CITATION: Noguera v. Muskoka Condominium Corporation No. 22, 2018 ONSC 7278
COURT FILE NO.: CV-18-590608; CV-18-599419
DATE: 20181211

ONTARIO

SUPERIOR COURT OF JUSTICE

2018 ONSC 7278 (CanLII)

BETWEEN:	
MICHAEL NOGUERA and VICTORIA NOGUERA Applicants	*Megan Mackey*, for the Applicants
– and –	
MUSKOKA CONDOMINIUM CORPORATION NO. 22 Respondent	*Erik Savas* and *B. Stella*, for the Respondent

BETWEEN:	
MUSKOKA CONDOMINIUM CORPORATION NO. 22 Applicant	*Erik Savas* and *B. Stella*, for the Respondent
– and –	
MICHAEL NOGUERA and VICTORIA NOGUERA Respondents	*Megan Mackey*, for the Applicants **HEARD:** September 10, 2018, followed by written submissions by October 15, 2018

REASONS FOR DECISION

W. MATHESON J.

[1] This is an application for an order under s. 135 of the *Condominium Act, 1998*, S.O. 1998, c. 19, arising from a course of events that the applicants submit are oppressive and unfairly prejudicial to them. The respondent has brought a cross-application seeking various other orders.[1]

[2] This matter arises out of a series of events through which the applicants sought advance approval for a structural change and obtained a now-challenged approval from the Board of Directors of the respondent Muskoka Condominium Corporation No. 22 (the "Condominium"). At a later stage, and after changes in the Board of Directors, the prior good relationship between various individuals broke down and significant issues were raised about the structural change and related approval process.

Brief background

[3] The Condominium has twenty condominium units. It is in Muskoka and its shared areas include a path near the waterfront, docks and boat slips.

[4] The applicants purchased unit #210 in May 2014. The applicant Michael Noguera was a director on the Condominium's Board of Directors from April 25, 2015 until February 24, 2018. He was also a 1st Vice President and Canoe/Kayak Storage Rack Coordinator and used to help with maintenance on a volunteer basis with other residents, including working on the grounds.

[5] The applicants currently live in Toronto but planned to retire to live in the Condominium. They wanted a bigger unit to accommodate visiting family, but had been unable to buy one. In February 2016, the applicants' next door neighbours at the Condominium contacted them indicating that they planned to sell their unit, #211.

[6] Without making any commitment to buy #211, the applicants made a proposal to the Condominium's Board of Directors that they be permitted to make an opening between #210 and #211. If approved, they would proceed to make an offer on #211. Mr. Noguera emailed the proposal to the Condominium's property manager on February 28, 2016, and the request was put on the Board agenda for the next Board meeting.

[7] The proposal was addressed at a Board meeting on March 25, 2016. The minutes show that a motion to approve the proposal to alter the common elements was moved, seconded and carried. Numerous disputes are now raised before me about this decision, but none of those issues were raised at the time.

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[1] In these reasons for decision, while there is a cross-application, the Nogueras are called the applicants and the Condominium the respondent.

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[8] At the time, the Condominium had four Board members, including both Mr. Noguera and the owner of #211, Don Mitchell. All of the Board members were present at the March 25, 2016 meeting, along with the property manager. For this agenda item, Mr. Mitchell indicated that he had a conflict of interest and excused himself for that part of the meeting. All present were obviously aware of Mr. Noguera's role in relation to the proposal under discussion. He did not believe that he had a conflict under the Act for reasons discussed below, nor did anyone else suggest that he was in conflict or should excuse himself. He remained for the discussion, but did not vote.

[9] The minutes show all the Board members in attendance, specifically Pat Atkinson, John McDonald, Mr. Nogeura and Mr. Mitchell. The minutes state the following in relation to this item:

> Proposed Change to Common Elements – Don Mitchell left the meeting as he had a pecuniary interest in this discussion. Michael Nogeura wishes to purchase Suite #211 from Don Mitchell and get approvals from a structural engineer and the Town to open up the demising wall between 210 & 211. Unit will remain separately deeded and will continue to pay the same proportionate share of common elements. Under the condominium act, 1998, [sic] this is deemed to be a minor alteration to the common elements and therefore can be decided at the board level. The Act specifies that alterations to the common elements are permissible subject to the following:
>
> 1) that the unit owner pay all costs.
>
> 2) that the alteration does not affect the use and enjoyment of adjacent unit owners.
>
> 3) that the alteration does not affect the symmetry of the building.
>
> 4) that the alteration in no way affects the Corporations' budget.
>
> 5) that all necessary engineering & Town approvals be given before work is to start.
>
> Pat wanted to make sure that the wall would be returned to its existing state if Michael were to sell one of the units at no cost to the corporation. Pat also was insistent that the (2) units could never be sold as one unit.
>
> Moved by Pat, seconded by John, that Michael be given approval to alter the common elements subject to meeting all criteria listed above. Carried.

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[10] Although the audio recording of the meeting includes a request that the property manager provide the applicants with an agreement under s. 98 of the *Condominium Act* for their signature, that item was not part of the resolution, was not minuted and was not pursued by the property manager. Section 98 agreements set out the respective duties and responsibilities of the unit owners and the condominium regarding a structural change and are registered on the title. Although offside the Act, this lack of obtaining a s. 98 agreement was the long-standing past practice of this Condominium. Most of the unit owners had previously made structural changes, and none had been required to enter into the statutorily-required s. 98 agreement.

[11] The issues of non-compliance now raised include conflict of interest, lack of quorum, the question of whether a unit owner vote was required and the lack of a condition regarding an agreement under s. 98 of the Act. Having reviewed the extensive evidence before me, I conclude that there was no deliberate non-compliance with the Act on March 25, 2016 – the decision made at the meeting was made in good faith by all concerned, following past practice.

[12] The applicants moved forward in reliance on the Board's approval. They retained a structural engineer to prepare and revise building plans to be submitted to the Town of Huntsville for approval.

[13] The applicants provided the Condominium's property manager with a copy of the plans in April 2016. Although the property manager emailed that he had what would fairly be described as a temporary computer problem that prevented him from opening the plans, there was no suggestion that the problem persisted.

[14] The plans showed that the applicants intended to open the demising wall by putting a wide opening on the main floor and a regular door on the second floor.

[15] Before the plans were approved and a building permit was issued, the Town required a letter from the Condominium confirming that it approved of the proposed changes. That letter was provided on June 6, 2016, confirming the Board's approval and stating that: "All conditions have been met to the Board's satisfaction."

[16] The applicants signed a conditional offer to purchase #211 on June 16, 2016. The purchase of #211 closed at the end of August 2016. The tenants in that unit moved out in May 2017. Steps in relation to the renovation began in the summer of 2017 but the renovation was not completed until January 2018.

[17] The relationship between these parties began to sour in 2017. In the summer, the new president told the applicants that they could not use the lakeside path based on what are unproven allegations that they were looking into the windows of other units. There are, however, proved allegations that at least one Board member was looking into the applicants' unit at a later stage without the same consequences.

[18] At a Board meeting in November 2017, there was discussion regarding whether the applicants should halt their renovation until they had executed a s. 98 agreement. Mr. Noguera

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complained because no other unit owner had ever been asked to sign a s. 98 agreement. The Board discussed having a "blanket" agreement regarding all owners. Ultimately, Mr. Noguera said he would execute a s. 98 agreement but not halt construction in the circumstances. A stop-work resolution was not pursued.

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[19] At the November meeting, the property manager was directed to deal with the issue of the s. 98 agreements. There were then discussions about an agreement, led by the property manager, and drafts were exchanged with the applicants. The applicants were also told that the other unit owners would be asked to sign a blanket s. 98 agreement regarding past structural changes. The applicants signed a form of s. 98 agreement but did not return it for the Condominium's signature pending more information about these "blanket" agreements. In their December 20, 2017 email, they made it clear that they fully expected to sign a s. 98 agreement regarding their structural change. The tone of the above correspondence between the applicants and the property manager was friendly and civil on both sides. The applicants pressed forward to complete the structural change.

[20] A Board meeting was held on January 2, 2018 without giving notice to Mr. Noguera even though he was a director. At this meeting, the Board directed the property manager to ask Mr. Noguera to stop work and also request information from him. Notice of this meeting was also not given to Mr. Mitchell, still a director.

[21] Shortly thereafter, on January 4, 2018, a lawyer for the Condominium sent a heavy-handed letter threatening immediate serious consequences if the applicants did not stop the work and in relation to the s. 98 agreement. The letter was out of keeping with the discussion about stopping work at the November Board meeting and the steps taken thereafter regarding the agreement, out of keeping with what had transpired in 2016 and out of keeping with the past practice of this Condominium. As well, it does not appear that the other unit owners who had made structural changes without entering into s. 98 agreements were treated in a comparable way with respect to the late request for s. 98 agreements.

[22] Another Board meeting without proper notice was held on January 8, 2018. Shortly thereafter, Mr. Mitchell resigned from the Board due to its "ambush" tactics, which he did not think were appropriate for the Condominium.

[23] The relationship between these parties had obviously broken down over this period. This was exacerbated by the president of the Board, who took steps to undermine Mr. Nogeura with other unit owners, calling him evil and dishonest and saying that she wanted him off the Board because he was evil. On the other side, Mr. Noguera audiotaped at least one meeting including the portion of the meeting where he was not present. Various issues between the unit owners came into the forefront and other events transpired that the applicants perceived as targeted against them, leaving the applicants uncomfortable to be on the premises.

[24] In response to a request to do so arising from the discord, Mr. Nogeura resigned from the Board.

[25] The structural changes were completed in accordance with the building permit and the permit has been closed.

[26] Returning to the need for a s. 98 agreement, the Condominium sent out a completely different form of agreement than that which had been provided to the applicants in late November 2017. The other unit owners were also sent agreements to sign.

[27] There is one difference between the form of agreement sent to the applicants and that sent to the other unit owners. The form of agreement provided to the applicants contains an additional clause that traces back to a dispute about the conditions attached to the approval of the proposal back in 2016. The applicants remain ready to execute a s. 98 agreement subject to that dispute.

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Relief sought

[28] On this oppression application, the applicants seek an order in relation to the s. 98 agreement as well as damages and relief from steps taken to stop them from using the lakeside pathway.

[29] The Condominium's cross-application seeks a myriad of relief generally involving a new and extensive examination of the proposal made in 2016 and a new decision-making process, including a unit holder vote, regarding whether or not that proposal should be approved.

[30] If the Condominium is permitted to avoid the approval given in 2016 as it seeks to do, the applicants seek damages of $230,642.42. This large figure arises because the applicants made other significant changes to the two units, for which no approval was required, consequent upon the approval to open the demising wall and live in the two units as one. For example, they took out the second kitchen.

[31] The applicants also seek damages for oppression arising from the steps taken against them that have had a negative impact on their ability to use and enjoy their property within the Condominium.

Analysis

[32] The main application is brought under s. 135 of the *Condominium Act*, which provides for an oppression remedy akin to corporate statutes. The cross-application also relies on s. 135 among other things. Subsection 135(2) provides as follows:

> 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.

[33] The oppression remedy is broad and flexible: *Hakim v. Toronto Standard Condominium No. 1737*, 2012 ONSC 404, 1 B.L.R. (5th) 159, at para. 37, citing *McKinistry v. York Condominium Corporation No. 4672* (2003), 68 O.R. (3d) 557 (S.C.J.). Under s. 135(3), the court may make "any order the judge deems proper" including but not limited to an order prohibiting the conduct at issue and an order requiring the payment of compensation.

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[34] As cited in *Hakim*, at paras. 42-43, relying on *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, the test for oppression is two-pronged:

(i) the claimant must establish reasonable expectations that he or she claims have been violated; and,

(ii) the claimant must show that these reasonable expectations were violated by corporate conduct that amounts to oppression, unfair prejudice or unfair disregard.

[35] The concept of reasonable expectations is objective and contextual. The actual expectations of a particular stakeholder are not conclusive. Factors that may inform the question of whether there are reasonable expectations include past practice, the size of the corporation, the relationship between the parties, representations made and knowledge of expectations, among other things. In this case, the statutory regime is a significant factor. The oppression remedy "seeks to ensure fairness – what is 'just and equitable'": *BCE*, at para. 58. It calls for a fact-specific, contextual inquiry looking at "business realties, not merely narrow legalities": *BCE*, at para. 58.

[36] Under s. 135, the court does not look at the interaction between the board and the applicant in isolation: *Hakim*, at para. 40. The court must balance the objectively reasonable expectations of an owner with the condominium board's ability to exercise judgment and secure the safety, security and welfare of all owners and the condominium's property assets: *Hakim*, at para. 38, citing *McKinistry*. Notably in this case, no safety, security or property issues have been established by the Condominium, quite the contrary.

[37] The applicants submit that the Condominium's attempt to retract its permission given in 2016 is oppressive and unfairly prejudicial to them. They raise related issues regarding the form of the s. 98 agreement, use of common elements and damage suffered by them.

[38] In response, the Condominium submits that there was no legal permission given in 2016 to begin with, because Mr. Noguera had a conflict of interest, there was no quorum at the board meeting, there ought to have been a s. 98 agreement and because in any event the scope of the purported approval was more limited than the changes that were actually made by the applicants.

[39] Given these issues, the claims must be addressed within the context of what was and was not actually approved by the Board in 2016 under the *Condominium Act* regime.

Issues regarding the March 2016 Board meeting

[40] The issues raised by the Condominium regarding quorum and conflict of interest are interrelated. In 2016, this Board had four directors and, therefore, under s. 32(2) of the Act, its quorum was three. Under s. 32 (1), the Board could not transact any business of the corporation except at a meeting of directors at which a quorum of the Board "was present". One of the directors declared a conflict and left. The applicants' position is that although Mr. Noguera did not vote, since he remained at the meeting there was a quorum. However, under s. 40(6), if he had a conflict of interest under the Act, he could not count toward the quorum.

[41] The Act addresses conflicts of interest in s. 40, defining a conflict of interest in ss. 40 (1)(2) as follows:

> 40 (1) A director of a corporation who has, directly or indirectly, an interest in a contract or transaction to which the corporation is a party or a proposed contract or transaction to which the corporation will be a party, shall disclose in writing to the corporation the nature and extent of the interest.
>
> (2) Subsection (1) does not apply to a contract or transaction or a proposed contract or transaction unless both it and the director's interest in it are material. [Emphasis added.]

[42] The applicants submit that the exception in s. 40(2) applies here. That subsection requires that, for a conflict to arise, the director's interest in the proposed transaction must be material *and* the transaction must itself material for the Condominium. The Condominium submits that the proposed transaction is material to it, in hindsight.

[43] The applicants accept that Mr. Noguera had a material interest in the requested approval for the structural change or, using the words of s. 40, the proposed transaction. Further, this is not a case about non-disclosure. The interest was disclosed. The applicants submit that there was no conflict because of the second requirement of s. 40(2) – that the proposed transaction must also be a material transaction for the Condominium. The change was to an interior wall. It would not be used by and was not even visible to anyone outside of these two units. There was no financial impact on the Condominium. The applicants were paying for the work. The common expenses and other financial obligations of each of #210 and #211 would not be reduced or eliminated. There was no impact on the Condominium's insurance. I find that the proposed transaction was properly described in the minutes as a "minor alteration" from the standpoint of the Condominium.

[44] The Condominium submits that the change was material to it based on the quantum of the cost, even though not being paid by the Condominium. At the time of the Board meeting in March 2016, the estimated cost of the structural change was $6,000 to $8,000. However, at a later stage, the cost increased to about $32,000. The Condominium submits that materiality

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should be judged based on the ultimate costs incurred by the applicants some years later, not the estimate put forward at the meeting. This submission seems to invite problems, since it would mean that any approval could be questioned and potentially revoked years later after the work was completed. In this case, the estimate was made in good faith. In financial terms, it was not material to the Condominium at the time it was approved and the Condominium has not established that hindsight should control the analysis in this case.

[45] The Condominium also submits that the change was material to it because the demising wall was not an exclusive use common element. Leaving aside the reality that none of this was raised at the time, the Condominium submits that there are added obligations regarding the wall, as a non-exclusive use common element, that made the proposed transaction material. However, this must be viewed in the context of what was required at the time, including plans approved by the Town and a structural engineer and the cost being entirely borne by the applicants. Bearing the conditions attached to the approval in mind, this issue does not transform the transaction into a material one for the Condominium.

[46] The Condominium also submits that the proposal ought to have been the subject of a unit owner vote under s. 97 rather than just Board approval under s. 98. Section 98(1)(c) requires that an owner making an alteration needs to meet the requirements of s. 97. However, even under s. 97, a vote would not have been required because of the exception in s. 97(2)(c) where the estimated cost of the proposed transaction was not more than 1% of the Condominium's budget for that year. A Board resolution was therefore sufficient, as was recognized by the Board in 2016.

[47] In summary, Board approval was sufficient and was given. Mr. Noguera did not have a conflict because the proposal was not material to the Condominium. There was therefore a quorum. The approval is not problematic as a result of these issues.

Scope of approval

[48] There are two issues about the scope of the approval granted in March 2016: (1) whether it was limited to one opening in the demising wall rather than two; and, (2) the meaning of one of the conditions imposed by the Board regarding the restoration of the demising wall on sale of the units.

[49] The parties have been unable to provide any case law that focuses on the proper approach to the interpretation of Board minutes where their meaning is in dispute, either from condominium or corporate law. The applicants submit that the resolution is a contract and therefore contract principles apply. I do not agree that the resolution is a contract – this situation is quite different from *Kirby v. Amalgamated Income Limited Partnership*, 2009 BCSC 1044, 75 C.C.E.L. 93 (3d) 186, the case relied upon by the applicants. In *Kirby*, the Board was expressly addressing the terms of an employment contract. The Condominium has provided other cases that stand for the straightforward principle that Board minutes may be evidence of the terms of an agreement: *MacRae v Fenway Resources, Ltd.*, 1992 CarswellBC 1752, at para. 12; *Northern*

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& Central Gas Corp. v. Hillcrest Collieries Limited (1975), 59 D.L.R. (3d) 533 (Alta. S.C.), at para. 247; *Rosenblat v. R.*, [1975] C.T.C. 472 (F.C.T.D.), at pp. 477-478. However, contract principles are of some assistance as reflected in the submissions of both sides of this dispute.

[50] Both parties submit that the minutes should be interpreted in context, which draws in both the legal regime and the past practice of this Condominium. The relevant context includes the informal approach taken by this Board, and its inadvertent disregard for statutory requirements. Like a contract, the surrounding circumstances known to both sides can be relevant context and the focus is on objective evidence, not the subjective intentions of the individuals involved. Further, the resolution should be read bearing in mind the ordinary meaning of the words in the context of the resolution as a whole.

[51] On the issue of how many openings were permitted by the Board, the resolution gives permission to "open up the demising wall". It is not specific about how many openings. There is some evidence that supports the Condominium's position that a single opening was mentioned, not two. Yet the plans provided as required by the resolution clearly showed both openings and drew no objection from the Condominium at the time. The directors now say they were not told about the plans, but the practice at the Condominium was to provide that sort of information to the property manager and that is what happened in this case. What was done was within the Board's approval as confirmed by the Condominium's own conduct after the fact. After receiving the plans, the Condominium wrote to the Town expressly confirming its approval.

[52] Bearing in mind the above principles, I find that the resolution did not limit the openings to one. Further, on the evidence, I conclude that this issue is somewhat of a red herring – the number of openings does not have a material impact on the issues now raised. That issue would not undermine the entire approval nor resolve all of the many issues that have been raised.

[53] The second issue relates to the conditions imposed by the Board as part of its approval, as set out in the minutes. It directly relates to the disputed term in the Condominium's form of s. 98 agreement.

[54] The applicants accept that the Board imposed seven conditions on its approval, as follows:

(1) that the unit owner pay all the costs;

(2) that the alteration not affect the use and enjoyment of other unit owners;

(3) that the alteration not affect the symmetry of the building;

(4) that the alteration not affect the Condominium's budget;

(5) that all the necessary engineering and town approval be given before the work commenced;

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(6) that the wall be returned to its existing state if the unit owner (Mr. Nogeura) was to sell one of the units and at no cost to the Condominium; and,

(7) the condition at issue, that the two units "could never be sold as one unit."

[55] The applicants' submit that the last condition does not foreclose them from selling the two units, retaining the structural change, to one buyer. The Condominium submits that the final condition means that they cannot do so.

[56] The last two conditions arise from this paragraph in the minutes:

> Pat [director] wanted to make sure that the wall would be returned to its existing state if Michael were to sell one of the units at no cost to the corporation. Pat also was insistent that the (2) units could never be sold as one unit.

[57] The first sentence is agreed to create the sixth condition. The second sentence is the seventh condition.

[58] The applicants take a technical position on the interpretation of the seventh condition, which is inconsistent with the more informal approach of this Board. They submit that the second sentence should be read using the technical meaning of "unit" as referring to units as shown in the parcel register. They submit that the two units could never legally be sold as "one unit" since they were registered separately and would remain so. Thus, the seventh condition adds nothing but they have no problem with it. The applicants submit that while they have no plans to sell, they thought they would only have to restore the demising wall if the units were being sold to different purchasers.

[59] The applicants rely on past practice, where other unit owners have not been asked to remove and restore structural changes before sale. However, the applicants also agree that past practice was departed from here to the extent that they may wish to sell to different purchasers. They accept condition #6, which would also be offside past practice. Past practice does not determine this issue.

[60] The applicants attest that they did not believe that they were prevented from selling the two units to one purchaser as a single living space. The members of the Board who voted attest to the opposite effect, that their intention was to foreclose that outcome. These subjective views are not determinative.

[61] The more natural and ordinary reading of the seventh condition, in context, is that the word "unit" is used conversationally rather than formally, and the condition was that the two units could not be sold together to one purchaser. It was the follow-on condition to the first sentence of that paragraph. The effect of the whole paragraph in the resolution is that the demising wall would have to be restored on sale at no cost to the Condominium and the two units could not be sold with the openings as is as a single living space.

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[62] Leaving aside the issue of the s. 98 agreement, I therefore conclude that there was an effective Board approval given for the structural change made by the applicants. The relief sought by the Condominium, which assumes that it can begin the approval process again, is therefore inappropriate.

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Section 98 agreements

[63] There is then the issue of the Board's failure to obtain a s. 98 agreement from the applicants (or anyone else). The necessary agreement is provided for in s. 98(1)(b), as follows:

> 98 (1) An owner may make an addition, alteration or improvement to the common elements that is not contrary to this Act or the declaration if,
>
> (a) the board, by resolution, has approved the proposed addition, alteration or improvement;
>
> (b) the owner and the corporation have entered into an agreement that,
>
> (i) allocates the cost of the proposed addition, alteration or improvement between the corporation and the owner,
>
> (ii) sets out the respective duties and responsibilities, including the responsibilities for the cost of repair after damage, maintenance and insurance, of the corporation and the owner with respect to the proposed addition, alteration or improvement, and
>
> (iii) sets out the other matters that the regulations made under this Act require; [Emphasis added.]
>
> . . .

[64] Pursuant to s. 98(3)(b), the Condominium must register the agreement against the title to the owner's unit.

[65] There is no dispute that such an agreement is required under the Act. However, the Condominium had never required a s. 98 agreement from any unit owner despite the mandatory provision in the Act and despite the fact that most of the unit owners in the Condominium had made structural changes that required a s. 98 agreement before the approval at issue here. This problem is therefore of the Condominium's making, given its past practice.

[66] The Condominium does not submit that every approval it has given for a structural change is void because the requirement for a s. 98 agreement was not met in advance of the change being made. And it is not in the position to fairly take that position against the applicants alone. When the oversight was noticed, the Condominium set about getting s. 98 agreements from all affected unit owners after the fact, including the applicants.

[67] The applicants agree that there must be a s. 98 agreement. The dispute relates to the terms of the agreement that the Condominium has provided to the applicants for signature. The Condominium has treated the applicants differently than the other unit owners who also ought to have executed s. 98 agreements inasmuch as the form of agreement requested from the applicants is different. It has an additional clause – clause 5 – which is the disputed clause.

[68] I am not persuaded that all the s. 98 agreements must be the same. Section 98 itself incorporates aspects of the particular structural change that the agreement applies to. To the extent that the disputed clause 5 properly implements the duties and responsibilities imposed by the Board as part of its approval of this structural change, it is not problematic.

[69] Clause 5 of the Condominium's form of agreement for the applicants' units provides as follows:

> The Improvements shall be removed by the Unit Owner, at the Unit Owner's sole expense, before the Unit is sold. Specifically, the Unit shall be restored to the condition before the Improvements were made, *including but not limited to the reinstallation of the common element demising wall within the Unit and any changes that were made by the Unit Owner related thereto*. [Emphasis added.]

[70] In large part, this clause accurately reflects conditions 6 and 7 of the Board approval and as such is an appropriate demarcation of duties and responsibilities as required by s. 98(1)(b)(ii). The only exception is the broad concluding language shown above in italics, since that part of the clause is not expressly limited to changes to the demising wall. The applicants have made other expensive changes to their units that were related to opening up the wall but for which no approval was required. The Condominium has given no rationale supporting a clause that would extend beyond the Board resolution, let alone a rationale that would justify treating the applicants differently from the other unit owners in this way.

[71] The concluding language in clause 5 should be limited to changes to the demising wall. As it stands, the applicants are justified in not agreeing to sign the Condominium's form of agreement. However, with this change, the applicants must do so in furtherance of their agreement to sign a proper s. 98 agreement.

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Other conduct at issue

[72] In addition to the above matters, the applicants have raised a myriad of conduct by the Condominium that they submit demonstrates that they were targeted after the relationships between the applicants and the new Board began to break down. Admitted conduct by the new president includes disparaging remarks to other unit owners. On the evidence before me, at least the president was also involved in encouraging other unit owners to call for Mr. Noguera's resignation. This type of activity makes it difficult to understand how the Condominium now says that there could be a fair vote in this small group of only 20 unit owners. Another instance relates to the use of the lakeside path. The applicants were told they could not use it based on an allegation that they had looked into other units from that path. On the evidence before me, I find that they had not done so. But other unitholders, including a Board member, had looked into the applicants' unit yet did not get comparable treatment. Other steps were taken that the applicants submit had a disproportionate impact on them. As well, issues were raised of the sort that become more prominent when a dispute brews between neighbours, such as complaints about a cat and about marijuana use by a guest visiting another unit owner.

[73] I do not attribute all the listed problems to bad behaviour targeting the applicants. However, I do find that the Condominium wrongly disparaged the applicants, especially Mr. Nogeura, wrongly excluded them from use of common elements, specifically the path, and wrongly fostered an atmosphere that made them uncomfortable.

Oppression claims

[74] The applicants seek the following relief under the oppression remedy:

(i) that the Condominium be foreclosed from re-opening the approval process as it has requested in its cross-application;

(ii) that the operative s. 98 agreement be that proposed by the applicants;

(iii) that the applicants may use the lakeside path again; and,

(iv) that the applicants receive damages for their loss of enjoyment of their property.

[75] The Condominium seeks extensive relief, including a cease and desist order regarding the structural change (even though the work has been completed), more plans (even though the plans were provided long ago), consent to obtain the Town's files (even though it confirmed to the Town that its conditions had been met long ago), written consent of the current Board, unit owner approval by two-thirds vote, its version of the s. 98 agreement, the right to impose more conditions and require changes at the applicants' expense and numerous other orders.

[76] Beginning with the Condominium's relief sought, it has failed to undermine the approval process conducted in 2016, with the exception of the need for a s. 98 agreement. And its

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requested form of s. 98 agreement over-reaches, as described above. I therefore deny the cross-application with the exception of addressing the s. 98 agreement raised by both applications.

[77] In regard to the agreed need for a s. 98 agreement, I find that the parties have a reasonable expectation of an executed and registered s. 98 agreement consistent with that required from the other unit owners, with only those differences required to give effect to the applicants' specific Board approval. In finding that reasonable expectation, I take into account the requirements of the Act, the long-standing past practice of non-compliance by the Condominium and the Condominium's approach to remedying its non-compliance by implementing an after-the-fact generic agreement for all implicated unit owners. I further find that the Condominium, by purporting to require a term in the s. 98 agreement that goes beyond both its own approval and what it required of other unit owners, was abusive and unfair, and prejudicial to the applicants. The additional term in the Condominium's form of agreement would mean that they would have to undo changes for which no approval was needed in the first place. The requirements of the oppression remedy under s. 135 have therefore been met.

[78] The Condominium submits that the court has no role in resolving the dispute between the parties regarding the terms of the s. 98 agreement. Yet, it seeks a court order that enforces its version. Similarly, the applicants proceed on the basis that their version should be implemented. Both sides rely on the oppression remedy, which allows for broad remedial relief.

[79] I order that the parties enter into an agreement in the form requested by the Condominium with the one change required above, narrowing clause 5 by removing the italicized text. I make this order under s. 135 of the Act and its broad remedial authority. This remedy addresses the s. 98 issue.

[80] Given the history of this matter, I will address the question of whether the oppression remedy would respond if there had been a defect in the approval process regarding the applicants' structural change, in addition to the s. 98 agreement issue already addressed above.

[81] I have found that the 2016 approval process was not deficient and the Condominium is therefore not entitled to reopen or revisit that approval or require that the applicants restore the demising wall other than in connection with a sale. However, if I am wrong and there were defects, I would grant the applicants' request that the Condominium be foreclosed from its requested relief of essentially restarting the approval process now. I would make that order under s. 135 of the Act.

[82] Beginning with reasonable expectations regarding the approval process, I find that the applicants' reasonable expectations were that the process approved of by the Board of Directors would give rise to an effective approval. The applicants followed the process in place at the Condominium. They made a written proposal. The Board went through the proposal and at least purported to pass a resolution without any of the issues now before me raised as possible defects. The Board was aware of Mr. Noguera's role in regard to the proposal. The applicants complied with the many terms attached to the resolution. A structural engineer was retained and plans

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were prepared and revised. The Town issued a building permit after written assurance from the Condominium that its conditions had been satisfied. The Board meeting, minutes and later correspondence were representations to the applicants to the effect that there was approval. Because of the past practice regarding s. 98 agreements, the absence of such an agreement does not detract from the above reasonable expectations.

[83] The stance taken by the Condominium commencing in or about mid-2017 was oppressive and unfair. The Condominium proceeded in breach of its governance obligations by holding board meetings without proper notice. The Condominium proceeded as if it had little or no responsibility for the circumstances giving rise to the disputed approval and that stance was taken even in oral argument before me. There is no doubt that the Condominium was responsible for a great deal of what happened here, most notably for an illegal past practice regarding s. 98 agreements that was in place before the applicants even became unit owners. The approach taken with these unit owners, as if the Condominium had little or no role in the prior events, was harsh and unfair. This is in stark contrast to the approach taken with other unit owners who had also made structural changes with now admittedly defective approvals. I recognize that there was a range of types of structural changes, and opening the demising wall had not been done before, but the s. 98 requirement applies to all of the changes. The Condominium treated the applicants more harshly than the other unit owners. Associated conduct by Board members shows targeting and ill will toward the applicants. Bearing everything in mind in the exercise of my discretion, I would foreclose the Condominium's requested orders.

[84] The applicants seek two other remedial orders. First, they seek a declaration that they may use the lakeside path and they have established that the actions of Condominium in barring that use were unfounded and they were treated more harshly than other unit owners as well. Their expectation that they would have the same use of that path as the other unit owners is reasonable based on the legal regime applicable to common elements and the Condominium has acted unfairly in singling them out in this way. I therefore find that requested order appropriate.

[85] Second, the applicants seek an award of $25,000 in general damages arising from the Condominium's oppressive and unfair conduct impairing their use and enjoyment of their property. They have established that they were treated unfairly in a number of respects, as set out above. I accept that the applicants have been made uncomfortable as a result of the Condominium's actions and this has reduced their enjoyment of their units. They have also been unfairly deprived of their use of the lake-side path, which is a narrow path but is significant given the waterfront aspect of the Condominium. Monetary awards have been made in condominium cases where there has been persistent poor conduct affecting the use and enjoyment of a unit owner over a period of time: e.g., *Wu v. Peel Condominium Corporation No. 245*, 2015 ONSC 2801. In this case, I find that a general damages award is appropriate and order that the Condominium pay the applicants a total of $10,000 in that regard.

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Orders

[86] On consent, the application is amended as set out in Schedule "A" to the notice of motion dated August 27, 2018.

[87] The application is granted in part, as follows:

(i) the parties shall enter into a s. 98 agreement in the form requested by the Condominium subject to clause 5 being amended to remove the over-reaching language identified above;

(ii) the applicants shall be permitted to resume use of the lake-front path; and,

(iii) the respondent shall pay the applicants damages in the total amount of $10,000.

[88] The cross-application is dismissed.

[89] If the parties are unable to agree on costs, they shall make their costs submissions in writing as follows: the applicants' submissions shall be delivered by January 14, 2019 and the respondent's submissions shall be delivered by February 8, 2019. Each side's written submissions shall be five pages or less in total, double-spaced, plus any costs outline.

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W. Matheson J.

Released: December 11, 2018

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CITATION: Noguera v. Muskoka Condominium Corporation No. 22, 2018 ONSC 7278
COURT FILE NO.: CV-18-590608; CV-18-599419
DATE: 201801211

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

MICHAEL NOGUERA and VICTORIA NOGUERA

Applicants

– and –

MUSKOKA CONDOMINIUM CORPORATION NO. 22

Respondent

BETWEEN:

MUSKOKA CONDOMINIUM CORPORATION NO. 22

Applicant

– and –

MICHAEL NOGUERA and VICTORIA NOGUERA

Respondents

REASONS FOR DECISION

W. MATHESON J.

Released: December 11, 2018

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