COURT OF APPEAL FOR ONTARIO

CITATION: York Region Standard Condominium Corporation No. 1206 v. 520 Steeles Developments Inc., 2020 ONCA 63
DATE: 20200131
DOCKET: C67084

2020 ONCA 63 (CanLII)

MacPherson, Rouleau, Roberts, Nordheimer and Harvison Young JJ.A.

BETWEEN

York Region Standard Condominium Corporation No. 1206

Plaintiff
(Respondent/Appellant by way of cross-appeal)

and

520 Steeles Developments Inc., 7 Brighton Place Inc., Kantium Development & Construction Inc., Liberty Development Corporation, Darcon Inc., Mondconsult Limited, York Region Common Element Condominium 1210, Affinity Aluminium Systems Ltd., JIT Professional Services Inc., Siu Hong (Ernie) Leung, P. Eng., Quest Window Systems Inc., Rouslan Tcholii, P. Eng., Ya Ping (Tom) Zhang, P. Eng., Tom's Structural Steel Detailing, Ya Ping (Tom) Zhang Structural Engineers & Solution Developers, Nasser Heidari, P. Eng., NCN Engineering Services Ltd., NCN Engineering Services Inc., Torsteel Company Co. Limited, Vorstadt Incorporated, Vorstadt Superior Roof, Vorstadt's Superior Sheet Metal Ltd., Duron Ontario Ltd., C&A Tedesco Waterproofing Inc., Saverino General Contractors Ltd., Advanced Precast Inc., Mukesh Patel, P.Eng., MRP Design Services, Delgant (Civil) Ltd., Delgant Construction Ltd., Delgant Limited, Resform Construction Ltd., Green Valley Inc., Global Plumbing & Heating Inc., System Drywall & Acoustics, Mayfair Electric Limited, York Sheet Metal Limited, Adjeleian Allen Rubeli Limited, Sigmund Soudack & Associates Inc., Schaeffer & Associates Ltd., United Engineering Inc., A&G Engineering Ltd., Disano Sprinkler Design Limited, EXP Services Inc./Les Services EXP Inc., Building Sciences Inc., Rafael & Bigauskas Architects, Sedun + Kanerva Architects Inc., Strybos Barron King Ltd., Strybos Associates Ltd., Simerra Property Management Inc., Simerra Property Management Ltd., 360 Community Management Ltd., Blandford Construction Services Inc., Marnick Fire Protection Inc., and Defendants #1, #2, #3, #4, #5, #6, #7, #8, #9, #10, #11, #12, #13, #14, #15, #16, #17, #18, #19, and #20

Defendants
(Appellant/Respondent by way of cross-appeal)

Elizabeth Bowker and Christian Breukelman, for the appellant/respondent by way of cross-appeal

R. Leigh Youd, Adam Wygodny, Tim Gleason and Mathieu Bélanger, for the respondent/appellant by way of cross-appeal

Heard: November 12, 2019

On appeal from the order of Justice Mario D. Faieta of the Superior Court of Justice, dated May 31, 2019, with reasons reported at 2019 ONSC 2991.

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Harvison Young J.A.:

A. OVERVIEW

[1] This matter arose out of alleged defects in the construction of a large condominium in Thornhill, Ontario. The respondent condominium corporation brought an action against many persons, including the appellant, 360 Community Management Ltd. ("360"). 360 had been the building's property manager. It brought a motion for summary judgment, arguing that because the condominium corporation had failed to comply with the notice provision in s. 23(2) of the *Condominium Act, 1998,* S.O. 1998, c. 19, the action should be dismissed as a nullity. The motion judge found that the notice provisions were inapplicable or, if they were applicable, they had been satisfied. He dismissed the summary judgment motion.

[2] The condominium corporation did not provide the unit owners with sufficient notice before the notice of action was issued on March 11, 2016. It did,

however, provide the owners with detailed notice, including a draft statement of claim, shortly thereafter, and before the statement of claim was filed on April 8, 2016. The parties disagree, in these circumstances, about whether notice was required, whether it was given, and the consequence of non-compliance. The latter issue is the central issue in this case: does a condominium corporation's failure to comply with the notice provision in s. 23(2) render the action a nullity?

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[3] According to a strict reading of this court's decision in *York Condominium Corp. No. 46 v. Medhurst, Hogg & Associates Ltd. et al.* (1983), 41 O.R. (2d) 800 (C.A.), the answer to this question is "yes". I have concluded, however, that this court's decision in *Medhurst* has been attenuated by subsequent Supreme Court of Canada jurisprudence. It has also generated unnecessarily harsh effects which, as I will explain below, are inconsistent with the purpose of the notice provision pursuant to the principles of modern statutory interpretation. In my view, we should overrule *Medhurst* and hold that non-compliance with the notice provision does not render an action a nullity. This conclusion determines the appellant's summary judgment motion below and I would therefore dismiss the appeal.

B. BACKGROUND

[4] Subsection 23(1) of the Act provides that a condominium corporation may, on its own behalf and on behalf of an owner, commence an action for, among other things, damages in respect of damage to the condominium or in respect of

a contract involving the condominium. Section 23(2) requires notice be given to the condominium owners before commencing such an action:

> Before commencing an action mentioned in subsection (1), the corporation shall give written notice of the general nature of the action to all persons whose names appear in the record of the corporation required by section 46.1 or are required by that section to appear in that record except if,
>
> (a) the action is to enforce a lien of the corporation under section 85 or to fulfill its duty under subsection 17(3); or
>
> (b) the action is commenced in the Small Claims Court. [Emphasis added.]

[5] The condominium corporation authorized its counsel to issue a notice of action claiming relief against various persons, including its former property manager 360, for damages related to deficient construction of the residential condominium building. The notice of action was issued on March 11, 2016.

[6] The allegations against 360 were based in breach of contract, negligence and breach of fiduciary duty arising out of alleged failures to properly manage the building's common elements, to properly manage a Tarion warranty claim and to notify the condominium corporation of health and safety issues.

[7] On March 18, 2016, the condominium corporation circulated a package of documents to condominium owners which, among other things, outlined the general nature of the action. It explained to condominium owners that the notice

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of action was filed out of concern for an expiring limitation period. It also included a draft statement of claim.

[8] The documents sent to the condominium owners also provided notice of the annual general meeting to be held on April 4, 2016. While the Act does not require condominium owners to authorize the filing of a statement of claim, one agenda item at the annual general meeting was the approval of the draft pleading. At this meeting, the members voted in favour of filing the statement of claim and it was filed on April 8, 2016.

[9] 360 brought a motion for summary judgment, arguing that the action, having been commenced in contravention of the s. 23(2) notice requirement, was a nullity.

C. DECISION BELOW

[10] The motion judge first held that the notice provision at s. 23(2) of the Act did not apply to a claim by a condominium corporation arising from a contract that it had entered into with another person. The action against 360 arose out of the contractual responsibilities it had to the condominium corporation and therefore, in the motion judge's view, fell outside the scope of s. 23 of the Act.

[11] In any event, the motion judge found that the condominium corporation had, in fact, complied with the notice requirement in s. 23(2) on the basis that the action had not been commenced when the notice of action was issued on March

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11, 2016, but rather when the statement of claim was filed on April 8, 2016. Notice had been provided prior to the issuance of the statement of claim which the motion judge found sufficient to comply with s. 23(2).

[12] Given these conclusions, the motion judge dismissed the summary judgment motion. He concluded that the notice requirement at s. 23(2) was not applicable to this case. Even if it applied, the motion judge would have found that the condominium corporation had complied with it.

[13] The motion judge observed, however, that failure to comply with the notice requirement renders an action a nullity, if s. 23 applies. He noted that despite concerns about the harshness of this result, this court's decision in *Medhurst* is binding authority for the proposition that non-compliance with s. 23(2) results in the proceeding being a nullity.

D. ISSUES

[14] The parties raise three central issues:

1. Did the motion judge err in holding that non-compliance with s. 23(2) renders an action a nullity?
2. Did the motion judge err in holding that an action is "commenced" for the purposes of s. 23(2) by the issuance of the statement of claim, rather than the notice of action?

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3. Did the motion judge err in finding that the notice provision in s. 23(2) of the Act did not apply to this action?

[15] To dispose of the appeal, however, it is only necessary to address the first issue. If non-compliance with s. 23(2) does not render an action a nullity, then the summary judgment motion was properly dismissed regardless of whether s. 23(2) applies or was complied with. Given that I agree with the condominium corporation that non-compliance should not render the action a nullity, my analysis focuses on the first issue and this is sufficient to dispose of this matter. Nevertheless, I offer a brief comment on the second issue. I decline to address the third issue.

E. ANALYSIS

(1) The Action is Not a Nullity

[16] I conclude that this action is not a nullity. This court's decision in *Medhurst* should be overruled as it has been attenuated by subsequent jurisprudence and generates harsh effects unconnected to the purposes underlying the Act. An application of the proper principles leads me to conclude that regardless of whether or not the condominium corporation complied with s. 23(2) of the Act, this action is not a nullity.

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(a) The Decision in *Medhurst*

[17] My analysis begins with a consideration of this court's decision in *Medhurst*, which stands as a leading authority on the nullity issue in the context of s. 23 of the Act.

[18] At first instance in that case, Gray J. of the Ontario High Court of Justice was asked to dismiss an action on the grounds that notice was not given pursuant to s. 14 of *The Condominium Act, 1978*, S.O. 1978, c. 84, which is the precursor to s. 23 of the current Act. In brief oral reasons, he dismissed the action on the basis that a failure to comply with the notice requirement resulted in the proceeding being a nullity: *York Condominium Corp. No. 46 v. Medhurst, Hogg & Associates Ltd. et al.* (1982), 39 O.R. (2d) 389 (H.C.), aff'd 41 O.R. (2d) 800 (C.A.). The rationale for this conclusion was the absence of any explicit statutory power to stay an action in the text of the Act. Given this fact, Gray J. concluded that there was no indication that the legislator intended courts to relieve parties from non-compliance, leaving nullity as the consequence:

> [I]f the legislature had intended judges to have the power to stay the action, quite apart from any inherent power to stay itself, … such a staying procedure would have been set forth in the clear language of the *Condominium Act* which has engaged the attention of the legislature now for some time in the past few years.
>
> In the result, I have reached the conclusion that the proceeding is a nullity by reason of the absence of notice and an order will therefore go dismissing the action without prejudice to the right of the plaintiff to

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> launch a new action if so advised presumably with compliance with the procedural requirements.

[19] In still briefer reasons, this court upheld Gray J.'s decision. The appeal reasons, in their entirety, read:

> The causes of action in this case appear to fall within s. 14(1) of the *Condominium Act*, R.S.O. 1980, c. 84, and Gray J. was right, therefore, in requiring that notice be given in accordance with the subsection. We agree with the reasons of Gray J. for dismissing the action. The appeal is dismissed with costs. Since we have heard this appeal together with Appeal No. 827/82, there will only be one set of costs.

[20] However brief, these reasons are unequivocal in endorsing the holding of Gray J. that non-compliance with the notice provision results in a nullity. As the motion judge in this case observed, it is thus "settled law that an action by a condominium corporation of the type that comes within the scope of s. 23 of the Act is a nullity in the absence of prior notice to the owners": at para. 55, citing *Beckett Elevator Ltd. v. York Condominium Corp. No. 42* (1984), 45 O.R. (2d) 699 (H.C.); *TSCC 2130 v. York Bremner Developments Limited*, 2016 ONSC 5393, 75 R.P.R. (5th) 243.

(b) *Medhurst* Should be Overruled

[21] Generally, this court will follow its previous decisions in order to ensure the certainty and predictability of the law in Ontario. However, this is not an absolute. Where the advantages of departing from the precedent outweigh the

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disadvantages, taking into account the effect on the parties, future litigants and on the administration of justice, this court may exceptionally decline to follow a past decision: *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co*. (2005), 76 O.R. (3d) 161 (C.A.), at para. 127, leave to appeal refused, [2005] S.C.C.A. No. 388-95. A decision to overrule precedent is rare because the values of certainty and predictability weigh heavily in favour of adherence to precedent. The circumstances in this case, however, warrant overruling *Medhurst*.

[22] In particular, *Medhurst* is inconsistent with intervening decisions of the Supreme Court of Canada which bind this court with respect to the modern approach to statutory interpretation. As a result, its jurisprudential value has been greatly attenuated in the years since it was decided.

[23] To demonstrate how *Medhurst* is inconsistent with the prevailing approach to determining whether non-compliance results in a nullity, I first outline this prevailing approach.

[24] Where a legislator imposes an imperative obligation on a person, and that person does not fulfill this obligation, it is not always immediately clear from the text of the legislation what the consequence of this failure will be. In some cases, the consequence will be that actions taken in contravention of the obligation are a nullity, and therefore that the failure cannot be cured or overlooked by the

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court: *Montreal Street R. Co. v. Normandin* (1914), 33 D.L.R. 195 (P.C.), at p. 198; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Toronto: LexisNexis, 2014), at para. 4.82.

[25] To determine the consequence of non-compliance with a given statutory obligation, the court engages in statutory interpretation: *British Columbia (Attorney General) v. Canada (Attorney General); An Act respecting the Vancouver Island Railway (Re)*, [1994] 2 S.C.R. 41, at p. 123. The words of the Act must be read in context and in their grammatical and ordinary sense harmoniously with the scheme and object of the Act, and the intention of the legislator: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21. A core element of this modern approach to statutory interpretation is that the meaning of legislation cannot be divined from the wording of the legislation alone, but rather must be determined purposively and in context: Sullivan, at para. 2.2. When determining whether nullity will result from non-compliance, the object of the statute and the effects of ruling one way or another may be particularly important: *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344, at para. 42, *per* McLachlin J. (concurring).

[26] *Medhurst* was decided in 1983, before *Rizzo*, and the subsequent jurisprudence that has emphasized the role of legislative purpose in the interpretation of statutes. The reasons endorsed in *Medhurst* were premised on

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the absence of explicit language indicating the availability of a stay, with no consideration given to the provision's intended purpose. Further, in determining the consequence of statutory non-compliance, *Blueberry River* now directs us to put significant weight on the purpose of the obligation and the effects of holding one way or another: at para. 42. Again, this contrasts with the reasoning in *Medhurst*.

[27] If *Medhurst* is disregarded and the requisite principles of statutory interpretation are properly applied, it seems clear that non-compliance with s. 23(2) should not render an action a nullity. There is nothing in the text of the Act that suggests that breach of the notice requirement carried the consequence of a nullity. Some legislative schemes specify within the text of the legislation that non-compliance will result in a nullity, see e.g. *Environmental Protection Act*, R.S.O. 1990, c. E.19, s. 101(12), but in the absence of clear direction from the legislator, courts will generally favour an interpretation that allows procedural irregularities to be cured: *Lawrence v. International Brotherhood of Electrical Workers (IBEW), Local 773*, 2017 ONCA 321, 138 O.R. (3d) 129, at para. 21, aff'd 2018 SCC 11, [2018] 1 S.C.R. 267. The fact that the Act is silent on the consequence of a failure to comply with s. 23(2) does not support a consequence of nullity.

[28] Further, it would be inconsistent with the purpose of the provision and the Act to find that non-compliance results in a nullity. This court has defined this Act

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as consumer protection legislation: *Harvey v. Talon International Inc.*, 2017 ONCA 267, 137 O.R. (3d) 184, at para. 62. Section 23 in particular was enacted to ensure that condominium owners could bring an action as a collective to recover for construction deficiencies in respect of common elements: *1420041 Ontario Inc. v. 1 King West Inc.*, 2012 ONCA 249, 110 O.R. (3d) 241, at para. 16, leave to appeal refused, [2012] S.C.C.A. No. 272. As Myers J. found in *York Bremner*, the purpose of the notice requirement specifically is to ensure that the condominium owners know that their corporation is about to sue on their collective behalf: at para. 175. In other words, the purpose of s. 23(2) is to protect the condominium owners from their condominium corporation by ensuring they are aware before it acts.

[29] Finding that non-compliance with s. 23(2) results in a nullity would undermine rather than support the purpose of this legislation. The section is meant to regulate the relationship between the condominium corporation and the condominium owners, not the relationship between the condominium corporation and third parties. Third parties should not be able to escape liability to the condominium owners because of a failure of the condominium corporation, acting on their behalf, to properly notify the owners. Nullity leads to this perverse result by allowing third parties to raise the procedural defect for their own benefit. It is perverse to allow the provision to be used to the prejudice of the condominium owners it was meant to protect.

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[30] This is especially so given that the Act as a whole is consumer protection legislation directed at protecting condominium owners and that s. 23 was enacted to facilitate actions against third parties by condominium owners as a collective to vindicate their rights. Therefore, an interpretation of the Act informed by its purpose does not support a finding of nullity.

[31] Finally, finding that non-compliance results in a nullity would lead to unnecessarily harsh effects and serve no intended purpose. When determining the result of non-compliance, courts should be particularly aware of the potential for adverse effects: *Blueberry River*, at para. 42.

[32] For example, at issue in *Blueberry River* were provisions which required a vote by the band to surrender land to be certified by oath of a commissioner and submitted to the Governor-in-Council for approval. The band in that case had technically not complied because the chiefs did not personally certify the surrender on oath. McLachlin J. declined to find that this resulted in nullity, noting that it would “work serious inconvenience” as surrendering bands would be forced to go through the surrender process all over again as a result of technical non-compliance: at para. 43.

[33] Here, nullity would not just “work serious inconvenience”; it could result in significant injustice. At the very least, it would require the commencement of a new action. At worst, due to the expiration of a limitation period, it could operate

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to defeat an otherwise meritorious action. This is particularly unjust because the rights of condominium owners are in jeopardy even though the notice requirement was enacted for the benefit and protection of these owners. Permitting a defendant to take advantage of the notice provision to invalidate otherwise meritorious claims for breach of the notice requirement serves no intended purpose.

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[34] This is not a merely theoretical concern. In *York Bremner*, Myers J. reluctantly applied *Medhurst* and found that the action at issue was a nullity, despite noting, at paras. 173-74, that it made little practical sense to do so:

> I see no purpose in holding the first claim a nullity. TSCC 2130 acted when it did and the limitation period should be measured against that act in my view. I see no reasons why YBDL should be able to take advantage of a notice provision in favour of owners. … In my view, I am not entitled to ignore the clear holding of the Court of Appeal in *Medhurst* that is binding on me. … If an interpretation is to be found to save the first action, it will have to be by the Court of Appeal or the Supreme Court of Canada.

[35] The motion judge below echoed these same concerns, at paras. 54-56:

> A finding that this action is a nullity for failure to comply with the notice requirement found in s. 23 in these circumstances is a harsh result and has the unintended consequence of resulting in a hardship to the owners and a benefit to a defendant.
>
> …
>
> [D]espite the above concerns this court is not entitled to ignore the Ontario Court of Appeal's brief but clear

> decision in *Medhurst* given the constraints of vertical *stare decisis*.

[36] This is not a case like *The Owners, Strata Plan LMS 888 v. The City of Coquitlam et al*, 2003 BCSC 941, 15 B.C.L.R. (4th) 154, because pursuant to the statute considered there, the right to commence an action was premised on obtaining a vote of three quarters of the owners. By contrast, the Act contains no such approval requirement. Rather, the condominium corporation is empowered to commence an action subject only to the procedural requirement that notice be given.

[37] Even if non-compliance with s. 23(2) does not result in a nullity, this does not mean that there is no possible consequence to such non-compliance. Non-compliance with a statutory provision creates a procedural defect. The court has discretion to determine the effect, if any, of such a procedural defect. Two key factors that a court will consider are the extent of the non-compliance and the extent of any prejudice suffered as a result of it: Sullivan, at para. 4.90. I also note that in considering how to address non-compliance with s. 23(2), courts have the discretion to fashion appropriate remedies that accord with the object and purpose of the Act, in accordance with ss. 134, 135 and 136 of that Act.

[38] In short, holding that non-compliance with s. 23(2) results in a nullity is not called for by the text of this provision, is wholly inconsistent with its purpose and can lead to substantial injustice. In so holding, *Medhurst* is inconsistent with

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binding Supreme Court jurisprudence regarding the modern approach to statutory interpretation and the concept of a statutory nullity.

[39] Accordingly, *Medhurst* has been attenuated and this weighs in favour of overruling it. The administration of justice would hardly be served by upholding the precedent in *Medhurst* simply because it predates the modern emphasis on a purposive interpretation of statutes. Rather, by overruling *Medhurst* the notice provision in the Act can be properly interpreted in accordance with relevant jurisprudence and by consequence ensure the coherence of the law in this respect.

[40] Further, *Medhurst* is not simply a case which, with the benefit of the subsequent jurisprudence, would likely have been decided differently by this court, but is a decision which has the potential to cause injustice. As noted above, holding that nullity must result from non-compliance can lead to inconvenience and injustice to the very constituency – condominium owners – that the provision was intended to protect. Automatically invalidating otherwise meritorious claims for breach of the notice requirement serves no intended purpose. The fact that adhering to *Medhurst* would impose harsh unintended results on precisely those the Act was enacted to protect, both the condominium owners in this litigation and condominium owners who may be litigants in the future, weighs against following it.

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[41] On balance, I find this is one of the rare circumstances in which the advantages of not following an earlier decision rendered by this court outweigh the disadvantages. For that reason, I would overrule *Medhurst*.

(c) Conclusion on Nullity

[42] Applying the relevant principles to an analysis of s. 23 of the Act, and contrary to the conclusion of the motion judge, even if this action is subject to s. 23 and even if notice was not properly given in accordance with s. 23(2), the underlying action is not a nullity.

[43] In the particular circumstances of this case, I conclude that even if the condominium corporation has failed to comply with this provision, it is only a procedural irregularity that was cured. This non-compliance does not entitle the appellant to summary judgment. In this case, it is not the condominium owners themselves who assert non-compliance with the notice requirement. Further, the condominium owners were provided with a synopsis of the lawsuit that outlined the general nature of the action shortly after the notice of action had been issued. It also included a draft statement of claim. Although not required by the Act, the condominium owners subsequently authorized the filing of the statement of claim. In the circumstances, no perceptible prejudice resulted from the purported failure.

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[44] Accordingly, it is not necessary to decide the other issues. The motion below was properly dismissed.

(2) The Action was Commenced by Notice of Action

[45] While it is not necessary to address the question of when the action was commenced in order to dispose of the appeal, I nevertheless address the issue. In my view, the motion judge erred in his conclusion that this action was only "commenced" for the purposes of s. 23 when the statement of claim was filed. Rather, as is clear from the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, the action was commenced when the notice of action was issued.

[46] The motion judge correctly held that an action is commenced for the purposes of the *Rules* by the issuance of either a statement of claim or a notice of action. He was also correct to point out that the definitions in the *Rules* cannot control the meaning of terms used in the Act. The motion judge, however, relied heavily on his view that, as there were no significant costs consequences to filing a notice of action, interpreting an action to be commenced by a notice of action did not advance the "sole purpose" of the notice requirement.

[47] I do not agree. First, the purpose of the notice requirement under the Act involves more than costs consequences. Further, the *Rules* are clear on this point. While normally the issuance of a statement of claim commences the proceeding, in those instances where a notice of action is issued, the latter then

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serves as the commencement of the proceeding. While a statute might change that result, there is nothing in the wording of the Act that does so in this case. It was not open to the motion judge to choose the commencement date for the reasons that he did.

[48] Therefore, the action in this case was commenced with the filing of the notice of action, not the statement of claim.

F. THE CROSS-APPEAL

[49] Before concluding, I must deal with one procedural point.

[50] In the event the appeal was allowed, the respondent brought a cross-appeal seeking the dismissal of 360's motion for summary judgment on the basis that the motion judge erred in concluding that non-compliance with s. 23(2) of the Act would have rendered the action a nullity. The cross-appeal, in effect, sought to offer an alternative basis for upholding the motion judge's order dismissing the motion for summary judgment. The respondent did not seek to set aside or vary the motion judge's order or to obtain a different disposition than that order.

[51] This is not a proper cross-appeal as defined by r. 61.07(1). It is, in essence, the respondent's argument on the appeal dressed up in different language.

[52] The question as to the condominium corporation's capacity to commence or maintain the action absent compliance with the notice requirement in s. 23(2)

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was clearly put in issue in the notice of appeal. The submissions from both parties on the cross-appeal amount to arguments about whether the appeal should be allowed or dismissed. Accordingly, I have treated all submissions in relation to the cross-appeal as made in relation to the appeal.

[53] Given that I would dismiss the appeal and given that the cross-appeal was only pursued in the event that the appeal was allowed, the cross-appeal is also dismissed.

G. CONCLUSION

[54] I would accordingly dismiss the appeal and the cross-appeal.

[55] At the hearing, the parties advised the court that they had agreed that costs of $15,000 would follow the event in each of the appeal and the cross-appeal. As discussed above, the issues from the cross-appeal were subsumed in the appeal in which the respondent was successful. I would order costs to the respondent in the amount of $30,000.

Released: January 31, 2020
"JCM"

"A. Harvison Young J.A."
"I agree J.C. MacPherson J.A."
"I agree Paul Rouleau J.A."
"I agree L.B. Roberts J.A."
"I agree I.V.B. Nordheimer J.A."

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