CITATION: Estanol v. York Condominium Corporation No. 299, 2020 ONSC 298
COURT FILE NO.: CV-18-605963
DATE: 20200115

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ROSA ESTANOL, Applicant

AND:

YORK CONDOMINIUM CORPORATION NO. 299, Respondent

BEFORE: Kimmel J.

COUNSEL: *Matthew Morden*, for the Applicant at the June 4, 2019 hearing/Applicant self-represented at the November 19, 2019 hearing

David Elmaleh, for the Respondent

HEARD: Application heard June 4, 2019, Motion for Leave to File Fresh Evidence Heard November 19, 2019

ENDORSEMENT

The Application and Positions of the Parties

[1] The applicant seeks various declaratory relief and damages under the *Condominium Act*, 1998, S.O. 1998, c. 16.

[2] First, she alleges that the respondent failed to repair and maintain its common elements appurtenant to and affecting her condominium townhouse unit and claims its handling of her repair and maintenance requests, particularly with respect to basement and roof water penetration issues that have persisted since July of 2018, was oppressive and unfair. The applicant purchased her townhouse in August 2017 as an investment with the intention of renting it out. Aside from an initial period during which she rented it back to the prior owners, she has been unable to do so because of the ongoing repair issues. In addition to the declaratory relief, she seeks damages for this lost rental income and for the common expenses and the property taxes she has paid since July 2018 when the roof and basement issues that are at the heart of her complaints were first discovered.

[3] Second, the applicant seeks relief from any special assessment that may be levied for a Site Restoration Project. This project was announced by the condominium corporation to the unit owners in February 2018. The applicant says this was not, but should have been, disclosed in the Status Certificate that was provided when she purchased her unit.

[4] After the application was heard on June 4, 2019, the applicant discharged the lawyer who had been acting for her and began to represent herself. She made various attempts to have the court consider further evidence and submissions through email correspondence, to which the respondent objected. The court issued a direction on July 17, 2019 that if the applicant considered the fresh evidence that she was attempting to file to be important to the determination of the issues raised on the application she should seek leave of the court to re-open the hearing and to file this fresh evidence. The applicant did so and that motion was briefed and then argued on November 19, 2019.

[5] The respondent's position is that it has investigated and responded to the many and varied repair and maintenance requests from the applicant in an orderly and reasonable manner. Some of these requests were legitimate and the respondent eventually addressed them. Others did not relate to the common elements and were the responsibility of the applicant. The respondent stands behind the Status Certificate that was issued. The respondent resists the applicant's request to be exempted from any assessment that may be levied against the unit owners of this condominium, in connection with the Site Restoration Project or otherwise.

Summary of Outcome

[6] While the respondent did investigate and respond to most of the applicant's reports of leaking and damage and her requests for repairs, I find that its actions in relation to the basement and roof water penetration were not reasonable in the circumstances. The respondent did not initially accept responsibility for any of the water penetration issues. It initially took the position that the water penetration issues in the basement were primarily due to cracking in the area of the garage slab within the boundaries of the townhouse unit and were not due to any disrepair of the common elements. The respondent also initially denied responsibility for the leaks in the roof of the townhouse. When the applicant took the initiative to remediate the roof leaks, the respondent was critical of the workmanship and took the position that the applicant's installation of vents on the roof had voided the roof warranty. In the basement, the respondent eventually implemented temporary repairs. However, the fresh evidence demonstrates that these temporary repairs did not resolve all of the basement water penetration issues and that more work is required.

[7] For the reasons that follow, the application is granted in part as it relates to the ongoing and necessary maintenance and repairs to remediate basement water penetration in the applicant's unit and the costs that she incurred to fix the roof vents that caused moisture penetration in the attic and upstairs ceilings. Certain damages are awarded, arising from the condominium corporation's failure to act in a reasonable and timely manner. The application is dismissed insofar as it relates the relief sought arising from the allegedly misleading Status Certificate. The specific relief granted is detailed at the end of these reasons.

Background and History of Leaks and Repairs

[8] The applicant purchased her townhouse unit 37, level 1 in York Condominium Corporation Plan No. 299 on August 31, 2017. The address is municipally known as 59 Cricklewood Crescent, Thornhill, ON L3T 3E1.

[9] After the applicant purchased her townhouse unit, she rented it to the prior owners between September 1, 2017 and May 30, 2018 for a monthly rent of $3,500.00. She planned to address some minor maintenance issues after they moved out and before finding a new tenant to rent the unit starting in July of 2018.

[10] The condominium corporation's declaration confirms its duty to maintain and repair the common elements. It is agreed that the property manager, St. George Property Management Inc., at all material times acted as agent for the condominium corporation. References in these reasons to the property manager include the condominium corporation (respondent).

[11] From February to April 2018, the applicant made requests for various repairs that she believed to be the responsibility of the condominium corporation. Some of these repairs (for example, to the living room windows) turned out not to be the condominium corporation's responsibility. There were also communications in this same timeframe about issues that the condominium corporation considered to have been raised and addressed with the previous owners of the applicant's townhouse. Other requests in this earlier period were about issues that the condominium corporation advised the applicant it intended to address as part of its ongoing program of repair and maintenance of all units (such as to her front and back balcony/decks).

[12] The applicant discovered moisture in the ceilings of the upstairs bedrooms of her townhouse in May of 2018, which she reported in late May and early June of 2018. The property manager arranged for some inspections to be done and for the eavestroughs to be checked and cleaned but did not determine the source of the problem.

[13] A heavy rain and thunderstorm on July 5, 2018 led to water penetration from the roof into the attic and upstairs bedroom ceilings. This too was reported by the applicant to the property manager at the end of July 2018. At this time the applicant had hypothesized that the leak in the roof was caused by vents that had been removed or closed by roofers who were working for the condominium corporation. This potential cause was not acknowledged by the property manager.

[14] The applicant eventually arranged for her own roofers to re-install the missing vents on the roof in August 2018 at her own expense. However, when these vents were installed, the condominium corporation criticized the applicant for making unauthorized repairs to the common area (roof) and threatened the applicant with legal action. The condominium corporation later acknowledged, after inspection, that it did not take issue with the work that the applicant did on her roof.

[15] Following the same heavy rain and thunderstorm on July 5, 2018, the applicant discovered two leaks in the foundation of the basement, with water entering under the garage slab and under the porch. A contractor hired by her insurer removed the damaged drywall from the basement walls and ceiling and parts of the basement floor covering and brought fans in to dry out the affected areas. There was visible black mould. The applicant's home insurance would not authorize the replacement of the walls, ceilings and floor coverings until the source of the water penetration had been addressed.

[16] The applicant reported the basement flood to the property manager on July 13, 2018. The property manager attended with an engineer on July 24, 2018 to inspect the leak under the garage slab. He did not investigate the foundation leak under the porch and conducted no water penetration tests. The property manager's hypothesis from the outset was that the leaks were coming from within the boundaries of the townhouse unit under the garage.

[17] The property manager received the report from its engineer (dated July 26, 2018) indicating cracks on both the common area and unit owner sides of the garage floor slab. The report recommended topside concrete repairs and waterproofing. The property manager persisted in the view that the leaks were coming from the garage slab within the townhouse unit. The property manager advised the applicant in its letter of August 3, 2018 that the question of the condominium corporation's responsibility for any common area components outside of the garage slab would be put to the board of directors for consideration at a future meeting.

[18] The applicant attempted to focus the property manager's attention on both the basement leak under the garage slab and the basement leak under her front porch. The applicant eventually hired Mike Holmes Inspections to prepare a report which described a water test that he conducted and his observation of water entering the basement both in the area under the front porch and at the front of the room under the garage. The report, dated September 7, 2017, recommend permanent repair options. The report was produced to the respondent in early October 2018.

[19] Following another basement leak in early November 2018, the property manager attended with its engineer again. This time, the property manager acknowledged responsibility for the basement foundation leak under the front porch (although this was identified as a "new" leak). The temporary solution of an injection of epoxy (resin) was indicated and this injection was made in the wall under the front porch in December 2018. The board of directors did not consider the matter until January 9, 2019. At that time they authorized the same temporary solution of the epoxy injection at the threshold of the garage floor slab that formed part of the common area which, by this time, they had acknowledged may be contributing to the leak in her basement under the garage floor slab. Thereafter, further temporary repairs were undertaken by the condominium corporation on January 15, 2019, including the epoxy injection and temporary asphalt and concrete repair to the common elements portion of the cracked concrete at the threshold of the garage floor slab.

[20] These injection sites were inspected and reinforced in March and April of 2019. The applicant believed that they had resolved the problem by the time the application was heard on June 4, 2019, there having been no further leaks since then.

The Status Certificate

[21] The condominium corporation prepared and delivered a Status Certificate dated July 5, 2017 to the applicant in anticipation of the closing of her purchase of her townhouse unit, which stated, among other things, that:

> 12. The Corporation has no knowledge of any circumstances that may result in an increase in the common expenses for the unit, except due to the increase costs *[sic]* of utilities.
>
> 15. …the board anticipates that the reserve fund will be adequate in the current fiscal year for the expected costs of major repair and replacement of the common elements and assets of the corporation.

[22] The applicant says that she relied upon the Status Certificate when she decided to waive all conditions in her agreement to purchase the townhouse unit.

The Special Assessment

[23] On February 23, 2018 the property manager posted a "Site Restoration Notice" describing a major undertaking of work that had been under development for the past year. At the May 2018 annual meeting, it was estimated that this Site Restoration Project would cost $1,700,000.00, of which $950,000.00 was unfunded and would have to be collected from the unit owners by way of a special assessment.

[24] The applicant received notice on November 23, 2018 of a $15,000.00 special assessment levy related to the Site Restoration Project.

[25] The applicant now says that she would not have purchased her townhouse unit if the alleged funding deficiency and anticipated Site Restoration Project and associated cost to unit owners had been disclosed in the Status Certificate.

The Reserve Fund and Alleged Prior Knowledge of Unfunded Repairs

[26] The property manager acknowledged on cross-examination that there had been discussions prior to July 2017 about the adequacy of the reserve fund, anticipated maintenance including the garden planter beds that are part of the Site Restoration Project, and that one of the board members, Mr. David Soloway, had previously proposed an arbitrary increase of $100 per unit in common expenses (which was implemented in 2015).

[27] The condominium corporation was required to do a reserve fund study with site inspection every six years. One had been conducted in 2010. A 2013 reserve fund study was undertaken without a site inspection. The 2013 reserve fund study was updated without a site inspection in 2015. The update was sent to unit owners with a letter dated April 21, 2015 indicating that the reserve fund was being increased because it had been determined to be inadequate to deal with anticipated maintenance and repairs. In this letter, the unit owners were advised that no additional funding was expected to be required for the identified maintenance and repair issues beyond this increase in monthly common expenses that was being implemented in fiscal 2015.

[28] There was no reserve fund study with site inspection done in 2016. The board and AGM minutes in the first half of 2017 indicate that there were continuing discussions about the garden beds and curb and roadway restoration needs.

[29] The condominium corporation says that the May 24, 2017 AGM minutes reflect its state of knowledge in the spring of 2017 to be consistent with the presentation given at that meeting. The presentation stated that the only contemplated work at the time was planter bed and landscape restoration work. The condominium corporation considered the reserve fund to be adequate for the expected costs.

[30] It was not until the board commissioned a detailed costing for the planter beds on November 21, 2017 that concerns were expressed about impacts on other works. This led to the engagement of an engineer and various reports were prepared. These reports resulted in the expansion of the scope of work in January 2018. The condominium corporation says this led to the announcement of the Site Restoration Project to the unit owners on February 23, 2018. The expanded scope of work included stone instead of wooden planters (subject to individual unit owner approval), water main replacement, stone paving, curbs, driveways, roadways and other site services.

[31] After the announcement of the Site Restoration Project, a reserve fund study with site inspection was conducted and provided to the unit owners in November 2018. This study confirmed the need for increased funding (albeit, less than what had been predicted at the AGM) to repair and replace common elements in 2019 and 2020 and the study also projected substantially decreased remaining life for other components of the common elements. This was when the $15,000.00 per unit special assessment was levied, to be paid in three installments of $5,000.00, on April 1, 2018, October 1, 2019 and April 1, 2020.

The Evidence of a Recorded Conversation in 2015 – Hearsay Objection and Ruling

[32] In support of the application heard on June 4, 2019, the applicant sought to rely upon an affidavit of her friend (and ex-husband) David Harding. Mr. Harding is a former owner of another townhouse unit in the condominium. Mr. Harding's affidavit attached a transcript of a conversation between him and Mr. Soloway that Mr. Harding had secretly recorded sometime between April 21 and May 4, 2015 (the "Soloway Transcript"). Soloway was and still is a director of the condominium corporation. The applicant seeks to rely on the truth of certain statements made by Soloway about, among other things, anticipated maintenance and expenses and the sufficiency of the reserve fund.

[33] The condominium corporation did not object to the authenticity of the Soloway Transcript but did object to the admission of this hearsay evidence, arguing that:

a. Rule 39.01(5) only expressly allows for affidavits on applications to contain statements of a deponent's information and belief with respect to facts that are not contentious (in contrast with Rule 39.01(4) which does not limit statements of information and belief on motions to non-contentious facts);

b. It was not the best evidence and it was not necessary to rely on it since Mr. Soloway could have been asked by the applicant for an affidavit or examined as a witness on the application;[1] and

c. It had been surreptitiously recorded and its admission would be unfair and prejudicial (without the opportunity for meaningful cross-examination) and would bring the administration of justice into disrepute because of the "general repugnance which the law holds for these kinds of recordings." (see *Scarlett v. Farrell*, 2014 ONCJ 517, at para. 16).

[34] It was submitted on behalf of the applicant that the admission of this hearsay evidence was crucial to her case. She argued that the admissions by the property manager and other evidence before the court were not, on their own, sufficient to prove that the condominium corporation had knowledge of the need for additional repairs and maintenance at the time it issued the Status Certificate. The applicant said this hearsay evidence was critical to that allegation and urged the court to admit it based on the same hearsay analysis that would be applied at a trial. In other words, the court should not be concerned that Rule 39.01(5) does not permit such evidence on points of controversy and should undertake a traditional hearsay analysis to determine its admissibility.

[35] The applicant argued that reliability rather than necessity should be the focus of this hearsay analysis, since Mr. Soloway could have been called by either side to address his statements. The applicant relied on the Supreme Court of Canada's decision in *R v. K.G.B.*, [1993] 1 S.C.R. 740, 1993 CanLII 116 (SCC) said to indicate a general shift towards reliability and away from necessity in the hearsay analysis. The applicant contended that reliability should not be a concern. The evidence at issue was a recording of a statement against interest made by a director of the condominium corporation. It was further argued that there was no prejudice to the condominium corporation because it had been aware of it since January 2019 when Mr. Harding's affidavit was served and there had been ample opportunity to ask Mr. Soloway explain or correct the comments he made on the recording.

[36] It was also pointed out by the applicant that the "general repugnance" in the law for surreptitious recordings arose in cases in which a person was being surreptitiously recorded in their own home where they would have had a high expectation of privacy, which was not the case here.

[37] The applicant asked her counsel to write to the court seeking to provide additional authorities on this subject after the June 4, 2019 hearing. The respondent objected to further submissions being made after the hearing. The applicant was advised that the court had not requested and was not expecting to receive further written submissions. The applicant then attempted to provide these further hearsay authorities as part of her "fresh evidence" on the fresh

[1] The applicant sought to examine Mr. Soloway *after* the June 4 hearing of the application, as a witness on her subsequent fresh evidence motion and this request was denied by counsel for the condominium corporation. No request was made of the court to order that examination and if it had been it would have been denied as that was clearly something that could have been requested before the June 4 hearing.

evidence motion. The respondent objected. I agree that these authorities are not properly before the court, although I note that they address points that were argued by the applicant's counsel at the June 4, 2019 hearing in any event.

[38] I advised the parties during the June 4, 2019 hearing that I would rule on the admissibility of Mr. Harding's affidavit and the Soloway Transcript in my decision on the application. However, I indicated that counsel should make their submissions on the assumption that this hearsay evidence might not be admitted.

[39] I find the evidence of Mr. Harding and the Soloway Transcript to be inadmissible on this application. Rule 39.01(5) is not an absolute prohibition against the admission of hearsay on an application. The court retains the discretion to admit hearsay evidence upon the application of the traditional hearsay analysis, but I am not satisfied that this is a case in which the court should do so.

[40] There was a way in which the applicant could have put Mr. Soloway's prior statements properly before the court. The applicant could have issued a summons under Rule 39.03 before the June 4, 2019 hearing for Mr. Soloway to give evidence directly on the pending application. During Mr. Soloway's evidence the recorded statements could have been put to him to impeach him if he had attempted to deny or change what he had told Mr. Harding back in 2015. Under the traditional hearsay analysis, necessity remains a relevant consideration, even if reliability has become more of the focus.

[41] The reliability of this evidence may not be in issue if it is construed as a statement against interest. However, I am not persuaded that it can be construed as a statement made on behalf of the board (and thus the condominium corporation) against its interests. The recorded conversation took place at a time when there was considerable unrest and Mr. Harding was attempting to persuade Mr. Soloway to join and support a new board slate. The context does not clearly indicate that Mr. Soloway was speaking on behalf of the condominium corporation or its board and no source is indicated for the comments he made.

[42] I read the Soloway Transcript and Mr. Harding's affidavit before making this ruling as both sides agreed I should do (parts having been referred to in the materials filed). I do not consider this evidence about a conversation that took place in 2015 to establish the knowledge on the part of the condominium corporation that would be required to impugn the statements made in its Status Certificate issued to the applicant more than two years later in July of 2017, in that:

a. It does not establish knowledge in 2017 of circumstances that may result in an increase in the common expenses for the unit in or after 2017, particularly when considered in the context of the intervening increase in common expenses that was implemented later in 2015 after the conversation;

b. It does not disclose that the board anticipated that the reserve fund would not be adequate in the current fiscal year (2017) for the expected costs of major repair and replacement of the common elements and assets of the corporation;

c. There is no indication of any quotes or specific planned expenditures in the conversation; and

d. There is an indication that some aesthetic improvements would be optional and would have to be voted on by the owners when it came time to consider them.

[43] Thus, I do not consider this hearsay evidence to be probative or material to the applicant's case even if it had been admitted. Applying the traditional hearsay analysis, I find that the hearsay evidence contained in the Harding affidavit and Soloway Transcript is not necessary or reliable and should not be admitted on this application.

Fresh Evidence Tendered by the Applicant Post-June 4, 2019 Hearing

[44] The applicant, representing herself, brought a motion that was heard on November 19, 2019 for leave to file and have the court consider on this motion fresh evidence. The evidence related to ongoing basement flooding that occurred after the original June 4, 2019 hearing date. She also sought leave to file additional evidence relating to the Status Certificate and the special assessment. Finally, the applicant submitted further authorities concerning the admissibility of the Soloway Transcript, which had been already argued at the hearing of the original motion on June 4, 2019.

[45] The respondent objected to the introduction of the fresh evidence for its failure to meet the test for its admission. The respondent asked, in the alternative, that the court grant leave for the filing and consideration of its responding evidence to any of the fresh evidence that is admitted.

(i) Fresh Evidence Re: Basement Flooding and Excavation Work post-June 4, 2019

[46] There was further water infiltration in the applicant's basement following heavy rains on July 5 and 6, 2019. This took place after the hearing of the application and after the applicant received the insurance settlement monies earmarked to be used to complete inside basement repairs to get the townhouse unit ready to be rented. The applicant provided information about this in affidavits sworn in support of this motion dated August 15 and September 30, 2019.[2]

[47] This fresh evidence disclosed that:

a. Initially, the property manager took the position that this water infiltration was due to a hole caused by an old polyvinyl chloride ("pvc") pipe that the applicant had removed during her basement cleanup;

[2] The applicant also brought a further affidavit to court at the hearing, relating to the ongoing excavation work in front of her townhouse. The respondent objected to this affidavit, having received no notice of it and it being well outside of the timeline for delivery of fresh evidence that I had indicated in my endorsement of July 17, 2019 and I ruled that this affidavit was too late and it was not admitted.

b. A new engineer for the condominium corporation had recommended at the end of August of 2019 that excavation be undertaken behind the foundation wall and the placement of a new external waterproofing membrane, and also anticipated possible downspout and weeping tile remediation, among other things, to address the leaks in the applicant's basement;

c. Work was being done on other units in the context of the Site Restoration Project (replacement of front garden boxes);

d. Excavation in front of the applicant's townhouse unit was started in August/September of 2019 but the waterproofing work recommended by the new engineer for the applicant's townhouse unit had not been completed.

(ii) Fresh Evidence Regarding the Condominium's Reserve Fund and Special Assessment

[48] Much of the "fresh" evidence that the applicant seeks to rely upon regarding the condominium's reserve fund and prior reserve fund studies is contained in historic materials. The applicant attached this evidence to her factum rather than to either of her affidavits in support of the motion for leave to file fresh evidence. The evidence is comprised primarily of historic minutes of the condominium corporation's annual general meetings and communications from other unit owners. She also attached to her factum, but not to any affidavit, the June 18, 2019 AGM minutes.

[49] The only post-June 4, 2019 evidence relating to the special assessment are communications from mid-June, July and August of 2019. These communications relate to the Site Restoration Project (to which the special assessment is being applied). They indicate that, in 2019, it would be focussed on changing the planter beds from wooden timbers to stone and other landscaping elements, with infrastructure work on roadways, driveways and services to be deferred to 2020.

(iii) Additional Cases on the Admissibility of Hearsay Evidence on an Application

[50] The applicant attempted to introduce additional caselaw in support of her request to admit the evidence of Mr. Harding and the Soloway Transcript. The applicant attached and referred to these cases in her post-hearing affidavits. She acknowledges in her affidavit that her counsel was advised by Regional Senior Justice Morawetz in response to an inquiry after the June 4, 2019 hearing that the parties had not been invited to make further submissions about this. I have previously indicated in my hearsay ruling that these cases were not properly before the court, although the points raised in them had been made by the applicant's counsel during the first hearing.

(iv) Rulings on Fresh Evidence

[51] Dealing first with the above-mentioned additional caselaw, this is not evidence and should not be received as such by the court. Accordingly, leave is not granted to the applicant to file the additional "evidence" contained in paragraph 27 and Exhibits "Q" and "R" of the

applicant's August 15, 2019 affidavit and at paragraphs 35 to 39 of the applicant's reply affidavit sworn September 30, 2019. There is thus no need for the corresponding paragraphs 25 and 26 and Exhibits "N" and "O" of Mr. St. George's August 31, 2019 responding affidavit to be admitted.

[52] To admit fresh evidence I must be satisfied by the applicant that:

a. The evidence probably would have changed the result of the application if it had been presented at the hearing; and

b. The evidence could not have been obtained before the hearing of the application by the exercise of reasonable diligence.

See *Scott v. Cook*, 1970 CanLII 331 (SCJ*); 671122 Ontario Ltd. v. Sagaz Industries Canada Inc*., 2001 SCC 59; and *Mehedi v. 2057161 Ontario Inc. (c.o.b. Job Success)*, 2015 ONCA 670.

[53] The motion for fresh evidence took place before I rendered a judgment. As such, I apply the criteria less stringently. See *Brasseur v. York*, 2019 ONSC 4043 at paras. 37-49.

[54] It is ultimately a matter for my discretion to consider whether this evidence would have changed the result and should be received and considered before my decision is rendered. In exercising my discretion, I must balance finality with fairness. However, the Supreme Court of Canada has indicated that this discretion must still be exercised sparingly. See *Sagaz Industries, at paras. 60 and 61* and *Mehedi*, at para. 16.

[55] The applicant has not satisfied me that the evidence that she seeks to introduce relating to events that occurred before the June 4, 2019 hearing date (and corresponding references to pre-June 4 events in the applicant's factum) could not have been obtained before the June 4, 2019 hearing date with reasonable diligence. No concrete or cogent explanation has been offered by the applicant for why the following paragraphs and exhibits could not have been obtained and presented at the original June 4, 2019 hearing:

From the applicant's August 15, 2019 affidavit (outlined in paragraph 12 of the respondent's factum):

a. Paragraphs 3, 6, 7, 16(a) – (e), 17, 18, 19, 21, 23, 24, 25-26 and 27; and

b. Exhibits B, C, J, K, L, M, O and P.

From the applicant's reply affidavit on the fresh evidence motion, sworn September 30, 2019:

c. Exhibits A, B, C, D, and S;

d. And corresponding paragraphs 9, 10, 11 and 46.

[56] The applicant's failure to meet the second branch of the test for fresh evidence is a sufficient reason for me to decline to exercise my discretion to admit this fresh evidence. See *Sagaz*, at para. 65. I am also not satisfied that the above evidence probably would have had an impact on the outcome of the application. The possibility that it might do so is not enough (see *Sagaz* at paras. 62 and 63). The fairness consideration cuts in favour (or against) both sides in this case. While the applicant contends that fairness dictates that everything she has presented should be considered, there is an unfairness to the respondent in the manner in which this evidence has trickled in, particularly having regard to the history of the matter and the way in which it has unfolded, with complaints being continuously added.

[57] I have considered the proposed fresh evidence about events that occurred before June 4, 2019, its cogency, and the competing interests of finality and fairness. In the exercise of my discretion I am not prepared to admit this evidence. The paragraphs and exhibits identified above from the applicant's affidavits (and corresponding references in her factum) relating to this pre-June 4, 2019 evidence have not been considered in my final analysis and decision on this application.

[58] I am, however, prepared to receive and consider the fresh evidence submitted by the applicant about events that occurred after the June 4, 2019 hearing. Specifically, relating to the subsequent flooding of her basement and excavation work. That evidence clearly was not available at the June 4 hearing since it did not exist. It could impact the ultimate decision on the application. It is relevant to the assessment of the reasonableness of the condominium corporation's response to the applicant's complaints and the temporary repairs undertaken.

[59] I have not determined at this admissibility stage that this evidence is determinative of any issue. I am satisfied, having regard to the overall fairness of the process, that I should receive and consider it and determine what weight to give it when I consider the other evidence already before me in my assessment of the application on its merits. To this extent, the cogency of this evidence outweighs the competing interest of finality. To balance the fairness, I am also prepared to receive and consider the fresh evidence submitted by the respondent about the post-June 4, 2019 events.

[60] The respondent raised an omnibus objection to some additional fresh evidence that appeared for the first time in documents appended to the applicant's factum dated November 5, 2019, not supported by an affidavit and after the date that had been allowed for submission of fresh evidence. This objection is procedurally valid. However, given that the applicant is self-represented, I prefer to approach this "evidence" on the same principled basis as has been applied to her other fresh evidence, with the added consideration of whether there is any apparent prejudice to the respondent arising from the procedural irregularity.

[61] The post-June 4, 2019 "evidence" attached to the applicant's factum, thus not available at the time of the first hearing, includes documents communicated to unit owners by the condominium corporation about the Site Restoration Project (factum tab 3). It also includes some post-June 4, 2019 communications between the applicant and the respondent (factum tabs 1, 9 and 10) that fill in some gaps in the exchanges about maintenance and repairs that are appended to her affidavits. There is no specific prejudice that I can see in these post-June 4

documents being admitted in the interests of completeness. In the exercise of my discretion, I am prepared to admit the post-June 4, 2019 documents appended to the applicant's factum.

[62] In contrast, the other "evidence" detailed at pages 1-9 and appended to the applicant's November 5, 2019 factum (tabs 2, 4, 5, 6, 7, 8, 11, 12 and 13) is not admitted. Some of this evidence falls into the category of pre-June 4, 2019 events. The rest does not involve communications with the respondent. Considering the interests of finality and fairness, and in the absence of any evidence to explain this material or its lateness, the prejudice arising from the respondent's inability to respond to, or test, it on cross-examination leads me to the conclusion that it should not be admitted.

Analysis of Heads of Relief Sought on the Application

[63] The applicant seeks the following relief pursuant to sections 134 and 135 of the *Condominium Act*:

a. directing the respondent to repair and maintain common elements appurtenant to her townhouse unit,

b. resulting damages for lost rent, carrying costs and the cost of repairs she has made to the inside of her townhouse unit;

c. aggravated damages of $15,000.00; and

d. a declaration that she be relieved from the $15,000.00 (and any other) special assessment associated with the Site Restoration Project due to alleged inaccuracies in the Status Certificate issued to her at the time of her purchase of the townhouse unit.

(i) Section 134 Declaratory Relief for Repairs and Maintenance

[64] The applicant seeks a declaration that the condominium corporation has failed to repair and maintain the common elements appurtenant to her townhouse, in breach of ss. 89 and 90 of the *Condominium Act*. The applicant also seeks an order pursuant to s. 134 requiring the condominium corporation to repair and maintain those that remain in disrepair. This relief was primarily focussed on the roof and basement water penetration issues.

The Condominium Corporation's Responses to the Applicant's Complaints

[65] The applicant had a history of making complaints and demands to the condominium corporation that began before the July 2018 water penetration occurrences. That history influenced the condominium corporation's response to the concerns that arose and that are the subject of this application. That history is reflected in many emails and facsimiles. For example, the property manager wrote to the applicant on February 26, 2018 indicating that her recent emails and requests would be addressed in the appropriate manner and that any necessary maintenance work affecting her unit would be prioritized in conjunction with other work within the current budget. As was later documented in a June 28, 2018 letter from the property

manager, "Despite our letter to you of February 26, 2018, we continued to receive numerous emails. Since February 5, 2018 there have been 45, many containing accusations and demands that are unreasonable and unacceptable."

[66] These early demands related to complaints about the decks, windows, brick repairs and caulking as well as requests for records. None were the focus of the relief sought on the application before me, but the respondent maintains that they provide important context. The applicant's concerns about roof and basement water penetration were raised shortly after this June 2018 correspondence.

[67] On July 13, 24 and August 1, 2018 the applicant wrote to the property manager about leaks and water penetration through the roof and in the basement and identified for the property manager, upon inspection, areas of moisture under the garage slab and the front porch. The property manager postulated various theories about the cause of the leaks that would have placed all or most of the responsibility for them on the owner/applicant rather than the condominium corporation.

[68] In subsequent correspondence dated October 19, 2018 the property manager recapped the initial position and response to these concerns, indicating that:

a. Although they had reversed their initial position that the applicant's actions to remediate the roof vents had created the roof leaks and invalidated the warranty, they would await the outcome of the application (which had by that time been commenced); and

b. They continued to maintain that the water coming in under the garage slab was the applicant's responsibility because the garage slab itself was within the boundaries of her townhouse unit and offered to pay only $500 towards the estimated $8,500 cost of the work to replace the slab.

[69] The existence of a second area of water penetration under the porch was acknowledged for the first time on or about November 2, 2018 when the property manager attended to inspect following a further reported leak, at which time it was suggested that the leak had been caused by the applicant having moved her laundry equipment. This notwithstanding the fact that the correspondence from the applicant to the property manager in July of 2018 had clearly indicated that there was leaking in the basement under the main entrance stairs and not just under the garage.

[70] The initial positions and responses were based on only visual inspections undertaken by the property manager and its engineer. They disregarded the Mike Holmes Inspection Report that the applicant obtained and provided to them in early October 2018. That report identified cracked concrete not only within the garage slab but also in front of the garage slab over the driveway. It confirmed leakage and waterproofing problems in the foundation under both the front porch and under the garage, based on water tests conducted by Mr. Holmes.

[71] The property manager eventually accepted responsibility and undertook temporary repairs to the threshold of the garage slab and the basement foundation in December 2018 and January, March and April of 2019.

[72] However, the fresh evidence that has been admitted demonstrates that after the hearing, in July 2019, there was further leaking in the basement under the front entrance/porch. After it was reported, the property manager again postulated that the cause was a hole where pvc pipe had been removed rather than the foundation. A new engineer was hired who conducted site inspections and eventually a water test. On August 30, 2019, the engineer recommended excavation, and the installation a new waterproofing membrane around the foundation and possible repairs to the downspout and weeping tile system. As of the hearing of the motion for fresh evidence on November 19, 2019, there was no evidence that this recommended work had been completed.

[73] At the time of the hearing of the application in June 2019, the applicant was under the impression that the temporary repairs undertaken had resolved the leaks in both places in her basement. She was still asking that the condominium corporation be ordered to effect more permanent repairs to the foundation based on the recommendations of Mr. Holmes. The fresh evidence that I have admitted on the November 2019 motion discloses that the temporary repairs did not resolve the problem. A more permanent resolution is required, as confirmed by the recommendations of the new engineering expert.

[74] With respect to the leaks in the applicant's roof, it was the applicant and her contractors who identified and remediated the problem by replacing vents that had been blocked by roofing contractors hired by the condominium corporation. This was resolved in or about August 2018. Thus, while there is nothing more for the condominium corporation to do at this time regarding the maintenance and repair of the roof, the cost of this work is something for which the applicant seeks damages.

The Legal Analytical Framework for the Roof and Basement Foundation Repairs

[75] Both parties rely on the case of *Ryan v. York Condominium Corporation No. 340*, 2016 ONSC 2470, at paras. 69-72. It is common ground that the court should apply a fact-specific test of reasonableness in determining whether a condominium corporation has satisfied or breached its statutory duties to repair and maintain the common elements. In considering whether the condominium corporation has met the reasonableness standard for repairs, I am to consider all pertinent factors to achieve a fair and equitable result, having regard to:

a. The relationship of the parties (which involved a history of complaints by the applicant, some of which were valid and some not);

b. Their contractual obligations (which in this case, mirror the *Condominium Act* and regulations for all intents and purposes);

c. The cost and work required (there is not a complete record upon which to determine this but initial quotes obtained by the condominium corporation from August Contracting in March of 2019 suggest various options each at a cost of

less than $5,000.00 for the temporary solutions and no specific cost outlines for the other solutions to be explored beyond those; there is no indication in the record that it would be financially crippling or impossible for the condominium corporation to undertake the necessary repairs);

d. The benefit to all parties if the repairs are effected, compared to the detriment which may be occasioned by the failure to undertake them (in this case, the applicant is really the only benefactor of the required repairs but the detriment to her is significant given that, without them, she faces future flooding and mould problems in a unit that she purchased as an investment and to lease out and that has been vacant since the former owners moved out at the end of May of 2018).

[76] In applying this test, I recognize that the condominium corporation is not to be held to a standard of perfection. I find that the leaks that the applicant has experienced through cracks in the threshold to the garage slab and through the foundation under the front porch (temporarily repaired) are in common areas appurtenant to the applicant's townhouse. The condominium corporation is responsible to maintain and repair them under sections 89 and 90 of the *Condominium Act.* The condominium corporation appears now to have accepted responsibility for these repairs, but the actions of the condominium corporation to date in carrying out its responsibilities have not been reasonable in the circumstances.

[77] The condominium corporation urges upon the court a step-by-step approach in an effort to demonstrate that it was reasonable in its assumptions, the professional advice it sought and its responses to the applicant. The condominium corporation asks the court to consider the applicant's history of complaints, some of which had been determined to be unwarranted. However, as was the case in *Ryan*, with the permitted use of hindsight, I find the overall conduct of the condominium corporation was unreasonable.

[78] The whole history demonstrates that the problem of basement water penetration should have been addressed in the fall of 2018 in the timeframe that the applicant's expert Mr. Holmes did water tests and recommended steps to be taken to address the problem. The respondent essentially came to the same conclusion with its new engineering expert but not until almost a year later. The roof water penetration was addressed by the applicant herself (for which she faced initial criticism). She cannot be expected to have undertaken the foundation work on her own. Particularly not in the face of the condominium corporation's resistance to accept responsibility and the controversy over whether these leaks originated from common elements.

[79] The condominium corporation also urges upon the court the approach adopted in *Weir v. Peel Condominium Corporation No. 485*, 2017 ONSC 6265 at paras. 114-130. The condominium corporation suggests that the complexity of the problem was such that it could not be expected to rectify the leakage problem quickly and that there were no protracted periods of complete inaction on its part and that it acted on professional advice.

[80] I disagree. The leaking problems in this case were not all that complex. Through a simple water test, Mr. Holmes was able in September 2018 to identify the source of the leak and recommend repairs. This was repeated by an engineer hired by the property manager approximately a year later. Further, no explanation was offered for why the repairs recommended by the property manager's engineering expert at the end of August of 2019 had not, as of the hearing of the November 2019 motion for fresh evidence, been undertaken.

[81] The fact that the applicant had "cried wolf" in the past and that the condominium had reason to want to ensure that her complaints were legitimately within its responsibility does not excuse the overall period of delay. The witness for the condominium corporation acknowledged that the reasonable thing for it to have done was to conduct an inspection and deal with the water penetration promptly.

[82] The timeframes of unreasonable delay in *Weir* and *Ryan* were much longer. For example, in *Ryan* it took 4.5 years to effect repairs and another year to remediate the mould. The fact that the delay in those cases was much longer does not detract from the seriousness of water penetration and the need for more immediate remedial action, which I consider to be in the range of months not years. I am not holding the condominium corporation to a standard of perfection or strict liability, but only to what I consider to be reasonable (or unreasonable) in the circumstances. I find that:

a. The time it took to commence the temporary repairs to the threshold to the garage slab and foundation wall under the porch (beginning in December 2018 and January 2019) from the initial complaint in July 2018 was not reasonable;

b. There is no evidence of any efforts to test or seek recommendations for more permanent options, or to have an engineer certify that what was considered at the time to be a temporary fix was in fact a permanent one until after the July 2019 leaks, and this was not reasonable;

c. Even if the temporary repairs were initially thought to have resolved the basement leaking, when it was discovered that the basement was still leaking in July of 2019 (and confirmed in August 30, 2019 when the engineer for the property manager identified what needed to be done for this to be remediated), the continuing delay is also not reasonable.

[83] I am ordering the condominium corporation to maintain and undertake all necessary and permanent repairs as have been or may be recommended by its engineering consultants to resolve the leaks and water penetration (and any resulting mould) in the basement of the applicant's townhouse unit both under the garage and in the area of the front porch that are the subject of complaint on this application. The areas of repair include the threshold of the garage slab and the foundation under the front porch.

Other Complaints About Common Elements in Disrepair

[84] The applicant has identified other common elements in disrepair, which are acknowledged by the condominium corporation, including the garden boxes, balconies, and

decks. The condominium corporation has a plan in place for the repair and maintenance of these common elements for the applicant and other unit owners, which takes into account priorities and budgetary considerations. There is no evidence of immediate risk to damage of the applicant's townhouse from these other areas of disrepair, which are not unique to her unit.

[85] There is no need for the court's intervention in respect of the ordinary course handling by the condominium corporation of this type of maintenance and repair and I am not satisfied that the condominium corporation has breached s. 89 or 90 of the *Condominium Act* in respect of these other common elements alleged to be in a state of disrepair.

(ii) Resulting Damages Claimed

[86] The applicant seeks damages in her notice of application of $4,650.00 per month in lost rental revenues, common expense fees and property taxes since July of 2018, and $10,000.00 for the cost of repairs to the inside of the townhouse. She has also itemized certain out of pocket expenses that she seeks to recover at Exhibit "UU" to her first affidavit sworn November 26, 2018.

[87] In addition to a compliance order under s. 134(1), s. 134(3) permits the court to make an order requiring persons named to pay damages incurred by the applicant as a result of the acts of non-compliance and costs incurred by the applicant in obtaining the order, as well as to grant such other relief as is fair and equitable in the circumstances. I will deal with each type of the applicant's claims for damages separately.

Claim for Lost Rental Income Since July of 2018

[88] The applicant's evidence is that she purchased the townhouse unit as an investment and that she was receiving rent of $3,500.00 per month from the previous owners from January 2018 to May 31, 2019, with the intention of making some small repairs and re-leasing it at a higher rent starting in July 2018. While the applicant suggested she could get more rent than what the prior owners were paying, there is no evidence before me of any higher rent she could achieve. I accept her contention that she has suffered damages in lost rent as a result of the condominium corporation's failure to effect repairs in a reasonable and timely manner to the common elements. This failure led to water penetration into the basement of her townhouse. It is not a giant leap for me to infer, and I do infer, that the wet and mouldy basement rendered the townhouse unrentable.

[89] There is a reasonable time that would have to be allowed for the remediation and repairs. I do not agree that the applicant is entitled to damages commencing in July 2018 as she claims. In the absence of any evidence about this directly, I have considered the report of Mr. Holmes, the other quotes that were received and the work that was actually done by the property manager. From this, I infer that it would be reasonable to expect that it could take a couple of months to get a proper report and quotes and that it would take another couple of months to effect the repairs (to the common elements and the inside of the unit) and a month longer to find a new tenant. I find an allowance of almost five months, until December 1, 2018, to be a reasonable

period within which these repairs should and could have been effected and for the applicant to have leased the townhouse.

[90] I calculate the applicant's damages for lost rental income at $3,500.00 per month commencing on December 1, 2018. These losses will continue to accrue until the work I have directed be done by the condominium corporation has been completed. If it takes longer than a month for the applicant to rent the townhouse after the work is completed, that will be on applicant's account and not included as part of the damages payable by the condominium corporation.

Claim for Reimbursement of Common Expenses and Property Taxes since July of 2018

[91] The applicant's claims for reimbursement of her common expenses and property taxes during this timeframe is denied. These are not losses resulting from the condominium corporation's failure to comply with sections 89 and 90 of the *Condominium Act*. These are the carrying costs of the townhouse unit that the applicant is responsible for regardless of the condominium corporation's conduct.

[92] I acknowledge that the applicant has not had the use and enjoyment of her townhouse during the period of non-repair that I have identified commencing December 1, 2018. Since this was an investment property that she intended to rent out and not live in, the damages for the lost rental income over that timeframe (indicated above) are the only losses she has suffered as a result of not being able to use it.

Claim for the Cost of Repairs to the Inside of the Townhouse

[93] The original application did not itemize or particularize the costs of any of the inside repairs for which the $10,000.00 in damages is being sought. As part of the fresh evidence that was admitted, it has been confirmed that the applicant received a settlement payment under her home insurance of $4,060.91. One of the items on the original list of amounts for which the applicant seeks reimbursement is her $2,000.00 home insurance deductible.

[94] There is no evidence before me of the applicant's specific out of pocket costs or expenses for repairs to the inside of her townhouse, nor anything to indicate that the insurance settlement she has received will not cover them. Even if there had been itemized repair costs and a resulting deficiency, the applicant would have to overcome the additional hurdle of demonstrating which of them, if any, were incurred as a result of the condominium corporation's breaches. This has not been established on the record before me.

[95] The evidence did not establish that the condominium corporation breached its duties to undertake reasonable repairs and maintenance of the common elements before the leaks occurred, and I have made no such finding. Accordingly, any costs incurred by the applicant for repairs to the inside of the townhouse (including the insurance deductible) cannot be said to have been the result of the condominium corporation's breaches. There would have been leaks and resulting repairs required to the inside of the townhouse unit, and the applicant would have had an insurance deductible, even if the condominium corporation had acted reasonably.

[96] The one exception to this is that I have ordered that the condominium corporation cover the cost of any mould remediation in the basement after the outstanding repairs have been completed. It is reasonable to infer that the mould is worse due to the delays in the response and repairs for which I have found the condominium corporation responsible.

Claim for Identified Out of Pocket Expenses

[97] The applicant claims some other expenses that are substantiated by invoices attached to Exhibit "UU" of the applicant's first affidavit. I find the following expenses (damages) were incurred by the applicant as a result of the condominium corporation's failure to comply with s. 89 and 90 of the *Condominium Act*:

a. Cost of re-installation of vents on the roof – invoice from Hunter Roofing & Construction for $565.00;

b. Two-thirds of the cost of the first Holmes Home Inspection Report, which dealt with the roof and basement water penetration issues as well as other issues (including a specific deck inspection add-on of $100). From the invoice total of $621.50, two-thirds is $415.00; and

c. The total cost of the second Holmes Home Inspection Report in October of 2018 regarding the attic (roof) and basement water infiltration, of $395.50.

[98] The other amounts itemized at Exhibit "UU" to the applicant's first affidavit are denied on the basis that I am not satisfied that they resulted from breaches of s. 89 and 90 of the *Condominium Act.* Some are discussed in the previous sections. Another example is her claim for the cost to remove and replace her washer and dryer and ceiling plumbing in the basement (KZ Capital Plumbing Service invoices for $452.00 and $542.40). The invoice for the removal is dated prior to the events in July 2018 and the invoice for the reinstallation after July 2018 has not been linked to the investigation of the basement water penetration.

[99] I am also not awarding damages for the cost of the mould testing as the evidence suggests that the mould was visible once the dry wall was removed, and no explanation was provided as to why that testing needed to be done.

(iii) Section 135 Oppression and Damages

[100] Section 135 of the *Condominium Act* provides a broader remedial jurisdiction to the court, to rectify any oppressive or unfairly prejudicial conduct of the condominium corporation towards a unit owner. Available remedies include the prohibition of the impugned conduct and payment of compensation.

[101] The applicant seeks, in addition to the damages claimed in the previous section as a result of the acts of non-compliance by the condominium corporation, $15,000.00 in aggravated damages for the manner in which she has been treated and $45.00 for the cost of her ambulance

to the hospital. These are the only damages that she claims that would not, if proven, also be recoverable under s. 134 of the *Condominium Act*. The same analysis detailed in the previous section of these reasons applies to all other heads of damages whether claimed under s. 134 or s. 135.

[102] The test for oppression from *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 also applies for applications for oppression under the *Condominium Act*. See *Metropolitan Toronto Condominium Corp. No. 1272 v. Beach Development (Phase II) Corp*., 2011 ONCA 667, at para. 6. The test for oppression has two parts. The first part requires the claimant to demonstrate that there has been a breach of her reasonable expectations. The second part considers whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard" of her interests. The applicant says it was reasonable for her to expect the condominium corporation to live up to its obligations under s. 89 and 90 of the *Condominium Act*, also mirrored in the condominium corporation's declaration. That is a reasonable expectation and satisfies the first component of the test.

[103] The respondent contends that oppressive conduct requires a finding of bad faith, relying on a case decided under the British Columbia corporate oppression statute, *Nystad v. Harcrest Apartments Ltd*., 1986 CanLII 1057 (BCSC), [1986] B.C.J. No. 3145 at para. 19. I am not convinced that a finding of bad faith is required on the strength of this authority. No other has been presented to support this as a requirement for a finding of oppression under s. 135 of the *Condominium Act*. That said, while the same conduct may be relied upon to support remedies under both sections 134 and 135 of the *Condominium Act*, a finding of oppression requires something more.

[104] In support of her claim for oppression, the applicant relies upon the aggressive emails and positions taken by the property manager in relation to her complaints. These include the initial reaction and accusations relating to the work she did on her roof (the stress of which she claims required her to be taken to hospital by ambulance), the suggestion that she had not initially reported the basement water penetration under the porch when in fact she had done so, and the general delay in response that has been addressed in the previous section. The applicant also relies on some anecdotal accounts of the condominium corporation responding more quickly to other unit owners about problems they experienced to suggest that she was treated unfairly.

[105] These interactions must be considered in the context of the history of dealings and the ongoing efforts of the property manager and condominium corporation to manage and respond to a difficult unit owner and her barrage of complaints. They do not support a finding that the applicant was treated in a manner that was oppressive or unfairly prejudicial to her or that unfairly disregarded her interests. I make no such finding.

[106] As part of its response to the s. 135 oppression claim, the respondent sought to invoke the business judgment rule in defence of the conduct of the condominium board (see *Courthouse Block Inc. v. Middlesex Condominium Corporation No. 173*, 2011 ONSC 3893 at para. 29). It is not necessary to consider this defence in any detail since I have not found there to have been a breach of s. 135. I also do not consider it to be applicable in this case since the record discloses that the only matter the board was asked to consider was the temporary remediation of the

threshold of the garage slab, which the board approved. However, it was acknowledged that the work could have been undertaken by the property manager without board approval, so their involvement appears to have been superfluous to their delegation of authority to, and responsibility for, the conduct of the property manager, which is the real conduct that is at issue.

[107] The oppression remedy under s. 135 of the *Condominium Act* is not available in the circumstances of this case. Nor has the applicant made out her claim for aggravated damages of $15,000.00 or her claim for the $45.00 cost of her trip by ambulance to the hospital on the day of her vent installations on her roof. These claims are dismissed.

(iv) The Status Certificate and Relief from Special Assessment

[108] The applicant seeks a declaration that she is not required to pay any special assessment to fund the Site Restoration Project because the prospect of such was not disclosed in the Status Certificate issued by the condominium corporation and given to her before she closed on the purchase of her townhouse.

[109] The Status Certificate contained the following standard language prescribed by the *Condominium Act:*

> 12. The Corporation has no knowledge of any circumstances that may result in an increase in the common expenses for the unit, except due to the increase cost of utilities.

[110] It also contained the following statements about the reserve fund:

> 14. The most recent reserve fund study conducted by the board was a Reserve Fund Study update dated March 9, 2015 and prepared by Remy Consulting Engineers.
>
> 15. …The board anticipates that the reserve fund will be adequate in the current fiscal year for the expected costs of major repair and replacement of the common elements and assets of the Corporation.
>
> 16. The board has sent to the owners a notice April 21, 2015, containing a summary of the reserve fund study, a summary of the proposed plan for funding of the reserve fund and a statement indicating the areas, if any, in which the proposed plan differs from the study. The proposed plan for future funding has been implemented and the total contribution each year to the reserve fund is being made as set out in the Contributions Table included in the notice.

[111] The *Condominium Act* is consumer protection legislation. The purpose of the Status Certificate is to provide a prospective purchaser with as full and complete information as possible regarding the state of finances of the condominium corporation. See *673830 Ontario Limited v. MTCC 673*, 2014 ONSC #1720 (Div. Ct), at paras. 13-17. However, the Status Certificate is grounded in known and planned expenditures and the adequacy of the existing reserve fund to meet them. As Nordheimer J. (as he then was) went on to find in para. 21 of the

same case, it was the failure to disclose a known urgent need to replace the roofs and the plans to pay for this roof replacement project from the reserve fund, that fell short of the required disclosure.[3]

[112] The condominium corporation says that the May 24, 2017 AGM minutes reflect its state of knowledge in the spring of 2017. There was no reserve fund study or site inspection done in 2016. The board and AGM minutes in the first half of 2017 indicate that there had been discussions about the garden beds and roadway and curb restoration. Quotes from contractors received in 2016 appear to be the subject of discussion at the meetings in the first part of 2017.

[113] Consistent with the presentation given at that meeting, the condominium corporation maintains that the only contemplated work at the time was planter bed and landscape restoration work, the expected cost of which it considered the reserve fund to be adequate to cover. Its uncontroverted evidence is that when the Status Certificate was issued on July 5, 2017 this was the only work that was contemplated, all of which fell within the scope of the reserve fund study update completed in 2015.

[114] It was not until after this, when the board commissioned a detailed costing for the planter beds on November 21, 2017 that concerns were expressed about the anticipated work, and its impact on other works. This led to the engagement of an engineer and various reports and eventually the expansion of the scope of work in January 2018. This is what the condominium corporation says led to the announcement of the Site Restoration Project to the unit owners on February 23, 2018 and the eventual levy of the $15,000.00 special assessment that the applicant objects to. The expanded scope of work (beyond what was initially discussed in the early part of 2017) included stone instead of wooden planters (subject to individual unit owner approval), water main replacement following a broken watermain in 2018, stone paving, curbs, driveways, roadways and other site services.

[115] The applicant initially sought to meet the onus of demonstrating the requisite knowledge on the part of the condominium corporation of planned or imminently needed repairs through the hearsay evidence of Mr. Harding and the Soloway Transcript. I have ruled that evidence to be inadmissible, but also observed that it would not establish the requisite knowledge even if it had been admitted. That evidence, even if it had been admitted, amounts to nothing more than a general recognition that an aging condominium complex will face capital and repair costs that will have to be studied and prioritized over the coming years. It is not inconsistent with the statements in the Status Certificate provided to the applicant.

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[3] Although none was levied in that case, Nordheimer J. also affirmed (at para. 25) that this sort of deficiency in a status certificate would prevent the condominium corporation from requiring the applicant to provide additional funds for the undisclosed liability. It did not, however, prevent the condominium corporation from using its existing reserve fund to pay for the costs of the undisclosed required roof repairs. Nordheimer J. found the bald assertion by the applicant in that case that he would have paid less if the proper disclosure had been made to be too speculative. I find the assertion made by the applicant at the November 2019 motion, that she would not have purchased the townhouse unit if the prospect of increased common expenses for the Site Restoration Project had been disclosed to be similarly speculative.

[116] The applicant conceded in support of her efforts to have the hearsay evidence admitted that she could not establish the requisite knowledge to impugn the Status Certificate without it. In the absence of that evidence, she also seeks to rely upon the failure of the condominium corporation to undertake a reserve fund study with site inspection in 2016 when it was due as a further ground for the relief she seeks from the special assessment. The obligation to produce such a study arises under sections 72(3)(f.1) and 94 of the *Condominium Act* and s. 31 of O. Reg. 48/01.

[117] This condominium corporation's reserve fund study was conducted with a site inspection in 2010. A further reserve fund study without site inspection was done in 2013. That study was updated without a site inspection in 2015. The 2015 update was sent to unit owners with a letter dated April 21, 2015 indicating that the reserve fund was being increased through the increase in common expenses recommended by Mr. Soloway because it had been determined to be inadequate to deal with anticipated maintenance and repairs. In this letter, the unit owners were advised that no additional funding was expected to be required for the identified maintenance and repair issues beyond the increase in monthly fees that was being implemented in fiscal 2015.

[118] There is no direct consequence that flows from the failure to undertake the reserve fund study with site inspection that was due to be completed in 2016. The applicant is in effect arguing that the condominium corporation should be deemed to have known in 2017 that the reserve fund was insufficient on a theory that it would have been discovered if the reserve fund study with site inspection had been undertaken in 2016 as it should have been. I was not presented with any authority for this, and the language of the Status Certificate speaks of actual "knowledge". In the absence of some authority to suggest it should be read more broadly to encompass deemed knowledge or some authority for a finding of mis-representation based on a lack of proper diligence, I am not satisfied that this claim has been made out by the applicant.

[119] Furthermore, it would be pure speculation to say that a 2016 reserve fund study with site inspection would have led the condominium corporation to an earlier determination of the need to proceed with a Site Restoration Project that would require a special assessment. No evidence was presented about what the site inspection would entail. The reserve fund study with site inspection that was undertaken in 2018 took place *after* the special assessment had already been determined to be necessary. The 2018 reserve fund study builds upon that determination, so it cannot be inferred that the required work would have been disclosed if the study had been done earlier.

[120] Accordingly, the applicant's request for relief from the special assessment that has been levied is denied.

Summary of Declarations, Orders and Directions on the Main Application

[121] My interlocutory evidentiary rulings regarding the hearsay and fresh evidence are outlined earlier.

[122] In summary, taken from the previous section, the following affirmative orders are made on the application:

a. It is declared that the leaks the applicant has experienced through cracks in the threshold to the garage slab and through the foundation under the front porch (temporarily repaired) are in common areas appurtenant to the applicant's townhouse unit that the condominium corporation is responsible to maintain and repair under sections 89 and 90 of the *Condominium Act;*

b. It is declared that the steps taken by the condominium corporation to date in fulfillment of its responsibilities to maintain and repair these common elements appurtenant to the applicant's townhouse unit have not been reasonable and it is in breach of sections 89 and 90 of the *Condominium Act;*

c. The condominium corporation is ordered and directed pursuant to s. 134 of the *Condominium Act* to maintain and undertake all necessary and permanent repairs as have been or may be recommended by its engineering consultants to the threshold of the garage slab and to the foundation so as to resolve the leaks and water penetration (and any resulting mould) in the basement of the applicant's townhouse unit both under the garage and in the area of the front porch that are the subject of complaint on this application.

d. The applicant is entitled to be paid by the respondent pursuant to s. 134 of the *Condominium Act* the following damages found to have been incurred as a result of the condominium corporation's failure to comply with s. 89 and 90 of the *Condominium Act*:

    i. The applicant's lost rental income calculated at $3,500.00 per month commencing on December 1, 2018. These losses will continue to accrue until the work ordered to be done by the condominium corporation in sub-paragraph (c) above has been completed. The respondent is ordered and directed to pay these accrued damages to the applicant within 30 days of this decision and to continue to pay damages for this lost rent on a monthly basis until 30 days after the work has been completed;

    ii. The cost of re-installation of vents on the roof – invoice from Hunter Roofing & Construction for $565.00;

    iii. Two-thirds of the cost of the first Holmes Home Inspection Report, being $415.00; and

    iv. The total cost of the second Holmes Home Inspection Report in October of 2018 in the amount of $395.50.

[123] The following other relief requested by the applicant on the application is denied:

a. The applicant's claims for declarations and directions concerning the maintenance and repair of other common elements, beyond the threshold to the garage slab and the foundation appurtenant to the applicant's townhouse.

b. The applicant's claims for reimbursement of her common expenses and property taxes paid in respect of the townhouse unit since July of 2018.

c. The applicant's claims for other out-of-pocket expenses detailed at Exhibit "UU" to her first affidavit, beyond those awarded in paragraph 122(c)(ii)(iii) and (iv) above.

d. The applicant's claims for an oppression remedy under s. 135 of the *Condominium Act* and for aggravated damages of $15,000.00 and for the $45.00 cost of her trip by ambulance to the hospital.

e. The applicant's request for a declaration that she is not required to pay any special assessment that has been or may be levied to fund the Site Restoration Project due to alleged deficiencies in the Status Certificate issued by the condominium corporation and delivered to the applicant when she purchased her townhouse unit.

Costs

[124] The parties asked for an opportunity to make submissions on the costs of the application and the motion for leave to file fresh evidence at the same time and after receiving my decision. The parties are encouraged to try to reach an agreement on costs, but if they cannot agree, I will permit written submissions as to costs.

[125] Since there has been, in my assessment, divided success on both the motion and the application, I will allow each side the opportunity to make a brief written submissions on costs (not to exceed 3 pages double spaced) and serve the other side and submit it to the court together with a costs outline (setting out the amount and scale of costs they seek for both the application and the motion for fresh evidence) on or before January 31, 2020 and each may respond to the other's submission by a brief responding submission of no more than 1.5 pages double spaced to be served on the other side and submitted to the court on or before February 10, 2020.

[126] The applicant is encouraged to seek advice from counsel or to consult with the available on-line or in-person resources for self-represented parties for guidance on the applicable principles that will be considered in the assessment of entitlement to, the scales and quantum of costs, and what might be recoverable in respect of work done by her counsel and what self-represented parties can typically apply for.

[127] These cost submissions may be filed with the court by delivery to my attention at Judges' Administration, Room 140, 361 University Avenue.

Kimmel J.

Date: January 15, 2020