MacDonald v. Wentworth Condominium Corp. No. 96, [2020] O.J. No. 732

Ontario Judgments

Ontario Superior Court of Justice

A.J. Goodman J.

Heard: May 2, 23, June 3, August 19 and December 16, 2019.

Judgment: February 20, 2020.

Court File Nos.: CV-17-62315, 18-67706

[2020] O.J. No. 732 | 2020 ONSC 1048

Between Joan Marilyn MacDonald, Applicant/Defendant, and Wentworth Condominium Corporation No. 96, Respondent/Plaintiff

(102 paras.)

Case Summary

Real property law — Condominiums — Assessments — Condominium corporation — Rights and obligations — Building management — Maintenance obligations — Common elements — Repair obligations — Common elements — Unit holders — Rights of — Application by condominium unit owner for oppression remedy dismissed — Unit owner claimed that Board breached her reasonable expectations by not giving owners opportunity to vote on plan to replace balcony and elevator before levying special assessment — Proposed work was for replacing balcony floors and remediating deterioration of walls — Work was remedial and covered by s. 97(1) of Condominium Act, 1998 — Condominium Act, 1998, s. 97(1).

Application by a condominium unit owner for an oppression remedy. The unit owner claimed that the Board of Directors breached her reasonable expectations by not giving owners an opportunity to vote on a plan to replace a balcony and elevator before levying a special assessment. The proposed work was, according to a tender report, for replacing the balcony floors and remediating the deterioration of the walls.

HELD: Application dismissed.

The Board based its decision on expert reports in addressing the ongoing deteriorating state of the building and its related costs within a finite funding base. The work was remedial and covered by s. 97(1) of the Condominium Act, 1998. The balcony and elevator were outside individual units and, as such, common elements. The Board had a statutory duty to "manage the affairs of the corporation" and a "duty to control, manage and administer the common elements". The work constituted "repair" or "maintenance". The work used material that was close in quality to the original and appropriate in the circumstances.

Statutes, Regulations and Rules Cited:

Condominium Act, 1998, *SO 1998, c. 19, s. 1*, s. 17(2), s. 27(1), s. 85, s. 94, s. 97, s. 97(1), s. 97(4), s. 97(6)(a)(i), s. 135

Condominium Management Services Act, 2015, S.O. 2015, c. 28, Sched. 2,

Mortgages Act, R.S.O. 1990. c. M.40, s. 26(1), s. 31, s. 33

Rules of Civil Procedure, Rule 20.4

Counsel

M. Rosenblatt, for the Applicant/Defendant.

M. Mackey, for the Respondent/Plaintiff.

REASONS FOR JUDGMENT

A.J. GOODMAN J.

1 The applicant, Joan Marilyn MacDonald ("MacDonald") seeks a declaration and other relief under an application brought pursuant to the *Condominium Act,* 1998, *SO 1998, c.19* (the *"Act"),* the condominium's rules, declarations, bylaws and legal principles that address oppression remedies and govern the conduct of a Board of Directors.

2 The respondent/plaintiff Wentworth Condominium Corporation No. 96, ("WCC96") is a residential condominium corporation with twelve unit owners. WCC96 is known as Sandyford Place and is located at 43 Duke Street in the City of Hamilton.

3 WCC96 seeks summary judgment and lien enforcement against MacDonald, who is an owner of condominium unit 3 ("the unit").

4 During the early stages of the hearing, the original co-applicant, Joy Ogunro, requested and was granted relief to be let out of the Application.

5 There was a motion to convert and consolidate the application to an action. Both the Application and the summary judgement motion were consolidated into one hearing before me. The litigation was adjourned over the course of several months to allow MacDonald to retain counsel and to allow the parties to conduct cross-examinations on affidavits recently filed as well as to respond to the various productions that arose over the course of this litigation.

6 For the sake of clarity, I may refer to MacDonald as the applicant and WCC96 as the respondent, when addressing the various matters.

Background:

7 The condominium building is noted to be of significant cultural and historical importance to the city and neighbourhood. It was built by Scottish merchants in 1847 and retains much of the original exterior stone masonry work. The exterior envelope of the building is subject to an easement in favour of the Ontario Heritage Trust.

8 The Board of Directors ("the Board") consists of its president, Sam Nash ("Nash"), Christopher Krnjeta ("Krnjeta")

and Nancy Forrester ("Forrester"). Nash and Krnjeta purchased their respective units in or around 2014 or 2015. They had no previous experience as directors of the Board. Previously, MacDonald sat on the Board with Nash and Krnjeta for two months in February and March 2015 before resigning.

Position of the Applicant:

9 MacDonald submits that the lien registered against title to her unit by WCC96 on May 2, 2017 was done in contravention of the *Act,* WCC96's rules, bylaws and declaration and her expectations as an owner.

10 MacDonald makes an application for an interim and permanent injunction restraining WCC96 from interfering in any way with the peaceful enjoyment of her possession of her unit; selling, conveying, transferring, mortgaging or otherwise encumbering or forcing the sale of her unit; an order declaring that the powers of the Board have been exercised in a manner that is oppressive, unfairly prejudicial or that unfairly disregards her interests. This includes; unlawfully levying a Special Assessment from unit owners; failing to provide access to and disclosure of requested financial documentation underlying the Special Assessment; ignoring requests by MacDonald to explore all available funding opportunities and cost savings options for repair work to be carried out at the condominium; ignoring requests by MacDonald to explore heritage funding and grants for scope of work items otherwise covered by the Special Assessment and Reserve Fund Study ("RFS"); failing to provide adequate or reasonable notice for the Special Assessment; and, imposing the Special Assessment in contravention of the *Act* and failing to abide by the policies, procedures and governance principles set-out in the condominium's Rules, Bylaws, and Declaration.

11 MacDonald submits that she has a legal and equitable interest in and all rights relating to competent financial management of the condominium's affairs. She says that she enjoys a reasonable expectation that the condominium's financial affairs will be competently managed by the Board. The Board has prejudiced and/or unfairly disregarded her rights and interests in her capacity as a unit owner and stakeholder in WCC96.

12 The Board has acted outside its authority by unilaterally imposing the Special Assessment without consulting or meeting with owners of the condominium, failing to provide owners with quotes, invoices or financial documentation substantiating the Special Assessment, and failing to adequately prioritize the necessary common element repairs required at the condominium. On December 29, 2016 - with one months' notice - the Board levied a Special Assessment in the amount of $181,666.00 in addition to the Reserve Fund Contribution and the 2017 budget. Payments for the Special Assessment were scheduled to commence on February 1, 2017 and end on July 1,2017. MacDonald submits that the Board has prematurely levied the Special Assessment without consulting with experts or the relevant authorities regarding prioritizing the scope of work items contained in a 2016 updated RFS, especially as it relates to the necessity for full replacement of the elevator. MacDonald claimed the Board did not carefully examine all options with respect to the elevator replacement.

13 MacDonald believes that the amounts contained in the Reserve Fund, updated in the 2016 "Updated RFS" (carried out by Brown & Beattie) would cover the entire cost of the balcony repairs. The RFS includes a "catch-up" contribution of $238,840.00 and represents a 330.3% reserve fund increase from 2015-2016. The applicant submits that the catch up contribution to the reserve fund is excessive in the circumstances. With this payment in addition to payment of the Special Assessment, MacDonald says that she has been placed in a position of significant financial hardship.

14 MacDonald submits that she was never advised by the Board or its management company about the necessity of the Special Assessment nor was she ever advised about what specific repair items this assessment was intended to cover. Subsequent to the levying of the Special Assessment in 2017, the Board changed its position on what repair items the assessment was intended to address, opting to maintain the elevator rather than replace it, adding exterior masonry repairs, and now describing the Special Assessment for "funding engineering investigations and ongoing work". The Board originally levied the assessment at the beginning of 2017 specifically for replacement of the exterior elevator lift and rear balcony. These building components remain unrepaired and have languished while the Board embarks upon an omnibus renovation project that will cost unit owners over $1,600,000.00 in the short term and up to $3,000,000.00 over time. The applicant reminds the Court, that she is

responsible for payment of the largest proportionate share of the common element expenses for her unit at 11.981%.

15 MacDonald also asserts that the Board is acting contrary to the interests of unit owners by pursuing a lending by-law arrangement in the face of the excessive amounts due and owing under the Special Assessment and catch-up contribution to the reserve fund. MacDonald suggests that if the lending by-law passes, any lender will inevitably take security for its loan over all units at the condominium which will significantly devalue her unit's sale price and restrict her ability to deal freely with the unit.

16 Furthermore, in the face of the excessive amounts due and owing under the Special Assessment and catch-up contribution to the reserve fund, the lending by-law is superfluous and will threaten the marketability of the unit to potential purchasers. The Board has been completely silent on the particulars of the lending by-law and its potential impact on the financial administration of the condominium. The Board has not held a meeting with the owners regarding the potential sale of the building or the potential dissolution of the corporation.

17 Finally, at relevant times, Board minutes were required and not completed and WCC96's Board of Directors consisted of only Nash and Krnjeta transacting business on behalf of WCC96. The applicant says that this is alleged to be contrary to WCC96's bylaws, declaration and the *Act.*

18 The applicant requests an order dismissing the summary judgment motion and vacating the liens registered on title to her unit. MacDonald also claims damages for stress, anxiety, inconvenience and mental anguish.

Position of the Respondent:

19 WCC96 submits that presently, the condominium is facing significant repair and maintenance issues, primary because the building's infrastructure is aging and needs to be repaired or replaced.

20 In 2015, WCC96 learned its reserve fund was underfunded. In order to "catch up" and fund investigations and ongoing necessary work, the Board levied a Special Assessment in the amount of $181,666 which was to be paid by all 12 units in accordance with their proportionate share.

21 Although the elevator ought to be replaced, the Board was informed by its elevator contractor that it could continue to be repaired but with no certainty that there would be no failures in the future due to the lack of available funds, and the immediate need for repairs to the balcony.

22 WCC96 submits that the Board has not yet decided what projects will be done now or how much money will be spent. They continue to investigate the best course of action for the different projects, however, no matter how one looks at the problem, there is a significant shortfall in the reserve fund that can only be resolved through Special Assessments or borrowing. Engineers have estimated that the total amount of work immediately/imminently recommended for the building is in excess of $3,000,000. In any event, even in the best-case scenario, the cost of the future work is likely in excess of $2,000,000 and will be paid for by only twelve unit owners.

23 WCC96 submits that condominium boards are entitled to levy Special Assessments when condo corporations require money for legitimate repairs or remediation. It is not disputed that all other unit owners paid the Special Assessment without issue or complaint. MacDonald remains the only owner who has not paid her share of the Special Assessment, which was $10,882.71 back in April 2017.

24 Since MacDonald failed to pay her proportional share, WCC96 sent a Notice of Lien to Owner dated April 13, 2017. The condominium registered a lien against title to MacDonald's unit in the Land Titles Division of Wentworth (No.62). The Condominium advised MacDonald in writing that the lien had been registered on title to the unit to secure payment of outstanding common expenses. MacDonald was provided over one year to make payment of her arrears, and failed to do so. WCC96 submits that part of the impetus for enforcement was the impending

urgency of the balcony replacement work. In 2017, contractors provided quotes for the replacement of both the balcony and elevator, all in excess of $1,600,000. At the time, the board held approximately $420,000 in reserve.

25 On June 19, 2018, WCC96 advised MacDonald it would enforce the lien and proceed to sell the unit if the arrears remained unpaid. On August 27, 2018, pursuant to ss. 26(1), 31 and 33 of the *Mortgages Act,* R.S.O 1990. c. M. 40, WCC96 sent a Notice of Sale Under Lien (the "Notice of Sale") to MacDonald and mortgagees of the Unit. WCC96 submits that this is the subject of the summary judgment motion and for enforcement of the lien.

26 WCC96 submits that at all times, the Board and the corporation acted reasonably, appropriately, legally and in the best interests of all the unit owners. The Board conducted its business within its authority and discretion granted by statue and the condominium bylaws. As such, the Application ought to be dismissed and summary judgment granted to enforce the lien and sale of the unit to recover the arrears due and owing.

Facts:

27 For the limited purposes of this application/motion, and where the evidence conflicts, I tend to prefer Nash's evidence as his evidence is supported by relevant engineering reports, documents, emails and other timely correspondence.

28 Condominium corporations are required to obtain RFS every three years. The 2012 RFS identified that the fund was deficient and needed to be increased through a Special Assessment and condominium fees. In April 2015, the Board held an owner's meeting to advise that the reserve fund was severely deficient. Owners expressed concern that they could not afford over $1,000,000 of the work. The Board investigated other sources of funding. In 2015 Brown & Beattie was tasked to complete an updated RFS and in 2016 the company was hired to perform an inspection of the balcony.

29 On February 15, 2015, a report by the condominium's engineers, Brown & Beattie, estimated reporting work on exterior masonry walls in the amount of $1,325,000 was required within the next five years. In December, 2016, Tacoma Engineers advised that the chimneys needed immediate restoration but that the masonry repointing could be done in three years; the estimate to repair the chimneys was $300,000; replacement of balconies was recommended in a November 5, 2015 report by Brown & Beattie for an estimated cost of $800,000. The elevator was outdated and requires regular repairs and maintenance. In 2016, Brock (elevator specialists) and TSSA suggested the elevator should be replaced at an estimated cost of $500,000.

30 In 2017, WCC96 learned the estimated cost to replace the balconies and elevator together as recommended was in excess of $1,600,000 and doors and windows needed to be replaced to meet the fire code requirements at an estimated cost of $45,000.

31 The condominium was also due to obtain an updated RFS in 2018. According to Nash, the condominium did not obtain such a study in 2018. At the time, Brown & Beattie recommended that the balcony replacement be completed before the update so the true cost of the work could be reflected in in the Special Assessment rather than an estimate. Nash deposed that the reason the Board did not proceed with the balcony repairs was that the removal of the balcony could cause structural issues and the only way in which to proceed was by Special Assessment. Apparently, the lowest quote for the balcony replacement was $800,000.

32 Nash says that the Board had hoped to get the balcony work done in 2018 and get an updated RFS thereafter; however, the permitting application process has taken far longer than was predicted as the City of Hamilton has not yet made a decision on the permit. Counsel could not advise why it is taking so long but the City of Hamilton has recently requested further details surrounding the plans for ensuring sufficient fire exits are maintained to each unit during the balcony replacement reconstruction. Brown & Beattie are coordinating with contractors to put a plan in place that can be returned to the City of Hamilton Building Department.

33 Again, according to Nash, at this point, because of the continued wait for the approval of the building permit, the

Board does not know when the balcony project will begin. Therefore, the Board has asked Brown & Beattie to update the 2015 RFS, as opposed to using other engineers, because the company is already familiar with the building and its challenges.

34 In regards to the elevator, in 2017, the Board instructed Brown & Beattie to incorporate a new elevator into the balcony replacement specifications and it would be more cost effective to do all of the work at the same time.

35 On December 29, 2016, the property managers for the condominium at the time, Precision Property Management ("Precision") sent a notice to unit owners that they were terminating their relationship with WCC96 and would no longer act as property managers, effective January 31, 2017. Precision also enclosed a budget for January 1, 2017 (the "Budget") and Notice of Special Assessment. The Budget increased by 6.4% on January 1, 2017. The Reserve Fund Allocation increased to $57,174 for "major repairs and replacement." The total amount for the budget for 2017 which covered utilities, contract services, insurance, repairs, maintenance and administration was $67,170 plus the additional $57,174 transfer to the Reserve Fund for a total amount of $124,344.

36 Tenders were received from the bidding contractors in June 2018. The range of quotes spanned from $1,140,413 to $1,360,901 for the replacement of the balcony. However, there were significant issues with the existing elevator, specifically, its shaft. The lowest quote for the elevator replacement was in excess of $1,600,000. Repairs to the existing elevator were pegged at $500,000, until such time the determination is made as to a feasible permanent replacement.

Analysis:

37 As referenced above, the applicant disputes the legitimacy of the 2017 Special Assessment because of a prior determination by a different Board of Directors in 2012 for the balcony repair. Moreover, the applicant advances several complaints as to the validity of the Special Assessment, including:

a) The Board did not provide owners the opportunity to vote on the repair items, or on the funding plan, based on past practice;

b) The underlying cost estimates for the Special Assessment were based on the "Brown & Beattie Wall Study", which was described as a "rather cursory inspection" rather than hard costing estimates;

c) The Brown & Beattie study formed the basis of the later 2016 Updated RFS which called for an increase in the reserve fund despite competing expert conclusions about the necessity or urgency for such repairs;

d) The Board did not provide instructions to Brown & Beattie to consider a later wall study undertaken by Tacoma Engineers, which revealed the masonry of the building was in fair condition, thus, contradicting Brown & Beattie's finding. Forrester emailed all owners indicating that the cost for replacement of the elevator and balcony was estimated at $370,000, a figure far less than what the Board now purports to be the amount of $1,600,000 for the same replacement option. The Tacoma Report was disclosed to owners in February 2017 after the first payment of the 2017 Special Assessment was due, despite the report being in the Board's possession in December, 2016;

e) The elevator was not at the end of its life, as described in a 2012 expert report and could be maintained on a go-forward basis. The Notice of Special Assessment did not articulate why the elevator and balcony needed replacement, as required under the bylaws. The Board did not consult with the unit owners, provide quotes, invoices or sufficient documentation regarding the intended work for replacing the balcony or elevator, nor did it provide justification for the cost prior to levying the Special Assessment;

f) The Board failed to call a vote on the replacement option and levying the assessment without putting the various options before the owners;

g) The Board levied a Special Assessment to fund the repair work of the balcony that was to occur in 2016. MacDonald had previously paid her share of a $190,000 Special Assessment between 2012 to 2014 with the expectation that this assessment would fund the repair of the rear balcony in 2016. This work did not occur despite the Board having knowledge and advising unit owners that the rear balcony repair construction would occur in the spring/summer of 2016.

38 Of import to the applicant's position is the fact that, to date, the balcony has not been replaced and no repair or replacement work has been scheduled for the foreseeable future. The monies allocated for the original Special Assessment were not spent or allocated. The Board took no action and as a result, Brown & Beattie did not put the project out to tender. MacDonald's reasonable expectation was for the RFS to be completed to ensure the Board had up to date and accurate information regarding the state of repair of the building and future projects intended to be completed.

39 Lastly, it has recently been revealed that the Board is actively seeking a purchaser for the condominium and that it is seeking legal advice on winding up the corporation.

40 The principal issue here is whether the respondent's actions warrant an oppression remedy under s. 135 of the *Act*, which provides:

> 135 (2) On an application, if the court determines that the conduct of an owner, a corporation ... 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.

41 The law on oppression is well defined. Black's Law Dictionary defines oppression as: "the act or an instance of unjustly exercising authority or power so that one or more people are unfairly or cruelly prevented from enjoying the same rights that other people have".

42 The test for oppression was established by the Supreme Court of Canada in *BCE Inc. Re*, *[2008] 3 S.C.R. 560*. While in the context of corporate law, it remains applicable to the analysis under s. 135. The court must answer two questions: (1) Does the evidence support the reasonable expectation asserted by the claimant? (2) And does the evidence establish the reasonable expectation was violated by conduct falling within the terms: "oppression", "unfair prejudice", or "unfair disregard" of the relevant interest?

43 In *Walia Properties Ltd. v. York Condominium Corp. No. 478*, *2007 CanLII 31573*, at paras. 22-24, Harvison Young J. (as she then was) articulated the following regarding the oppression remedy in the context of condominium law:

> Section 135 allows a unit owner to apply to the court for relief from conduct that is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant. The section came into effect in 2001. While this is a new concept for Ontario condominium corporations, Canadian courts have dealt with the oppression remedy for many years in the context of corporate law. Corporate law principles regarding oppression are, therefore, applicable in determining what constitutes conduct that is oppressive, unfairly prejudicial or unfairly disregards the applicant's interests in the context of condominium law: see *Niedermeier v. York Condominium Corp. No. 50 (2006), 149 A.C.W.S. (3d) 708*, *[2006] O.J. No. 2612* (Sup. Ct. J.).
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> In the corporate law context, oppressive conduct requires a finding of bad faith, while conduct that is unfairly prejudicial or that unfairly disregards the interests of the applicant does not: see *Brant Investments v. Keeprite Inc.* (1991), *1991 CanLII 2705* (ON CA), *3 O.R. (3d) 289* (C.A.) at 305-306. Oppressive conduct has been described as conduct that is burdensome, harsh and wrongful. Unfair prejudice has been held to mean a limitation on or injury to a complainant's rights or interests that is unfair or inequitable. Unfair disregard means to unjustly ignore or treat the interests of the complainant as being of no importance: see

Niedermeier, supra, and *Consolidated Enfield Corp. v. Blair* (1994), 47 A.C.W.S. (3d) 728, [1994] O.J. No. 850 (Gen. Div.) at para. 80. Loeb suggests that in the context of condominium law:

> ..."unfairly prejudicial" more appropriately describes deception, or different treatment for what may seem to be similar categories, whether financial or otherwise. "Unfairly disregards," however, may more accurately describe an alleged failure to take into account a legitimate minority interest or viewpoint: see Audrey M. Loeb, Condominium Law and Administration, looseleaf (Scarborough, Ontario: Thomson Carswell, 1998) at 23-23.

When determining whether conduct falls within the meaning of s. 135, the court must be mindful that the oppression remedy protects the reasonable expectations of shareholders or unit owners. Reasonable expectations should be determined according to the arrangements that existed between the shareholders or unit owners of a corporation: see *Naneff v. Con-Crete Holdings Ltd*. (1995), 1995 CanLII 959 (ON CA), 23 O.R. (3d) 481 (C.A.). In addition, the court must examine the cumulative effect of the conduct complained of. In *Blue-Red Holdings Ltd. v. Strata Plan VR 857* (1994), 42 R.P.R. (2d) 49 (B.C.S.C.) Dorgan J. looked at the cumulative effect of the conduct complained of, and concluded that the conduct was unfairly prejudicial because it resulted in substantial and significant changes that affected only the commercial owners in a mixed use condominium. Commenting on this case, Loeb suggests that where a proposed change or course of conduct in management dramatically alters the relationship between commercial and residential unit owners, courts are likely to grant a remedy to the aggrieved minority interest unless it can be demonstrated that the proposed change or the conduct itself represents an attempt to balance the competing economic interests of the two groups.

44 Several principles can be gleaned from this passage. Oppressive conduct requires a finding of bad faith. The focus is ultimately on the reasonable expectation of the owners. The analysis on reasonable expectations will center on the arrangement between the parties and whether the impugned conduct violates an applicant's reasonable expectations of that arrangement. However, regard must be given to whether the impugned conduct is an attempt to balance competing interests.

45 A party's expectation must be objectively reasonable. The applicant is correct in stating "the oppression remedy does not protect a party's wish list." The oppression remedy is meant to balance the interests of those claiming rights from the corporation against the ability of management to conduct business in an efficient manner.

Reasonable Expectations with Respect to the Reserve Fund Study:

46 The applicant asserts the respondent breached the applicant's reasonable expectation that a RFS is completed every three years, in compliance with s. 94 of the *Act.* A RFS would ensure the Board has accurate information regarding the state of repair and the need for future projects. As mentioned, the last full study was completed in 2012 with amendments in 2015 and 2016. A forthcoming study was promised to be completed in 2018 but has yet to be completed.

47 The applicant's expectation that a study be completed may be reasonable in the circumstances but failing to deliver one is not oppressive.

48 I accept that the Board did not obtain a study at the recommendation of Brown & Beattie, who suggested the effort ought to be postponed so that the true cost of the balcony replacement work would be reflected. The delays in the balcony replacement project was due to permitting issues with the City of Hamilton. This delay is unfortunate but beyond the control of the Board or the corporation.

49 In my opinion, delaying the RFS to ensure the special assessment following a RFS reflected the true costs of the ongoing projects does not evince the bad faith, unfair prejudice or unfair disregard of the applicant's interest to warrant the oppression remedy.

Reasonable Expectations with Respect to the 2017 Special Assessment:

50 The applicant submits that the conduct of the Board breaches MacDonald's reasonable expectations to follow the voting provisions of the *Act* allowing them, as well as other owners, an opportunity to vote on the plan to replace the balcony and elevator prior to levying the 2017 Special Assessment.

51 The applicant relies on s. 97(4), which provides:

> 97. (4) Despite subsection (3), the corporation shall not make a substantial addition, alteration, improvement to the common elements, or a substantial change in the assets of the corporation or a substantial change in a service that the corporation provides to the owners unless the owners who own at least 66 2/3 per cent of the units of the corporation vote in favour of approving it.

52 Further, the applicant relies on s. 97(6)(a)(i), which defines the meaning of "addition, alteration, improvement or change" under s. 97(4):

> [i]ts estimated cost, based on its total cost, regardless of whether part of the cost is incurred before or after the current fiscal year, exceeds the lesser of,
>
> (i) 10 per cent of the annual budgeted common expenses for the current fiscal year...

The applicant argues that because the cost of the 2017 Special Assessment was greater than the 10 percent of the annual budgeted common expenses, the 2017 Special Assessment was a substantial alteration under s. 97(4).

53 The applicant asserts the Board did not put the replacement option of the rear balcony and elevator lift to the owners for a vote instead opting to employ a "shoot first, ask questions later" approach to levying the 2017 Special Assessment. Although the Board is authorized to levy extraordinary expenditures under the Condo's bylaws for urgent repairs without a vote from owners, the Board breached the extraordinary expenditure provision in the bylaw because it failed to provide written reasons to owners why the expenditure was necessary in the first place.

54 I must disagree. Here, the statute and the by-law permit the Board to act. The evidence establishes that the Board based its decision on the expert reports provided at relevant times in addressing the ongoing deteriorating state of the building and its related costs with a finite funding base.

55 Moreover, the applicant asserts that the "catch-up" contribution to the reserve fund is excessive. She asserts that any and all plans must effectively be run past her and the owners prior to any decision being made. The jurisprudence does not seem to support these assertions.

56 The articles also read:

> EXTRAORDINARY EXPENDITURES: Extraordinary expenditures not contemplated in the foregoing budget and for which the Board shall not have sufficient funds may be assessed at any time during the year in addition to the annual assessment, by the Board serving notices of such further assessment on all owners which shall include a written statement setting out the reasons for extraordinary assessment, and such extraordinary assessment shall be payable by each owner within ten (10) days after the delivery thereof to such owner, or within such further period of time and in such instalments as the Board may determine.

57 It is true that to date, the Board has not carried out the urgent repair items facing the condominium. The rear balcony and elevator lift as outlined in the Notice of Special Assessment have not been replaced. The Board concedes that the elevator will be maintained on a go-forward basis rather than be replaced, a position that appears to be different from the information contained in the Notice of Special Assessment. However, I find that the Board's decisions have been sensibly and rationally explained.

58 The applicant's concerns also stem from the suggestion that she was misinformed or provided with repeatedly inaccurate depictions of what is required to be repaired or addressed. At the end of the day, I must conclude that much of the applicant's concerns appear to be anecdotal in nature, premised on personal belief and with little evidential support.

59 The applicant asserts the Board did not follow the declaration because it did not put the replacement option of the elevator and rear balcony to a vote of unit owners prior to levying the 2017 Special Assessment. I observe that the declaration, at Article III 4(a) on which the applicant relies, is permissive: "[t]he Corporation may by a vote of members" make substantial alterations. The Board did not breach the declaration in not holding a vote based on its own language.

60 In the alternative, the applicant argues that that the extraordinary expense provision in bylaw number one must be contrasted with the condominium's declaration which provides owners with a mechanism to a vote to authorize the Board to undertake "substantial additions, alterations, or improvements to, or renovation of the Common Elements, or make any substantial change in the assets of the corporation."

61 By this, the applicant means the permissive nature of the bylaw - which gives the Board the option to hold a vote prior to authorizing the payment of extraordinary expenses - ought to be contrasted with the mandatory nature of s. 97(4), which requires the Board to hold a vote on substantial additions or alterations. Further, the applicant asserts these repair items constitute a substantial alteration or repair as prescribed by the *Act*.

62 However, again, I must disagree with the applicant's characterization of the *Act*. My reason stems from a plain reading of s. 97 of the *Act*, which does not support the applicant's argument. The applicant claims the replacement option of the elevator and rear balcony constituted a substantial addition, alteration, or improvement, and are captured under s. 97(4), requiring the Board to hold a vote.

63 When s. 97 is read in its entirety, the scope of "substantial addition, alteration, or improvement" is circumscribed by s. 97(1), which provides:

> 97. (1) If the corporation has an obligation to repair the units or common elements after damage or to maintain them and the corporation carries out the obligation using materials that are as reasonably close in quality to the original as is appropriate in accordance with current construction standards, the work shall be deemed not to be an addition, alteration or improvement to the common elements or a change in the assets of the corporation for the purpose of this section.

64 In effect, s. 97(1) limits the type of additions, alterations, or improvements that fall outside the ambit of s. 97(4) and, thereby, will not trigger a vote by the unit owners. Section 97(1) provides that remedial work will not trigger s. 97(4).

65 I agree with the respondents that the declaration is different and is not read in conjunction with s. 97 of the *Act* to ensure protection of condominium owners from over-reach and unfettered decision-making by a board, to substantially alter the common elements of a condominium without a vote of owners.

66 The issue is whether the remedial work contemplated under s. 97(1) is met in the case at bar. I refer to *Harvey v. Elgin Condominium Corporation No. 3*, *2013 ONSC 1273*, wherein Leach J. outlined the framework for analysis at para. 90. Remedial work undertaken by the respondent will fall under s. 97 (1) by examining a number of incidental questions, namely:

A. Does the elevator and balcony form part of the "common elements"?

B. Does the respondent have an obligation to repair the common elements after damage, or to maintain them?

C. Does the remedial work carried out by the respondent in relation to elevator and balcony constitute "repair" or "maintenance"?

D. Was the remedial work carried out "using materials that are as reasonably close in quality to the original as is appropriate in accordance with current construction standards?"

67 The answer to these questions is "yes" such that the remedial work to the balcony and elevator are captured within the ambit of s. 97(1). I will address these questions in turn.

A. The *Condominium Act* defines "common elements" as "all property except the units" under s. 1. The balcony and elevator are outside individual units and, as such, are common elements.

B. The respondent, as a condominium board has a statutory duty to "manage the affairs of the corporation" under s. 27 (1) of the *Condominium Act*, and a "duty to control, manage and administer the common elements" under s. 17 (2). In this case, Article V of the WCC96's bylaws articulate the duty to repair, restore, control, manage, and administer the common elements. The respondent clearly has the duty to manage, maintain, and administer the common elements in this case.

C. While the *Act* does not define "repair" and "maintenance", I am satisfied the remedial work at issue constitute "repair" or "maintenance". In *York Condominium Corp. No. 59 v. York Condominium Corp. No. 87*, *[1983] O.J. No. 3088* (C.A.) at para. 14, the Court of Appeal defined "repair" to mean "restore to good condition renewal or replacement of decayed or damaged parts or by re-fixing what has given way, and to "maintain" as "to keep in repair".

D. The terms "repair" and "maintenance" have not been interpreted strictly. Courts have repeatedly held that replacement of old or defective common elements with "new" or "upgraded" material, equipment or designs can still constitute "repair" and "maintenance": *Laidis v. MTCC No. 727*, *[2005] O.J. No. 726*, at para. 18-19; *Perper v. York Region Condominium Corp, No. 860*, *[2012] O.J. No. 2594*, at paras. 24-25. The projected work on the balcony floors, masonry walls, and elevator, are, according to the Brown & Beattie tender report (June 22, 2018), for replacing the balcony floors, remediating the deterioration of the walls. I am satisfied that this work uses material that is close in quality to the original and appropriate in the circumstances.

68 The applicant also claims the Board relied upon a "general consensus" at meetings to proceed with the replacement option of the rear balcony and elevator. Further, general consensus amongst unit owners is not adequate given the scope of work and costs associated with the Board's omnibus construction plan. However, I do not accept that a vote must first be put to the owners.

69 In finding the balcony and elevator work to be remedial and covered under s. 97 (1), the work is not subject to a voter approval process under s. 97(4). Consequently, the applicant's expectation there be a vote of unit owners prior to the 2017 Special Assessment is not reasonable.

70 However, should I be in error on this finding, there is no cogent evidence the applicant would be able to meet the second prong of the analysis. In *Harvey*, Leach J. found that the applicant was not unfairly prejudiced. She held that all of the unit owners received equal treatment and "there is nothing to suggest that Mr. Harvey's rights were limited in any differential way": at para. 74. The same can be said for MacDonald in this case.

71 There is no evidence to warrant a finding of bad faith, unfair prejudice, or unfair disregard on the part of the Board. The costs of the assessment are borne by each unit owner based on the proportion of their ownership of the shared property. The applicant stands as a one-unit owner out of 12, of which 11 of whom have acceded to the Board's request for funds.

Reasonable Expectations with Respect to Quorum and Board Minutes:

72 The applicant also argues that there was no quorum. The articles read:

> QUORUM: Until changed by a by-law, the number of directors shall be three (3) of whom two (2) shall constitute a quorum for the transaction of business at any meeting of the Board. Notwithstanding vacancies the remaining directors may exercise all the powers of the Board so long as a quorum of the Board remains in office.

73 It is true that the Board did not keep minutes of its meetings from 2015 up to and including March of 2017. There are no minutes from any Board meeting authorizing legal action to be taken against MacDonald or instructing its legal counsel to commence the Power of Sale. There are no details of what was discussed during the Board meeting authorizing the liens to be registered on MacDonald's title on May 2, 2017. Without minutes from this meeting, MacDonald did not know if a vote was taken to authorize the registration of the liens, if the vote carried, who voted or if a quorum existed to allow a vote to proceed in the first place.

74 The applicant presents a valid argument. It is a reasonable expectation for a Board to keep minutes from all meetings and more importantly, to keep detailed minutes from meetings where punitive action is sought to lien a unit owner's property knowing full well the hardship and restriction this action can have on a property owner's rights. The applicant claims such conduct by the Board is clandestine and runs contrary to the intent of the Act for openness, transparency and access to information by owners.[1]

75 While pleaded, in oral argument, I note that applicant's counsel effectively abandoned the claim about the Board's questionable practice or process. Quite properly, counsel focused his argument on the Board's substantive conduct, rather than the procedural issues. Thus, I need not address the issue of quorum when decisions were made or when the minutes of the Board were actually memorialized in deciding this application.[2]

76 However, the analysis hinges on reasonable expectations and whether the Board's conduct, in failing to keep minutes, rises to the level of oppression. I find that it does not. As the minutes were provided to the parties, I do not find the lack of minutes, itself, to violate the applicant's reasonable expectation. Nonetheless, the outcome of the Board's decision to seek a lien is known to the applicant, just as the reasoning for it obvious: the applicant is refusing to contribute funds for remedial work for which the Board is within its statutory right and obligation to levy.

Reasonable Expectation with Respect to the Board's Alleged Inability to Manage the Corporation:

77 Without sounding unduly repetitive, the applicant makes broad assertions under the oppression remedy claim that the Board has demonstrated an inability to manage the corporation.

78 Overall, the applicant asserts the Board's actions and improper constitution for the relevant period in 2015 cumulatively escalated to the level of oppression.

79 It may be that, on its face, the Board did comply with certain formalities. I agree that the lack of or delayed minutes from the relevant board meetings as to decisions taken by the Board is somewhat problematic as it pertains to the decision-making processes.

80 That said, I recognize the business judgment rule is applicable in assessing the conduct of condominium corporations: *3716724 Canada Inc. v. Carleton Condominium Corporation No. 375*, *2016 ONCA 650*, at para. 53. The question is whether the Board's decision demonstrates that the directors acted honestly, in good faith, exercising the care, diligence and skill a reasonably prudent person would in comparable circumstances. The court will consider whether the Board balanced the interests of the applicant under s. 135 of the *Act* against competing concerns. The court will also defer to decisions that fall within the range of reasonable choices which do not unfairly disregard the interests of the applicant.

81 In the applicant's foregoing assertions of Board mismanagement, I do not find the Board engaged in conduct

that a reasonably prudent person would not do in comparable circumstances. There is no evidence to demonstrate that the directors did not act fairly or unreasonably with respect to the other allegations.

82 As mentioned, the applicant asserts the 2016 rear balcony repair project did not proceed as a result of the Board's conduct to gather further information. I must disagree with the applicant that by failing to instruct its engineer to put the draft Invitation to Bid out to tender in 2015, the Board breached MacDonald's reasonable expectations that the rear balcony work would be carried out as previously agreed and paid for by the 2013 Special Assessment. The Board did not neglect to repair the balcony. Rather, the Board acted on the advice of engineers that the removal of the balcony could cause structural issues that might spiral into other problems. I accept that the Board fully considered that the cost of such work would have led to greater fees or assessments, which the Board opted not to do.

83 Another complaint raised by the applicant reflects that the newly amended regulations and the *Condominium Management Services Act,* 2015, S.O. 2015, c.28, Sched. 2 require directors sitting on a condominium's board to take training courses. The Directors have not yet completed the mandatory director's training; however, it is understood that there are several months before the deadline by which training must be completed. The Condominium's other two directors, are also not under any present obligation to complete the training, but they also intend to complete it in the future. Nothing really turns on this point.

84 With regard to the applicant's assertion that the Board's current consideration of the potential dissolution and sale of Sandyford Place without disclosure to the owners constitutes mismanagement, I find it premature. The dissolution and sale cannot be carried out without majority consent from the owners. The Board is clearly canvassing its options. I do not find this to be unreasonable or imprudent in the circumstances. Rather than indicia of mismanagement, the approach is gathering material information to address all viable options available to be considered by the unit owners collectively. This ultimate decision will affect all owners alike, not just the applicant.

85 While the applicant urges this Court to draw a logical inference that the Board's conduct in actively seeking purchasers to sell Sandyford Place and seeking to dissolve the corporation meets the statutory threshold that it is just and convenient and in the best interests of the owners for an administrator to be installed, and investigate all options available to avoid a sale of Sandyford Place; I decline to do so. Again, while the applicant may disagree with the decisions being adopted by the Board, WCC96 is within its rights and has conducted themselves within the four corners of their bylaws, declaration and the enabling *Act* to solicit interest or market the building for potential sale. Ultimately, there will be an opportunity for all of the unit owners to actively participate in any decision or action that will affect the conveyance or financial well-being of WCC96. The applicant's concerns in this regard are premature at this stage.

86 That being said, the Board's decision-making process ought to be transparent and compliant with the Condominium's rules, bylaws and the scheme of the Act, to protect unit owners while balancing the ability of the corporation to self-manage.

87 While I accept that the Board did not fully communicate with MacDonald in a timely or direct manner, overall this does not detract from the Board's overall conduct and decisions taken by them in this case. In my opinion, the Board was elected by the unit owners, and in my view, is in a better position to make decisions affecting the corporation than this court.

88 In summary, I am persuaded that the law sustains the Board's actions in this case. In the appropriate circumstances, Condominium Boards can levy Special Assessments and have done so as a necessary component of management: *McDonough v. York Condominium Corp. No. 41*, [*[1990] O.J. No. 2791*](), at para. 62. Such assessments for the purpose of remedial work do not require a vote, either by the declaration or under the *Act*.

89 It cannot be said that the Board's acts or conduct was oppressive or prejudicial to the applicant. The Board's actions sufficiently demonstrate it has balanced the applicant's interests against competing collective concerns for

all unit holders. It has not acted in bad faith to warrant the applicant's claim for an oppression remedy. It does not give rise to any claim for mental distress or other collateral relief being sought.

90 Based on the evidence, the enabling bylaws, declarations, relevant jurisprudence and statutory interpretation, I cannot find in favour of MacDonald. The s. 135 Application is dismissed.

Summary Judgment:

91 Under Rule 20.4 of the *Rules of Civil Procedure*, the court may grant summary judgment if there is no genuine issue requiring a trial. The parties do not dispute the relevant legal analysis for summary judgment, and I need not delve into the jurisprudence. In effect, the respondent's motion for summary judgment relates to the enforcement of a lien based on the 2017 Special Assessment.

92 Having found the 2017 Special Assessment valid, the Board's right and obligation to assess MacDonald's unit was crystalized and is valid. MacDonald has not alleged that there are any errors with the registration of the lien, the Notice of Lien to Owner dated April 13, 2017 or the August 27, 2018 Notice of Sale. To date, MacDonald has not paid the Special Assessment and related costs. As such, the summary judgment to enforce the obligation to pay the common expenses resulting in the lien action presents no genuine issue requiring further legal proceedings. Therefore, summary judgment is granted in favour of WCC96.

Other Commentary:

93 It is clear that there is ongoing vitriol and an unfortunate history between the Board of Directors, WCC96 and the applicant. No doubt, the resulting acrimony or lack of dialogue throughout this long chain of events has been a catalyst for this dispute. It seems to me that both parties have contributed to the miscommunication. The Board could have documented and communicated its minutes and decisions with supporting records in a more transparent and timely manner.

94 It seemed that the Board withheld the timely presentation of various experts or engineering reports that would have contributed to the costing discussions. For example, MacDonald cites a quote by Brock elevator which purported to complete the replacement work between $70,000 to $100,000. This quote was not shared with the owners and was inconsistent with the $200,000 estimate presented at the December 18, 2017 meeting. MacDonald also references the Board's withholding of the Cooke report of January 12, 2018 which presented findings on the options to either replace or repair the rear balcony. The Board did not disclose the report which found that balcony could be repaired at between $200,000 to $300,000, until eight months later and after the lending bylaw information meeting.

95 At the same time, MacDonald could have been more accommodating when requesting records and information from the Board, WCC96 or property managers.

96 Overall, I have concluded that the Board acted within its authority under the *Act,* declaration and bylaws. However, I agree with MacDonald that WCC96 did not always conduct themselves in a fully transparent manner. Thus, notwithstanding WCC96's ultimate success in responding to this application and obtaining summary judgment, in order to address MacDonald's valid concerns about communicating relevant information in a timely manner, or providing reports and memorializing the Board's decisions as they impacted the issues raised in this proceeding; the parties ought to contemplate a reduction of costs that WCC96 would otherwise have been entitled to receive.

Conclusion:

97 For all of the aforementioned reasons, the Application is dismissed. The applicant has not demonstrated that she was oppressed or otherwise prejudiced or treated unfairly or inequitably by the Board or WCC96. At all material

times, the Board was acting within its mandate and authority granted by the *Act*, bylaw, declaration and the relevant authorities.

98 Given the dismissal of the Application, the 2017 Special Assessment levied by WCC96 against all unit owners is valid and confirmed. The Board is authorized under s. 85 of the *Act* to register a lien against an owner who defaults in his or her obligation to contribute to common expenses.

99 WCC96's motion for summary judgment relates to the enforcement of a lien against MacDonald's unit based on the 2017 Special Assessment. As MacDonald failed to pay her proportional amount, WCC96's summary judgment to enforce the lien presents no genuine issue requiring further legal proceedings. Therefore, summary judgment is granted.

100 Leave to issue a writ of possession of MacDonald's unit is granted. WCC96 is at liberty to conduct a Power of Sale and may avail itself of any of the remedies provided in s. 85 of the *Act,* including an order for vacant possession of the unit.

101 Notwithstanding the aforementioned, any remedial action to enforce WCC96's rights under this judgment shall not take force or effect any earlier than 30 days after the release of this decision. This will allow MacDonald to remedy any deficiency or payment of the Special Assessment and other costs in order to vacate the lien and writ of possession and to place her in good standing as a unit owner.

Costs:

102 If the parties cannot agree on the issue of costs, I will consider brief written submissions. These cost memoranda shall not exceed five pages in length, (not including any bill of costs or offers to settle). WCC96 shall file their costs submissions within 15 days of the date of this judgment. MacDonald shall filer her submissions within 15 days of the receipt of the respondent's materials. WCC96 may file a brief reply within five days thereafter. If submissions are not received by March 27, 2020, the file will be closed and the issue of costs considered settled.

A.J. GOODMAN J.

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1 Again, while the applicant makes a valid point, the basis for the relief sought in this case is premised on substance rather than form. In any event, minutes were later drafted and provided to the parties.

2 There is a brief reference to the Board's actions in relation to this issue later in these Reasons.