

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
Durham Condominium Corporation No. 43)
) George F. Vella, for the Applicant
Applicant)
)
– and –)
)
James Ira Bradley and Christine Bradley) The Respondents, both appearing in person
)
Respondents)
)
)
)
) **HEARD:** January 10, 2019

2019 ONSC 677 (CanLII)

REASONS FOR DECISION

DE SA J.

Overview

- [1] The Applicant (the Applicant or “DCC 43”) seeks an Order directing the Respondents to enter into a section 98 agreement for a deck installed in the backyard of their unit.
- [2] According to the Applicant, the deck constitutes an alteration, addition or improvement to the common elements, both of which are covered by section 98 of the *Condominium Act, 1998*. Accordingly, the Applicant argues that the Respondents must either enter into a section 98 agreement or remove the deck.
- [3] I agree with the Applicant and grant the relief sought in relation to the deck.
- [4] The reasons for my decision together with my position on various other issues raised by the Applicant are outlined below.

Summary of Facts

- [5] The Applicant is a condominium corporation which is comprised of 180 residential units. The Declaration of the Applicant was registered in 1977 (the Declaration).

- [6] The Respondent, James Ira Bradly, is the registered owner of Units 81 and 172 and leases Unit 172 to the Respondent Christine Bradley, who is his sister, who resides in the Unit.
- [7] In August 2017 the property manager, Kelly Hill-Berardi, discovered that the Respondents had installed a large deck on the common elements (backyard) attached to Unit 172. She attended in that area of the property and observed the deck which she estimates covers at least 40% of the rear yard.
- [8] Ms. Hill-Berardi promptly wrote to the Respondent, James Ira Bradley, the owner of Unit 172, and requested that he enter into a section 98 agreement with the Applicant immediately, dealing with the deck as required by the *Condominium Act, 1998* and Paragraph IV of the Declaration. Mr. Bradley never responded to the request.
- [9] Failing to hear back from Mr. Bradley, the Applicant's lawyer again wrote to the Respondents requesting that they enter into a section 98 agreement in relation to the deck.
- [10] After hearing from the Applicant's lawyer, the Respondents advised the Applicant that the condition of the yard was unsightly and unsafe due to the remains of a tree that had been cut down by the Applicant. The Respondents indicated that they would remove the deck once the Applicant took the necessary steps to remove the stump and restore the yard.
- [11] Despite numerous attempts by the Applicant to have the Respondents enter into a section 98 agreement in relation to the deck, they have refused to do so.

Analysis

Legal Background: Operation and Management of Condominiums

- [12] The *Condominium Act, 1998* (the *Act*) provides the legal framework for the establishment and management of condominiums in Ontario.
- [13] A condominium is a form of property ownership which combines individual property interests, exclusively owned by individual "unit owners", and common elements that are jointly owned by all unit owners as tenants in common: *Re 511666 Ontario Ltd. et al. and Confederation Life Insurance Co.* (1985), 1985 CanLII 1950 (ON SC), 50 O.R. (2d) 181 (H.C.J.), at pp. 189-190; *3716724 Canada Inc. v. Carleton Condominium Corporation No. 375*, 2016 ONCA 650 (CanLII).
- [14] Property becomes a condominium and starts being subject to the *Act* upon registration of a declaration and description: s. 2(3). Registration of the declaration will also create a condominium corporation, which is a corporation without share capital whose members are the unit owners: ss. 2(3) and 5(1).
- [15] Section 27(1) of the *Act* provides that a board of directors shall manage the affairs of the corporation. Part of a board's obligation is to oversee and manage the common elements of the condominium. The corporation is deemed to be the occupier of the common

elements and may be found liable as such. Therefore, the corporation, and by extension the board, has a legal obligation to manage the common elements: *MTCC No. 985 v. Vanduzer*, 2010 ONSC 900 (CanLII), at para. 28.

- [16] Under the *Act*, an owner wishing to make an “addition, alteration or improvement” to the common elements must, among other things, obtain the approval of the board: s. 98. In addition, if the board chooses to treat a proposed change as “substantial” then it must also be voted on and approved by unit owners who own at least two thirds of the units of the corporation: ss. 97(4) and (6).
- [17] In keeping with its duty under section 17(3), the board is empowered to make an application to the Superior Court of Justice for an order enforcing compliance with any provision of the *Act*. The corporation may also bring an application to enforce the declaration or rules as against a tenant and include the unit owner as a respondent.

Meaning of Alteration, Addition or Improvement to the Common Areas

A. The Deck

- [18] An owner may make reasonable use of the common elements, subject to the provisions of the *Act*, declaration, by-laws and rules of the condominium corporation: s. 116 of the *Act*.
- [19] A unit owner may only make an alteration, addition, or improvement to the common elements after having obtained the consent of the corporation, through the board of directors and after having entered into an agreement with the condominium corporation relating to the alteration addition or improvement and the agreement has been registered against the title of that owner’s unit: ss 17(3), 98, 119(1) and 119(2) of the *Act*. In *MTCC No. 985 v. Vanduzer, supra*, the Court explained at paras. 25-29:

Under the predecessor legislation, there was no right given to unit owners to make alterations, additions or improvements to common elements. The Act loosened the prohibition by allowing them on the conditions set forth in s. 98 of the Act. Under the Act there is still no right vested in an owner of a unit to make alterations, additions or improvements to common elements. There is merely a statutory mechanism whereby an owner may acquire permission to do so from the condominium corporation through compliance with the requirements in s. 98 and at the discretion of the condominium corporation.

There are no statutory criteria limiting the scope of the discretion reposed in condominium boards in assessing a request and either giving or denying approval of proposed alterations, additions or improvements. The basis of a denial could be for reasons of safety concerns, as I find it was here, but they could equally be for aesthetic reasons, or reasons relating to the market value of the property among others.

...

The corporation has a statutory duty to manage the common elements and under s. 26 of the Act, “For the purposes of determining liability resulting from breach of the duties of an occupier of land, the corporation shall be deemed to be the occupier of the common elements and the owners shall be deemed not to be occupiers of the common elements.”

Under s. 23(6) “[a] judgment for the payment of money against the corporation is also a judgment against each owner at the time of judgment for a portion of the judgment determined by the proportion specified in the declaration for sharing the common interests.” Accordingly, condominium boards of directors have both the obligation and the right to manage common elements including what is placed thereon and the power to manage is not fettered by the statute.

- [20] According to the Applicant, the deck constitutes an alteration, addition or improvement to the common elements, each of which are covered by Section 98 of the *Act* and it requires an agreement to clarify who owns the deck and ensure that the deck will be moved when required by the Applicant, to make it clear that the unit owner will maintain and insure the deck and be responsible for the costs of repair of any damage that the deck causes to the common elements and to ensure that it is clear to a subsequent owner of the unit that the owner of that unit is responsible for the deck. The Declaration also states that no owner shall maintain, decorate, alter or repair the common elements.
- [21] I agree. The deck is clearly an addition to the backyard. It is something that requires maintenance, changes the overall appearance of the backyard, and can also give rise to potential liability on the part of the condominium corporation. A section 98 agreement is clearly required if the Respondents intend to retain the deck.
- [22] The Respondents take the position that the condition of the yard prior to the installation of the deck was unsafe due to the remains of a tree that had been cut down by the Applicant. According to the Respondents, the condition of the yard was unsafe, muddy, slippery, and an eye sore. The addition of the deck was necessary to address these concerns.
- [23] I acknowledge the concerns raised by the Respondents and sympathise with their position. It is clear that the deck serves a useful purpose, and from reviewing the pictures, the deck is clearly an improvement to the overall look of the property. Indeed, the deck may even be necessary to render the backyard usable.
- [24] However, the Applicant is not refusing to allow the Respondents to keep the deck. Rather, it is merely requiring that a section 98 agreement be entered into to clarify the terms of maintenance, and to set out the respective liability in the case of injury. Not

only is this a reasonable request, but it is required by the *Act*. In my view, a section 98 agreement is necessary purely from the perspective of ongoing maintenance and potential liability.

- [25] The Respondents maintain that they will remove the deck prior to selling the unit. The deck is portable, and easily removed. Moreover, according to the Respondents, the prior owner of the deck in the adjacent unit was not required to enter into a section 98 agreement while possessing the same deck.
- [26] I cannot see the relevance of these points. The section 98 agreement is required for any addition, alteration or improvement. Even if the deck is removable, it is an addition/improvement that requires maintenance, repair and could give rise to potential liability.
- [27] Moreover, just because other tenants were able to circumvent the requirements of the *Act* and Declaration does not mean the requirements have been waived. No doubt, if there was clear evidence to indicate that the Applicant was seeking enforcement purely as a means to harass the Respondents, a court would not likely assist in the request. However, in this case, it is clear that a section 98 agreement is required and the request is more than justified in the circumstances. I do not accept the Respondents' position that the request has been made by the board purely to harass them.
- [28] As such, I will grant the Order sought.

B. Other Issues in Dispute

1) The Satellite Dish

- [29] The Applicant seeks an Order requiring the Respondents to remove the satellite dish antenna located on the post of the Respondents' fence. The Respondents have a satellite dish antenna fastened to the fence located on the common elements.
- [30] Rule 17 of the condominium corporation's rules states in part that a satellite dish must be on a post located in the unit's yard and that permission to install the satellite dish must be obtained before the work is carried out. According to the Applicant, the Respondents have not complied with this requirement.
- [31] The Respondent takes the position that they received permission by the board to install the satellite dish some years earlier, and have included a letter from the former president of DCC 43, Bryan Burl Hannah, confirming that the satellite had been approved. The trees had also been trimmed by DCC 43 to allow for usage of the satellite.
- [32] When I questioned Applicant's counsel about the letter, he took the position that the letter was hearsay. However, the Applicant does not dispute the content of the letter, or its authenticity.

[33] In the circumstances, the letter suggests that the requisite permission was obtained by the Respondents to place the satellite dish in its current location. Given the existence of the letter, and the Applicant's failure to disprove its authenticity, the Applicant has not satisfied me that the satellite dish was installed in contravention of the rules. Accordingly, I am not prepared to order that the Respondents remove the satellite dish in the circumstances.

2) The Leak

[34] The Applicant takes the position that a leak in the Respondent's unit caused damage to the common areas of the condominium and accordingly, he is responsible for the repairs associated with the common areas.

[35] According to the Applicant, the Declaration and the *Act* requires an owner to maintain his/her unit. The Declaration also requires that an owner of a unit indemnify the corporation for any losses, costs or damages for acts or omissions of the owner or resident of the owner's unit with respect to his unit. The Applicant takes the position that the Respondent's failure to maintain his unit (Unit 81) is what caused the damage to the common areas and accordingly, the Respondent is liable for the repairs.

[36] The Respondent disputes that his apartment (Unit 81) was the cause of the leak. He maintains that it was Unit 83 that caused the leak. The leak was in the hallway of Units 81, 82, 83, and 84.

[37] In my view, the Applicant has not filed compelling evidence to establish the damage was caused by the Respondent's Unit. On the evidentiary record before me, I am not satisfied that the Applicant has demonstrated that the Respondent's Unit caused the damage. In the circumstances, I am not prepared to Order the Respondent to indemnify the Applicant for the damage.

Disposition

[38] The Respondents shall either enter into a 98 agreement with the Applicant with respect to the deck and/or remove the deck within 30 days of the date of this Order, failing which the Applicant may do so and charge the costs of doing so to Unit 172, Level 1 of Durham Condominium Corporation No. 43 as common expenses.

Costs

[39] Costs of the Application as far as they pertain to the deck, are to be paid to the Applicant by the Respondents on a solicitor client basis, which costs are to be added on to the common expenses due for Units 81, and 172 Level 1, Durham Condominium Corporation No. 43 and to be collected as such: *The Condominium Act, 1998*, 134 (5).

[40] If the parties are unable to agree on the amount of costs, I will entertain costs submissions from the parties no more than 2 pages in length, together with a bill of costs. The Applicant to file costs submissions within 2 weeks and the Respondents can file their

response within 1 week of receiving the Applicant's submissions. There is no right for any reply submissions.

[41] I thank counsel and the parties for their assistance.

Justice C.F. de Sa

Released: January 29, 2019

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- and -

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