# COURT OF APPEAL FOR ONTARIO

CITATION: Noguera v. Muskoka Condominium Corporation No. 22, 2020 ONCA 46
DATE: 20200127
DOCKET: C66412 and C66413

MacPherson, Pepall and Lauwers JJ.A.

DOCKET: C66412

BETWEEN

Michael Noguera and Victoria Noguera

Applicants (Respondents)

and

Muskoka Condominium Corporation No. 22

Respondent (Appellant)

DOCKET: C66413

AND BETWEEN

Muskoka Condominium Corporation No. 22

Applicant (Appellant)

and

Michael Noguera and Victoria Noguera

Respondents (Respondents)

Erik Savas, for the appellant

Megan Mackey, for the respondents

Heard: October 21, 2019

On appeal from the judgments of Justice Wendy Matheson of the Superior Court of Justice, dated December 11, 2018, with reasons reported at 2018 ONSC 7278.



REASONS FOR DECISION

[1] The Nogueras purchased Unit 210 in Muskoka Condominium Corporation No. 22 ("the Condominium"), a lakeside condominium development, in May 2014. In February 2016 their immediate neighbour, Don Mitchell, advised them that Unit 211 was to be sold. The Nogueras were interested in purchasing, but only if they could make an opening from their unit into the adjoining unit.

[2] Before making an offer on Unit 211 and without committing to buy it, Mr. Noguera asked the Condominium's board of directors for permission to make the alterations. This request was addressed at the board meeting on March 25, 2016. Mr. Noguera was then a director as was Mr. Mitchell, the seller of Unit 211. Mr. Mitchell absented himself from the meeting but Mr. Noguera remained. The board approved the proposal with several conditions. Mr. Noguera did not vote on the proposal. We note in passing that with respect to Unit 211, Mr. Noguera was not an owner, and the board could have refused his request to consider the proposal. But it proceeded as it was entitled to do.

[3] The minutes of the meeting were set out in the application judge's decision at para. 9. The board imposed seven conditions on the approval, set out by the application judge at para. 54:

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

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

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

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

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

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

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

[4] Section 98 of the *Condominium Act, 1998*, S.O. 1998, c. 19 ("*Condominium Act*") required the Condominium to enter into and register on the title to the units an agreement with the Nogueras before they made "an addition, alteration or improvement to the common elements." Consistent with its long-standing past practice, the Condominium neglected to do so.

[5] The respondent Nogueras provided the property manager with a copy of the plans in April 2016. They showed an opening on the main floor and a door on the second. The Condominium gave a letter to the Town on June 6, 2016, confirming the board's approval and stating that "All conditions have been met to the [b]oard's satisfaction."

[6] Based on the board's approval, the Nogueras bought the adjoining unit. They signed an offer to purchase on June 16, 2016 and the transaction closed in August 2016. Renovations began in the summer of 2017 and were completed in early 2018.

[7] The membership of the board of directors changed, and the new board sought to unravel all that had gone before regarding the two units owned by the Nogueras, largely on the basis that there was no s. 98 agreement covering the alterations. The new president of the board also advised the Nogueras that they could not use the lakeside path based on unproven allegations of window peeping.

[8] The controversy between the parties alerted the Condominium board to a problem. The evidence was that the Condominium had consistently neglected to enter into agreements required by s. 98 of the *Condominium Act*, from the Nogueras or from anyone else who had made "an addition, alteration or improvement to the common elements". The application judge noted, at para. 10, that "[m]ost of the unit owners had previously made structural changes, and none had been required to enter into the statutorily-required s. 98 agreement."

[9] The board decided to validate retrospectively the changes made by unit owners by what was termed "blanket" s. 98 agreements. The Nogueras agreed to sign a s. 98 agreement and were told that others who had made structural

changes would sign one too. The s. 98 agreements provided to the affected unit owners were identical, except for the one provided to the Nogueras. Their s. 98 agreement, as proposed by the Condominium board contained the following additional language in clause 5:

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

[10] Two board meetings were held without notice to Mr. Noguera even though he was a director.

[11] The Nogueras brought an application under s. 135 of the *Condominium Act* for an oppression remedy on the basis that they were “targeted” after their relationship with members of the new board began to break down: at para. 23. The indicia were described by the application judge, at para. 72, and signal considerable animosity on the part of some members of the new board towards the Nogueras, who consequently asked for the following relief:

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

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

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

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

[12] In response, the Condominium sought extensive relief. The relief sought, which the application judge outlined at para. 75, included:

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

[13] The application judge dismissed the Condominium's cross-application, and granted the Nogueras' oppression application, in part, on the following terms:

> 1) This Court Declares that on March 25, 2016 the board of directors of the Respondent approved changes to the demising wall between suite 210 and 211 to create two openings, one on the main floor and one of the second floor.
>
> 2) This Court Orders that the parties are required to execute the Respondent's requested form of section 98 agreement. The following terms must be added as clause no. 5:
>
>> The changes to the demising wall should be removed by the Unit Owner, at the Unit Owner's sole expense, before the unit is sold. Specifically, the Unit shall be restored to the condition before the demising wall was altered.

> 3) This Court orders that the Respondent shall pay Michael Noguera and Victoria Noguera $10,000 in damages for oppression.
>
> 4) This Court orders that Michael Noguera and Victoria Noguera may resume use of the lake-front path.

[14] The Condominium appeals.

[15] We dismiss the Condominium's appeal because we largely agree with the application judge's oppression analysis.

[16] We begin with s. 135 of the *Condominium Act*, the oppression remedy provision found in the Act. It was introduced by the legislature in 1998 and came into effect in 2001. Section 135(2) and (3) provide:

> (2) On an application, if the court determines that the conduct of an owner, a corporation, a declarant or a mortgagee of a unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant, it may make an order to rectify the matter.
>
> (3) On an application, the judge may make any order the judge deems proper including,
>
> > (a) an order prohibiting the conduct referred to in the application; and
> >
> > (b) an order requiring the payment of compensation.

[17] The test for oppression under s. 135 mirrors that for oppression in corporate law generally: *Metropolitan Toronto Condominium Corp. No. 1272 v. Beach Development (Phase II) Corporation*, 2011 ONCA 667, 285 O.A.C. 372, at paras. 5-6. In *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, the Supreme Court described the two-part test for oppression. First the

claimant must establish that there has been a breach of reasonable expectations and second, the conduct must be oppressive, unfairly prejudicial or unfairly disregard the interests of the claimant. The subjective expectation of the claimant is not conclusive; rather the question is "whether the expectation is reasonable having regard to the facts of the specific case, the relationship at issue, and the entire context, including the fact that there may be conflicting claims and expectations": *BCE*, at para. 62. The availability of the oppression remedy largely turns on a factual analysis.

[18] At its heart, the oppression remedy is equitable in nature and seeks to ensure what is "just and equitable": *BCE*, at para. 58. In a case such as this one, relevant considerations include the board's statutory duties and the conduct of the parties.

[19] The appellant Condominium submits that the application judge cited the law correctly, but she erred in its application. It argues that in essence, she disregarded both the board's duty to ensure statutory compliance and the expectations of other unit owners. In support of its argument, it relies on *Carleton Condominium Corporation No. 279 v. Rochon et al.* (1987), 59 O.R. (2d) 545; *Orr v. Metropolitan Toronto Condominium Corporation No. 1056*, 2011 ONSC 4876, 11 R.P.R. (5th) 189, rev'd on other grounds, 2014 ONCA 855, 327 O.A.C. 228; and *Toronto Common Element Condominium Corp. No. 158 v. Stasyna*, 2012 ONSC 1504, 18 R.P.R. (5th) 15.

[20] We disagree with the Condominium's position.

[21] As the application judge correctly observed, the oppression remedy is broad and flexible and under s. 135, the court may make "any order the judge deems proper". She also noted that the statutory regime is a significant factor. Citing *Hakim v. Toronto Standard Condominium No. 1737*, 2012 ONSC 404, 1 B.L.R. (5th) 159, she stated at para. 36 that "[t]he court must balance the objectively reasonable expectations of an owner with the condominium board's ability to exercise judgment and secure the safety, security and welfare of all owners and the condominium's property assets." Having considered these factors, she then went on to conclude that the Condominium's conduct was oppressive and unfair.

[22] The application judge, at para. 83, canvassed the instances of oppressive behaviour by the Condominium at some length:

> The Condominium proceeded in breach of its governance obligations by holding board meetings without proper notice. The Condominium proceeded as if it had little or no responsibility for the circumstances giving rise to the disputed approval and that stance was taken even in oral argument before me. There is no doubt that the Condominium was responsible for a great deal of what happened here, most notably for an illegal past practice regarding s. 98 agreements that was in place before the applicants even became unit owners. The approach taken with these unit owners, as if the Condominium had little or no role in the prior events, was harsh and unfair. This is in stark contrast to the approach taken with other unit owners who had also

> made structural changes with now admittedly defective approvals. I recognize that there was a range of types of structural changes, and opening the demising wall had not been done before, but the s. 98 requirement applies to all of the changes. The Condominium treated the applicants more harshly than the other unit owners. Associated conduct by Board members shows targeting and ill will toward the applicants. Bearing everything in mind in the exercise of my discretion, I would foreclose the Condominium's requested orders.



[23] She found, at para. 73, "that the Condominium wrongly disparaged the applicants, especially [Mr. Noguera], wrongly excluded them from use of common elements, specifically the path, and wrongly fostered an atmosphere that made them uncomfortable." She made the finding, at para. 77, that the particular form of s. 98 agreement to which the Condominium would accede was "abusive and unfair, and prejudicial" to the Nogueras. She concluded, on the evidence, that the requirements of the oppression remedy under s. 135 had been met.

[24] The application judge's view was so strong that she added, at para. 81:

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

[25] These conclusions were available to the application judge on the basis of the evidence before her. The three cases relied upon by the appellant Condominium are quite different. *Rochon* predated the incorporation of the oppression remedy into the *Condominium Act*; relief from oppression was never sought in *Stayna* and moreover there was a total absence of any reasonable expectation; and in *Orr*, the application judge found no oppression. Quite apart from those factors, the underlying facts in these three cases differed significantly from those in this case.

[26] The Condominium also argues that the board meeting at which the alterations were approved was invalid under s. 40 of the *Condominium Act*. The Condominium argues that Mr. Noguera had a conflict of interest and could not be counted in the quorum, as required by s. 32 of the Act. If this argument is correct, then the meeting at which the alteration proposal was approved lacked a quorum. Although Mr. Noguera was present at the meeting, he did not vote.

[27] We agree with the application judge's analysis of the quorum issue. Section 40 provides:

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

[28] Section 40(6) provides that the director "shall not be present during the discussion at a meeting, vote or be counted in the quorum on a vote" where, as noted in s. 40(2), the interests of both the director and the Condominium in the contract or transaction are "material." If they are not material, then the director may be present and may vote.

[29] The application judge concluded, at para. 47, that "Mr. Noguera did not have a conflict because the proposal was not material to the Condominium." She viewed materiality in functional terms, and noted, at para. 43:

> The change was to an interior wall. It would not be used by and was not even visible to anyone outside of these two units. There was no financial impact on the Condominium. The applicants were paying for the work. The common expenses and other financial obligations of each of # 210 and # 211 would not be reduced or eliminated. There was no impact on the Condominium's insurance. I find that the proposed transaction was properly described in the minutes as a "minor alteration" from the standpoint of the Condominium.

[30] The application judge rejected the Condominium's argument, largely based on the cost of the alteration, that "the proposed transaction is material to it, in hindsight": at para. 42. The cost was initially estimated at between $6,000 and $8,000, but once the Town imposed its requirements that the doors in the openings be fire-rated, the cost climbed to about $32,000.

[31] The application judge rejected the Condominium's argument that materiality should be judged on the ultimate costs that were incurred rather than

on the initial estimate. She found, at para. 44, that “in financial terms, it was not material to the Condominium at the time it was approved, and the Condominium has not established that hindsight should control the analysis in this case.” We agree.

[32] The Condominium does not dispute that s. 98 could be available to the Nogueras to retrospectively validate and ratify their alterations. The terms required by the application judge in her order would comply with s. 98(2), and save harmless the Condominium.

[33] The Condominium renewed before us the argument that the court has no business making an order prescribing the terms of the s. 98 agreement. The parties should be left to negotiate the terms of the agreement with the Condominium retaining its complete discretion. We reject this argument. The application judge provided relief from oppression, a remedy that is broad and flexible. The application judge described in para. 83 an attitude on the Condominium’s part that “shows targeting and ill will”. The Condominium had provided s. 98 agreements to the other unit owners who had completed alterations but the one prepared for the Nogueras to sign was both onerous and different. It is not surprising that the application judge declined to give effect to the Condominium’s argument. The evidence supporting her view is overwhelming. The application judge’s remedy served to rectify the Condominium’s oppressive conduct, which seeped through all its actions,

including its approach to this litigation. The Condominium's real interests were entirely protected by the s. 98 agreement ordered by the application judge, which simply incorporated the conditions imposed when the Board originally approved the Nogueras' proposal.

[34] The appeal is dismissed with costs as agreed payable by the Condominium to the Nogueras in the amount of $20,000, all-inclusive.