant repairs. Two days later, contractors attended Ms. Weir's Unit to replace the drywall that had been removed inside her solarium.

[46] Ms. Weir emailed the on-site manager on December 23, 2015, inquiring as to whether the water testing had been completed and whether the problem had been resolved. She also asked when her damaged floor would be replaced. The manager advised her the next day that flooring was not the Corporation's responsibility. He confirmed that the engineers' work and water testing was done, but that there was not yet a final report from the engineers.

[47] On January 6, 2016, Ms. Zheng wrote to the regional and on-site managers and the President, advising that, due to the Corporation's apparent unwillingness to attend a mediation, Ms. Weir was requesting an arbitration pursuant to s. 132 of the *Condominium Act*. Ms. Zheng noted the Corporation's refusal to repair Ms. Weir's damaged flooring and reiterated her request for the results of the engineers' testing.

[48] Shortly thereafter, Ms. Zheng had a discussion with the Corporation's solicitor, Denise Lash. After their conversation, Ms. Lash wrote to Ms. Zheng on

January 11, 2016, confirming their understanding that "no mediation proceedings are required with respect to this matter". She advised Ms. Zheng that she would be in touch once she received a copy of the engineers' report. She provided Ms. Zheng with a copy of the Corporation's Standard Unit by-law, which defines the items within a unit that are covered under the Corporation's insurance policy. The by-law shows that flooring is not covered and is therefore the unit owner's responsibility to insure.

[49] Ms. Lash advised Ms. Zheng that the Corporation was investigating Ms. Weir's most recent complaint of water leakage on January 10, 2016. On January 12, 2016, Ms. Zheng sent Ms. Lash photos of the most recent water damage. Ms. Zheng confirmed that, "At this time, my client will wait for the results of the report and the ongoing investigation."

[50] Contractors were retained by the Corporation and attended Ms. Weir's Unit on January 13 and January 18, 2016 to investigate the cause of the leaks. Upon leaving her Unit, they told her that she would be informed of the outcome of their investigation.

[51] By February 11, 2016, Ms. Weir had not heard anything further. Ms. Zheng followed up with Ms. Lash, who requested that Ms. Weir communicate directly with property management, so Ms. Weir wrote to the on-site manager on

February 12, 2015, asking for an update on the Corporation's plan to deal with the situation.

[52] On February 16, 2016, the on-site manager responded that, based on tests conducted, "there is no evidence of leak to your suite as of now and therefore the corporation will be looking for other alternatives." The manager further noted that no leak had been reported by Ms. Weir on January 26, 2016, despite heavy rain with wind in the Mississauga area that day.

[53] Ms. Weir replied to the on-site manager on February 17, 2016 as follows:

> Your response did not address my concern and the REAL ISSUE. Apparently the details of the reports made by myself regarding the direction of rainfall are ignored.
>
> In case you forget, we are in the winter season. The date you mentioned as far as I remember there was wet snow and wind. Again and again I have repeated: I only report when there is a leak. I will not or do not fabricate reports.
>
> Have you received the reports from any of the engineers that conducted tests?
>
> PLEASE ADDRESS THE ISSUE AND STOP GOING AROUND IT.
>
> Dissatisfied Owner of Unit 2303

[54] Ms. Zheng also wrote to the on-site manager, explaining that Ms. Weir was upset because she felt she had been wrongfully accused of making "false representations." Ms. Zheng asked whether the testing was concluded and

reiterated her request for a copy of any reports provided by the Corporation's engineers.

[55] The regional manager then wrote directly to Ms. Weir, re-emphasizing the Corporation's request that she report any water seeping into her unit. He commented that having Ms. Zheng send "unwarranted intimidating communication" on her behalf could lead the Board to take legal action at her cost.

[56] Ms. Weir commenced her Application on March 29, 2016. The initial hearing date of April 28, 2016 was adjourned to August 29, 2016 at the Corporation's request, because the Corporation changed counsel. It retained Mr. Fine's firm in connection with the litigation. (Since more than one lawyer at Fine & Deo acted on the file, I will simply refer to the "Corporation's lawyer" or "Corporation's counsel" without using names, except where Ms. Lash re-enters the file at a later date.)

[57] The water seepage problem in Ms. Weir's solarium continued. The Corporation's engineers attended the property on April 21, 2016 with a roofer. They discovered deficiencies in the roof that required repair. However, the engineers were of the view that the roofing deficiencies were not consistent with the pattern of water leakage described by Ms. Weir.

[58] The parties then met, with their respective counsel and the Corporation's lead engineer (Tim Beattie) on May 4, 2016, in an effort to resolve their dispute. No settlement was reached, but Ms. Zheng confirmed, by letter dated May 6, 2016, that Ms. Weir would take no further steps in the litigation until June 30, 2016, to allow for further investigation by the Corporation.

[59] On May 10, 2016, drywall was removed below each window panel in Ms. Weir's solarium and further water testing was conducted by the Corporation's engineers.

[60] On July 11, 2016, the Corporation's lawyer wrote to Ms. Zheng to report on the outcome of the engineers' investigation. She stated that, when the outside sliders on Ms. Weir's windows were closed fully, the engineers had not been able to replicate the leakage, despite simulating storm conditions. However, when the outside sliders were left open during similar controlled water testing, the engineers replicated the leak. The Corporation therefore concluded that the water penetrating into the Unit was caused by Ms. Weir's failure to properly close the outside sliders during rainstorms.

[61] The conflict between Ms. Weir and the Corporation escalated significantly from this point forward. The Corporation demanded payment of $45,492.94 to cover its legal costs and contractors' and engineers' fees. This demand was made pursuant to s.37 of the Corporation's declaration, which

requires each unit owner to indemnify the Corporation against any loss, cost, damage or liability resulting from a unit owner's acts or omissions. The Corporation's counsel advised that, if it did not receive written confirmation of withdrawal of Ms. Weir's Application and payment in full of the $45,492.94 within two weeks, it would collect the money and its legal costs in the same manner as common expenses (implying that a lien would be registered against her Unit).

[62] Ms. Weir denied that she was responsible for the water damage, questioned the reliability of the engineer's findings and retained her own engineer, Anthony Sabatini, to investigate.

[63] Mr. Sabatini inspected Ms. Weir's Unit on July 14, 2016 and conducted preliminary testing. He poured water on the window tracks and found the drainage holes to be clear and operating effectively. Ms. Weir relies on these test results to dispute the Corporation's allegation that open exterior window sliders were the cause of the leaks. The reliability of these test results is challenged by the Corporation because the tests were not conducted with simulated storm conditions. In the end, Mr. Sabatini was unable to identify the source of the leak and concluded that further investigative work was required.

[64] The Corporation's lawyer wrote to Ms. Zheng on July 15, 2016, demanding that Ms. Weir cease having Mr. Sabatini perform services on the property without the Corporation's prior approval. The Corporation's declaration

prohibits unit owners from carrying on any activity in their unit or upon the common elements that is likely to damage the Corporation's property, or impair the structural integrity of any portion of the common elements or the unit. The Corporation's rules specifically prohibit contractors, trades and service personnel from entering the property to perform any work or service in any unit that may affect the common elements, unless employed by the Corporation or previously approved by the Corporation.

[65] The Corporation demanded that Ms. Weir cease and refrain from providing contractors, trades and service personnel entry to her Unit without prior written approval of the Corporation. The Corporation also demanded indemnification from Ms. Weir in the amount of $649.75 within two weeks, for legal costs incurred to address her non-compliance with the declaration and rules. It reminded Ms. Weir that costs incurred by the Corporation by reason of a breach of the declaration, by-laws or rules, are recoverable from a unit owner in the same manner as common expenses (implying, again, that a lien may be registered against her Unit).

[66] When Ms. Weir subsequently requested permission to have Mr. Sabatini access the roof to perform further investigation, the Corporation responded with a list of non-negotiable conditions, including that Ms. Weir would be required to pay for Mr. Beattie to be present during Mr. Sabatini's inspections.

[67] At that point, Ms. Weir requested an adjournment of the August 29, 2016 hearing date. Mr. Sabatini was not available to conduct further testing until the last week of August, so she would not have been able to file an updated affidavit from him prior to the hearing. The Corporation did not consent to the adjournment request, but neither party met its production obligations under the *Rules of Civil Procedure*, so the Application hearing was unable to proceed. It was adjourned to May 24, 2017, with a Court-endorsed timetable for next steps in the litigation. Deadlines were fixed for ongoing inspection and testing of the property by both parties' engineers (September 30, 2016), for the exchange of engineers' final reports (November 30, 2016) and for the delivery of supplementary affidavits (December 30, 2016). Deadlines were also fixed for cross-examinations, answers to undertakings, and exchange of factums, to ensure that the matter would be ready to proceed on May 24, 2017. This new hearing date was made peremptory on both parties.

[68] The Corporation's responding materials, which were filed late in August 2016, included a detailed engineers' report dated August 9, 2016. In the report, Mr. Beattie summarized his observations and assessments made during his multiple visits to the property over the previous year. He explained how he reached his opinion, adopted by the Corporation in its July 11, 2016 letter to Ms. Zheng, that the water leakage was caused by the exterior window slider assemblies not being tightly closed. In May 2016, previous testing was repeated

after interior drywall was removed to facilitate non-concealed access and more accurate monitoring of test conditions. The interior sliders on the windows were closed but the exterior sliders were left open. Water testing without a blower confirmed no leakage in these conditions, but when testing was attempted under simulated storm conditions, water showed up on the floor in "very similar patterns" to what Ms. Weir had previously photographed and reported. Mr. Beattie noted:

> Initially, it appeared the window assembly had leaked below the windows. HOWEVER on close examination it was revealed that NO water leaked directly below the window assemblies. Water entered the interior through the interior slider weather-stripping components (again, not meant to repel water on their own without the exterior sliders being tightly closed ...) and onto the interior finish sill, and from there both directly onto the floor as well as in between the sill and window assembly (not meant to be watertight) to within the wall cavity below and eventually onto the floor. There was a significant amount of water on the floor very quickly after the ingress initiated, which is consistent with prior leakage accounts.

[69] Mr. Beattie concluded:

> We were not able to replicate the leakage at the floor slab below the windows despite the prolonged and aggressive water testing completed at the window wall components and adjacent concrete wall panels on several different occasions ... using a blower door to simulate wind-driven rain conditions when the sliders were closed fully. The leakage reported was replicated on May 10, 2016 when the outside sliders were open during similar controlled water testing ... We therefore conclude that the recent water entries into this solarium have been a result of the sliding window assemblies not being tightly closed.

[70] On September 7, 2016, Ms. Zheng provided the Corporation's lawyer with a list of water leakage occurrences in Ms. Weir's Unit since May 2016. She

conveyed that Ms. Weir maintained that the window sliders had been properly and fully closed during each of the occasions. She noted that, in some instances, Ms. Weir had observed water seepage from a windowless wall and water dripping from the ceiling. A photograph was enclosed, showing the affected ceiling area. Each of the occurrences listed in this letter had previously been reported to property management in the form of a Service Request Form. Each had also previously been mentioned in an affidavit sworn by Ms. Weir and served on the Corporation.

[71] Pursuant to the timetable endorsed by the Court in August 2016, the parties agreed on two dates in September 2016 when Mr. Sabatini could attend the property to conduct further testing and Mr. Beattie would be available to observe. Ms. Weir agreed "under protest" to pay Mr. Beattie for his time at a $200 hourly rate, per the Corporation's stipulated condition, even though the Court had not imposed that condition in the August 2016 Endorsement.

[72] On September 9, 2016, the Corporation's lawyer wrote to Ms. Zheng, requesting that Ms. Weir pay Mr. Beattie a retainer in the amount of $4,500 in advance. Ms. Weir refused and did not comply with this request.

[73] The engineers attended the property on September 23, 2016 and Mr. Sabatini carried out further investigation. On October 12, 2016, Mr. Sabatini reported that, based on visual roof inspection and water testing performed, he

was unable to determine the cause of the water leaks. However, he expressed confidence that the source was "not roof related", as the roof of the solarium "had been flooded for hours on end with no active leaks noted in the unit". He commented that the leaks seem to commence near the air conditioning unit and that water infiltration is mostly evident during wind driven rain conditions, which led him to suspect that there might be a breach in the assembly of the grille on the exterior of the building wall that acts as an exhaust fan for the air conditioning unit. He recommended removal of the drywall around the air conditioning unit and investigation of the exhaust fan and architectural and mechanical drawings. This report was forwarded to the Corporation’s lawyer on October 17, 2016.

[74] Mr. Beattie invoiced Ms. Weir in the amount of $1,773.39 for the time spent observing Mr. Sabatini's testing, plus 5.75 hours of office work and his travel expenses. Ms. Zheng objected to the fees for anything other than supervision time, but the Corporation insisted that Mr. Beattie's full fees be paid and noted that the costs would be charged back to Ms. Weir's Unit. Ms. Weir then paid the invoice "under protest".

[75] In early November 2016, Mr. Sabatini reviewed the planning drawings and prepared a written proposal, setting out the scope of destructive testing that he recommended be performed. The proposal was forwarded to the Corporation for its approval. On November 17, 2016, the Corporation granted conditional

permission, stipulating that Mr. Beattie must be present, with his fees (including office work and travel expenses) reimbursed by Ms. Weir, and that Ms. Weir would also be responsible for the cost of any repair work resulting from the destructive testing.

[76] On November 28, 2016, Ms. Zheng notified the Corporation's counsel that Ms. Weir could not afford the "exorbitant costs" associated with the Corporation’s conditions and that Mr. Sabatini would therefore not be conducting any further investigation.

[77] On November 30, 2016, Mr. Sabatini delivered his final report, in which he opined,

> The on-going leaks are clearly due to building related issues which must be thoroughly investigated further to link cause and effect. [T]he ongoing water leaks are due to issues pertaining to the exterior cladding system and performance of the building envelope. The leak is not due to the owner's negligence. Therefore, the unit owner is not responsible for the water leaks as was stated in the initial report prepared by the Consultant. This is clearly a misrepresentation of the facts.

[78] A copy of this report was forwarded to the Corporation’s lawyer on November 30, 2016, per the Court-endorsed deadline.

[79] The Corporation's engineers did not conduct any investigation or testing in the fall of 2016 and the Corporation did not deliver any further engineers' report by the November 30, 2016 deadline.

[80] Ms. Weir served the Corporation with a supplementary affidavit on December 22, 2016, in accordance with the timeline endorsed by the Court. In it, she deposed that she had, on more than one occasion, observed water seepage (during rainfall) starting from a point at an area adjacent to her kitchen, which was a windowless wall. She further deposed that on November 7, 2016, she removed some drywall on the wall nearest the kitchen and A/C unit and found mould. She attached a photograph of the mould as an Exhibit to her affidavit.

[81] On December 29, 2016, the Corporation's lawyer advised Ms. Zheng that the Corporation required an extension of time to deliver its affidavits so that it could conduct further investigation into the ongoing water leakage problem in Ms. Weir's Unit.

[82] Ms. Weir requested to have Mr. Sabatini present during any investigation by the Corporation's engineers. On January 11, 2017, the Corporation's lawyer advised Ms. Zheng that Mr. Beattie would likely be attending Ms. Weir's Unit on January 16, 2017. She requested confirmation of Ms. Weir's and Mr. Sabatini's availability on that date. She also advised Ms. Zheng that the Corporation was willing to facilitate opening the area around the fan coil unit in Ms. Weir's Unit for Mr. Sabatini to conduct destructive testing and would close up the area afterward, provided that Ms. Weir paid Mr. Sabatini's fees. This represented a reversal from the Corporation’s earlier position that Ms.

Weir would be required to pay for the costs of repairs after any destructive testing.

[83] On January 13, 2017, Ms. Zheng responded that Mr. Sabatini was not available on such short notice and that Ms. Weir required some time to determine whether she wanted to incur the cost of the non-destructive testing.

[84] The Corporation's lawyer replied that the Corporation would be accessing Ms. Weir's Unit at 10:30 AM on January 16, 2017 to conduct investigations pursuant to s.40(a) of the Corporation's declaration, which permits the Corporation to enter any unit at all reasonable times and upon giving reasonable notice for the purpose of making inspections and repair or remedying conditions that might result in property damage, or that violate public health and safety regulations or the provisions of any insurance policy.

[85] Mr. Beattie and other Corporation representatives attended Ms. Weir's Unit on January 16, 2017. During their visit, Mr. Beattie asked Ms. Weir about the direction of flow of water during leaks. She told him that water ingress had originated from the corner where the partition wall meets the exterior wall. Mr. Beattie removed portions of drywall, including around the fan coil unit and below the kitchen window, and examined the area identified by Ms. Beattie. He recommended to management that he be permitted to return during the next

rainfall (forecasted for the following day) so that he could observe any leakage in the identified area, which had previously been concealed by drywall.

[86] Ms. Weir was advised by the Corporation that the engineers might return on either January 17 or 18. She was scheduled to be out of the country from January 17-31, 2017, so Ms. Zheng wrote to the Corporation's counsel, advising of Ms. Weir's impending departure and requesting that there be no further entries to the Unit without her express permission. Ms. Zheng asserted that the Corporation's purpose for entry that day and for any intended further entries was to prepare an expert report to be produced in litigation, which did not fit any of the circumstances justifying entry to Ms. Weir’s unit, set out in s.40(a) of the Corporation's declaration.

[87] The Corporation's counsel responded, this time relying on s.40(b) of the declaration which permits the Corporation to enter any unit without prior notice or express permission, in the event of an emergency (as determined by the Corporation in its sole discretion). He wrote, "Your client swore under oath that she found mould in her unit. Our client deems this an emergency."

[88] The Corporation entered Ms. Weir's Unit on January 17 and 18, 2017, in her absence and without her consent. Portions of drywall and insulation were removed from her kitchen during these entries.

[89] On February 1, 2017, Ms. Zheng wrote to the Corporation's lawyer, asking (among other things) whether the Corporation's engineers would be conducting any further testing, when the drywall would be repaired in Ms. Weir's kitchen, and whether the Corporation intended to file a further affidavit. She noted that the Corporation was not in compliance with the Court-endorsed timetable and advised that Ms. Weir was not consenting to it filing of any further affidavits.

[90] The Corporation's lawyer responded on February 17, 2017, that it did not intend to have its engineers conduct any further testing, but did intend to file further affidavit materials and would consent to Ms. Weir filing a further affidavit before the commencement of cross-examinations.

[91] On March 1, 2017, the on-site property manager and contractors attended at Ms. Weir's Unit, but she refused to permit them access to carry out further investigation and water testing.

[92] On March 2, 2017, the Corporation's lawyer provided Ms. Zheng with a report prepared by Mr. Beattie dated January 31, 2017. Counsel explained that, "due to a computer glitch, it did not come to our attention until late yesterday."

[93] In the report, Mr. Beattie remarked that the water leakage he observed on January 17, 2017 was "different in location, pattern and volume to that

previously reported". He confirmed that, when he attended the Unit on January 17, 2017, he did not observe water leakage below any windows. He noted that the window sliders were tightly closed at the time of the inspection. He acknowledged the possibility of multiple sources for the water leakage, which he had previously attributed exclusively to Mr. Weir's failure to close her window sliders tightly. He recommended opening the drywall at the ceiling level and removing interior finishes at the top of the solarium partition wall to review concealed conditions during active leakage. He also commented on prior roofing repairs, which appeared to be incomplete, and recommended further roofing repair work, but noted that the reported leakage conditions (i.e., only during wind-driven rain) were not consistent with the roof being the source of leaks.

[94] In his March 2, 2017 letter, the Corporation's counsel advised Ms. Zheng that the Corporation required access to Ms. Weir's Unit in order to implement Mr. Beattie's recommendations. He also notified her that the Corporation would be submitting further evidence, "the extent and timing of which is not known at this time" and he stated that the litigation timetable "will have to be amended for sure, and the hearing date may have to be rescheduled as well."

[95] Ms. Zhen responded immediately,

> The purpose of further entries from the Corporation's engineer would be for the purposes of making an expert's report to be produced in litigation. All investigations by the parties' engineers were to be completed in November

> 2016 as per the Court order of August 2016, and so my client is refusing entry from the Corporation's engineers on that basis.

[96] Ms. Zheng advised that Ms. Weir was not agreeable to altering the scheduled hearing date, which had been set peremptory on both parties. She proposed a revised timetable for the litigation that would accommodate the May 24, 2017 date.

[97] Further correspondence ensued between counsel. The Corporation asserted that it was merely attempting to fulfil its duty to maintain and repair the common elements. Ms. Weir asserted that the Corporation was not entitled to rely on its declaration and by-laws to ignore the Court-endorsed timeline. The parties reached an impasse. Ms. Weir issued a Notice of Motion and the Corporation issued a Notice of Cross-Motion, both of which were scheduled to be heard on March 17, 2017.

[98] On March 3, 2017, Ms. Lash (the Corporation's solicitor) sent Ms. Weir a "final notice" regarding the Corporation's demand to enter her Unit, citing its duty to maintain and repair common elements and its right to gain entry for the purpose of performing this duty. Ms. Lash chastised Ms. Weir for moving "construction items" (drywall and tools) using the elevator, without first making an elevator reservation, contrary to the Corporation's rules. Ms. Weir was cautioned that, if she prevented the Corporation from gaining entry to her Unit or used the

elevator in breach of the Corporation's rules again, the Corporation would commence legal proceedings against her and seek its costs, ranging "from $5,000.00 (at a minimum) to $50,000.00 and up", which would be deemed a contribution to common expenses (recoverable by way of a lien). Finally, Ms. Lash advised Ms. Weir that, in accordance with the Corporation's declaration, the Corporation was seeking indemnification of legal costs in connection with her breach of the rules. She demanded that Ms. Weir pay $742.98 within 15 days, or that amount would be deemed a contribution to her common expenses and recovered as such (implying that a lien would be registered against her Unit).

[99] Ms. Zheng wrote to Ms. Lash, advising her of the pending motions Court date, which would determine the Corporation's right to enter Ms. Weir's Unit to conduct further investigation.

[100] On March 17, 2017, the Court heard the motions and ordered an adjournment of the Application hearing to August 14, 2017, with a revised timetable to complete the steps in the litigation. It also ordered that the Corporation be permitted to enter Ms. Weir's Unit "for the purposes of carrying out further investigations, taking steps to determine the source of the leakage, and to rectify same" but only "upon giving at least seven days' notice in writing to Applicant and her counsel, in order to allow the Applicant's engineer an opportunity to attend."

[101] Ms. Zheng provided Ms. Lash with a copy of the Court Order. She asserted that the Corporation had given insufficient notice of its intended entry to Ms. Weir's Unit on March 1, 2017 and requested that the Corporation consider dropping the "penalty charge" ($742.98) for the March 1, 2017 incident, or in the alternative, agree that it be dealt with in the court matter on the return date.

[102] Ms. Lash responded by confirming her instructions that lien proceedings would be commenced if Ms. Weir did not pay $742.98 by the due date, noting that it was not a "penalty" but rather an indemnification. The full amount was subsequently paid by Ms. Weir "under protest".

[103] On April 3, 2017, the Corporation served a supplementary Affidavit sworn by Mr. Beattie, which contained two reports dated January 31, 2017, one in respect of the January 17 visit to Ms. Weir's Unit (which had previously been disclosed to Ms. Zheng on March 2, 2017) and another in respect of the January 16, 2017 visit, which had not been previously disclosed. In the second (previously undisclosed) report, Mr. Beattie states that the information provided by Ms. Weir on January 16, 2017 regarding the direction of flow of water was "new information" that she had not provided during his previous inspections.

[104] Much was made of this fact in Mr. Fine's oral submissions at the hearing. He suggested that Ms. Weir had failed to furnish the Corporation with relevant information to enable its engineers to resolve the problem. However,

the record shows that the information was included in Ms. Weir's August 26, 2016 affidavit, her December 20, 2016 affidavit, and Ms. Zheng's letter to the Corporation’s counsel dated September 7, 2016. While Mr. Beattie might not have been aware of these reports by Ms. Weir, she cannot be faulted for his ignorance. It was incumbent on the Corporation to ensure that its engineer was apprised of all the relevant information provided by the Unit owner. Moreover, there is no evidence that Mr. Beattie asked Ms. Weir, prior to January 16, 2017, about the direction of flow of water, or that she withheld relevant information from him.

[105] In the spring of 2017, additional roofing repairs were completed by the Corporation’s contractors, pursuant to Mr. Beattie's recommendations. The regional property manager for the Corporation deposed that the Corporation incurred approximately $20,000.00 in costs to complete these and other earlier roofing and sealant repairs in its efforts to address the water leakage problem in Ms. Weir's Unit.

[106] Mr. Beattie attended Ms. Weir's Unit a final time on June 27, 2017 to create an investigative opening through the drywall at the top of the partition wall between the kitchen and solarium. The purpose of this opening was to determine possible source(s) of the leakage at the bottom of the partition wall, as reported by Ms. Weir on January 16, 2017 and observed by him on January 17, 2017.

[107] According to a report prepared by Mr. Beattie dated June 29, 2017, no active leakage was observed on June 27, 2017, but evidence of water staining was present, extending up into the suspended ceiling to the bottom of the concrete slab above. He concluded,

> Based on our understanding that leakage has not occurred since the last set of roofing repairs were completed, and the findings from this investigation pointing to a source above the ceiling of the solarium, the roof detailing above the solarium may have been the likely source of leakage noted at this particular location.
>
> ...
>
> As discussed previously, it has been recognized there may be multiple source(s) of leakage. Given the information available we conclude the water leakage previously noted pooling on the solarium floor below the windows was a separate leakage to the one noted on site on January 17, 2017.

ANALYSIS

[108] In my view, Ms. Weir had a reasonable expectation of peaceful enjoyment of her Unit. She also had a reasonable expectation that the Corporation would deal with her in good faith, in a neighbourly manner, commensurate with living in a condominium community, and in accordance with its statutory obligations and the terms of its constituting documents. See *Couture*, *supra*, at para.61.

[109] The question for me to determine is whether the Corporation failed to meet these reasonable expectations and if so, whether it acted in a manner that

was oppressive, unfairly prejudicial to Ms. Weir, or unfairly disregarded her interests.

[110] Ms. Weir's submissions can be grouped under the following headings, representing ways in which she claims that the Corporation's conduct fell short of her legitimate expectations: it failed to fulfil its statutory duty to maintain and repair common elements, it committed unlawful entries to her Unit, it levied arbitrary penalty fees, it refused to participate in mediation, contrary to the dispute resolution scheme established by the *Condominium Act*, and it attacked her credibility and wrongfully blamed her for the leaks. I will address each of these submissions in turn.

Failure to Maintain and Repair Common Elements

[111] The most obvious sources of a unit owner's reasonable expectations regarding a condominium corporation's conduct are the law and the formal legal documents produced by the corporation. *Couture*, *supra*, at para.59.

[112] Sections 89 and 90 of the *Condominium Act* impose a duty on the Corporation to maintain and repair the common elements of the property. The Corporation is not held to a standard of perfection, but rather to a reasonableness standard of maintenance and repair. See *Leclerc v. Strata Plan*

LMS 614, 2012 BC SC74, at para. 61 and *York Condominium Corporation No. 59 v. York Condominium Corp. No. 87*, [1988] O.J. No. 3088 (CA).

[113] The complexity of the maintenance issue must be taken into consideration in evaluating the reasonableness of the Corporation's actions. In this case, the water ingress into Ms. Weir's solarium was a difficult problem to diagnose, in terms of identifying the source(s) of the leaks. The totality of the evidence suggests that there may have been multiple sources for the leaks and that the roof was a likely factor (since the leaks finally stopped after the roof repairs were completed), yet both parties' engineers had previously discounted the roof as a possible source. Despite multiple inspections and tests carried out by both engineers, neither was ever able to make a conclusive finding about the cause(s) of the leaks. Ms. Weir acknowledged during cross-examination that it was a "tricky problem" for the engineers to solve.

[114] In light of the complexity of the problem, the Corporation could not reasonably be expected to rectify the leakage problem swiftly. The Corporation could, however, reasonably be expected to take Ms. Weir's concerns seriously, to act with appropriate diligence and to take timely steps to repair the problem.

[115] The Corporation's initial responses to Ms. Weir's early reports of water leakage were far from diligent. It attempted to shirk its responsibility and told Ms. Weir that she was responsible to find her own solution. However, within two and

a half weeks of the first reported leak, Corporation representatives had made 4 visits to her Unit and the regional property manager had committed to having window cleaners repair what appeared, at that time, to be the source of the problem, namely deficient caulking around the solarium windows. That work was performed by July 2, 2015, within less than a month of the first reported incident of water ingress on June 8, 2015. Despite being slow off the mark, the Corporation ultimately responded appropriately to Ms. Weir's expressed concerns and took reasonable steps within a reasonable time frame to diagnose and attempt to rectify the problem.

[116] When it became clear that the new window caulking had not resolved the problem, the Corporation made substantial efforts over a period of many months to investigate and attempt to rectify the leaks. It retained engineers to conduct water testing and provide professional advice on how to address the problem. It followed the engineers' advice and retained contractors to complete recommended sealant and roofing repairs. The contractors also performed repairs inside Ms. Weir's Unit, where destructive testing had resulted in damage to drywall.

[117] The problem persisted for a long time and greatly inconvenienced Ms. Weir, but the record shows that the Corporation made diligent efforts. Even Ms. Weir acknowledged during cross-examination on July 17, 2017 that, "since June

of 2015, the Condominium Corporation has taken many, many steps to try to figure out what the problem was and solve it."

[118] The Corporation did not always act with the degree of dispatch that Ms. Weir desired, but s.135 of the *Condominium Act* is intended to protect the legitimate expectations of parties, not individual wish lists. See *McKinstry v. York Condominium Corporation No. 472*, [2003] O.J. No. 5006 (ONSC), at para. 13.

[119] There were intermittent brief periods of delay during the Corporation's investigation, but they were justified by circumstances outside of the Corporation's control. For example, there were occasional periods of hiatus because next steps were weather-dependent (i.e., further testing could not be undertaken when there was substantial rainfall). The President (Darryl Fulton) testified that some delays were caused by Mr. Beattie's unavailability.

[120] There was only one extended period of time during which the Corporation was not actively taking steps to rectify the problem, namely from mid May 2016 to late December 2016. Its inaction during the first half of that period is explained by Mr. Beattie's initial hypothesis (after the May 10, 2016 testing) that Ms. Weir was responsible for the leaks by failing to close the exterior window sliders. Based on its engineers' findings and empirical evidence, the Corporation believed that there was no need to take further action to rectify the problem. The

Corporation was also preparing for litigation, with an August 29, 2016 hearing date pending.

[121] Ms. Weir argues that the Corporation ought to have resumed its investigation in September 2016, based on information she provided that contradicted Mr. Beattie's theory that open window sliders were the cause of the leaks.

[122] The continuing hiatus in the Corporation's investigation between September 2016 and January 2017 is explained by the fact that the Corporation was monitoring Mr. Sabatini's work and then waiting to learn of the outcome of his investigative steps. Although Mr. Beattie did not conduct his own testing during the fall of 2016, he attended the Unit to observe Mr. Sabatini's testing. I find this to be reasonable in the circumstances.

[123] Ms. Weir argues that the Corporation thwarted her own efforts to fix the problem by obstructing Mr. Sabatini's testing, requiring that Mr. Beattie be present during Mr. Sabatini's visits, and demanding that Ms. Weir compensate Mr. Beattie for his time.

[124] Given the Corporation's duty to maintain the common elements and the existence of pending litigation, I find that it was reasonable for the Corporation to require Mr. Beattie's attendance to observe Mr. Sabatini's work. However,

payment of Mr. Beattie's time (and his related travel expenses and office time) ought to have been left to the determination of costs in the litigation. Requiring Ms. Weir to pay those costs prior to the resolution of her Application and as a condition of granting approval for Mr. Sabatini to conduct testing was heavy-handed and counter-productive.

[125] The Corporation's actions became even more heavy-handed and counter-productive when it decided, on November 17, 2016, that the destructive testing proposed by Mr. Sabatini could only be conducted if Ms. Weir paid for any repairs required after the testing. The Corporation ought to have assumed responsibility for those costs as part of its duty of repair. Its refusal to cover those expenses created potentially exorbitant costs for Ms. Weir, which effectively terminated her ability to pursue her own investigation. However, the Corporation quickly reversed its position on this issue. On January 11, 2017, it retracted its earlier demand, offered to facilitate the destructive testing to be performed by Mr. Sabatini and confirmed that it would pay for the necessary repairs afterward. Given this swift retraction, the Corporation's actions relating to this issue cannot be characterized as abusive or unfairly prejudicial.

[126] The Corporation should have been more pro-active and diligent in its communications with Ms. Weir about its plan of action, the status of its investigation, and the progress of any requisite repair work. Ms. Weir and her

counsel made repeated requests for information regarding the results of the engineers' testing but none was provided until July 11, 2016. Mr. Beattie's first report was not forwarded to Ms. Weir until late August 2016, even though the investigations had begun in September 2015. Also, Mr. Beattie's second January 31, 2017 report was not disclosed to Ms. Weir until April 2017, despite a March 17, 2017 motions hearing. The Corporation's conduct left Ms. Weir in the dark for long stretches of time, which understandably contributed to her frustration.

[127] The Corporation's conduct was not ideal, but the facts of this case are distinguishable from those in *Wu v. Peel Condominium Corporation No. 245, 2015 ONSC 2801,* on which Ms. Weir relies. In *Wu*, the applicant was successful in obtaining oppression remedies against the condominium corporation, even though it had expended more than $31,000 to retain professional engineers, consultants and contractors to investigate the source of noise and vibration problems in the applicant's unit.

[128] In *Wu*, the noise and vibration problems had persisted for 6 years, a considerably longer period of time than the two years in this case. During that time, the corporation had periodically conducted investigations but the court found that it had undertaken "little to no work to solve the problem". It had done nothing throughout 2011 and 2012, despite recommendations from consultants

on what should be done. It had promised to complete the recommended work, but had never taken steps to do so, and did not produce financial statements or any other evidence to justify its decision not to act on the consultants' advice. Between March 12, 2013 and December 19, 2015, the Corporation did nothing other than replace some elevator pads under one of the elevators in June 2014.

[129] In this case, in contrast, there were no protracted periods of complete inaction and the Corporation acted on the professional advice it received. After retaining engineers to investigate, it implemented the engineer's recommendations to try to correct the problem. It retained contractors to perform sealant repairs in September 2015 and November 2015. It conducted water testing after each of these repairs to assess their effectiveness. It permitted destructive testing recommended by Mr. Sabatini. It also performed roof repairs in the spring of 2017. Although it expended considerable resources trying to diagnose the problem, it also took a variety of concrete steps to attempt to rectify the problem.

[130] In conclusion, I find that the Corporation satisfied its duty to maintain and repair the common elements. It did all that it could reasonably be expected to do. The delay in resolving the problem was due to the complexity of the maintenance issue and circumstances beyond the Corporation's control. The Corporation fell short of Ms. Weir's reasonable expectation that she be kept

apprised of the status of the ongoing investigation and of the progress toward resolution, but its deficient communications did not amount to oppressive or unfairly prejudicial conduct, or unfair disregard of Ms. Weir's interests.

Alleged Unlawful Entries

[131] Ms. Weir had a reasonable expectation that the Corporation would respect her privacy and would comply with the statutory limits on its right to enter her Unit.

[132] Section 19 of the *Condominium Act* gives the Corporation (or a person authorized by the Corporation) the right, on giving reasonable notice, to enter any unit at any reasonable time to perform its duties.

[133] Section 40 of the Corporation's declaration specifies in greater detail the purposes for which entry may be made and permits entry without prior notice or permission in emergency circumstances.

[134] Absent emergency circumstances, the Corporation is required to provide reasonable notice before entering a unit in order to make inspections or repairs. The evidence establishes that, during active periods of its investigation, the Corporation would often provide Ms. Weir with very short, sometimes same-day, notice of the engineers' need to access her Unit. While this resulted in predictable inconvenience and understandable frustration for Ms. Weir, some of

the water testing needed to be performed during rainfall conditions and the Corporation could not predict the weather. The notice provided was therefore reasonable in the circumstances.

[135] Ms. Weir's more serious allegation is that the Corporation made multiple unlawful entries to her Unit. It is not disputed that the Corporation entered her Unit in her absence and without her permission on three occasions, namely July 24, 2015, January 17, 2017 and January 18, 2017.

[136] No reasonable explanation has been furnished by the Corporation for the first unauthorized entry on July 24, 2015. There is no evidence that it was raining that day, that an emergency situation existed, or that any investigative or repair work was being conducted at that time. The only reason provided on the superintendent's note was "check window". The superintendent later advised Ms. Weir that the Board had approved the entry. The Corporation did not present any evidence to explain the basis of the Board's approval. I conclude that this was an unlawful entry that violated Ms. Weir's reasonable expectation that her right to privacy would be respected.

[137] The circumstances were different when the Corporation made further unauthorized entries to the Unit in January 2017. By that point in time, it was apparent to all parties that there were likely multiple sources of leaks into the Unit. Rain was forecast for January 17 and Ms. Weir was going to be out of the

country for two weeks. Water ingress was anticipated and serious property damage (including common elements) could have resulted if the Unit was left unattended until Ms. Weir's return from her vacation. Moreover, Ms. Weir had just deposed (in an affidavit dated December 22, 2016) that she found mould in her Unit. In these circumstances, the Corporation's entry to her Unit without her permission was justified pursuant to the provisions in section 40(a) and 40(b) of the declaration.

[138] The two impugned visits by the Corporation's engineer on January 17 and 18, 2017 may have assisted Mr. Beattie to prepare another report to be used as evidence in this proceeding, but I do not accept Ms. Weir's submission that preparation for litigation was the sole or even primary purpose of the unauthorized entries. Based on correspondence between the parties' counsel and the circumstances that existed at that time, I find that the Corporation's primary reason for entering the Unit was to try to identify the source of the leaks, prevent further damage to the property and fix the problem.

[139] Although the Corporation did commit one unlawful entry to Ms. Weir's unit in July 2015, that single incident is not sufficient to ground an oppression remedy under s. 13 of the *Condominium Act*. Ontario courts have held that the word "unfairly" in s. 135 qualifies the words "prejudice" and "disregard", such that "some prejudice or disregard is acceptable, provided that it is not unfair". See

Carleton Condominium, supra, at para. 31 and *Hakim, supra*, at para. 36. The disregard for Ms. Weir's privacy that was occasioned by the Corporation's unauthorized entry during her absence is mitigated by the fact that the superintendent made no attempt to conceal the entry; a Notice was left for Ms. Weir. This isolated incident of non-compliance with the statute and declaration does not amount to oppressive conduct.

Arbitrary Fees and Fines

[140] Ms. Weir argues that another aspect of the Corporation's oppressive and unfairly prejudicial conduct toward her was its decision to levy arbitrary penalty fees or fines on her. She points to the July 15, 2016 and March 3, 2017 letters from the Corporation's lawyers, which demanded payment of $649.75 and 742.98 within two weeks, failing which the amounts would be deemed a contribution to her common expenses.

[141] Section 85(1) of the *Condominium Act* states that, if an owner defaults in the obligation to contribute to the common expenses, the Corporation has a lien against the owner's unit for the unpaid amount, all interest owing and all reasonable legal costs incurred in connection with the collection of the unpaid amount.

[142] In *Couture, supra*, evidence that the corporation had levied "subjective and arbitrary fines" was a factor in the court's finding of harsh, vindictive and oppressive conduct under s.135 of the *Condominium Act*. See *Couture*, *supra*, at para. 62. The Condominium Board had levied $250 administrative fees against the applicant, in relation to allegations that she had violated provisions of the corporation's declaration. The Court found that the imposition of administrative fees or fines was *ultra vires* the powers of the corporation. See *Couture*, *supra*, at para.35. The Court noted, however, that the corporation had "a clear right to indemnity for costs, expenses and losses that it actually suffers at the hands of a unit owner who may breach the provisions of the declaration". See *Couture, supra*, at para. 35. In that case, the corporation had neither documented nor proven any costs incurred and had failed to demonstrate entitlement to any indemnification. The payments demanded from the unit owner were effectively penalty fees, the quantum of which had been set arbitrarily by the corporation.

[143] The facts in this case are different. The Corporation did not impose arbitrary fines or penalties on Ms. Weir for breaches of provisions in the Corporation's declaration. Rather, it sought indemnification for its actual legal costs associated with having to address her non-compliance. The Court in *Couture*, *supra*, commented at paragraph 35:

> [if] the corporation claims entitlement to indemnity for costs, losses, or expenses incurred, it must document and prove its entitlement in the ordinary

> course under the statute whether through the lien, court, or alternate dispute resolution processes provided.

In this case, the Corporation effectively threatened to register a lien. By deeming any unpaid amounts to be a contribution to Ms. Weir's common expense, the Corporation would have a lien against her Unit pursuant to s. 85(1) of the *Condominium Act*. This may have been a strong-arm tactic employed by the Corporation, but it is one that is permitted by the statute.

[144] In different circumstances, a condominium Board could reasonably be expected to deal with a non-compliant unit owner though direct communication, without resort to instructing counsel to write cease and desist letters and seeking recovery of legal fees from the individual owner. The Corporation's decision in this case to retain counsel and then seek to recover its legal fees through the declaration's indemnification clause exacerbated the conflict between the parties. It was not a particularly neighbourly way for a condominium Board to communicate with a unit owner who is part of the condominium community. However, in evaluating the Corporation's conduct under s.135 of the *Condominium Act*, "The court does not look at the interaction between the Board and the applicant in isolation. The conduct of the corporation must be viewed in light of the behaviour of the applicant." See *Hakim*, *supra*, at para.40, citing *Orr v. Metropolitan Toronto Commission Corporation No.1056*, 2011 ONSC 4876, at paras.158-160, 165 and 166.

[145] Ms. Weir escalated the conflict when she retained counsel and when she chose to initiate litigation. She commenced her Application in March 2016, even though, by her own admission during cross-examination on December 15, 2015, the Corporation had been making an effort to determine the cause of the leaks. In these circumstances, it was reasonable for the Corporation to retain and instruct counsel to write to Ms. Weir about instances of her non-compliance with the condominium's rules. The Corporation's demand for indemnification of its legal costs was therefore neither harsh nor unfairly prejudicial conduct.

Refusal to Mediate

[146] The escalation in hostilities between these parties is contrary to the policy objectives underlying the mandatory mediation provisions in the *Condominium Act*. Section 132 of the *Condominium Act* provides for mediation or alternatively, arbitration of disputes between an owner and a Corporation. Participation in the mediation and arbitration processes are a statutory pre-condition to accessing the Court's remedial enforcement powers under s.134 of the *Condominium Act*.

[147] A party that refuses to participate in mediation runs the risk of being found to have unfairly disregarded the interests of the opposing party under s. 135 of the *Condominium Act*. In *Couture*, *supra*, at paras.35 and 57, the condominium Board's refusal to mediate was a relevant factor in the Court's

conclusion that the unit owner was entitled to an oppression remedy. The Court held (at para.57) that the escalation in hostilities in that case could have been prevented and the entire dispute could have been avoided if the corporation had agreed to sit down in good faith to work out the issues.

[148] In this case, the evidence does not support Ms. Weir's claim that the Corporation refused to participate in mediation. Ms. Zheng proposed mediation on November 2, 2015. She received no immediate response from the Corporation. She then gave notice of arbitration under the *Condominium Act* on January 6, 2016. At that point, the Corporation instructed its solicitor, Ms. Lash, to communicate with Ms. Zheng. After a telephone conversation on or about January 11, 2016, Ms. Lash confirmed in writing that "no mediation proceedings are required with respect to this matter." Ms. Zheng did not dispute this in any subsequent correspondence. I therefore accept the Corporation's submission that it did not refuse to participate in mediation, but rather the parties agreed that mediation was unnecessary at that time.

Attack on Credibility

[149] In *Wu*, *supra*, the corporation impugned the unit owner's credibility by implying that she was either fabricating or imaging non-existent noise or vibration in her Unit. Despite multiple expert reports confirming the existing of excessive noise and vibrations, including a report from the corporation's own expert, the

corporation doubted the veracity of the unit owner's accounts. The court held that this was one aspect of the Corporation's unfair prejudicial treatment of the applicant.

[150] In this case, the corporation never doubted that water was getting into Ms. Weir's unit – they had observed the pooled water on the floor of her solarium – but they suspected that she was responsible for the water ingress. The Corporation's suspicion was bolstered by the results of Mr. Beattie's testing on May 10, 2016, but it arose long before those results were available. Indeed, it appears to have arisen as early as July 24, 2015, when the superintendent made the unauthorized entry to Ms. Weir's unit to "check window". It is unclear why this was done, but the fact that he found an open window (while Ms. Weir was away for the weekend) likely fuelled the suspicion that Ms. Weir may not have been diligent about closing the windows. Subsequent correspondence questioned the accuracy of Ms. Weir's accounts by referring to the "alleged leak" and pointing to instances when Ms. Weir did not report a leak despite rainfall, implying that there was no structural problem causing the leaks.

[151] Although the Corporation appears to have suspected early on that Ms. Weir may have inadvertently allowed water to enter the Unit by failing to secure the window sliders, it nevertheless continued to invest significant resources in a thorough investigation of the problem. Its suspicions were later reinforced by Mr.

Beattie's report, in which he articulated the theory that Ms. Weir must have failed to seal the outside window sliders during rainstorms.

[152] The Corporation was entitled to give some weight to the engineer's opinion. While the accusation in the July 11, 2016 letter understandably made Ms. Weir feel falsely and unfairly maligned, it is not the same type of affront to credibility as the corporation's completely unfounded insinuation in *Wu* that the unit owner had simply fabricated or imagined complaints of noise and vibration, despite expert evidence corroborating the owner's accounts.

[153] In the circumstances, I find that the Corporation's expressed suspicion that Ms. Weir may have been responsible for the water leakage by failing to properly close her window sliders is not evidence of harsh, vindictive, or unfairly prejudicial conduct.

Demand for Payment of the Corporation's Expenses

[154] One troubling aspect of the Corporation's conduct in this case is its July 11, 2016 demand for payment from Ms. Weir of $45,492.94 to cover its legal costs and engineers' and contractors' fees. The Corporation warned that, if Ms. Weir's Application was not withdrawn and the requested amount paid within two weeks, it would collect the money and its legal costs in the same manner as common expenses, meaning that a lien would be registered against her Unit.

[155] The Corporation based this demand on its assumption that Ms. Weir must have failed to secure the window sliders during rainstorms. Although the Corporation was entitled to give some weight to Mr. Beattie's opinion, it was hardly a conclusive finding that Ms. Weir was solely responsible for the water damage. There was no definitive finding about the source of the leaks. The Corporation had not yet even received a written report from Mr. Beattie. It did not have compelling proof that Ms. Weir had caused water to enter the solarium and did not have a reasonable claim for compensation from her at that time.

[156] It is not necessary for me to decide what caused the leak(s), but I find that it was not reasonable for the Corporation to demand full reimbursement of its expenses in July 2016 based on the assumption that Ms. Weir must have been responsible. Even if Ms. Weir had failed to close her window sliders tightly on one or two of the early occasions when water leaked into her Unit, it is simply not plausible that all of the subsequent instances of water ingress could be attributed to her ongoing carelessness. She was suffering significant adverse consequences from the water damage, so she would have been motivated to take extra precautions. She confirmed on numerous occasions that water was entering the unit when her windows were tightly closed. The Corporation must not have genuinely believed that open windows were solely responsible for the leaks because it continued to invest time and considerable money into an

investigation to diagnose the problem. Yet it still threatened to register a lien on her Unit if she did not immediately pay $45,492.94 in July 2016.

[157] I am troubled by this intimidating conduct, but I do not believe that it is comparable to the facts in *Couture*, where the corporation actually registered facially invalid liens against the unit owner's property. In this case, the Corporation never followed through on its threat to register a lien.

[158] I recognize that a remedy under s.135 of the *Condominium Act* may be granted to rectify conduct that merely "threatens to be oppressive". However, in the circumstances of this case, given that Ms. Weir had commenced an Application against the Corporation, the source of the leaks could not be determined and there was at least a possibility that her conduct had contributed to the leaks, the Corporation's threat to initiate a counter claim is hardly surprising or abusive.

CONCLUSION

[159] The Corporation's conduct was, in certain respects, less than neighbourly and short of ideal. It was often deficient in its communications, it entered her unit unlawfully on one occasion, and it was heavy-handed in its demand for payment of Mr. Beattie's fees. Its adversarial stance is, however, justified by the fact that Ms. Weir had retained counsel and commenced an Application against the Corporation. In the full context of all the relevant facts

and circumstances of this case, I find that the Corporation's conduct was not the type of harsh, vindictive, and abusive behaviour that would ground an oppression remedy.

[160] I do not agree with Mr. Fine's submission that the Corporation "bent over backwards" to find a solution to Ms. Weir's situation, but that is not the standard to be applied. The Corporation's attitude was increasingly combative and its actions were at times heavy-handed, but its conduct was not so egregious as to constitute oppression or unfair prejudice to Ms. Weir and it did not unfairly disregard her interests.

[161] Ms. Weir's Application is therefore dismissed.

COSTS

[162] The parties are invited to make brief written submissions (maximum 3 pages, excluding Bill of Costs) with respect to costs. The Respondent Corporation will serve and file its submissions by no later than November 3, 2017. Ms. Weir will serve and file her submissions by no later than November 17, 2017. There will be no reply submissions unless requested by me.

Petersen, J.

Released: October 20, 2017

CITATION: Weir v. Peel Condominium Corporation No. 485, 2017 ONSC 6265
COURT FILE NO.: CV-16-1469-00
DATE: 2017 10 20

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

DORRETT WEIR

Applicant

- and -

Peel Condominium Corporation No. 485

Respondent

REASONS FOR JUDGMENT

Petersen J.

Released: October 20, 2017