CITATION: Brasseur v. York, 2019 ONSC 4043
COURT FILE NOS.: CV-17-573795; CV-18-598549
DATE: 20190704

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
HELEN MARY BROWNE BRASSEUR	)	*Carol A. Dirks* and *Rachel Fielding*, for the Applicant
	)	
Applicant	)	
	)	
– and –	)	
	)	
YORK CONDOMINIUM CORPORATION NO. 50	)	*Fatima Vieira*, for the Respondent
	)	
Respondent	)	
	)	
	)	
	)	**HEARD:** July 17, 2018 and April 17, 2019

JUSTICE S. NAKATSURU

[1] The Applicant, Helen Brasseur, is the registered owner of Unit 701, 1360 York Mills Road (the "Unit"). She took title to the Unit in 1978 and has lived there since that time. The building is owned by York Condominium Corporation No. 50 ("YCC 50"). YCC 50 is a non-profit condominium corporation created in 1972 and is governed by Ontario's *Condominium Act, 1998,* S.O. 1998, c. 19 (henceforth the "*Act*"). YCC 50 has been managed by AA Property Management Inc. ("AAPM") for the last twenty years. Tim Brasseur, the adult son of Helen Brasseur, also resides in the unit and became a primary point of communication with YCC 50 and AAPM.

[2] Ms. Helen Brasseur is 79 years old. Since 2009, when the exterior windows of the condominium building were replaced, the Brasseurs noticed condensation problems. That led to mould, which led to years whereby the Brasseurs and YCC 50 tried to remediate the problem. Ultimately, this has led to the two competing applications before me. One by Ms. Brasseur and one by YCC 50. Ms. Brasseur alleges that YCC 50 has breached its duty to maintain and repair

the common elements and that its actions were oppressive. YCC 50 denies this and alleges that Ms. Brasseur has breached her duty to maintain and keep in repair her Unit.

[3] The parties have agreed to bifurcate Ms. Brasseur's claim for compensation which are to be dealt with at a separate hearing.

[4] At the initial hearing of this application, the remediation was still in progress at the Unit. The parties were having a difficult time in agreeing to what and how any remediation should be done. It seemed obvious to me that despite the difficulties coming to a mutual agreement, that the remediation had to be completed. It was in no one's interest to have the Unit remain vacant and the mould issue unaddressed. Thus, at the end of the hearing, with some encouragement, the parties indicated that they wished an opportunity to discuss and resolve some of the multiple issues dealing with the nature and scope of the proposed remediation before I rendered my decision. This made sense to me. Thus, this indulgence was granted. A number of extensions were requested of and granted by me given that discussions were taking place and the repairs were being conducted.

[5] On January 21, 2019, I was advised that the parties had completed the remediations and had agreed to the pricing of them. What remained outstanding was the issue of who would be responsible for the costs of these remediations. There was also the issue of damages sought by the Applicant. Thus, I am tasked with deciding the issue of liability.

[6] Given the nature of the allegations raised in this application, a brief summary of the chronology of the events will be helpful in understanding the issues and my reasons. This case has had a long history.

A. CHRONOLOGY OF EVENTS

[7] The events relating to the disputed repairs are organized by year and are set out below.

The years 2009-2012

[8] On September 25, 2009, Ms. Brasseur first reported the existence of mould in the Unit by submitting a work order. Within a month of receiving this work order, YCC 50 arranged for repairs to be performed by J & A Renovations and was invoiced for the work. However, according to Tim Brasseur, he informed YCC 50 that the work completed by J & A Renovations was cosmetic and that the condensation issues returned shortly afterwards. Several months later, YCC 50 had a contractor come in to re-caulk the windows and doors.

[9] In 2011, the Brasseurs reported that the heating coil system in the ceiling of the Unit was not working properly. No action was taken by YCC 50.

[10] In 2012, YCC 50 arranged for Dominion Windows to attend the Unit and perform repairs. Dominion Windows attended the Unit on July 23, 2012. On September 12, 2012, YCC

50 received a work order from Tim Brasseur stating that two windows still had drafts. In response, YCC 50 arranged for Dominion Windows to perform more repairs on October 5, 2012.

The years 2013-2014

[11] In 2013, YCC 50 retained a building consultant to investigate condensation issues in the building. The consultant gave YCC 50 recommendations for improving the air circulation in the affected units. The consultant did not investigate the Brasseurs' unit specifically. On January 11, 2013, YCC 50's property manager provided written recommendations to Helen Brasseur on reducing condensation. Tim Brasseur states that he followed these recommendations, but they did not alleviate the moisture issues.

[12] On February 1, 2013, GRG Engineering ("GRG") issued a report to YCC 50 containing various findings and recommendations after investigating several units for moisture damage. These included recommendations that the ventilation system be cleaned, that the unit ventilation fans be upgraded, that exterior insulation systems should potentially be added, and that residents should remove weather-stripping and keep ventilation fans on.

[13] On or about October 21, 2013, YCC 50 received a letter from Tim Brasseur, setting out a remediation plan. On November 30, YCC 50 sent a response asking for evidence on which this remediation plan was based so that it could be reviewed by YCC 50's engineers. YCC 50 never received a response.

[14] On October 14, 2014, Tim Brasseur sent AAPM's new manager, Tracy Eberlin, the same letter he had sent in October 2013. Ms. Eberlin arranged for a contractor, Paul Belchior of Belchior Contracting, to examine the apartment and provide a repair quote. The contractor submitted a repair quote on November 24, 2014. Ms. Eberlin wrote to the Applicant to advise them of this on November 25th, and sent a further status update on December 15th. The Board of Directors of YCC 50 approved a repair quote on December 18, 2014. The repair work for the Unit was scheduled for January 2015.

The year 2015

[15] Tim Brasseur requested that the work not proceed as scheduled because he wanted the windows and balcony door to be reviewed, and to expand the scope of the repair work. YCC 50 arranged for Tri-Mark Maintenance to inspect the windows and doors, but they did not report any defects. The scope of work remained unchanged.

[16] A meeting for February 17, 2015, was scheduled to discuss the repair work. According to YCC 50, Tim Brasseur cancelled the meeting and the repair work was postponed. Tim Brasseur simply states that the meeting "never happened". On February 23, 2015, Belchior Contracting sent a letter to YCC 50 and Tim Brasseur stating that the work was to begin on March 16, 2015, and that the Applicant would have to remove all contents from the Unit. Tim Brasseur claims that he never received this letter, and that there was no evidence it was ever delivered. YCC 50

states that on March 16, 2015, Tim Brasseur refused to allow Belchior Contracting to proceed with the repair work. YCC 50 had to forfeit its deposit.

[17] On September 15, 2015, Tim Brasseur approached YCC 50's Board President, Mr. Girard, to discuss repairs to the Unit. This led to correspondence between the Brasseurs, YCC 50 and AAPM, but the discussions were later stalled. These discussions included:

- On September 18, YCC 50's property manager wrote to the Applicant with a proposed scope of work and requested available dates for the work to proceed. Tim Brasseur had concerns about the proposed plan. The AAPM advised him to put his concerns in writing.

- On or about November 23, 2015, Tim Brasseur delivered a five-page timeline of events to the AAPM to be passed on to the board of directors.

- On December 8, 2015, Tim Brasseur received a letter from Ms. Eberlin, the property manager, stating that the timeline would be forwarded to the board of directors upon receiving a cover letter.

- On January 8, 2016, Ms. Eberlin sent a follow-up letter to Helen Brasseur indicating that YCC 50 was awaiting her cover letter, and advising that the next board meeting was February 2, 2016. In response, Tim Brasseur requested that all communication be with the board directly.

- On or about February 8, 2016, property management distributed a cover letter and questionnaire to the Applicant to complete.

The year 2016

[18] In February of 2016, YCC 50 again retained GRG to investigate condensation issues in some of the units. According to Tim Brasseur, on February 16, 2016, he was notified that GRG required entry to the Unit on February 23, 2016, to perform an investigation. On February 19, Tim Brasseur called Ms. Eberlin, indicating that he refused to allow GRG to enter the Unit.

[19] In March 2016, Ms. Eberlin advised that YCC 50 was arranging for an environmental assessment of the Unit. As of the end of May 2016, however, the Board of Directors had not given authorization for the assessment to proceed. On April 14, 2016, Tim Brasseur and the property manager, Ms. Eberlin, signed an agreement with respect to future environmental testing and investigations within the Unit that allowed Tim Brasseur to be involved.

[20] On April 29, 2016, YCC 50 sent a letter to the Applicant requesting entry by GRG to investigate potential damage that was outside the scope of an environmental assessment. On May 2nd, Tim Brasseur attended the management office and advised that he was refusing entry.

[21] On May 19, 2016, David De Rose, an engineer from Synergy Partners (a consulting firm) entered the Unit to investigate, but performed a short visual inspection only. Mr. De Rose's affidavit states that based on his inspection, the inhabitants' failure to use in-slab heating and poor ventilation were both contributing factors to the condensation issues.

[22] The Brasseurs corresponded with YCC 50 management and an environmental assessment by Grande Environmental was set for July 4, 2016. The inspection took place, and Grande Environmental provided a report on July 18, 2016. The report confirms the existence of mould growth in the apartment, as well as an asbestos report. Both Concord Group and Spectrum Building Services subsequently entered the Unit to provide repair quotes in late July 2016.

[23] On August 26, 2016, the Applicant requested a status update. On September 1, YCC 50 received a scope of work from David De Rose of Synergy Partners, its consulting engineers. On September 12, 2016, YCC 50's legal counsel advised the Brasseurs that she would follow up with them about repair work shortly. On October 20, 2016, YCC 50's legal counsel sent a follow-up letter, advising that repairs would commence on November 14, 2016, but that the cost of the repairs would be shared.

[24] The work could not proceed on November 14, 2016, because the Brasseurs did not remove the contents of their Unit.

[25] On December 8, 2016, YCC 50's counsel confirmed that repairs were rescheduled for January 11, 2017. The letter included instructions on preparing the Unit for the repair work. However, on December 21, 2016, YCC 50's counsel advised that the start date had been cancelled due to the lack of a confirming response from the Applicant. Counsel asked for a date when the Applicant would remove the contents of the Unit. On December 22, 2016, counsel for the Brasseurs responded. Counsel stated that the Applicant was not refusing access, but sought details about the proposed remedial work to be completed. According to the Applicant, that information was not forthcoming.

The year 2017

[26] On January 17, 2017, YCC 50's counsel responded and confirmed that YCC 50 was proceeding with an insurance claim. There was an investigation by an independent adjuster, ClaimsPro. An inspection by ClaimsPro took place on January 26, 2017. YCC 50's insurer ultimately denied coverage, relying on an exclusion clause for claims related to mould.

[27] This application was issued on April 21, 2017. YCC 50's counsel asked the Applicant's counsel for the repair work in the Unit to proceed. The parties agreed that July 4, 2017, would be the new start date for remediation, and to adjourn the hearing date of this application.

[28] As the work proceeded, discussions between counsel continued and the scope of work was amended. Asbestos was found in the Unit, and an abatement company was called to inspect the Unit on October 19, 2017.

[29] Tim Brasseur indicated that he received no communication from YCC 50 about the progress of this mould remediation work, and that his meeting requests were denied. On November 22, 2017, Tim Brasseur requested clarification about the resulting loss of interior space along certain walls of the Unit due to the repair work. Tim Brasseur directed that the work could not continue until this issue was resolved.

[30] Although discussions continued and mediation was completed, the work did not resume from November 23, 2017, to the initial hearing date of the application. The Brasseurs identified numerous problems with the existing work, while YCC 50 states that the Brasseurs' requests are unreasonable and unsafe, and that they are responsible for the delays.

B. MOTION FOR THE ADMISSION OF FRESH EVIDENCE

[31] Before turning to the merits of this application, I must deal with a preliminary issue. The Brasseurs have formally brought a motion to introduce fresh evidence. Some background to the motion is required.

[32] On July 17, 2018, the parties attended before me to argue the merits of the application on the issues of liability and the necessary remediation work to be done in the Unit. At the conclusion of the hearing, I directed the parties and their experts to attempt to work together to finalize a scope of work so that the Unit could be made liveable. The remaining issues of what caused the mould and who should be responsible for the cost of remediation could be later determined by me.

[33] In August of 2018, Mr. Thomas Furr, the expert representative for Ms. Brasseur, and Mr. David De Rose, the expert representative for YCC 50, met to discuss and finalize the scope of work. The initial plans had not included removal of the interior service wall behind the master bathroom and laundry room. Behind this false wall was a hollow area that housed the domestic plumbing. This wall was removed at Mr. Furr's insistence given that he found temperature disparities in this area. In addition, the finalized scope of work included installation of added insulation above the window head areas.

[34] While the remediation work was underway, a leak was discovered in the interior false wall. The Corporation's contractors investigated and found a corroded pipe in the interior bathroom wall behind the Unit. YCC 50 retained a mechanical consultant to conduct a review, remediate and prepare a report. The cost for the mechanical consultant was paid by the Corporation and deleted from the pricing for the remediation work.

[35] While my decision on the application was on reserve, on mutual consent, the parties contacted me given these new issues. On October 30, 2018, a teleconference call was held. I provided some instructions and guidance to the parties.

[36] The Applicant prepared a motion record to introduce fresh evidence including the affidavits from Mr. Furr and Tim Brasseur. YCC 50 prepared a responding motion record including another affidavit from Mr. De Rose. Cross-examinations were conducted. The motion

was perfected and heard by me on April 17, 2019. I reserved my decision on the motion along with the merits of the application.

1. The Test for the Introduction of Fresh Evidence before a Decision is Made

[37] The test for allowing fresh evidence on appeal is stricter than at trial. This makes sense since the admission of fresh evidence on appeal overturns a final judgment and a new trial can potentially be ordered. The need for finality in this context is a paramount consideration: *Palmer v. The Queen*, [1980] 1 S.C.R. 759.

[38] Equally, where a case has been decided and judgment entered, the need for finality usually trumps other considerations. Thus, to re-open a trial under rule 59.06(2)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, after judgment or other order has been issued and entered is exceptional with a number of factors being considered: *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 41 O.R. (3d) 257 (C.A.).

[39] However, when the matter is yet with the judge of first instance, (at least in civil matters), the test for the admission of fresh evidence is less stringent.[1] This is so even where the judge has already decided the case, but before formal judgment is entered. In this circumstance, it has been held that a two-prong test must be met: (1) would the evidence if presented at trial, probably have changed the result; and (2) could the evidence have been obtained before trial by the exercise of reasonable diligence?

[40] This was the conclusion of Grant J. in *Scott v. Cook*, [1970] 2 O.R. 769 (H.C.), after he had canvassed a number of authorities. Justice Grant referred to some of the possible reasons why this would be the case:

> It seems, therefore, that the rule pertaining to the right of a trial Judge to open up a case and consider new or fresh evidence after the close of the trial but before judgment is entered is less stringent than the principle governing an application to adduce new or further evidence before an appellate Court. While there is not too much indication in the authorities as to the reasons for such difference, the following is a brief resume of what the various Courts have said in this respect:
>
> > (1) The trial Judge should have unfettered discretion in this matter so as to ensure that a miscarriage of justice does not occur;

[1] I note that this motion was brought after the parties had made final submissions on a Rule 14 application. It was styled as a motion to introduce fresh evidence. Different considerations may apply when a party moves to re-open its case at a trial: *Malkov v. Stovichek-Malkov*, 2018 ONCA 620 at paras. 12-15.

> (2) before entry of a judgment, the trial Judge is in a better position to exercise that discretion than is an appellate Court. The trial Judge knows the factors in the case that influenced his decision and can more readily determine the weight that should be given to the new evidence offered;
>
> (3) the authorities indicate that a trial Judge can always reconsider his decision until the judgment is drawn up and entered;
>
> (4) the trial Judge is the one in the best position to judge the bearing of the new or further evidence upon the case in light of the evidence already heard;
>
> (5) once a litigant has obtained a judgment, he is entitled not to be deprived of it without very solid grounds.

[41] The Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, dealt with a decision made by a trial judge who had used the test set out in *Scott v. Cook.* The trial had been decided but formal judgment had not yet been entered. The trial judge had declined to admit the fresh evidence. The Ontario Court of Appeal reversed the trial judge's decision and admitted the fresh evidence. The Supreme Court of Canada upheld the trial judge's decision, found he made no error in principle, and decided that appellate deference should have been afforded. Major J. noted that appellate courts should defer to the trial judge who is in the best position to decide whether, at the expense of finality, fairness required the trial be reopened. Major J. further commented that this discretion should be exercised sparingly and with the greatest care so that fraud and abuses of the court's process do not happen.

[42] The reasons for this caution were well-expressed in *Risorto v. State Farm Mutual Automobile Insurance Co.* (2009), 70 C.P.C. (6th) 390 (Ont. Div. Ct) at paras. 34-36.

[43] More recently, in the case of *Mehedi v. 2057161 Ontario Inc. (c.o.b. Job Success)*, 2015 ONCA 670, Lauwers J.A. has further expanded upon the test found in *Sagaz*. He explained at para. 20:

> In my view, properly understood, the test in *Sagaz* goes beyond the two questions of whether the new evidence, if presented at trial, would probably have changed the result, and whether the evidence could have been obtained before trial by the exercise of reasonable diligence. It includes considerations of finality, the apparent cogency of the evidence, delay, fairness and prejudice, factors that were articulated by this court in its decision in *Baetz*. The error in this case was not in the motion judge's decision to apply *Sagaz* rather than *Baetz*, but in his application of the test, as I have already described. In this case, the new evidence meets both the *Baetz* and the *Sagaz* tests for re-opening a trial assuming there is any real distinction between the two.

[44] I will apply these considerations in the case at bar. But this case is also different from these authorities in a significant way. I had not yet decided the case before the motion to introduce fresh evidence was made. When a decision is made, greater caution is needed. As explicitly recognized in *Sagaz*, where a decision has been released but formal judgment not yet entered, a litigant who comes to know of the effect of the decision, may try to disturb that judgment or to reconstruct a disfavoured case by putting forth new evidence. This potential for abuse must be discouraged.

[45] However, when a case is yet undecided, the balance may tilt more towards fairness and truth-seeking rather than finality. This has been recognized in the authorities that have dealt with motions to introduce fresh evidence before a judge has rendered a decision. These authorities have generally held that the threshold required in the first question of *Sagaz* is loosened: *Carleton Condominium Corporation No. 116 v. Sennek,* 2017 ONSC 5016; *Varco Canada Ltd. v. Pason Systems Corp.,* 2011 FC 467; *Levant v. Day,* 2017 ONSC 5988.

[46] This different approach to the first prong of the test was emphasized by Lauwers J. (as he was then) in *Jackson v. Vaughan (City),* 2009 CarswellOnt 152 (S.C.J.) at paras. 22-23

> It seems to me intuitive that where a court has not yet reached a conclusion on the matter to be addressed by the fresh evidence the standard ought to be somewhat relaxed, although I am mindful of the need to avoid never ending evidence….. Given the current state of my deliberations I have decided to exercise my discretion in favour of admitting the fresh evidence. I cannot say that it will likely be conclusive of the issue of vagueness, that it would probably change the result, or even that it would probably have an important influence on the result, but I can say that it may have an influence on the result.

[47] In my opinion, where a decision has not yet been rendered, the need for finality does not require the evidence to have "probably" changed the result if it had been presented at trial. I emphasize that no decision has yet been made. There is no "result" to speak of. The judge may be at a very preliminary stage of adjudicating the case in their mind. In these circumstances, to have a test that makes reference to a likelihood that the fresh evidence could have affected the result is premature if not illogical. Furthermore, when the parties do not know the result, any dangers associated with permitting parties to present fresh evidence is not as acute. Thus, in my view, provided a judge finds it in the interests of justice to do so, the judge may properly exercise the discretion to receive fresh evidence.

[48] That being said, the proffered evidence must still be relevant and cogent. The need for orderly and efficient litigation demands that such motions remain exceptional.

[49] The degree of cogency required to pass the threshold will depend on the circumstances. For instance, if the added delay, cost, or complexity of the proceedings will likely substantially increase due to such a motion, it may require increased probative value of the evidence. Or, if the opposing party will suffer prejudice due its admission, this may be a reason to require the

evidence be such that the denial of its admission could work a clear miscarriage of justice. On the other hand, when countervailing factors are not significant, the truth-seeking interest may require admission even though the fresh evidence does no more than confirm or corroborate other evidence. A trial or application judge hearing the motion will be in the best position to balance the various factors.

2. Application of the Test to the Case at Bar

[50] In this case, the Applicant wishes to admit two pieces of fresh evidence: (1) evidence of a water leakage behind a false wall in the Unit; and (2) evidence of the need to add insulation to the window head of exterior windows in the Unit.

[51] For the purpose of assessing its cogency, two factual issues regarding the water leakage are important: (1) how much water was leaking from the pipes; and (2) did that contribute to the mould in the Unit?

[52] Regarding the additional insulation, this fresh evidence is confirmatory of Mr. Furr's initial opinion presented on the application. It also potentially could be an admission by YCC 50 as to it being a contributing cause to the mould.

(i) Summary of the Fresh Evidence

[53] As I noted, two affidavits were presented by the Applicant on the fresh evidence motion: Mr. Furr and Tim Brasseur. In response, the Respondent introduced an affidavit of Mr. De Rose.

[54] Mr. Thomas Furr is a certified Residential Air System Design Technician from the Heating, Refrigeration, and Air Conditioning Institute of Canada. He is certified as an Energy Star and Energuide Evaluator and a trainer with Natural Resources Canada. He has done work in the area for 28 years with an interest in energy evaluations and related conditions like mould. He and Tim Brasseur are acquainted with each other.

[55] Mr. Furr testified about the installation of additional insulation above the window head areas to stop the reappearance of condensation in those areas which would increase risk of mould. Mr. Furr testified that the energy modeling prepared by Mr. De Rose of Synergy Partners showed that condensation would definitely re-appear in these areas. According to Mr. Furr, when discussing the scope of work to be done, Mr. De Rose agreed to the addition of the insulation albeit of a different sort, although he had previously dismissed those concerns.

[56] In his first affidavit on the application, Mr. Furr had referred to the same interior wall housing the plumbing as the "false" wall. It exhibited extreme temperature disparities in the area. He believed there was significant air leakage within the wall which could create a real risk of condensation and mould. When the contractor removed the false wall, the shut-off valves had to be replaced as they started to leak. After observing the area, Mr. Furr opined that there had been fairly extensive water leakage coming from the units above the Unit. In his view, the leak was

not of recent origin given the black colour of floor and galvanic corrosion found. In his opinion, the leakage would not be constant as it would depend upon use of toilets and showers from the units above the Unit. It could have been minor at first and then become more significant. Mr. Furr testified that the significant amount of moisture in the false wall was exacerbated by and contributed to by the leaking plumbing stack. When combined with the air leakage from the exhaust vents connected to the outside which feeds into that wall and the temperature differentials, he opined this was the reason why the unit sustained the level of condensation and moisture it did which contributed to the growth of mould.

[57] Mr. Furr also observed that there were water blisters on the false wall. He popped one and water escaped from it. Mr. Furr had noted these water blisters or bubbling effects in the paint in his earlier affidavit. He opined that a "vapor drive" resulted within the false wall area when the concrete behind the false wall absorbed the moisture from the leakage. Eventually when the concrete could not absorb more, the moisture had to go somewhere, thus moving into the false wall and creating the blisters.

[58] Mr. Furr opined that the significant water leakage in the false wall was a major contributing factor to the moisture issues and mould growth.

[59] On September 25, 2018, Tim Brasseur went to see the progress of the work. He saw the leak and took a video of what he found. He testified he heard the sound of water through the main stack and saw water from sanitary pipe splashing down and hitting the floor.

[60] Mr. Brasseur in cross-examination testified that there were other occasions when there was water flooding in the same area. Once was in 1999 when he had heard dripping and an employee from AAPM came and found nothing after going through access panels. At the time, it was simply attributed to sweaty pipes in the summer. There was another time when there had been an overflow of a tub in an upper unit. This was in about 2014 or 2015, and Tim Brasseur had heard dripping. When an access panel was removed, there was visible water which had soaked into the carpet in the hallway. Mr. Brasseur cleaned it up with a wet vacuum.

[61] Mr. De Rose is a professional engineer and a principal of a company called Synergy Partners. He is a building enclosure specialist with over 20 years of experience in evaluating building enclosure performance problems and designing retrofit repairs. Mr. De Rose gave evidence responding to the two issues raised by Mr. Furr.

[62] With respect to the additional insulation placed at the window heads, Mr. De Rose's opinion was that this was not necessary provided that the humidity was controlled and the in-slab concrete heat was running. He agreed to add the insulation just to keep the remediation going as Mr. Furr insisted on it.

[63] Mr. De Rose's opined that if the radiant ceiling coils were operated properly and the humidistats controlled the fans to keep the humidity low, he was not concerned about the deterioration at the slab edges or the window heads. Mr. De Rose testified there was no question

that adding the insulation above the window heads would reduce the risk for condensation, but whether it was strictly required would depend on the surface temperatures on a really cold day. Installing metal flashings and installation was a reasonable accommodation in his view.

[64] Mr. De Rose was cross-examined on the realities of how heating works in the Unit. The thermostat cycles on and off to maintain a certain temperature and the actual temperature within the Unit fluctuates. There were also other heat sources in the Unit such as kitchen stoves, TV, people, etc. Mr. De Rose maintained that in the ceiling heating system, the slabs store the heat and this smooth out the peaks and valleys. Mr. De Rose said moisture accumulation is only a problem when the heat is off for long periods of time.

[65] Mr. Furr replied to Mr. De Rose's opinions. Mr. De Rose's opinion that the window head insulation was not required was premised on the heating element in the ceiling being constantly on. Radiant coil heating did not work that way. The controls in the Unit cycle on and off and the temperature fluctuates between a range even though the control is on and set for a certain temperature. Other factors within the Unit, such as heat from appliances, can affect the cycle and the timing. Given this, the exterior concrete slab would cool at a faster rate than the interior air and this could result in condensation at isolated points.

[66] Mr. De Rose also opined that despite galvanic corrosion in the plumbing stack, no pitting or cavity was observed and the pipe looked like it was in good condition. Mr. De Rose opined that such surface corrosion and staining was normal for piping of this vintage. Other serious corrosion observed could be the result of dissimilar metals being adjacent to each other. The mesh supporting the wall had surface corrosion but was in overall good condition.

[67] Mr. De Rose averred that the plumbing work order done by the plumbing contractors noted that the leak was through pin holes in a 3-inch copper pipe and a cracked cast-iron Y joint that connected to the main stack. These components were located in the wall of Suite 801. There was no leakage found occurring at the piping in the Unit. The water came from the suites above and then entered the Unit via the slab opening around the drain stack.

[68] On September 21, 2018, Mr. De Rose had not seen any leakage around the main stack or the base indicating the leak was not occurring at that time. The video taken on September 25th shows leaks around the drain stack. From this, Mr. De Rose opined that the leakage started after the wall was opened by the contractors and was not long lived.

[69] It was Mr. De Rose's opinion that the recently reported plumbing issues were not related to past exterior wall deterioration because if water leaking above the Unit was a significant on-going moisture source, then one would expect the deterioration to be worse there than other locations. This was not the case. In cross-examination, he agreed that concrete floors and walls could absorb water but he believed that if water was leaking into the Unit, one would expect it to pass through into Unit 601. If this was a long standing problem, one would expect suite owners below to have raised an objection. He was shown a photo of staining in the ceiling of Unit 601, but his opinion remained unchanged.

[70] In his opinion, minor amounts of water sitting on the concrete slab did not pose a risk to added humidity in the Unit any more than standing water in the toilet. The ceiling and wall finishes were in good condition and not deteriorated as it would be if exposed to prolonged wetting. Even after being shown evidence of efflorescence (white salts) on the wall, the blistering and bubbles behind the paint on the wall, and the surface corrosion, he did not change his view, although he did admit they could be a result of moisture or water. This fresh evidence did not change Mr. De Rose's original opinion that the lifestyle of the Brasseurs caused the mould.

(ii) Analysis on the Admissibility of the Fresh evidence

[71] I find that the fresh evidence should be admissible. To begin, the evidence about the leaking pipes and the installation of additional insulation above the window head areas to stop the reappearance of condensation in those areas, could not have been discovered at the time of the initial hearing of the application. At that time, the drywall was up and hid these issues. It would not have been reasonable for the Applicant to tear done the walls in order to uncover all possible defects. As Mr. De Rose said, he had no reason to go "start busting walls open in a 45 year old building." It was only after the agreement on remediation had been reached that further work was conducted and these issues were uncovered.

[72] Secondly, the countervailing factors against admission are not weighty. This motion was brought while my decision was under reserve. However, I was kept abreast of the developments. In giving directions, I was of the view if the matter could not be mutually settled by the parties, that the steps for a formal motion to introduce fresh evidence should be followed with a timetable. Any delay caused by the motion was manageable and could be minimized. Furthermore, given that the parties had agreed on the scope of work and the Unit was being remediated during this period of time, the parties were not suffering any prejudice from any delay caused by this motion. The issues that needed to be decided were narrowed after the hearing of the application and any delay in the final resolution did not impact on making the Unit liveable as soon as it was practically possible. Furthermore, the issues raised in the fresh evidence do not further complicate the issues at the hearing. They involved the same issue regarding causation of the mould. There was no unfairness to the parties in the sense that the fresh evidence would have injected totally new issues on the application. There was no procedural unfairness in that the parties were able to readily produce evidence and had the opportunity to cross-examine fully on that evidence. The parties resorted to the experts who had already been retained for the initial application and who were doing ongoing work on the remediation. The added cost of the motion was thus not significant.

[73] In light of these considerations, let me address the cogency of the evidence. In my view, the fresh evidence is no smoking gun.

[74] The water leaking from the pipes and any condensation at the window head are not decisive causes of the mould in the Unit. However, they are cogent in that they provide more logical and reasonable explanations for potential sources of moisture in the Unit that could lead

to mould. Thus, the significance of this fresh evidence lies not in the determinative nature of it. It does not decisively resolve the issue of why mould was occurring within the Unit. But, in my view, its significance lies in supporting the conclusion that the development of mould in this Unit is a complex issue. Causation is not a straightforward issue. Mould can originate for a number reasons and difficult to discern. As my reasons will go on to show, this is in itself important. Said in a different way, the indecisive nature of the fresh evidence on this issue is itself significant in my determination of the first issue on this application. That is, it contributes to my view that it cannot be established on a balance of probabilities that the lifestyle of the Brasseurs was the cause of the mould. In this way, I can say that the fresh evidence will likely have an influence on my decision.

[75] In these particular circumstances, I find that the fresh evidence is admissible.

C. DID YCC 50 OR MS. BRASSEUR BREACH THE *ACT*?

[76] Ms. Brasseur alleges that YCC 50 breached sections 17, 90, and 117 of the *Act*. Ms. Brasseur submits that YCC 50 failed to take all reasonable steps to maintain the common elements and YCC 50 permitted a condition (mould) to exist in a unit or in the common elements when the condition was likely to damage the property or cause injury to an individual. As a result, she seeks a compliance order under s. 134.

[77] In its own application, YCC 50 relies on the following provisions in the *Act* and YCC 50's declaration: sections 90, 91, 117 of the *Act* and Article XIV s. 1 of the declaration. These provisions impose obligations on the Brasseurs to maintain the Unit and to take steps to repair and deal with any condition (the mould) that creates an unsafe condition to the occupants or to the property or assets of YCC 50. It is YCC 50's position that pursuant to the articles of the declaration and s. 92(4) of the *Act*, YCC 50 is entitled to recover all of its costs incurred due to the Brasseurs' conduct and to recover those costs as common expenses of the owner's Unit. In short, YCC 50 submits that given it was the Brasseurs' lifestyle that caused the mould problem, the Brasseurs should pay for these costs.

[78] Of course, given the passage of time and the cooperation of the parties, YCC 50 has complied with any obligation it may have owed Ms. Brasseur to remediate the mould problem in the Unit. YCC 50 did this on a without prejudice basis. Ms. Brasseur has permitted YCC 50 to do this. However, the issue of who is to pay for the remediation remains unresolved. I must determine this issue.

[79] Let me begin with this over-arching observation. The relationship and communication between the Brasseurs and YCC 50, especially between Mr. Tim Brasseur and Mr. Girard, the President of the Board of Directors of YCC 50, was not a model of harmony and cooperation. Over time, mistrust and antagonism came to define it. Of course, this is unfortunate. And it made resolution of the mould issue more difficult and more expensive. Hopefully we are now at a point where some reconciliation can begin to take place. Given that the remediation is now complete, it is not necessary for me to delve deeply into the *minutiae* of the numerous

disagreements regarding recollections about past events that took place over the span of many years.

1. Legal Framework Regarding Duty to Maintain and Repair

[80] Condominium corporations are creatures of statute governed by the *Act*. A condominium corporation operates on the basis of mutual rights and obligations. The condominium's declaration, by-laws, and rules are vital to the definition and operation of that relationship. Section 119(1) of the *Act* provides that the condominium corporation and the unit owners are to comply with the *Act*, the declaration, the by-laws, and the rules.

[81] Sections 89(1) and 90(1) of the *Act* obligate the condominium corporation to maintain and repair the common elements.

[82] Perell J. in *Ryan v. York Condominium Corp. No. 340*, 2016 ONSC 2470 at paras. 70-71 described the test to be applied in assessing whether a condominium has met its obligations to maintain and repair the common elements in the following fashion:

> In *York Condominium Corporation No. 59 v. York Condominium Corporation No. 87*, the Court of Appeal described how the court should approach determining whether or not a condominium corporation has met the reasonableness standard for repairs. Justice Cory stated:
>
> > 13. The concept of repair in such a situation should not be approached in a narrow legalistic manner. Rather, the court should take into account a number of considerations. They may include the relationship of the parties, the wording of their contractual obligations, the nature of the total development, the total replacement cost of the facility to be repaired, the nature of the work required to effect the repairs, the facility to be repaired and the benefit which may be acquired by all parties if the repairs are affected compared to the detriment which might be occasioned by the failure to undertake the repairs. All pertinent factors should be taken into account to achieve as fair and equitable a result as possible.
>
> As appears from the approach directed by the Court of Appeal, whether a condominium corporation has breached its repair and maintenance obligations is a fact-specific inquiry in the particular circumstances.

2. Analysis

[83] Ms. Brasseur's claim of the YCC 50's breach of its failure to repair and maintain has two components to it given that YCC 50 has now repaired and remediated the mould issue according to a mutually agreed upon scope of work plan: 1) Should YCC 50 pay for the cost of this remediation if it fell within its obligations or should Ms. Brasseur pay for it if it was their

lifestyle conduct that led to the mould? 2) Even if it was eventually remediated, were the steps taken by YCC 50 reasonable given the delay in addressing the issue?

[84] In assessing this issue, let me begin with what is not in dispute. YCC 50 is responsible to manage and to maintain the common elements for the benefit of the owners of the units. According to the declaration, the exterior windows, the heating system within the common element ceiling, the ventilation systems and the exterior walls are all part of the common elements. The mould appeared on the exterior walls of the Unit for which YCC 50 is responsible for. The Brasseurs claim that the deficiencies that caused the mould are part of the common elements. The mould was a problem that required attention and repair. YCC 50 has recognized this and has paid for the remediation for other units in the building.

[85] Mould needs moisture. That much is obvious. Mr. De Rose succinctly said:

> So you need moisture for mould to grow. So one of the things I do is I figure out where the moisture sources are because those need to be dealt with so that the mould doesn't come back.

[86] The difficult question in this case is to exactly determine the source of moisture and the mould. Why was there moisture in the Unit that caused the mould? There are many different sources of moisture. Some are related to the external environment. Some are found within the Unit. The source and the amount of moisture can depend upon the changing seasons. The amount of moisture can depend upon how the Unit was built. The relevant period of time I must deal with is measured by years. This is not an easy question to answer. Not with any degree of certainty.

[87] However, my task is not to answer it with any absolute degree of certainty. While I must assess the evidence as to what caused the mould, I do not need to be definitive. I say that not simply because proof only need be established on a balance of probabilities. I say that because what I must determine is whether the repair i.e., remediation required to solve the problem of mould, fell within the duty to repair found in the *Act*. On the other side of the coin, I must determine whether the Brasseurs' conduct fell within the *Act* and declaration as alleged by YCC 50.

[88] After carefully assessing the evidence, I find that remediation of the mould is the responsibility of YCC 50. I conclude this for the following reasons.

[89] First of all, the problem can be attributed to the common elements. Here the issue is not the narrow question of where the mould was found. For instance, whether it was found on an exterior wall or whether it was on an interior wall. The issue is whether some defect or problem with the common elements contributed to the growth of mould within the Unit such that this triggered the duty to repair. I find that it did as my reasons will show.

[90] Secondly, and this is another way of approaching this issue, I find that the Brasseurs' conduct, the lifestyle choices that they made, were not likely the cause of the mould problem.

[91] The evidence that it was the Brasseurs' conduct that lead to the development of mould comes mainly from the expert opinion of Mr. De Rose. Mr. De Rose's opinion is that the main contributors to the deterioration of the walls leading to mould were:

> a. the suite owner not operating the in-slab heating system: This made the ceiling slabs and exterior walls colder than intended. We expect that deterioration/staining at interfaces (ceiling to wall, ceiling to windows, exterior wall to demising wall,) and on walls was the direct result of these colder slabs and walls that encouraged condensation;
>
> b. deficient ventilation systems: the exhaust fans did not appear to be adequately exhausting air and moisture from the suite. Exhaust ductwork penetrations through the exterior walls were also not fully sealed at perimeters which likely allowed some moist air to re-enter the suite; and,
>
> c. seals on main entry door: The suite owner had weather-stripped their suite entry door. The air flow from the corridors, around the perimeter of the suite door, is intended to be the primary source of ventilation air and without it, humidity in the suite can be expected to rise, increasing condensation risk.

[92] The Applicant averred that the heating system was not working properly to the point they used space heaters to keep the interior warm. He also averred that they did not fail to operate the heating systems to save expenses, despite an alleged comment attributed to him to this effect. In addition, Mr. Furr responds to these conclusions of Mr. De Rose. Other factors also affect the temperature in the Unit even if the heating system was turned on properly. The ventilation system, which includes the bathroom fans and the piping to the fans, is a common element. If that system was deficient, this was the responsibility of YCC 50. With respect to the sealing of the main floor door done by Mr. Brasseur, Mr. Furr had measured the airflow in the hallway ventilation system and the airflow was from the Unit into the hallway and not the reverse as designed. Therefore seals would have had no impact as the hallway ventilation system was not operating as designed. Any deficient hallway ventilation is a common element.

[93] Mr. Furr's opinion is these older buildings were constructed without a vapor barrier. Given this, when moisture passes through an exterior wall and hits an inside surface that is below the dew point, it will condense and cause mould damage. The buildings relied upon ventilation from the corridors in conjunction with make-up air units to ensure the level of humidity in the individual units remained low enough to prevent condensation. In addition, given the prior old windows the building had, higher levels of air leakage ensured indoor relative humidity remained low. He was of the view that the ventilation system was ineffective, the new windows prevented air leakage that ventilated the building, and significant air leakage into the units bypassed any insulation which then produced the conditions for the mould. Condensation developed on the interior surface of the thermal bridge locations. Mr. Furr also reviewed Mr. De Rose's opinion, and disagreed with his views on the causation of the mould and condensation. Mr. Furr made recommendations including better or additional insulation in certain areas.

[94] Mr. Crane is a construction expert retained by Ms. Brasseur. Given this different background, I find his evidence to be of little weight. On the other hand, the initial report from Synergy Partners is also equally of less weight as this was based on a short visual inspection only.

[95] On the other hand, I find that the GRG Building Consultants' report in 2013 significantly confirms on Mr. Furr's opinion. It states:

> The suction at the unit ventilation fans feels minimal and likely does not meet the requirements of ASHRAE…allowing moist air to stagnate. The resident noted that the moisture occurrence appeared to accelerate after the replacement of the windows and particularly during the colder winter months. This is likely because previous air leakage at the old windows provided a path for the moisture laden air to escape during the winter months as well as additional air movement. Cold air contains less moisture than warm air.
>
> The connection between the floor slabs and the exterior walls can create a "thermal bridge" which is an area of increased thermal (heat/cold) transfer. During cold months this can result in relatively cold spots on the interior walls and floor slabs of the units. Since the condensation is concentrated at these thermal bridge locations, it is most likely that the moisture damage is the result of moist, interior air condensing on the colder areas of the walls, ceilings and floors.

[96] The environmental assessment report prepared in 2016 by Grande Environmental had the following conclusion:

> Mould growth in the subject unit appears to be a result of moisture build up from condensation on the interior of the exterior walls. High levels of humidity inside the home can easily condense once it reaches its dew point usually on a cold surface, such as an exterior wall, especially if walls are not insulated or insufficiently insulated. According to A.A. Property, the subject unit is known to have walls which are insufficiently insulated.

[97] Before looking at the collective effect of the expert opinions, one issue, as previously noted, is whether there was a defect in the ceiling heating. Mr. Brasseur avers there was though there is evidence in the record that he had said they did not use it since electricity was expensive. Also, when inspected by YCC 50, no faults were found with it and YCC 50 has no record of complaints about the heating. On the other hand, the Brasseurs used electric space heaters which undoubtedly would use a not insignificant amount of electricity and not provide the level of comfort the heating system would. Ultimately, I find that it has not been proven that the heating was defective because no defect was found and the Brasseurs' view that it was is only subjective, though they did make a complaint about it. At the same time, I find it has not been proven that the Brasseurs deliberately chose not to use it. Given how vehement the Brasseurs were about the

mould problem, it does not make sense that they would not take the recommended actions to ameliorate the mould and would conduct their lives in such a way that would aggravate the problem further.

[98] At the end of the day, I find that whatever the impugned lifestyle choices of the Brasseurs, this was not the primary cause of the condensation and mould problem. Put another way, it does not relieve YCC 50 of their obligations. It did not result in breaches of the declaration and the *Act* as argued by YCC 50.

[99] One of the most significant reasons against lifestyle causation is that other units in the building suffered the mould problem. Mr. Girard noted that the corporation undertook unit repairs in other units affected by condensation. He specifically noted five other corner units which had condensation and mould for which YCC 50 paid for remediation. Mr. Brasseur was told 20 units had been investigated. If Mr. De Rose's opinion is to be believed, then all the other units which suffered the same problem, had occupants who did what the Brasseurs did. Certainly, there is no evidence that they did. Further, Ms. Jacqueline Anne Levasseur provided an affidavit to the contrary. She lived in corner Unit 607 and had condensation problems and mould. She outlined what efforts were made by YCC 50 to remediate. There is no evidence to suggest that her lifestyle choices were similar to the lifestyle choices of the Brasseurs. But beyond that, I find it to be simply implausible that all these occupants conducted themselves in the same fashion as the Brasseurs in causing the mould. For this reason, I prefer the evidence of Mr. Furr over Mr. De Rose on this issue. Even though Mr. De Rose has sound qualifications and experience, his opinions do not adequately account for why the other unit owners suffered from mould.

[100] Secondly, when the expert evidence is looked at as a whole, I find that the primary reasons for the mould were not related to lifestyle choices. There is no doubt that Mr. De Rose honestly believed in his opinions, but some of his opinions were weakened by other evidence that did not support the foundations for it. For instance, the weather stripping at the door would not be material because the ventilation between hallway and Unit was not functioning in the way it was supposed to. Mr. De Rose's opinion regarding the ceiling heating did not adequately take into account the cycling of the thermostat. His opinion is also dependent upon the Brasseurs not using the ceiling heat; something which I find was not the case.

[101] Mr. Furr, who is less qualified than Mr. De Rose, did give opinions that were sound and made sense. I prefer the essential substance of those opinions over those of Mr. De Rose. That is that it was the common elements that contributed to the condensation and mould. My conclusion on this also takes into account the fresh evidence presented. The fresh evidence too is consistent with the conclusions that the common elements were likely the cause of the mould.

[102] With respect to the leaking in the stacks, Mr. Furr opines that it was significant and the evidence shows it was prolonged. Mr. De Rose takes an opposite view. Both gave reasons for their views. I have assessed both their evidence, the photos, the video, and the other circumstantial evidence. I cannot come to a determination of exactly how much water was

leaking. I can say that it was not minor. It is difficult for me to believe that the stream of water visible on the video had been going on for some time. Had it been so, this would have been a major problem that would have been detected earlier. I appreciate the water damage in the ceiling below could definitively confirm a significant flow, but this was only observed in November of 2018, and could have been a result of the stream of water observed in September of 2018. The contractors could have possibly caused this flow of water. That being said, despite Mr. De Rose's opinion, the blistering and the corrosion suggest that at some point in time previous to the September 2018 work, the moisture within the false wall was significant. Previously, Mr. Furr had seen a visible pool of water by the bathroom wall which is consistent with a greater leak of water then Mr. De Rose says. Also, any water leakage would not likely have been constant given the water came from intermittent use by occupants in units above. Thus, the best I can determine is that the water leak was not streams of water, but it was not a drop here or there. Mr. Furr's opinion that absent a leak, the area containing the stacks, isolated as it is, should have been dry or of low humidity, to me, is more convincing. I find Mr. De Rose was too quick to dismiss the possibility of there being moisture in that wall. I find whatever the actual amount of moisture, it was not isolated to September of 2018, had been going on for a while, and was sufficient to contribute to the moisture in the Unit.

[103] With respect to the added insulation, Mr. De Rose's agreement to add insulation, does support Mr. Furr's opinion regarding it. Mr. De Rose's evidence that he simply agreed in order to move the project along does sound credible. However, if Mr. De Rose felt adamant that there was absolutely no foundation to Mr. Furr's concern, he would not have acceded to the added cost. While Mr. De Rose believes it is of little moment, when I look at the evidence as a whole, I find that this issue too contributed to the moisture in the Unit.

[104] Finally, I agree with Mr. Furr's opinion that some of the opinions of Mr. De Rose does not take into account the practical realities of how conditions in the Unit can fluctuate depending upon a number of variables.

[105] I do not find that the Brasseurs' lifestyle choices created an enhanced risk of mould. Of course, there is an argument that more could have been done by the Brasseurs or any of the other occupants to help deal with the problem. But there must be a reasonable limit to this. Unit owners should not be expected to take extreme, costly, or other exceptional measures that would impinge upon normal daily activities, in order to deal with condensation or mould caused by a failure to maintain or repair common elements. For instance, the failure to follow the recommendation that the occupants keep their windows open during the winter is not a "lifestyle" choice that contributed to the mould problem. In our frequently harsh Canadian winters, occupants cannot reasonably be expected to do that.

[106] I would like to note that YCC 50 was initially willing to pay for the cost of the remediation. Later, YCC 50 took the position that the costs should be shared given the lifestyle choices of the Brasseurs. At this hearing, they argued that the Brasseurs should pay for it all. I appreciate YCC 50 is fully entitled to change their position. It may well be that a greater appreciation on their part as to what they believed was the cause of the mould lead to this

change. At the same time, it is not lost on me that YCC 50's change came once the Brasseurs became insistent on what was needed for a proper fix, the costs of investigation and remediation went up, and lawyers became involved.

[107] Thus, I find that it is more likely than not that mould was not caused by the lifestyle choices of the Brasseurs but for reasons related to building design. Thus, remediation of the mould fell within YCC 50's obligation to repair and maintain the common elements of the building. It did not fall under Ms. Brasseur's obligations.

[108] In terms of what was required for YCC 50 to meet their obligations, I find that the agreed scope of work is reasonable in all of the circumstances. Perfection is not required: *Metropolitan Toronto Condominium Corp. No. 985 v. Cheney*, 2015 ONSC 7124 at para. 37. Furthermore, the Board of YCC 50 is charged with the duty of balancing the private interests of individual unit owners with the communal rights of all and some deference should be afforded to their decisions: *York Condominium Corp. No. 382 v. Dvorchik* (1997), 12 R.P.R. (3d) 148 (Ont. C.A.) at para. 5.

[109] The mould was a serious and persistent problem in the Unit despite the efforts to eradicate it. I appreciate that YCC 50 had obligations to a large number of unit owners and that the record shows they had other issues that required their attention. Also, as I said previously, the deterioration in the relationship did not help the situation. But the solution that was agreed upon in the scope of work is a reasonable one and one which was required under YCC 50's obligation to repair and maintain.

[110] I am aware that the cost of remediating the mould in the Unit is significantly more than the other units. I have little doubt that the Brasseurs' insistence that it be done thoroughly with little compromise contributed to this. However, looking at the overall remediation done, I do not find it to be so unreasonable that YCC 50 should be relieved of their obligation to pay. In assessing the appropriateness of the scope of work, it must be remembered that the investigation done in this Unit compared to other units showed that the level of mould found in the Unit posed a serious risk to the health of the occupants and indeed the welfare and integrity of the condominium building. Past efforts to fix the problem with less expensive and comprehensive methods had not worked. There were a number of investigations and meetings that ultimately lead to this level of remediation that was required. I hope that it will be a permanent solution. I hope that it will also be a one-off for YCC 50. Putting those hopes aside, based on the evidence, I see no reason why YCC 50 should not pay the cost of the remediation. As they did for the other units in the buildings even though the cost of this remediation is significantly higher.

[111] With respect to the second issue of whether the nature and timeliness YCC 50's response to Ms. Brasseur's complaints and efforts to resolve the mould problem in the Unit failed to meet their obligations of repairing and maintaining the Unit, despite their ultimate remediation, I find this more difficult to determine.

[112] In my opinion, YCC 50 did respond to the Brasseurs and their issues. Also, there is no question that YCC 50 had other issues that required their attention and resources not the least being mould in other units. While Ms. Brasseur takes issue with the communications between them and YCC 50 and their lack of transparency, what is more significant to me is the timeliness of the response and the nature of it. The issue was first raised in 2011. It has only got fixed in 2018. In my opinion, looking at the whole of the history and evidence, it was not timely enough nor truly responsive enough.

[113] As an example, I do not see any hard evidence that YCC 50 ever took action on the recommendations regarding ventilation and insulation, other than advising residents of things they could do for themselves and repairing individual units until this application was brought to court. The October 20, 2016 letter to the Brasseurs, makes reference to repairing the "venting system", but this is three years after the initial GRG report.

[114] In addition, the Grande Report confirmed the presence in the Unit of Aspergillus/Penicillium, a species of mould unacceptable to Health Canada in occupied spaces at a highly elevated level compared to the outside and indoor control samples. It recommended the highest level of mould remediation. Once this information was verified, I find that more urgent action should have been taken. However, it was only months later that lawyers from YCC 50 contacted the Brasseurs stating that remediation would commence on November 14, 2016. The lawyers also advised Ms. Brasseur she was expected to pay for the remediation work and engineering and legal costs. Not surprisingly, the Brasseurs resisted and contacted a lawyer of their own. Thereafter, as the history showed the matter became even more contentious and litigious. The end result was that it was not until a year after the Grande Report that an agreement was reached for remediation to take place on a "without prejudice" basis. While I find this history and delay understandable given the nature of the relationship between the parties by this point, I also find it unacceptable given the health concerns that were verified by experts.

[115] In some ways, this case is similar to the *Ryan* case decided by Perell J. While I appreciate that the water penetration and mould problem were both more extreme and took far longer to fix than the case at bar and, ultimately, like in this case, the condominium corporation did fix both, Perell J. held it should not have taken so long to remedy. He found a breach of the condominium corporation's duty to repair. As he stated (at para. 72):

> In the immediate case, one difficulty of applying this contextual approach to reasonableness is that if one does a step-by-step analysis, then at any given step the conduct of the condominium corporation and the choices it made between making urgent repairs, temporary repairs, or permanent repairs was arguably reasonable; however, with the benefit of hindsight, i.e., a sort of "the proof of the pudding is in the eating" approach, the conduct of YCC 340 is shown to be unreasonable.

[116] While Perell J. had sympathy with the condominium corporation's efforts to deal with this intractable problem, he found that they did not address the difficulties reasonably.

[117] I too understand that YCC 50 had to take into consideration other financial concerns and had to balance competing needs and priorities. That said, for the reasons given above, I have concluded the same. YCC 50's overall approach to the mould problem was not reasonable. Thus, I find that YCC 50 has violated their duties as found in s. 90 of the *Act*.

D. OPPRESSION AND SECTION 117 OF THE *ACT*

[118] Section 135 of the *Act* allows an owner of a unit to make an application to the Superior Court of Justice for an order prohibiting oppressive conduct by the condominium corporation and/or requiring the payment of compensation. This provision should be given broad and flexible interpretation: *McKinstry v. York Condominium Corporation No. 472* (2003), 68 O.R. (3d) 557 (S.C.), at paras. 28, 31 and 33.

[119] Recently in *Toronto Standard Condominium Corporation No. 2051 v. Georgian Clairlea Inc.*, 2019 ONCA 43, the two-part test for oppression that the Supreme Court of Canada set out in para. 68 of *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, was approved:

> In summary, the foregoing discussion suggests conducting two related inquiries in a claim for oppression: (1) Does the evidence support the reasonable expectation asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

[120] Oppressive conduct is conduct that is coercive, harsh, harmful, or an abuse of power. Unfairly prejudicial conduct is conduct that adversely affects the claimant and treats him or her unfairly or inequitably from others similarly situated. Unfair disregard means to ignore or treat the interests of the complainant as being of no importance.

[121] In this case, I am satisfied on an objective basis that the remediation of the mould issue was a reasonable expectation of Ms. Brasseur. This is not really disputed.

[122] The fundamental issue is whether YCC 50's conduct amounted to oppression, unfair prejudice, or unfair disregard of her reasonable expectation. To determine this, I must look at the cumulative effect of the conduct complained of, the nature of the relationship between the parties, the extent to which the complained of conduct was foreseeable, and the detriment to the interests of the complainant. I have already examined some of these factors above.

[123] While YCC 50's response was not a model of responsiveness at all times, I find that Ms. Brasseur has not proven that their conduct amounted to oppression, unfair prejudice, or unfair disregard of the Ms. Brasseur's interest. In so finding, I must look at the whole of the history and all of the circumstances.

[124] YCC 50 needed time to investigate. It did retain and hire more than one expert. It retained and hired contractors. It met with the Brasseurs. It has ultimately remediated the mould

albeit on a without prejudice basis. The Brasseurs have criticized the "band aid" approach of YCC 50. I do not agree. YCC 50 did not have to immediately go with the most comprehensive and expensive option to remediate. It was entitled to take a more graduated, cost-conscious, and hopefully adequately effective option to solve the problem. In addition, one cannot go back in time with the benefit of hindsight. Mould and its reoccurrence can be a complex issue. As it was in this case. It was not a result of a flood or a leaking roof. The reasons for it are multi-faceted and not easy to sort out. The gravity of the situation may not have been immediately appreciated. Hence the need for investigation and expert advice. Also, even when appreciated, experts and contractors are not always immediately available at the drop of a hat. Even when retained, some, like Spectrum in this case, may not work out. There may be honest and reasonable differences of opinion that needs to sorted out. Even though I am confident no one truly wanted it, this judicial proceeding had to be resorted to work out the differences.

[125] That said, of course, I appreciate that things got delayed. But I do not find that YCC 50 was deliberately dragging its feet. While YCC 50 may share the blame, the record shows that they were not the sole cause of it. Spectrum was; it appears that it was not doing the work it was supposed to. Other times, the Brasseurs must bear some responsibility as the unit owners had to in the case of *Leclerc v. Strata Plan LMS 614*, 2012 BCSC 74 at paragraphs 4-5, 9, 25 and 61. As I have previously said, over time, trust was broken between the Brasseurs and YCC 50. Thus, there were instances of miscommunication and misunderstanding.

[126] Again referencing *Ryan,* Perell J. found that despite the lengthy delay in fixing the water and mould issue and the breach of the condominium corporation's obligation to repair and maintain, he dismissed the oppression argument. He noted that the condominium corporation did not disagree that something had to be done to fix the water infiltration problems, and it did try to remedy the problems but its conduct was ineffective until recently. He found in the circumstances the failure of the condominium corporation to maintain and repair the unit owner's property was not abusive or oppressive. In my view, the same can be said here.

[127] The oppression claim is, therefore, dismissed.

[128] For similar reasons, I find that YCC 50 did not breach s. 117 of the *Act.* It did not permit the mould to exist in the Unit. When looked at contextually, YCC 50 did endeavor to deal with the problem. However, while their response was not timely enough, I find that it has not been proven that they "permitted" the condition to exist.

E. CONCLUSION

[129] In conclusion, Ms. Brasseur's application is allowed to the extent indicated. The application of YCC 50 is dismissed.

[130] Given that I have found in favour of Ms. Brasseur on the first issue, I order that YCC 50 pay for the remediation which they have already done on a without prejudice basis. To be clear

though, in accordance with s. 84 of the *Act*, Ms. Brasseur is not exempt from contributing her proportionate share to the common expenses of this remediation.

[131] If there are any other expenses or damages that are still in issue given my conclusions, as agreed, this issue shall be bifurcated. I would encourage the parties to come to an agreement on any outstanding damages.

[132] I would also encourage the issues of costs be resolved between the parties. If it cannot, I will entertain written submissions, each one limited to two pages excluding any attachments (any Bill of Costs, Costs Outline, and authorities). Ms. Brasseur shall file within 10 days of the release of these reasons. YCC 50 shall file within 7 days thereafter. There will be no reply submissions without leave of the court.

Justice S. Nakatsuru

Released: July 4, 2019

CITATION: Brasseur v. York, 2019 ONSC 4043
COURT FILE NOS.: CV-17-573795; CV-18-598549
DATE: 20190704

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

HELEN MARY BROWNE BRASSEUR

Applicant

– and –

YORK CONDOMINIUM CORPORATION NO. 50

Respondent

REASONS FOR JUDGMENT

NAKATSURU J.

Released: July 4, 2019