CITATION: Landont Limited v. Frontenac Condominium Corporation No. 11, 2021 ONSC 2069
COURT FILE NO.: CV-19-00000033-0000
DATE: 20210318

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
LANDONT LIMITED	)	*Kurt Pearson* and *Sarah McCarthy*, for the Applicant, Landont Limited
Applicant	)	
	)	
– and –	)	
	)	
FRONTENAC CONDOMINIUM CORPORATION NO. 11	)	*Antoni Casalinuovo,* for the Respondent, Frontenac Condominium Corporation No. 11
Respondent	)	

AND BETWEEN:	)	**COURT FILE NO. CV-19-0018**
	)	
FRONTENAC CONDOMINIUM CORPORATION NO. 11	)	*Antoni Casalinuovo,* for the Applicant, Frontenac Condominium Corporation No. 11
Applicant	)	
	)	
– and –	)	
	)	
LANDONT LIMITED	)	*Kurt Pearson* and *Sarah McCarthy*, for the Respondent, Landont Limited
Respondent	)	
	)	
	)	**HEARD in Kingston:** 26 October 2020

MEW J.

REASONS FOR DECISION

[1] Two applications before the court address certain rights and responsibilities in relation to the use and maintenance of a commercial condominium unit at the Landmark building located at

165 Ontario Street, Kingston. The unit in question includes a commercial parking garage and a number of other commercial spaces.

[2] Frontenac Condominium Corporation No. 11 ("FCC 11") is a non-profit mixed-use condominium corporation registered as such in 1981. The Landmark comprises 94 residential dwelling units, plus the one commercial unit which is the subject of these proceedings. Landont has owned the commercial unit since 23 November 2009.

[3] The Condominium Declaration permits Landont's unit to be operated as "retail commercial office space and a pay parking lot". The commercial parking garage which forms part of the unit is situated directly above the residential (common element) parking garage of FCC 11, and is separated by a concrete slab. It is common ground between the parties that the concrete floor in the commercial garage is a common element and that FCC 11 is required to repair and maintain the common elements.

[4] Although there are a number of subsidiary disputes between the parties, the principal controversy turns on whether a waterproofing membrane applied to the top of the upper surface of the concrete slab forms part of the concrete floor, or falls within the boundaries of Landont's unit. If, as Landont contends, the waterproofing membrane forms part and parcel of the concrete slab, it would be a common element of the building and FCC 11 would be responsible for its maintenance and repair. Conversely, as FCC 11 would have it, if the membrane is part of the unit, its maintenance and repair would be Landon's responsibility.

[5] FCC 11's Board of Directors made a determination, in the purported execution of its responsibility to manage its affairs on behalf of its owners, its obligations under the *Condominium Act*, S.O. 1998, c. 19, and its governing documentation, that Landont should be financially responsible for the costs of replacing the membrane and repairing the concrete slab. That determination was based on a conclusion that the membrane forms part of Landont's unit and that damage to the concrete slab is the result of Landont's failure to properly maintain and repair its unit and specifically, the parking area contained within its unit.

[6] FCC 11 asserts that the court should show appropriate deference to the Board's decision if it was within a range of reasonable choices and was made honestly and in good faith. Landont challenges that. In addition, Landont argues that FCC 11 is estopped from demanding that Landont now pay, due to historical treatment of the membrane and related repairs by FCC 11.

[7] Landont also seeks the removal of a lien of $1,508.55 registered on title representing the amount incurred by FCC 11 power washing the parking area in Landont's unit.

Responsibility for the Membrane

[8] FCC 11 asserts that its position is supported by a straightforward reading of the natural and ordinary meaning of the words contained in the Condominium Declaration, which state that the boundaries of the commercial unit comprise the area measured, *inter alia*, "vertically from the upper surface of the concrete floor to the underside surface of the concrete ceiling", but with

the caveat that, notwithstanding the foregoing, the commercial unit "shall not include…concrete or masonry portions of walls or floors within the unit".

[9] The evidence is that the membrane was installed in 2002 – over twenty years after the registration of the Condominium Declaration – to mitigate the ongoing damage to the concrete slab caused by the operation of the commercial parking garage within the unit. FCC 11 asserts:

> The Membrane was applied on top of the upper surface of the Concrete Slab, and thus forms part of the Unit as it is located within the boundaries of same. The responsibility to maintain and repair the Membrane therefore falls to Landont as the owner of the Unit, as it exclusively serves the Unit and is located entirely within its boundaries.

[10] Landont counters that it is a fiction to separate the membrane from the porous concrete because the membrane is integrated into the surface itself. It is applied with paint brushes or a roller. It is not a visible stratum and has no aesthetic purpose.

[11] Quite apart from the practical absurdity, as Landont sees it, of separating the membrane from the concrete slab, Landont claims that until recently, FCC 11 included the membrane within its responsibility to maintain the common elements.

[12] Neither counsel were able to provide the court with any cases that have dealt with this, or a similar issue previously. As I reflected on my decision, it did, however, bring to mind a similar dilemma which arose a few years ago in respect of another property in downtown Kingston. There was a dispute as to the meaning of "external walls" in a lease and, hence, the respective repair obligations of the landlord and lessee: *Fenwick v. Hotel Belvedere Inc.*, 2017 ONSC 768.

[13] In that case, as in this one, had the parties wished to more clearly set out their respective maintenance and repair obligations, they could have done so.

[14] The interpretation of the Condominium Declaration, as with any other contract or set of rules, requires the court to read the contract as a whole, giving the words used their ordinary or grammatical meaning, consistent with surrounding circumstances known to the parties at the time of its formation: *Creston Moly Corp. v. Sattva Capital Corp.*, [2014] 2 S.C.R. 633, at para. 47.

[15] Neither of the parties now before the court were a party to the original Condominium Declaration. However, in divining what the framers of the words could reasonably have understood them to mean, the subsequent behaviour of the parties is instructive.

[16] The evidence suggests that for the first twenty years of the life of the building, no membrane had been incorporated into or applied to the surface of the concrete slab.

[17] David Sim is the president of FCC 11. In his affidavit, sworn on 23 February 2019, he states that prior to Landont's purchase of the commercial unit, FCC 11 and the then owner of the

unit recognised that the salt and other debris being introduced into the unit was causing damage to the concrete slab. He continues:

> During this time FCC 11 undertook repairs to its common elements, including the Concrete Slab located beneath the Unit. In the year 2000, on the advice of FCC 11's Engineers and in order to preserve the repair work and protect its common element Concrete Slab from damage associated with the use of the Unit as a commercial parking garage; FCC 11, on behalf of the then owner of the Unit, arranged for the installation of a protective traffic coating membrane on top of the entire upper surface of the suspended concrete floor within the Unit… [Emphasis added]

[18] Mr. Sim was cross-examined on his affidavit on 17 July 2019. He acknowledged that FCC 11 paid for the application of the membrane. As a result of undertakings given during the course of Mr. Sim's cross-examination, a letter from an engineering firm retained by FCC 11 in March 2000 was produced. It contained extensive recommendations concerning the identification and repair of the commercial garage slab, culminating with the application of a "water repellant penetrating sealer over entire concrete deck area".

[19] No evidence has been produced to suggest that FCC 11 charged back the costs which it incurred installing the membrane to the then owner of the commercial unit. Indeed, there is nothing in terms of contemporaneous evidence to support Mr. Sim's representation that FCC 11 arranged for installation of the membrane on behalf of the unit owner.

[20] After Landont purchased the unit, certain amendments were made to the Condominium Declaration which clarified responsibility for maintenance and repair of the windows, including the window frames of the commercial unit, as well as the garage overhead door. However, no attempt was made to clarify responsibility for maintenance and repair of the waterproof membrane.

[21] Having regard to all of the circumstances, including relevant contextual factors, the purpose of the declaration, the behaviour of the parties, the nature of the relationship and the responsibilities created by it, and the known use of the commercial parking area, I conclude that the upper surface of the concrete floor includes whatever membrane, paint or other veneer FCC 11 applied to it.

[22] I should add that, while recognising that a degree of deference is owed to *bona fide* decisions of the Board of FCC 11, no deference is owed to a decision which effectively seeks to unilaterally re-engineer the Condominium Declaration to suit its purposes.

Responsibility for Damage to the Common Elements

[23] Having found that the membrane forms part of the common elements, it follows that the maintenance and repair of the membrane arising from normal wear and tear is the responsibility of FCC 11.

[24] While this is a substantial burden for FCC 11 and the unit owners (including Landont), FCC 11 has known about this contingent expense for a long time. A 2006 Reserve Fund Study prepared for FCC 11 noted that a new membrane had been installed on the top surface of the slab within the commercial garage and went on to advise that an allowance in the reserve fund should be provided for replacement of the commercial garage membrane in the next fifteen years (i.e. by 2021) due to the normal life span of a membrane being fifteen to twenty years. While I agree with FCC 11 that the reference in that document to the membrane does not imply a dispositive acknowledgment that the membrane forms part of the common elements, it did give notice that in time that the membrane would need to be replaced.

[25] A further reserve fund study prepared for FCC 11 in 2013 recommended allocating $280,000 in the reserve fund by 2023 to replace the membrane.

[26] That does not, however, end the matters in dispute between the parties.

[27] Section 90(2) of the *Condominium Act* creates a distinction between repair after damage, and maintenance after normal wear and tear. While maintenance of the common elements is the responsibility of FCC 11, responsibility for damage to the common elements caused by the use of Landont's unit which is not the result of normal wear and tear rests with Landont.

[28] I pause to observe that a condominium declaration may alter the obligation to maintain or repair after damage set out in the Act by providing that an owner shall maintain and repair after damage to those parts of the common elements which the owner has the exclusive use of: *Condominium Act*, s. 91(c). There has, however, been no such change to the obligation to maintain and repair as between the parties to these proceedings.

[29] FCC 11 alleges that Landont has damaged the membrane and, hence, the common elements.

[30] A report prepared by engineers for FCC 11 confirms that the continued operation of the commercial parking garage creates a condition which has exposed the concrete slab to harsh elements, including water, salt and other chemicals. These elements are said to have caused significant damage to the membrane and the concrete slab, resulting in the repairs now required.

[31] According to FCC 11, Landont's choice to use part of its unit as a parking garage continues to exacerbate damage to the membrane and the concrete slab and that such use, and resulting damage, goes well beyond routine wear and tear.

[32] Landont's representative, Michael Springer, acknowledges that Landont could be held responsible for its acts and omissions which go beyond normal wear and tear associated with the known and permitted use of the unit. But Landont disputes that there have been such acts or omissions. With the exception of a small part of the parking lot converted for use by a commercial tenant, the parking lot area as it existed at the outset has, to FCC 11's knowledge, only ever been used as a commercial parking lot.

[33] Where there is a dispute between the responsibility of a condominium corporation to repair and maintain the common elements and a unit owner's responsibility for damage which it causes to the common elements:

a. The determination of who is responsible for the costs of performing remedial work is a fact-specific exercise, which is dependent on the source of the damage;

b. A court is not tasked with making a factual finding regarding the source of the damage with any absolute certainty but, rather, must assess the evidence before it; and

c. In assessing the requisite scope of work necessary to repair damage to the common elements, the proposed scope must be reasonable and perfection is not required.

See: *Brasseur v. York Condominium Corporation No. 50,* 2019 ONSC 4043, paras. 86, 87 and 108.

[34] The experts retained by both parties point to the consequences of operating a commercial parking garage within the unit. Those consequences include the introduction of corrosive chemicals and carbon dioxide exhaust. That is a principal cause of the deterioration of the membrane and the concrete slab.

[35] According to Mr. Sim, Landont has repeatedly failed and/or refused to conduct necessary routine maintenance (he also states that Landont has failed to attend to the timely repair of the commercial parking garage within the unit, including the membrane). He cites the lack of power washing of the floor as an example of Landont's failure to conduct the necessary maintenance. As a result, FCC 11 made arrangements to have the commercial parking garage floors within the unit power washed. When this occurred in 2013, Landont, without protest, reimbursed FCC 11 for the power washing invoice. Mr. Springer cannot recall the precise reason why Landont paid for the power washing account incurred by FCC 11 in 2013.

[36] FCC 11 makes reference to a decision of the Small Claims Court, *Chai v. York Condominium Corp. No. 325,* 2009 CarswellOnt 8984. There, the owner of a residential unit failed to winterise her window box air conditioner. The resulting cold draft caused the water in a water pipe in the living room of the unit to fracture. Deputy Judge Mungovan held that a prudent owner of a condominium unit would undertake regular preventive maintenance of the fixtures that regulated the flow of hot water through the copper water pipes in her unit. "Maintenance", she opined, implies "preventive maintenance".

[37] Although responsibility for repairing the membrane falls to FCC 11, I agree that Landont's responsibility to maintain its unit includes keeping the parking lot surface clean and to undertake preventive maintenance to mitigate the effects of ordinary wear and tear.

[38] It is not clear from the record that a specific request was made to Landont to power wash the parking lot, failing which, FCC 11 would do so itself. However, I agree with FCC 11 that it

was reasonable for the Board to decide to undertake the power washing itself and charge it back to Landont. Section 92(3) of the *Act* authorised the Board do the work necessary to carry out Landont's obligation to maintain its unit where its failure to do so was adjudged to present a potential risk of damage to the property or the assets of FCC 11.

[39] Although Landont, through Mr. Springer, asserts that it has always maintained the commercial parking garage, particulars of what Landont has done, beyond arranging at its expense to have the area swept, are lacking.

[40] In June 2018, when FCC 11 once again made arrangements to have the parking garage floor power washed. Landont refused to render payment. This ultimately led to the registration of a condominium lien against the unit. Mr. Springer justified the failure to pay the "fairly modest amount" (his words) of $1,508.55 for power washing the commercial unit in 2018 on grounds of the ongoing issue with respect to liability for a replacement of the water proofing membrane. He says that the subsequent registration of a condominium lien came as a shock and was humiliating for Landont. I am surprised that he was surprised. Landont played hardball and FCC 11 acted within its rights.

Conclusion and Disposition

[41] The comprehensive and earnestly presented arguments over deference to condominium board decisions, estoppel and breaches of duty notwithstanding, the issues, and their solution, appear to be relatively straightforward.

[42] My primary finding, as explained above, is that the maintenance and repair of the membrane falls to FCC 11. This is because the membrane is indistinguishable from and integrated with the concrete slab which undoubtedly forms part of the common elements of the condominium.

[43] Since day one, the commercial unit has operated a commercial parking lot. That involves cars entering and leaving the area. Those cars emit carbon dioxide and track in salt, water and corrosive substances. That is part of the natural and ordinary use of a parking lot. If the condominium declaration wanted to make the corrosive consequences of such use the responsibility of the unit owner, it could have done so. But it did not. Furthermore, the historical assumption of responsibilities by the condominium corporation and the unit owner points firmly in the direction of FCC 11 as the party responsible for the repair of the concrete slab which, approximately twenty years ago, involved the application of a membrane at FCC 11's expense.

[44] Contrary to the submission of FCC 11, this dispute has little, if anything, to do with the authority of the Board of FCC 11 to make good faith decisions which it adjudges to be in the best interests of its unit holders. While FCC 11 undoubtedly has that responsibility, and the decisions which it makes in the discharge of that responsibility are entitled to deference, it cannot unilaterally rewrite the declaration, or history, to serve those interests. While it will no doubt be a burden on FCC 11 to bear the cost of repairing or replacing the membrane, FCC 11 has known for a long time that this day would come. If a different attribution of responsibility was desired,

it had a long time to address the issue. It is unfortunate that the parties have found themselves at loggerheads and sought a litigated solution rather than a collaborative one.

[45] Landont has a responsibility to keep the parking deck swept and clean and to undertake preventative maintenance to mitigate the effects of everyday wear and tear. Both parties surely contemplated that use of the space as a commercial parking lot would mean cars coming and going on a daily basis and tracking in salt, dirt and other chemicals as well as exposing the local environment to exhaust fumes, oil drips and other daily detritus that one would expect to occur. The reports obtained by the parties and common sense suggest that a failure to keep the parking area swept and clean will have a negative impact on the deterioration of and damage to the concrete surface of the slab, including the membrane which is embedded into it. It was therefore reasonable for the Board of FCC 11 to power wash the parking area when, in the Board's judgment, Landont should have, but failed to do so.

[46] I can understand why the residential unit holders in the Landmark building feel aggrieved about having to share in the cost of repairing a common element that they derive little, if any, benefit from. But that is the arrangement that was made forty years ago when the Condominium Declaration was settled, and although the declaration has been changed since then, the allocation of responsibilities concerning the parking area of Landont's unit have remained essentially unchanged.

[47] For the foregoing reasons, I grant the declaration sought by Landont that FCC 11 is obliged to pay for the costs of maintenance and repair/replacement of the concrete floor membrane at commercial unit level 1, Unit 1, as a common element expense. However, such declaration in no way derogates from Landont's responsibility to maintain its unit in good order. That includes taking reasonable steps to mitigate the wear and tear caused by the commercial parking activities carried on within the unit.

[48] I decline to make the declaration and order sought by Landont requiring FCC 11 to reimburse Landont the sum of $2,966.87 and all associated expenses paid by Landont to discharge the condominium lien.

[49] Landont asks me to make an order requiring FCC 11 to fund the temporary removal of vehicles from the commercial parking garage in order to effect the necessary repair/replacement of the parking membrane. I decline to do so. It is not the function of the court to micromanage in advance the arrangements which may need to be made as and when the concrete slab and/or membrane in the commercial parking area is repaired or replaced.

[50] To similar effect, I decline the request by FCC 11 to make orders that "Landont immediately comply with the [Condominium] Act and FCC 11's Declaration, By-Laws, and/or Rules".

[51] FCC 11 also asks for a declaration that Landont has failed and/or refused to properly maintain and/or repair the unit, which has resulted in damage to FCC 11's common elements in the unit itself. I decline to make such an order. I have considered that the engineering reports from Trow Engineers in 2008 and Keller in 2013 found the concrete slab to be in good condition.

However, the evidence does not sufficiently address the cause of the deterioration of the concrete slab and the membrane so as to differentiate between the consequences of ordinary wear and tear and the alleged failure of Landont to discharge its responsibility to maintain its unit.

[52] That said, and as previously explained, I am of the view that the Board of FCC 11 was within its rights to adjudge that the parking area needed to be power washed, and to require reimbursement by Landont for the provision of that service. I would, however, suggest that in the future, if the Board of FCC 11 comes to the conclusion that, at any point, Landont has fallen short of its obligation to keep the surface of the parking area clean or otherwise properly maintained, that it give Landont an adequate opportunity to respond to such concerns prior to taking unilateral action, and then going after Landont for the cost of doing so.

[53] It also follows from these reasons that because FCC 11 has the responsibility for undertaking the necessary repairs to the concrete slab (including the membrane) in accordance with the *Condominium Act*, FCC 11 should not be unreasonably obstructed from discharging those responsibilities.

Costs

[54] I am provisionally of the view that each party should bear its own costs. Both FCC 11 and Landont have enjoyed a degree of success, but neither has prevailed. If either party is of the view that there should be a different disposition of costs, a written submission not exceeding three pages may be made to that effect within fourteen days of the release of this decision. A costs summary should be attached to the submission. There will then be a further seven days for the opposite party to respond to such submission, again confined to three pages in addition to which the responding party may provide its own costs summary. Copies of any qualifying offers to settle should also be attached.

Mew J.

Released: 18 March 2021

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– and –

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REASONS FOR DECISION

Mew J.

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