York Region Standard Condominium Corp. No. 1206 v. 520 Steeles Developments Inc., [2019] O.J. No. 3039

Ontario Judgments

Ontario Superior Court of Justice

M.D. Faieta J.

Heard: May 3, 2019.

Judgment: May 31, 2019.

Court File No.: CV-16-548539

[2019] O.J. No. 3039 | 2019 ONSC 2991

Between York Region Standard ***Condominium*** Corporation No. 1206, Plaintiff, and 520 Steeles Developments Inc., 7 Brighton Place Inc., Kantium Development & Construction Inc., Liberty Development Corporation, Darcon Inc., Mondconsult Limited, York Region Common Element ***Condominium*** 1210, Affinity Aluminum Systems Ltd., Jit Professional Services Inc., Siu Hong (Ernie) Leung, P. Eng., Quest Window Systems Inc., Rouslan Tcholii, P. Eng., Ya Ping (Tom) Zhang, P. Eng., Tom's Structural Steel Detailing, Ya Ping (Tom) Zhang Structural Engineers & Solution Developers, Nasser Heidari, P. Eng., NCN Engineering Services Ltd., NCN Engineering Services Ltd., Torsteel Company Co. Limited, Vorstadt Incorporated, Vorstadt Superior Roof, Vorstadt's Superior Sheet Metal Ltd., Duron Ontario Ltd., C&A Tedesco Waterproofing Inc., Saverino General Contractors Ltd., Advanced Precast Inc., Mukesh Patel, P.Eng., MRP Design Services, Delgant Construction Ltd., Delgant Limited, Resform Construction Ltd., Green Valley Inc., Global Plumbing & Heating Inc., System Drywall & Acoustics, Mayfair Electric Limited, York Sheet Metal Limited, Adjeleian Allen Rubeli Limited, Sigmund Soudack & Associates Ltd., Schaeffer & Associates Ltd., United Engineering Inc., A&G Engineering Ltd., Disano Sprinkler Design Limited, Exp Services Inc./Les Services Exp Inc., Building Sciences Inc., Strybos Barron King Ltd., Strybos Associates Ltd., Simerra Property Management Inc., Simerra Property Management Ltd., 360 Community Management Ltd., Blandford Construction Services Inc., Marnick Fire Protection Inc., and Defendants #1, #2, #3, #4, #5, #6, #7, #8, #9, #10, #11, #12, #13, #14, #15, #16, #17, #18, #19, and #20, Defendants

(69 paras.)

Counsel

R. Leigh Youd, Tim Gleason and *Adam J. Wygodny*, for the Plaintiff.

Elizabeth Bowker and *Christian Breukelman*, for the Defendant 360 Community Management Ltd.

No one appearing for the other defendants.

REASONS FOR DECISION

M.D. FAIETA J.

INTRODUCTION

1 York Region Standard ***Condominium*** Corporation No. 1206 ("YRSCC") brings this action against the developer, contractors and others, including its former property manager, 360 Community Management Ltd. ("360"), for damages related to the allegedly deficient construction of a residential ***condominium*** building.

2 360 brings this motion for summary judgment to dismiss the action as a nullity on the basis that YRSCC failed to comply with the notice requirements found in s. 23 of the ***Condominium*** *Act*, 1998, *S.O. 1998, c. 19* (the "Act") in that it failed to give written notice of the general nature of the action prior to the issuance of its Notice of Action.

3 Given that the parties agree that the determination of whether this claim should be dismissed may be determined by summary judgment, this court shall grant summary judgment if it is satisfied that it appropriate to do so: Rule 20.04(2)(b), *Rules of Civil Procedure*, *R.R.O. 1990, Reg. 194*. I find that it is appropriate for this matter to be determined by summary judgment as the evidence delivered by the parties is not disputed and thus this motion allows for a proportionate, more expeditious and less expensive means to achieve a just result than a trial.

4 For the reasons described below, I have dismissed this motion.

BACKGROUND

5 In July, 2015, the plaintiff retained corporate counsel, John Legge, to advise whether the plaintiff's Board of Directors should authorize a proposed settlement by the plaintiff with the defendant ***condominium*** developer. The proposed settlement arose from a conciliation under the Tarion Warranty Corporation's warranty claim process related to alleged construction defects in the ***condominium*** building located at 520 Steeles Avenue West, Vaughan, Ontario. Mr. Legge requested several materials from the Defendant 360 by letter dated August 21, 2015. Those materials included a building performance audit, as well as advice from a professional engineer to the Board and to owners about the nature, extent and value of the building's deficiencies and recommendations for pursuit of Tarion and other remedies.

6 By email dated October 23, 2015, Christopher Blundell, litigation counsel for the plaintiff, was advised by Tarion that a conciliation inspection in relation to the plaintiff's first and second year warranty claim had been cancelled as a result of an email received from the plaintiff's property manager that the parties had come to an agreement.

7 On October 29, 2015, the President of 360 sent an email to the plaintiff's Board of Directors:

> After much deliberation and reflecting on the tone of the meeting on Tuesday morning, it is with much regret that we have come to the conclusion that we can no longer continue as your managers.
>
> As per the terms of our agreement, please accept this as Notice of Termination. Our last day of service will be December 31, 2015. ...

8 A notice, described below, dated November 24, 2015, of a special meeting of owners to be held on December 17, 2015 was delivered by the plaintiff in November, 2015 to all persons who were entitled to notice under s. 23(1) of the Act (the "November 2015 Notice").

> **YRSCC No. 1206**
>
> **NOTICE OF SPECIAL MEETING OF OWNERS**
>
> TAKE NOTICE that a SPECIAL meeting of the OWNERS of YRSCC No. 1206 will be held at 520 Steeles Avenue West, Vaughan, Ontario on Thursday, the 17th day of December, 2015 at 7:00 o'clock in the afternoon (Toronto time) for the following purposes:

1. To meet the current Board of Directors and to receive the Report of the Board of Directors;
2. To receive the Report of the Corporation's solicitor, Mr. John Legge, of the firm Legge & Legge, Barristers and Solicitors;
3. To receive the Report of Clifford J. Blundell, LLB, P.Eng., Litigation Counsel, regarding settlement/conciliation that was made by the Management Company with Tarion without the knowledge of the Board of Directors, which conciliation with Tarion did not address or reflect all deficiencies which require further investigation;
4. To receive the recommendations of the Board of Directors for a new Property Management Company and if deemed advisable, to authorize the Board of Directors to select a new Property Management Company;
5. To approve and confirm all acts and proceedings of the directors and officers referred to in the minutes of the meetings of the Board of Directors of the Corporation held from July to November, 2015; and
6. To transact such other business as may properly come before the meeting. [Emphasis added]

9 The Minutes from the Special Meeting of Owners held on December 17, 2015 indicate that the 41 owners present at the meeting authorized Mr. Blundell "to pursue Owner's rights". The Minutes also include the following notes:

> Motion to Authorize Blundell to pursue Owner's rights
>
> 47 No opposition to this motion
>
> Unidentified Owner: What is the next step?
>
> Blundell: A Decision Letter has been requested from Tarion. Tarion acknowledged this request and upon receipt we have 14 days to appeal LAT. The statement of claim against other parties will happen when it is necessary. [Emphasis added]

10 Sometime after the meeting, Mr. Legge states that he approached the Board of Directors and told them that they had to "protect the owners from the expiry of any limitation period" by authorizing the issuance of a Notice of Action. To do so would protect against the possibility that the plaintiff may have had enough information in or about March 2014 to understand that a claim existed in respect of matters such as building envelope water penetration and foundation leakage.

11 The Board of Directors authorized Mr. Blundell to issue a Notice of Action. The Notice of Action, issued on March 11, 2016, states:

1. The Plaintiff ***condominium*** corporation claims in its own capacity and in its capacity as representative plaintiff for unit owners, for interim interlocutory relief and final injunctive relief or equitable damages, an accounting of monies received, damages, interest and costs and directions for the expedited hearing of issues in the action and other relief.
2. The Plaintiff claims arise from the breaches of statutory duty, breaches of contract, breaches of duty to report and to warn, negligent acts and omissions, and concealment of dangers and hazards to life, fire safety and property by the Defendants concerning the 520 Steeles Ave. W., ***Condominium*** in Vaughan, Ontario in relation to:
    a. The design, construction and construction supervision of the ***Condominium*** premises in conformity with applicable codes and standards and reasonably capable of use and occupation without being burdened with unreasonable ongoing needs of remediation and repair and associated expenses;

b. The preparation and issuing of drawings, specifications, tender documents, certificates, reports, and other design and construction related documentation so that such documentation would completely and accurately state the representations made and would not omit any material matters;

c. The readying of the ***Condominium*** for registration and the performance of declaration, turnover and post turnover responsibilities and attempts at repair and remediation;

d. That undertaking of the post construction audit function so that such would be performed properly and carefully to comply with the duty to warn and to permit the timely and complete and appropriate remediation of non-conformities and non-compliances such that the Plaintiff would not be burdened with undetected deficiencies and unreasonable remediation or ongoing repair expenses; and

e. The undertaking and performing the management of the ***Condominium*** up to December 16, 2015 so that the post construction audit would be performed properly and carefully, that any warranty claims would be properly and carefully initiated and administered, that proper records would be kept, that complete, timely and accurate reports would be made and instructions sought from the Plaintiff's Board, and that the Property Managers would account to the Plaintiff for the management and operation of the ***Condominium***,

all of which wrongful acts and omissions and breaches of duty have created immediate physical structural safety, fire and life hazards in the ***Condominium*** premises and caused the Plaintiff present and continuing damages.

12 On March 18, 2016, a Synopsis of the claim, along with an Agenda, an Information Circular, the Notice of Action and a draft Statement of Claim, was delivered to each member of the Corporation along with notice of the Annual General Meeting to be held on April 4, 2016, was sent to each recorded owner of the Corporation (the "Annual Meeting Package"). One of the items on the Agenda for that meeting was the "Approval of Notice of Claim and of Draft Statement of Claim on behalf of Corporation and Owners".

13 The Information Circular describes various items on which the owners would be asked to make a decision. It includes the following statement:

> Building Deficiencies
>
> The Corporation's engineers will review the defects in the building; The Corporation's solicitor will review the re-opening of the Tarion Warranty Claim. Owners will be asked to approve the Notice of Action and authority to proceed with the Statement of Claim.

14 The Synopsis is six pages long and includes the following statement:

> BACKGROUND
>
> At the Special General Meeting in December 2015, Litigation Counsel for the Corporation reviewed the List of Defects and Deficiencies prepared for the Corporation's Tarion Warranty Claim and examples of material defects and deficiencies which are hazardous, or a danger to life and safety including fire safety. A letter to the Mayor of Vaughan and to the Fire Chief are attached. The Mayor, Chief Building Officer, and Fire Chief for the City of Vaughan have responded. None of the listed defects or deficiencies has been repaired.
>
> A supposed settlement was said to have been entered into by a designated representative who was the Property Manager for 520 Steeles Avenue West, employed by 360 Management. No copy of this supposed settlement was provided to the Directors or new Property Managers on turn-over in December 2015. Tarion is satisfied that the supposed settlement was not acted on by the Developer. However, on filing the supposed settlement document, it is believed that the Developer received about $3.5 million of holdback warranty funds.

> TARION
>
> Tarion has re-opened its Warranty Claim File. The Tarion warranty is limited and restricted as to what it will pay for. ... The Corporation's Tarion Claim is being pursued. The engineering and other evidence necessary to pursue the Tarion Claim parallels that needed for this litigation
>
> VALUE
>
> In broad general terms, the Tarion Warranty would appear to be worth, at most, $2.1 million. ...
>
> In broad general terms, the overall cost of necessary repair is not now known. The 360 Management designated representative did not obtain or file an estimate of the cost of the repairs as the Rules, and indeed common sense, require....
>
> In broad general terms, the Directors have been advised that the Tarion Warranty may be grossly inadequate. To obtain reasonable protection, the Directors recommend that the draft Statement of Claim be filed with the Court. The Claim against the developers, architects, builders, engineers, and other parties listed in the Notice of Action and in the draft Statement of Claim is to seek recovery of the amounts claimed which are not covered by the Tarion Warranty.
>
> In broad general terms, the Directors have been advised that the Claim in litigation may be worth a multiple of the values of the Tarion Claim.
>
> WHAT DOES THE LITIGATION SEEK?
>
> The Notice of Action provides a concise overview of the overall Claim. In broad general terms, the Claim seeks an Order from the Court requiring the developer to fix the premises properly.
>
> DAMAGES
>
> ... Some of the major deficiencies are as follows: perimeter slab-edge fire stopping; missing structure support of the garage slab; balcony railing system; ... .
>
> In total there were 970 deficiency items submitted to Tarion Warranty Corporation on December 23, 2014.
>
> Unfortunately, the Performance Audit Engineer (BSI), the previous property managers (360 Management), and Fire and safety professionals did not disclose or value these hazards, dangers, defects or deficiencies to your then President, Ian Serota, or to your Directors. Mr. Serota told your Board and its lawyers that he had been told there were no "as built drawings, and therefore no limitation period has started to run". On the basis of the information available to us now, this was not fair or accurate.
>
> Because of the concerns that limitation periods have indeed been running, the Notice of Action was filed with the Court to protect the Owner's rights.
>
> The Owners have a choice.
>
> The Owners do not have to authorize filing the Statement of Claim attached. If they do not authorize filing the Statement of Claim, the Notice of Action expires. The Owners have paid real legal fees to prepare the Notice of Action and the draft Statement of Claim. But unless and until the Statement of Claim is filed, and then served with the Notice of Action on all Defendants, they are not exposed to potential Costs Claims against the Corporation. ... [Emphasis added]

15 At the April 2016 meeting, the owners voted to support the filing of the Statement of Claim by votes of 82 in favour to 24 votes against.

16 On April 8, 2016, the Statement of Claim was filed with the court. The Amended, Amended, Amended Statement of Claim seeks the following relief in respect of 360: (1) damages; (2) an order that 360 account as agent to the plaintiff as principal, for all amounts billed, had or received from any source for or on behalf of or in relation to the plaintiff, together with a full accounting for any and all payments or other benefits it may have received for work done on the plaintiff's behalf or contract entered into on the plaintiff's account; (3) an order that 360 pay to the

plaintiff any amount taken, received or procured by them on account of, or in relation to the plaintiff for which it is not entitled at law or in equity. [see paragraph 1 of the Amended, Amended, Amended Statement of Claim]

17 The plaintiff alleges that 360, as the plaintiff's property manager, is liable in breach of contract and negligence in that, amongst other things, it failed or neglected to: (1) ensure that the common elements were managed properly; (2) ensure that the Tarion Warranty Claim was properly managed; (3) notify and warn the Board of Directors of various matters related to health and life safety. It is also alleged that 360 breached its professional and fiduciary duty to the plaintiff as it is alleged that 360 exceeded its authority in respect of any settlements related to the Tarion Warranty Claim. [see paragraphs 166.1, 206-213, 230-244 of the Amended, Amended, Amended Statement of Claim]

18 360 filed a Statement of Defence and Crossclaim. It states that 360 entered a ***condominium*** management agreement with the plaintiff on June 1, 2013 that required it to manage the property located at 520 Steeles Avenue West, the affairs and assets of the plaintiff, subject to the overall control of the plaintiff and the direction of the plaintiff's Board of Directors. It denies the plaintiff's allegations of breach of contract and negligence. Amongst other things, it states that it fulfilled its obligations under the management agreement in a careful and competent manner. 360 pleads that the action should be dismissed as the plaintiff failed to provide notice to the owners as required by s. 23 of the Act. Alternatively, 360 pleads that the action against it should be stayed pursuant to s. 132 of the Act as "... the action arises out of an agreement between the plaintiff and 360 for the management of the property ..." and therefore any disagreement must be submitted to mediation and arbitration.

RELEVANT STATUTORY PROVISION

19 Subsections 23(1) and (2) of the Act provide:

> Action by corporation
>
> 23 (1) Subject to subsection (2), in addition to any other remedies that a corporation may have, a corporation may, on its own behalf and on behalf of an owner,
>
> (a) commence, maintain or settle an action for damages and costs in respect of any damage to common elements, the assets of the corporation or individual units; and
>
> (b) commence, maintain or settle an action with respect to a contract involving the common elements or a unit, even though the corporation was not a party to the contract in respect of which the action is brought.
>
> Notice to owners
>
> (2) Before commencing an action mentioned in subsection (1), the corporation shall give written notice of the general nature of the action to all persons whose names appear in the record of the corporation required by section 46.1 or are required by that section to appear in that record except if,
>
> (a) the action is to enforce a lien of the corporation under section 85 or to fulfil its duty under subsection 17 (3); or
>
> (b) the action is commenced in the Small Claims Court.

ISSUES

20 The following issues are raised by 360's motion:

* Was the plaintiff required under s. 23(2) of the Act to give notice to the owners of its action against 360? In other words, is the action against 360 "an action mentioned in subsection (1)"?
* Did the action "commence" with the issuance of a Notice of Action?

* Did the November 2015 Notice provide "written notice of the general nature of the action"?
* Is the action against 360 a nullity if the plaintiff failed to comply with the s. 23(2) notice requirement?
* Is there discretion to relieve against the consequences of non-compliance with s. 23(2) of the Act either by s. 134 of the Act or s. 98 of the *Courts of Justice Act*, *R.S.O. 1990, c. C.43* ("*CJA*")

21 The hearing of the motion proceeded on the basis that the plaintiff was obliged to give notice to the owners of its action against 360 as it was the type of action described in s. 23(1)(b) of the Act. After the hearing of the motion I asked the parties for further submissions on whether the action against 360 was the type of action under s. 23(1) of the Act that triggered the need to provide notice under s. 23(2) of the Act.

POSITION OF THE PARTIES

360's Position

22 360 submits that the action should be dismissed as a nullity because the plaintiff failed to comply with s. 23 of the Act in issuing the Notice of Action as it failed to give "written notice of the general nature of the action" to the owners before commencing the action and more particularly:

* The action is a type that comes within s. 23(1)(a) of the Act;
* The action was "commenced" with the issuance of the Notice of Action;
* The November 2015 Notice failed to give "written notice of the general nature of the action";
* The action is a nullity; and
* There is no discretion to relieve against non-compliance with s. 23 of the Act.

Plaintiff's Position

23 The Plaintiff submits that its action should not be dismissed for failure to comply with s. 23 of the Act for the following reasons:

* The action against 360 is not a type described by s. 23(1)(a) of the Act;
* The action was "commenced" with the filing of the Statement of Claim rather than the issuance of the Notice of Action;
* In the alternative, if the action was commenced with the issuance of the Notice of Action, then the requirement to "give written notice of the general nature of the action" to the owners was satisfied by the delivery of the November 2015 Notice;
* In the alternative, the action is not a "nullity" for failure to comply with s. 23 of the Act;
* In the alternative, the plaintiff should be granted relief from forfeiture.

ANALYSIS

24 The principles of statutory interpretation described by Zarnett, J.A. in *Business Development Bank of Canada v. Astoria Organic Matters Ltd.*, *2019 ONCA 269*, at para. 44, govern the interpretation of the Act:

> The modern approach to statutory interpretation instructs a court to consider the words of a statute "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": ... While there is a presumption that the plain meaning of

> a statute's words reflect Parliament's intention, that plain meaning is only one aspect of the modern approach: ... . The court must read statutory provisions in their entire context. This involves considering "the history of the provision at issue, its place in the overall scheme of the Act, the object of the Act itself, and Parliament's intent both in enacting the Act as a whole, and in enacting the particular provision at issue": ...

Essential Features of *Condominium* Property Ownership

25 A ***condominium*** is a type of property ownership made up of units and common elements. A developer, being the owner of land, can invoke the Act by registering a declaration and description that divides its land into units and common units. The units are individually owned. All other property, whether indoor or outdoor, including elevators, hallways and parking garages, are common elements. Each unit owner has an undivided interest in the common elements. The ***condominium*** corporation is automatically formed upon the registration of the declaration and description. Although the corporation does not own the common elements it is responsible for the administration of the property at the shared cost of the owners: Audrey Loeb, *The* ***Condominium*** *Act*: A User's Manual, 5th ed. (Ontario: Thomson Reuters, 2018) pp. 1-7.

History of Section 23 of the Act

26 While s. 92(1) of the *Legislation Act, 2006*, S.O. 2006, c. 21, and its predecessors including the *Interpretation Act*, R.S.O. 1960, c. 191, s. 26, provide a ***condominium*** corporation with broad powers, including the power to sue and contract, the legal structure of ***condominium*** ownership raises many issues. These issues include whether a ***condominium*** corporation, which is created for the administrative convenience of the owners of the units and common elements, has standing to sue the developer and contractors in respect the faulty construction of the ***condominium*** building, given that (1) it neither owns the units nor the common elements, and (2) it does not contract with the developer or the contractors for the construction of the units and common elements.

27 In 1967, the Ontario Law Reform Commission's Report on the Law of ***Condominium*** recommended draft legislation that resulted in *The* ***Condominium*** *Act, 1967*, S.O. 1967, c. 12 (the "1967 Act"). Subsection 9(18) of the 1967 Act clarified that a ***condominium*** corporation may bring an action in respect of common elements:

> Any action with respect to the common elements may be brought by the corporation and a judgment for the payment of money in favour of the corporation in such an action is an asset of the corporation.

28 The LRC's explanatory note states that "This subsection is included entirely for procedural convenience". Despite this language, it was argued that a ***condominium*** corporation did not have the right to sue for faulty construction of common elements and that such claim had to be brought by the unit owners as a class action: *Frontenac* ***Condominium*** *Corp. No. 1 v. Joe Macciocchi & Sons Ltd.* *(1974), 3 O.R. (2d) 331* (Ont. H.C.), para. 43; rev'd in part, *(1975), 11 O.R. (2d) 649* (C.A.).

29 The Report of The Ontario Residential ***Condominium*** Study Group, 1977 to the Minister of Consumer and Commercial Relations led to the replacement of the 1967 Act. At page 72, the Report states:

> **The corporation and legal actions**
>
> *The power to sue*
>
> It is clear that a ***condominium*** corporation has the power to sue if a contract with the corporation is breached by another party.
>
> Section 26 of the *Interpretation Act* vests in a corporation the power to sue and be sued, and exempts individual members of the corporation from personal liability for its debts, obligations or acts, if these powers do not contravene the provisions of the Act incorporation the corporation.

A slight ambiguity arises with respect to an asset of the corporation. The corporation has the power under Section 9(15) of *The **Condominium** Act* to own real property and personal property and under The Interpretation Act would therefore have the power to sue if the property is damaged.

However, under 9(16), owners of the corporation share its assets in their respective common interest proportions. It is not clear whether this means that the owners of the corporation would have to join in any law suit with respect to these assets, or whether the ***condominium*** corporation is acting as a trustee on behalf of the owners.

The situation is clearer with regard to common elements. Under Section 9(18) of *The **Condominium** Act*, the corporation may bring any action with respect to the common elements. If the common elements become damaged, the ***condominium*** corporation may bring an action.

A problem arises with respect to common elements that were incomplete or improperly built by the builder. The ***condominium*** corporation itself was not a party to any agreement with the builder as to what common elements were to be supplied or the quality of the workmanship to be provided and so has difficulty in showing that the builder owed a duty to it.

Notwithstanding this problem, in the case of *Frontenac **Condominium** Corporation No. 1 v. Macciocchi and Sons Ltd*., the ***condominium*** corporation was permitted to bring an action with respect to construction deficiencies in the common elements. In this case, it was considered prudent to have included, as plaintiffs, the unit purchasers as a class, for if the ***condominium*** corporation did not have the power to sue for construction deficiencies, then the unit owners as a group might have had the power.

A problem arises with this technique because, if the basis of the claim is that the builder represented that there would be certain items included in the common elements, then the only people constituting the class of plaintiffs would be those who originally purchased from the builder. Subsequent owners would not be a part of the class.

If the class action is the proper vehicle for legal action based upon deficiencies then surely the recoveries from the builder belong to those purchasers, not to the owners on resale and not to the ***condominium*** corporation.

The ***Condominium*** *Act* gives the [board of directors of the] corporation the duty to manage the affairs of the corporation. This implies both rights and responsibilities with which the board is charged. In any community of this type, unit ownership is constantly changing and all the owners may not be parties to the contract with the party with whom there is a dispute. Thus, there must be a vehicle through which the rights of all the owners affected by such a dispute can be resolved. If the only alternative available to achieve a resolution is by legal action, then it should be the ***condominium*** corporation which represents all the owners where their interests are affected. In a ***condominium*** community the individual owners' lack of privity should not be an issue.

The rights of legal action between owners and the corporation and the corporation and "outsiders" should be clearly spelled out in The ***Condominium*** Act. ***Condominium*** corporations should be able to represent all owners without having to resort to court applications to determine if they must proceed by way of a class action.

Recommendation No. 64:

*The **Condominium** Act be amended to provide that the **condominium** corporation may act as a representative of the unit owners with respect to the common elements, the corporation's assets and two or more of the units in the corporation, notwithstanding that the corporation was not a party to the contract on which the action is brought.*

30 The 1967 Act was repealed and replaced by the ***Condominium*** *Act, 1978*, S.O. 1978, c. 84 (the "1978 Act").

31 Section 14 of the 1978 Act expanded a ***condominium*** corporation's standing to bring an action in a

representative capacity and was passed in response to the above recommendation: Alvin B. Rosenberg, "The ***Condominium*** Corporation as Plaintiff" (1981) 2 Advoc. Q. 471, at 472.

32 Section 14 of the 1978 Act reads as follows:

> 14(1) The corporation after giving written notice to all owners and mortgagees may, on its own behalf and on behalf of any owner, sue for and recover damages and costs in respect of any damage to common elements, the assets of the corporation or individual units, and the legal and court costs in any such actions brought in whole or in part on behalf of any owners in respect of their units shall be borne by those owners in the proportion in which their interests are affected.
>
> (2) The corporation after giving written notice to all owners and mortgagees may sue on its own behalf and on behalf of any owner with respect to the common elements and any units, notwithstanding that the corporation was not a party to the contract in respect of which the action is brought, and the legal and court costs in an action brought in whole or in part on behalf of any owners in respect of their units shall be borne by those owners in the proportion in which their interests are affected.
>
> (3) The notice referred to in subsections 1 and 2 is not required to be given in respect of an action brought in the small claims court.
>
> (4) Any judgment for payment in favour of the corporation in an action brought on its own behalf is an asset of the corporation.
>
> (5) The corporation may, as representative of the owners of the units, be sued in respect of any matter relating to the common elements or assets of the corporation.
>
> (6) Where an action is commenced after this Act comes into force, 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 proportions specified in the declaration for sharing the common interests.
>
> (7) Where an action has been commenced before this Act came into force, a judgment for the payment of money against the corporation is also a judgment against each owner at the time the cause of action arose for a portion of the judgment determined by the proportions specified in the declaration for sharing the common expenses. [Emphasis added]

33 There is nothing in the 1977 Report that addresses or recommends the notice requirements found in s. 14(1) and (2) of the 1978 Act.

34 The underlined words shown in subsections 14(1) and 14(2) above were added by the Standing Administration of Justice Committee after Second Reading. The Urban Development Institute and the Housing & Urban Development Association of Canada ("HUDAC") submitted that a ***condominium*** corporation should not be permitted to commence an action of the type caught by this provision against a developer unless the owners had provided their consent. These two organizations expressed concern that without such prior consent a unit owner would be liable for costs of an ill-advised action commenced by the Board of Directors. Rather than require prior approval, the Committee opted for "disclosure and notice to everyone": See Submission by the Housing & Urban Development Association of Canada, Ontario Council, to the Standing Administration of Justice Committee on Bill 103, *The* ***Condominium*** *Act*, August 1978, page 4; Submission by the Urban Development Institute, Ontario, to the Standing Administration of Justice Committee on Bill 103, *The* ***Condominium*** *Act*, September 29, 1978, page 2; Standing Administration of Justice Committee, Bill 103, *The* ***Condominium*** *Act*, 1978, October 13, 1998, page J1130-2.

35 The 1978 Act was repealed and replaced in 1998 by the Act which was proclaimed in force on May 5, 2001. The notice requirements were placed in a separate subsection. There was no discussion of these notice requirements in the Legislature and very little discussion of these notice requirements at the Standing Committee on General Government where this draft legislation was sent for further consideration.

36 Section 23 of the Act now provides:

> Action by corporation
>
> 23 (1) Subject to subsection (2), in addition to any other remedies that a corporation may have, a corporation may, on its own behalf and on behalf of an owner,
>
> (a) commence, maintain or settle an action for damages and costs in respect of any damage to common elements, the assets of the corporation or individual units; and
>
> (b) commence, maintain or settle an action with respect to a contract involving the common elements or a unit, even though the corporation was not a party to the contract in respect of which the action is brought.
>
> Notice to owners
>
> (2) Before commencing an action mentioned in subsection (1), the corporation shall give written notice of the general nature of the action to all persons whose names appear in the record of the corporation required by section 46.1 or are required by that section to appear in that record except if,
>
> (a) the action is to enforce a lien of the corporation under section 85 or to fulfil its duty under subsection 17 (3); or
>
> (b) the action is commenced in the Small Claims Court.
>
> Costs
>
> (3) Unless the board determines otherwise, the legal and court costs in an action that the corporation commences or maintains in whole or in part on behalf of any owners in respect of their units shall be borne by those owners in the proportion in which their interests are affected.
>
> Judgment as asset
>
> (4) A judgment for payment in favour of the corporation in an action that the corporation commences or maintains on its own behalf is an asset of the corporation. Corporation may be sued
>
> (5) The corporation may, as representative of the owners of the units, be sued in respect of any matter relating to the common elements or assets of the corporation.
>
> Judgment against corporation
>
> (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 proportions specified in the declaration for sharing the common interests.

Objects of the Act

37 Most often, consumer protection has been described as the objective, or a significant objective, of the Act particularly in the context of disclosure requirements for purchasers of units: *Metropolitan Toronto **Condominium** Corporation No. 723 v. Reino*, 2018 ONCA 223, para. 9; *Orr v. Metropolitan Toronto **Condominium** Corp. No. 1056*, 2014 ONCA 855, 327 O.A.C. 228, para. 48; *Toronto Standard **Condominium** Corp. No. 2095 v. West Harbour City (I) Residences Corp.*, 2014 ONCA 724, 328 O.A.C. 255, para. 44; *Lexington on the Green Inc. v. Toronto Standard **Condominium** Corp. No. 1930*, 2010 ONCA 751, 102 O.R. (3d) 737, para. 49; *Harvey v. Talon International Inc.*, 2017 ONCA 267, 412 D.L.R. (4th) 553, para. 62; *Carleton **Condominium** Corp. No. 441 v. Carleton **Condominium** Plan No. 441* (1998), 42 O.R. (3d) 62 (Ont. C.A.), para. 14; *Budinsky v. Breakers East Inc.* (1992), (sub nom. *Abdool v. Somerset Place Developments of Georgetown Ltd.*) 58 O.A.C. 176, para. 25.

38 The standing given under s. 23(1) of the Act to a ***condominium*** corporation to bring an action on behalf of the

unit owners reflects the consumer protection objective of the Act: *1420041 Ontario Inc. v. 1 King West Inc.*, 2012 ONCA 249, 349 D.L.R. (4th) 97, para. 29.

39 It has also been noted that another purpose of the Act is to provide predictability and sufficient certainty to those involved in ***condominium*** projects, including developers and purchasers, to enable them to make informed decisions about their investments, so as to promote the development and purchase of ***condominium*** units: *Lexington*, para. 51.

ISSUE # 1: DO THE NOTICE REQUIREMENTS IN SECTION 23 APPLY TO THE ACTION AGAINST 360?

40 The notice requirements found in s. 23(2) of the Act do not apply to a claim by a ***condominium*** corporation arising from a contract that it has entered with another person. The notice requirements only apply in respect of the type of actions described in s. 23(1) of the Act, namely: an action in respect of (a) damage to any common elements, the assets of the corporation or individual units; and, (b) a contract involving common elements or a unit to which the corporation was not a party: *Middlesex* ***Condominium*** *Corp. 229 v. WMJO Ltd.*, 2015 ONSC 3879, 59 R.P.R. (5th) 11 at paras. 103-105 [claim based in contract by a ***condominium*** corporation for contribution from defendants towards costs of private shared sewage system was not a claim subject to the notice requirement]; *Beckett Elevator Ltd. v. York* ***Condominium*** *Corp. No. 42* (1984), 45 O.R. (2d) 699, paras. 3-4. [counterclaim by ***condominium*** corporation based on elevator maintenance contract to which it was a party not subject to the notice requirement]

41 As noted in the Statement of Defence and Crossclaim, the action against 360 "arises out an agreement between the plaintiff and 360 for the management of the property". As the pleadings described earlier show, the plaintiff's action against 360 is not brought in a representative capacity on behalf of a contract or other cause of action held by the owners, whether current or past, against 360, but rather arises from the alleged breach by 360 of its duties under its management contract with the plaintiff. The plaintiff's action against 360 is similar to the action brought by the ***condominium*** corporation in *Beckett* against an elevator maintenance company with whom it had contracted to maintain the elevator that served a ***condominium*** building. In an attempt to distinguish *Beckett* from this case, 360 suggests that it is unknown whether the elevator in *Beckett* was a common element. Given the typical ownership structure of property in a ***condominium***, it is my view that it very likely that the elevator in *Beckett* was a common element.

42 I find that the action against 360 is not the type of claim caught by s. 23(1) of the Act and therefore the notice requirements under s. 23(2) are inapplicable.

ISSUE # 2: WAS THIS ACTION "COMMENCED" WITH THE ISSUANCE OF THE NOTICE OF ACTION ?

43 360 submits that this action was "commenced" within the meaning of section 23(1) of the Act either by the issuance of a Notice of Action or a Statement of Claim. In this regard, 360 relies on the *Rules of Civil Procedure* which provides that an "action" includes a proceeding commenced by notice of action: Rule 1.03.

44 The plaintiff submits that the meaning of "commence" should have regard to the purpose of the s. 23(1) of the Act -- namely, to provide owners with notice of any proposed litigation by the corporation that may have significant costs consequences for the owners. The exclusion of the notice requirement in respect of an action commenced in the Small Claims Court under s. 23(2)(b) supports the view. There are no such costs consequences in respect of the issuance of a Notice of Action given that a Notice of Action cannot be served on a defendant without filing and serving a Statement of Claim: Rules 14.03(4), 14.08(2). Its issuance merely serves to stop the running of a limitation period when there is insufficient time to file a Statement of Claim: Rule 14.03(2).

45 In my view, adopting 360's proposed meaning of the word "commence" does not reflect its distinct statutory context and purpose. As noted above, words in a statute take their meaning from their statutory context and purpose. The Act and the *Rules of Civil Procedure* are not *in pari materia*. Accordingly, the meaning of words used in the *Rules of Civil Procedure* do not inform the meaning of those words as used in the Act. Further, there is

nothing in the Act that suggests that the definitions and provisions found in the *Rules of Civil Procedure*, a regulation under the *CJA*, should be adopted or otherwise be used to inform the interpretation of the Act.

46 Most importantly, given that there are no significant cost consequences associated with the issuance of a Notice of Action, 360's interpretation is inconsistent with the sole purpose of the notice requirement in section 23(1) of the Act. Further, a broad interpretation of "commence" as suggested by 360 would, in its view, render the plaintiff's very substantial claim a nullity, and thus would not promote the Act's consumer protection objective.

47 Accordingly, I find that the action against 360 was "commenced" with the filing of the Statement of Claim rather than the issuance of the Notice of Action.

ISSUE # 3: WAS THIS REQUIREMENT TO "GIVE WRITTEN NOTICE OF THE GENERAL NATURE OF THE ACTION" SATISFIED BY THE DELIVERY OF THE NOVEMBER 2015 NOTICE?

48 Section 23(2) requires that "the corporation shall give written notice of the general nature of the action" to the owners before it commences an action.

49 The plaintiffs submit that the November 2015 Notice satisfies this requirement. The notice stated that a meeting would be held for several purposes including the following purpose:

> To receive the Report of Clifford J. Blundell, LLB, P.Eng., Litigation Counsel, regarding settlement/ conciliation that was made by the Management Company with Tarion without the knowledge of the Board of Directors, which conciliation with Tarion did not address or reflect all deficiencies which require further investigation;

50 There is nothing in the Act or regulations that specifies: (1) the form of notice; (2) the content of the notice; (3) the length of notice to be given; (4) the method of service of the notice: Alvin B. Rosenberg, "The ***Condominium*** Corporation as Plaintiff" (1981) 2 Advoc. Q. 471, at 472-473. Further, there are no cases that have considered the content of the notice requirement.

51 A similar provision exists under subsection 7(1) of the *Proceedings Against the Crown Act*, *R.S.O. 1990, c. P.27*, which provides that "... no action for a claim shall be commenced against the Crown unless the claimant has, at least sixty days before the commencement of the action, served on the Crown a notice of the claim containing sufficient particulars to identify the occasion out of which the claim arose, and the Attorney General may require such additional particulars as in his or her opinion are necessary to enable the claim to be investigated."

52 In *Mattick Estate v. Ontario (Minister of Health)* *(2001), 52 O.R. (3d) 221*, the Ontario Court of Appeal stated at para. 18:

> ... I think that s. 7(1) requires that a claimant must serve a notice that communicates a complaint which, if not satisfied, could reasonably be anticipated to result in litigation against the Crown. When coupled with particulars that sufficiently identify the occasion in question to permit the Crown to investigate, such a notice fulfils the legislative purpose. It allows the Crown to gather sufficient information to permit resolution of the complaint in advance of legal action or, if that fails, to prepare to defend the litigation which the notice makes it reasonable to anticipate. Not every complaint to the Province must be treated as a s. 7(1) notice. The complaint must be such that, in the circumstances it could reasonably be anticipated by the Crown that if not resolved, litigation could result. [Emphasis added]

53 The November 2015 Notice does not give "notice of the general nature of the action" and thus is insufficient to satisfy s. 23(2) of the Act. The mere fact that it references that a report will be received from litigation counsel is inadequate to convey that the possible commencement of an action in respect of construction deficiencies is being considered by the Board of Directors. Further, the notice does not describe the general nature of the action that was commenced, which goes beyond dissatisfaction with 360's handling of the Tarion claims process. The information

provided by the Information Circular delivered in March, 2016, described above, would have been sufficient to provide the required notice. The six page Synopsis delivered with the March 2016 information circular provides more than ample information to satisfy the s. 23(2) notice requirement.

ISSUE # 4: IS THIS ACTION A "NULLITY" FOR FAILURE TO COMPLY WITH THE NOTICE REQUIREMENT FOUND IN SECTION 23 OF THE ACT?

54 The plaintiff submits that the notice requirement found in s. 23 of the Act is for the benefit of the owners of the corporation. 360 suffered no prejudice as a result of the plaintiff's failure to comply with the notice requirement. The owners of the corporation subsequently received notice of this proceeding after the Notice of Action was issued but before the Statement of Claim was issued. A finding that this action is a nullity for failure to comply with the notice requirement found in s. 23 in these circumstances is a harsh result and has the unintended consequence of resulting in a hardship to the owners and a benefit to a defendant. The plaintiff submits that there is nothing in the Act that expressly states that the consequence of failing to comply with s. 23(2) of the Act results in such action being a nullity. The plaintiff further submits that the failure to give notice in accordance with s. 23 of the Act should be viewed as a procedural irregularity capable of cure rather than a nullity, given the lack of prejudice to the attacking party and the risk that this action may be barred by a limitation period if it is declared a nullity: see *Guaranty Trust Co. of Canada v. Berry*, *[1980] 2 S.C.R. 931*, para. 30; *Lawrence v. IBEW, Local 773*, *2017 ONCA 321*, *138 O.R. (3d) 129*, para. 21, aff'd *2018 SCC 11*, *[2018] 1 S.C.R. 267*.

55 However, it is settled law that an action by a ***condominium*** corporation of the type that comes within the scope of s. 23 of the Act is a nullity in the absence of prior notice to the owners: see *York* ***Condominium*** *Corp. No. 46 v. Medhurst, Hogg & Associates Ltd. (1982), 39 O.R. (2d) 389* (Ont. H.C.), at 391, affd. *(1983), 41 O.R. (2d) 800* (Ont. C.A.); *Beckett Elevator v. York* ***Condominium*** *Corp. No. 42 (1984), 45 O.R. (2d) 699*, para. 2; *Toronto Standard* ***Condominium*** *Corp. No. 2130 v. York Bremner Developments Ltd*., *2016 ONSC 5393*, 75 R.P.R. (5th) 243, paras. 170-174. Similarly, the plaintiff relies on the Supreme Court of Canada's decisions in *British Columbia (Attorney General) v. Canada (Attorney General), [1994] 2 S.C.R. 41*, pages 121-127 and *Blueberry River Indian Band v. Canada (Department of Indian Affairs & Northern Development)*, *[1995] 4 S.C.R. 344*, paras. 41-43, for the submission that the notice requirement in s. 23 is directory rather than mandatory given the resulting effects if the requirement is viewed as mandatory. While that submission is attractive given the consumer protection object of the Act, it is also inconsistent with *Medhurst*.

56 I agree with the view expressed by Justice Myers' in *York Bremner* that despite the above concerns this court is not entitled to ignore the Ontario Court of Appeal's brief but clear decision in *Medhurst* given the constraints of vertical *stare decisis*.

ISSUE # 5: DOES SECTION 134 OF THE ACT PROVIDE A REMEDY FOR NON-COMPLIANCE WITH SECTION 23 OF THE ACT?

57 The plaintiff submits that s. 134 of the Act provides authority to stay a proceeding in order to afford a ***condominium*** corporation an opportunity to comply with the notice requirement found in s. 23 of the Act.

58 Section 134 states:

> Compliance order
>
> 134 (1) Subject to subsection (2), an owner, an occupier of a proposed unit, a corporation, a declarant, a lessor of a leasehold ***condominium*** corporation or a mortgagee of a unit may make an application to the Superior Court of Justice for an order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules or an agreement between two or more corporations for the mutual use, provision or maintenance or the cost-sharing of facilities or services of any of the parties to the agreement.
>
> Pre-condition for application

(2) If the mediation and arbitration processes described in section 132 are required, a person is not entitled to apply for an order under subsection (1) until the person has failed to obtain compliance through using those processes.

Contents of order

(3) On an application, the court may, subject to subsection (4),

(a) grant the order applied for;

(b) require the persons named in the order to pay,

(i) the damages incurred by the applicant as a result of the acts of non-compliance, and

(ii) the costs incurred by the applicant in obtaining the order; or

(c) grant such other relief as is fair and equitable in the circumstances.

Order terminating lease

(4) The court shall not, under subsection (3), grant an order terminating a lease of a unit for residential purposes unless the court is satisfied that,

(a) the lessee is in contravention of an order that has been made under subsection (3); or

(b) the lessee has received a notice described in subsection 87 (1) and has not paid the amount required by that subsection.

Addition to common expenses

(5) If a corporation obtains an award of damages or costs in an order made against an owner or occupier of a unit, the damages or costs, together with any additional actual costs to the corporation in obtaining the order, shall be added to the common expenses for the unit and the corporation may specify a time for payment by the owner of the unit. [Emphasis added]

59 The vast majority of compliance cases under s. 134 of the Act are about "people, pets and parking" and arise from infringements of the declaration, by-laws and rules of the ***condominium*** corporation: Audrey Loeb, *The* ***Condominium*** *Act*: A User's Manual, 5th ed. (Ontario: Thomson Reuters, 2018) p. 513.

60 Contrary to the plaintiff's submission that section 134 was enacted after *Medhurst*, this provision can be traced to section 23 of the 1967 Act which provided:

23(1) Where a duty imposed by this Act, the declaration or the by-laws is not performed, the corporation, any owner or any person having an encumbrance against a unit and common interest may apply to the Supreme Court for an order directing the performance of that duty.

(2) The Court may by order direct performance of the duty, and may include in the order any provisions that the Court considers appropriate in the circumstances.

(3) Nothing in this section restricts the remedies otherwise available for failure to perform any duty imposed by this Act. [Emphasis added]

61 In any event, the purpose of s. 134 is to direct compliance with the Act and the other instruments referenced therein: *Stulberg v. York* ***Condominium*** *Corp. No. 60 (1981), 34 O.R. (2d) 92*, para. 11 (C.A.). I have not been directed to any case law that supports the plaintiff's submission that s. 134, and in particular, the authority to grant "such other relief as is fair and equitable in the circumstances" provides a court with authority to relieve a person from non-compliance.

62 It is impossible at this point, given that the action has been commenced, to compel performance with the section 23 requirement by staying the action and ordering that service be made on the owners effective *nunc pro tunc*.

Such order would negate the notice requirement and thus the purpose of the Order would not be to compel performance with the Act but rather to relieve the corporation from compliance with the Act.

63 In my view, s. 134 of the Act affords no assistance to a ***condominium*** corporation that seeks relief from compliance with the notice requirements of s. 23 of the Act.

ISSUE # 6: DOES THIS COURT'S AUTHORITY TO GRANT RELIEF FROM FORFEITURE EXTEND TO PROVIDING A REMEDY FOR NON-COMPLIANCE WITH SECTION 23 OF THE ACT?

64 Section 98 of the *CJA* provides that "[a] court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just".

65 Relief from forfeiture has traditionally been limited to forfeiture or penalties arising from a breach of contract. For instance, in *Dube v. RBC Life Insurance Company*, *2015 ONCA 641*, *127 O.R. (3d) 161*, the plaintiff, injured in a car accident, was granted relief from forfeiture of his disability insurance arising from failure to give timely notice of his claim to the defendant insurer.

66 However, the Ontario Court of Appeal in *Poplar Point First Nation Development Corporation v. Thunder Bay (City)*, *2016 ONCA 934*, at paras. 7 and 33, makes it clear that a court may grant relief from forfeiture under s. 98 of the CJA in respect of a forfeiture imposed by statute when: (1) the forfeiture is not imposed as a penalty for breach of any requirement of the statute; and, (2) relief from forfeiture would not be contrary to the statutory scheme as the statute does not expressly, or by necessary implication, exclude the court's general power to grant relief from forfeiture.

67 I agree with 360's submission that the plaintiff has nothing to forfeit given that the motion judge in *Medhurst,* whose reasons the Ontario Court of Appeal adopted, found that the notice requirement was not merely procedural requirement but rather a pre-condition to a ***condominium*** corporation's capacity to maintain an action of the type described in the predecessor to s. 23(1) of the Act. Accordingly, relief from forfeiture is not an answer to the plaintiff's failure to comply with the notice requirements found in section 23 of the Act.

CONCLUSIONS

68 360's motion for summary judgment is dismissed on the grounds that: (1) the notice requirements under s. 23(2) of the Act are inapplicable given that the action against 360 is not one of the types of action described in s. 23(1) of the Act for which notice is required to be given; (2) in any event, even if the plaintiff was required to give notice to the owners prior to commencing the action it did so given that: (a) the action commenced with the filing of the Statement of Claim on April 8, 2016 rather than the Notice of Action; (b) the delivery of the Synopsis on or about March 18, 2016 satisfied the notice requirement under s. 23 of the Act.

69 I ask that the parties make every effort to settle the question of costs failing which the plaintiff shall provide its submissions within one week, 360 shall provide its submissions within two weeks and the plaintiff shall provide any reply submissions within three weeks. Each submission shall be a maximum of eight pages in addition to an Outline of Costs and any Offers to Settle.

M.D. FAIETA J.