

CITATION: Symonik v. Metropolitan Toronto Condominium Corp. No. 572, 2021 ONSC 2494
COURT FILE NO.: CV-20-635266
DATE: 20210401

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)
)
)
 SANDRA SYMONIK)
 Plaintiff) *Milton Davis and Carol A. Dirks for the*
) *Plaintiff*
 - and -)
)
)
 METROPOLITAN TORONTO)
 CONDOMINIUM CORPORATION NO.)
 572)
 Defendant) *Timothy M. Duggan for the Defendant*
)
) **HEARD:** March 22, 2021

2021 ONSC 2494 (CanLII)

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] The Plaintiff, former Applicant, Sandra Symonik owns unit 312 in a residential condominium apartment building in Toronto, Ontario. She sues the Defendant, former Respondent, Metropolitan Toronto Condominium Corporation No. 572 (“MTCC 572”).

[2] In what was an Application and is now an action, Ms. Symonik seeks:

(a) a declaration that MTCC 572 has breached sections 17, 90, and 117 of the *Condominium Act, 1994*,¹ as well as Article V(2) of the Declaration of MTCC 572;

(b) an order that MTCC 572 comply with sections 17, 90, and 117 of the *Act* by maintaining the common elements;

(c) an order that MTCC 572 restore the property legally described as [...] to a habitable state, including restoring the damaged ceiling, walls, flooring, baseboards, furniture and other effects in the Unit;

(d) a declaration that the conduct of MTCC 572, and/or its directors, is oppressive and/or unfairly prejudicial and/or unfairly disregards the interests of the [Plaintiff];

¹ S.O. 1998, c. 19.

(e) damages in the amount of \$100,000.00 or such other amounts to be determined at the hearing of this [proceeding] as a result of MTCC's failure to comply with its statutory duties and/or its oppressive conduct;

(f) an order requiring the payment of compensation to the [Plaintiff] in the amount of \$150,000.00 or such further amount as this Honorable Court may deem just, for physical and mental distress, anxiety, and psychological and emotional damages as a result of MTCC 572's failure to comply with its statutory duties and/or its oppressive conduct;

[...]

[3] Ms. Symonik's Application came on for a hearing on January 26, 2021. By that time, there were factums, books of authorities, and an evidentiary record of approximately 4,000 pages of affidavits, transcripts, and exhibits.

[4] At the commencement of the hearing, Ms. Symonik sought leave to file four additional affidavits. This was opposed by MTCC 572, which asked for an adjournment, if leave to file the affidavits was granted.

[5] The request for leave to file additional affidavits along with Ms. Symonik's counsel's request that the damages aspect of the Application be adjudicated at a trial cemented my concerns that it was not appropriate jurisdictionally or as matter of procedural fairness to adjudicate what amounted to a serious oppression remedy case and a serious personal injury claim by way of Application. Further, it would not have been fair to either party to have a bifurcated hearing separating the liability issues from the assessment of damages, if any. I, therefore, converted the Application into a proceeding by action.

[6] However, Ms. Symonik requested mandatory interim relief. I remained seized of that motion, and I set a timetable for the motion.

[7] It is Ms. Symonik's interlocutory motion for injunctive relief that is now before the court. In her notice of motion for a mandatory interlocutory injunction, Ms. Symonik seeks:

(a) An Order that MTCC No. 572 shall forthwith obtain a written opinion from a licensed professional engineer or qualified environmental consultant (the "Consultant") as to whether the Plaintiff and her family can safely continue to occupy the Unit while any remediation or repair work is undertaken in the Unit and/or the surrounding common elements (the "Work"). The Consultant shall report to both MTCC 572 and the Plaintiff jointly;

(b) An Order that, in the event that the opinion of the Consultant is that the Plaintiff and her family cannot safely continue to occupy the Unit during all or part of the Work, then MTCC 572 shall pay for alternative accommodation at a cost of \$100.00 per night, or such other amount as the Court may advise, towards alternative accommodation for the Plaintiff and her family for as long as engineer or consultant advises. Such accommodation will be in the form of a hotel room, or functional equivalent, and will be to a similar or equivalent standard of accommodation as to the Plaintiff's current Unit. MTCC 572 will make payment directly to the entity providing the accommodation;

(c) An Order that MTCC 572 shall also retain the Consultant to inspect the Unit and prepare a written scope of work for acceptable mould remediation and asbestos remediation in the Unit, which scope of work shall be made available for review and comment by Grande Environmental Projects Ltd. ("Grande Environmental") prior to any remediation work proceeding. Grande Environmental shall be entitled to make recommendations to the Consultant for its consideration. The Consultant shall perform such testing as is deemed appropriate (*i.e.* air samples, swabs, tape-lifts) in order to confirm that the Unit is no longer impacted by mould or asbestos contamination and that the remediation process has been properly completed in accordance with all governmental requirements and the

Consultant's recommendations, which confirmation shall be in writing and provided to the Plaintiff ("Environmental Clearance");

(d) An Order that, following receipt of the Environmental Clearance, MTCC 572 shall forthwith retain a qualified contractor to repair all damages to the interior of the Unit resulting from the leakage issues from the common elements and the mould and asbestos remediation, and restore said Unit to its original condition, including to restoring the ceiling, the drywall, the baseboards and flooring, at the sole cost and expense of MTCC 572. The aforesaid repairs shall be overseen by and be compliant with the specific directions and recommendations of the Consultant or other licensed engineer retained by MTCC 572;

(e) An Order permitting the Plaintiff to bring an urgent motion on five (5) days' notice to MTCC 572, peremptory to MTCC 572, should MTCC 572 fail to comply with this Court's order;

(f) An Order that the Order of Justice Pinto remains in full force and effect as it relates to paragraphs 3, 4, 6, 8, and 9 of said Order;

[...]

[8] In her factum, Ms. Symonik varies and expands her request for relief. In her factum she requests:

(a) an order that MTCC 572 comply with sections 17, 90 and 117 of the Act and the Declaration forthwith by maintaining and repairing the Unit in accordance with the specific directions and recommendations of a licensed professional engineer, who shall report to both MTCC 572 and the Plaintiff;

(b) an order that MTCC 572 pay \$100 a night to relocate the Plaintiff and her family to a hotel for the duration of the remediation and renovation of the Unit;

(c) an order that once the Plaintiff and her family have been relocated, that MTCC 572, within 15 days:

(i) retain a qualified contractor to inspect the Unit for acceptable completion of the mould remediation and asbestos remediation, and to perform clearance tests (air samples, swabs, tape-lifts) to confirm that the Unit is no longer impacted by the mould or asbestos contamination and removal process in accordance with the recommendations of Grande Environmental Projects Ltd.;

(ii) in the event the mould remediation contractor determines that the Unit is still impacted by mould and asbestos contamination, to take any and all steps that Grande Environmental Projects Ltd. deems necessary to remediate fully the mould or asbestos in the Unit, which shall include, if necessary, remediation of all items/clothing in the master bedroom and second bedroom; and

(iii) retain a qualified licensed contractor forthwith to complete the repairs of the interior of the Unit to its original condition, including, but not limited to damages caused as a result of the water penetration (drywall, flooring, ceiling, baseboards etc.) and the shoring/painting of the fibre-lock on the ceilings of the unit;

(d) an order that the Plaintiff and her family not return to her Unit until such time as all remediation and repairs to the Unit have been completed;

(e) an order permitting the Plaintiff to bring an urgent motion on five (5) days' notice to MTCC 572, peremptory to MTCC 572, should MTCC 572 fail to adequately maintain and repair the Unit, or otherwise fail to comply with this Court's order;

[...]

[9] Based on the Defendant's undertaking to provide alternative accommodation for Ms. Symonik while her apartment is remediated and repaired, which undertaking I will describe below, and for the reasons that follow, I dismiss the motion for a mandatory interlocutory injunction, and I vacate the order made by Justice Pinto dated October 19, 2020.

B. Facts

1. Procedural and Evidentiary Background

[10] The following procedural and evidentiary narrative is part of the factual background to this motion for interlocutory relief.

[11] On January 29, 2020, Ms. Symonik commenced an Application against MTCC 572.

[12] On February 27, 2020, Ms. Symonik delivered her Application Record (157 pages).

[13] On August 27, 2020, Ms. Symonik delivered a Supplementary Application Record (181 pages).

[14] On October 2, 2020, amended on October 6, 2020, MTCC 572 delivered a Responding Application Record (373 pages).

[15] On October 9, 2020, Ms. Symonik delivered a Further Supplementary Application Record (215 pages).

[16] The hearing of the Application was scheduled for October 23, 2020, but the parties agreed that there should be an adjournment on terms. There was a case management conference on October 19, 2020, and the parties asked Justice Pinto to settle the terms of the Order. The content of the Order had essentially been agreed to save for some details.

[17] Justice Pinto issued a file direction and made the following Order dated October 19, 2020:

[...]

3. THIS COURT FURTHER ORDERS that the Respondent shall forthwith provide the Applicant with copies of any and all reports and recommendations, including any site visit or inspection reports, of RDQ Engineering Inc. ("RDQ") or of any other engineering consultant or environmental consultant in relation to the Partial Lobby Repairs and Waterproofing Project at 541 Blackthorn Avenue, Toronto and the subsequent remedial work in Unit 312 (the "Unit"), (collectively referred to as the "Repair Project"). Any existing reports and recommendations in the possession of the Respondent or its agents, shall be provided to the Applicant within three days of the within Order;

[...]

5. THIS COURT FURTHER ORDERS that the Respondent shall forthwith request an opinion from RDQ as to whether the Applicant and her family can safely continue to occupy the Unit during the course and completion of the Repair Project (the "Opinion"). The Opinion will detail what, if any, portions of the Unit are unsafe, what work needs to be completed prior to making any unsafe portion(s) of the Unit safe for habitation again, and, if necessary, an estimated time frame for when the work shall be completed and when the Applicant and her family can safely return to the Unit. RDQ will monitor the state of the work, and regardless of the Opinion, if the Unit is deemed to be unsafe, prior to the Applicant and her family moving back into the Unit, will confirm that the Unit is safe for habitation. The Applicant acknowledges that the entire Repair Project does not have to be completed for the Unit to be safe for habitation, as long as RDQ confirms that the Unit is safe for habitation.

6. THIS COURT FURTHER ORDERS that, as part of the Opinion as referenced in paragraph five, RDQ will inspect, investigate and determine if there is damage to any area of the Unit, other than the Master bedroom, and if such damage was caused by the water penetration from the common elements. Should RDQ advise that there is further damage to the Unit, beyond the damage in the Master Bedroom, caused by water penetration from the common elements, then the Respondent agrees to alter the scope of work for the Repair Project to include the repairs/renovation of the further damaged areas.

7. THIS COURT FURTHER ORDERS that, should the Opinion state that the Applicant and her family need to vacate the Unit for a period of time because the Unit is deemed unsafe due to the Repair Project, the Respondent will pay \$100.00 per night towards alternative accommodation for the Applicant and her family, for as long as the RDQ deems the Unit unsafe for habitation. Such accommodation will be in the form of a hotel room, or functional equivalent, and will be to a similar or equivalent standard of accommodation as to the Applicant's current Unit. The Respondent will make payment directly to the entity providing the accommodation.

8. THIS COURT FURTHER ORDERS that, if RDQ advises that the Unit is unsafe for the Applicant and her family to continue to occupy, then the Applicant shall make a claim for alternative accommodation with her homeowner's insurance, provide the Respondent with the insurer's response to said claim, and credit any insurance proceeds paid by the insurer in respect of alternative accommodation to the Respondent. If RDQ advises that the Unit is unsafe, then the Respondent agrees to cooperate with the Applicant, in providing whatever documents and/or information required to the Applicant in order for the Applicant to make the claim and/or respond to her insurer; which includes but is not limited to, a letter or report from the Respondent and/or RDQ confirming that the Applicant needs to vacate her Unit because the Unit is unsafe due to the Repair Work.

9. THIS COURT FURTHER ORDERS that the Respondent, within 15 days of this Order:

(a) retain a qualified mould remediation contractor to inspect the Unit and lobby common element area for acceptable levels of the mould and asbestos, and to perform clearance tests (air samples, and if recommended, swabs, tape-lifts) to confirm if the Unit is impacted by the mould or asbestos contamination at an unsafe level, and if so to remove and remediate in accordance with the recommendations of that qualified mould and asbestos remediation contractor;

(b) in the event the mould remediation contractor or consultant determines that the Unit continues to be impacted by mould and asbestos contamination at an unsafe level, to take whatever steps which that mould remediation contractor deems necessary to remediate said mould or asbestos in the Unit; and

(c) in good faith and without prejudice, retain a qualified contractor to repair the following items in the master bedroom of the Unit:

(i) damaged wall areas will be painted flat white or off white with latex paint;

(ii) the west wall;

(iii) the bulkhead;

(iv) damaged areas of the ceiling;

(v) baseboards that have been removed will be replaced with standard size baseboard molding all around the room;

(vi) epoxy filler will be applied from the interior, despite the fact the Work will be addressed from the exterior;

(vii) remove the installed wooden casing in the Bulkhead and reinstate the original metal straps to remedy the unit as per standard unit bylaw No. 9;

(viii) lift the upgraded laminate flooring to repair any possible damage to the original parkay flooring and subfloor, and install upgraded laminate flooring in the Master bedroom;

(ix) repair and/or replace the closet doors and radiator in the Master bedroom;

(x) save and except for in the event of an emergency, the Applicant shall provide the Respondent, its agents and contractors, with access to the Unit between 9:00 a.m. and 5:00 p.m. Monday to Friday, upon 24 hours' notice to the Applicant and also to the Applicant's counsel by email. Such notice is to be effectively given between 9:00 a.m. and 5:00 p.m. Monday to Friday, for the repairs contemplated in subparagraph 9(c) above, and, in the event that access is unreasonably denied then this will not amount to a breach of this order. The 24 hours' notice will be effective exactly 24 hours from the time the notice is provided, as such, if notice is provided at 10 am on Monday. access will not be granted until 10am on Tuesday.

10. THIS COURT ORDERS in the event that the Respondent or the Applicant breach any of these interim orders then the non-breaching party is granted permission to bring an urgent application on five (5) days' notice to the breaching party.

11. THIS COURT ORDERS that the orders made herein are without prejudice to the Respondent's position in this proceeding and any determinations that may ultimately be made by the judge hearing the application.

12. THIS COURT ORDERS that the costs of today's attendance will be reserved to the judge hearing the application.

[18] On November 10, 2020, MTCC 572 delivered a Supplementary Responding Application Record (483 pages).

[19] On November 25, 2020, Ms. Symonik delivered a Second Further Supplementary Application Record (242 pages).

[20] On December 3, 2020, Ms. Symonik delivered a Third Further Supplementary Application Record (67 pages).

[21] On December 10, 2020, MTCC 572 delivered a Further Supplementary Responding Application Record. (73 pages).

[22] On December 16, 2020, Ms. Symonik delivered her Fourth Supplementary Application Record (13 pages).

[23] On January 22, 2021, Ms. Symonik delivered a Motion Record for Leave to File Further Affidavits (111 pages).

[24] On January 25, 2021, MTCC 572 delivered a Further Further Supplementary Responding Application Record (706 pages).

[25] Ms. Symonik's Application came on for a hearing on January 26, 2021. At that time, the Application was converted into an action and a timetable was set for Ms. Symonik's motion for interlocutory relief.

[26] On February 2, 2021, Ms. Symonik delivered her Motion Record for a mandatory

injunction (518 pages).

[27] On February 23, 2021, MTCC 572 delivered a Responding Motion Record (880 pages).

[28] Ms. Symonik supported her Application and her motion for an injunction with:

- Affidavits of **Shawn Geary** dated October 8, 2020 and November 24, 2020. Mr. Geary is the partner of Ms. Symonik. He was cross-examined on January 20, 2021 (49 pages).
- Affidavits of **Bernardino Grande** dated October 8, 2020, November 24, 2020, December 16, 2020, and January 20, 2021. Mr. Bernardino is the principle of Grande Environmental Projects Ltd. He was cross-examined on December 10, 2020 (81 pages).
- Affidavit of **Rachel Fielding** dated January 22, 2021. Ms. Fielding is a lawyer at Fogler, Rubinoff LLP, Ms. Symonik's lawyers.
- Affidavit of **Jason Knowles** dated November 25, 2020. Mr. Knowles is Ms. Symonik's ex-boyfriend and a former owner of unit 312. He was cross-examined on December 17, 2020 (18 pages).
- Affidavit of **Betty Lau** dated January 22, 2021. Ms. Lau is a law clerk at Fogler, Rubinoff LLP, Ms. Symonik's lawyers.
- Affidavit of **Margaret Lopes** dated September 24, 2020. Ms. Lopes is the President of Onus Property Management Inc, which was the property management company for MTCC 572 in 2013 and 2014. She was on-site manager. She was cross-examined on December 14, 2020 (87 pages).
- Affidavits of **Kate Merriman** dated October 8, 2020, November 4, 2020 and November 24, 2020. Ms. Merriman is the unit owner of unit 615. She was cross-examined on December 17, 2020 (23 pages).
- Affidavits from **Ms. Symonik** dated February 26, 2020, August 26, 2020, October 8, 2020, November 24, 2020, November 25, 2020, December 3, 2020, December 16, 2020, and February 2, 2021. She was cross-examined on December 21, 2020 (190 pages).
- Affidavits of **Fernando Vilela** dated October 8, 2020 and December 2, 2020. Mr. Vilela is the unit owner of unit 930 in MTCC 572. He was cross-examined on December 17, 2020 (39 pages).

[29] MTCC 572 resisted the Application and the motion with:

- Affidavit of **Adriana Agolli** dated October 4, 2020. Ms. Agolli is employed by Kindle Property Management and was the on-site manager of MTCC 572.
- Affidavits of **Odie Arruda** dated October 1, 2020, November 9, 2020, and December 9, 2020. Ms. Arruda is the owner of a unit in MTCC 572. She was cross-examined on December 10, 2020 (22 pages).
- Affidavit of **Diana de Sousa** dated December 9, 2020. Ms. De Sousa is a resident of MTCC 572. She was cross-examined on December 22, 2020 (9 pages).
- Affidavit of **Emela Filja** dated October 2, 2020. Ms. Filja is an employee of Kindle Property Management and was the on-site administrator.
- Affidavits of **Michael DiLello** dated October 1, 2020 and December 22, 2020. Mr. DiLello is an employee of Kindle Property Management/Andrejs Management Inc. Between

February 2019 and March 30, 2020, he was the on-site condominium manager. He was cross-examined on December 22, 2020 (51 pages).

- Affidavits of **Daman Grewal** dated October 1, 2020 and November 9, 2020. Mr. Grewal is a resident of MTCC 572.
- Affidavits of **Lucia Isidori** (also known as Affidavit of **Lucia Bianca**) dated September 29, 2020 and November 10, 2020. Except for short periods of time in 2014 and 2015, Ms. Isidori has been a member of the Board of Directors of MTCC 572. She was cross-examined on December 15, 2020 (245 pages).
- Affidavits of **Lennox LaMont** dated October 2, 2020 and November 9, 2020. Mr. LaMont is the on-site superintendent.
- Affidavit of **Natalie Marchan** dated September 10, 2020. Ms. Marchan has been a member of the Board of Directors of MTCC 572 since the summer of 2017.
- Affidavits of **Mario Melo** dated October 2, 2020 and November 9, 2020. Mr. Melo has been a resident of MTCC 572 for thirteen years. He is the weekend relief superintendent.
- Affidavit of **Enrico Morfea** dated October 3, 2020. Mr. Morfea is the principal of Precise Renovations Inc. He was cross-examined on December 14, 2020 (29 pages).
- Affidavits of **John Papadakos** dated October 3, 2020 and November 10, 2020. Mr. Papadokos is the principal of J.P. Plumbing & Mechanicals Ltd.
- Affidavit of **Angela Piotti** dated November 10, 2020. Since 2013, Ms. Piotti has been a member of the Board of Directors. She was cross-examined on December 16, 2020 (96 pages).
- Affidavits of **Michael Sanderson** dated October 3, 2020 and November 9, 2020. Except for the period between the fall of 2017 and 2018, he has been a member of the Board of Directors. He was cross-examined on December 15, 2020 (54 pages).
- Affidavit of **Danuta Stadnik** dated September 29, 2020. Mr. Stadnik with the exception of the period of May 20, 2017 to May 25, 2018, was a member of the Board of Directors. He was cross-examined on December 18, 2020 (57 pages).
- Affidavit of **Spencer F. Toole** dated February 22, 2021. Mr. Toole is a lawyer with Horlick Levitt Di Lella LLP, the lawyers for MTCC 572. He was cross-examined on February 26, 2021 (62 pages).
- Affidavit of **Fjoralba Tota** dated December 9, 2020. Mr. Tota is the on-site condominium manager. He was cross-examined on December 22, 2020 (33 pages).
- Affidavit of **Patricia Vanegas** dated November 9, 2020. Ms. Vanegas is the owner of a unit in MTCC 572.
- Affidavit of **Carla Zannella** dated November 9, 2020. Ms. Zannella has been a resident at MTCC 572 for 27 years in an apartment below Ms. Symonik's unit.

[30] In all there were 46 affidavits, 28 deponents, 17 of whom were cross-examined (1,085 transcript pages).

[31] Not counting the transcripts, the evidentiary record for the motion for an injunction constituted over 4,000 pages.

2. Facts

[32] There is no end to the number of genuine issues that ultimately will have to be decided at a trial of Ms. Symonik's action for declarations, damages and for injunctive relief, but for present

purposes of Ms. Symonik's motion for a mandatory injunction, I make the following findings of fact.

[33] MTCC 572 is the condominium corporation for the unit owners of a 183-unit residential high-rise condominium apartment building located at 541 Blackthorne Avenue in Toronto, Ontario.

[34] Ms. Symonik, who is almost fifty years old, is the owner of unit 312 in the condominium building. She has lived there since 2011. The unit was originally purchased by Ms. Symonik and her ex-boyfriend Jason Knowles. Ms. Symonik is now the sole owner. She lives in the unit with her companion Shawn Geary and their ten-year-old stepson Connall, who visits every other weekend and who during the Covid-19 pandemic has been spending his weekdays at the condominium for remote access education.

[35] For present purposes, the following provisions of the condominium declaration are pertinent:

ARTICLE V – MAINTENANCE AND REPAIR

(1) Repairs and Maintenance of Units

Each owner shall maintain his unit, and those parts of the common elements of which he has exclusive use and, subject to the provisions of this declaration and Section 42 of the Act, each owner shall repair his unit after damage, all at his own expense.

Each owner shall be responsible for all damage to any and all other units and to the common elements, which are caused by the failure of the owner to maintain and repair his unit, save and except for any such damages to the common elements for which the cost of repairing same may be recovered under any policy or policies of insurance held by the corporation.

Notwithstanding that they may be part of the common elements each owner shall maintain the interior surface of doors which provide the means of ingress from a unit, interior surfaces of windows and exterior surfaces of windows where access thereof is available from common elements of which the owner has the exclusive use.

The corporation shall make any repairs that an owner is obligated to make and which he does not make within reasonable time; and in such event, an owner shall be deemed to have consented to having repairs done to his unit by the corporation; and an owner shall reimburse the corporation in full for the cost of such repairs, including any legal or collection costs incurred by the corporation in order to collect the costs of such repairs, and all such sums of money shall bear interest at the rate of twenty-four (24%) per annum. The corporation may collect all such sums of money in such installments as the Board may decide upon, which installments shall be added to the monthly contributions towards the common expenses and such owner, after receipt of a notice from the corporation thereof. All such payments are deemed to be additional contributions towards the common expenses and recoverable as such.

(2) Repairs and Maintenance of Common Elements by the Corporation

The corporation shall repair and maintain the common elements other than herein provided. The corporation shall not be responsible to clean the interior and exterior surfaces of windows, where access thereto is available from common elements of which the owner has exclusive use. The corporation shall be reimbursed in full for the costs expended by it in accordance with the provisions of subparagraph (1) of Section V hereof.

[36] The condominium building is constructed on a hill, and Ms. Symonik's unit, which is on the third floor of the building, is below the lobby entrance to the building. Water flowing from the

lobby, a common area, was eventually identified as a problem for Ms. Symonik's unit.

[37] A few months after purchasing the unit, Ms. Symonik noticed a rusty patch on the ceiling of the master bedroom area. She complained to property management. The patch was spray painted, but the stain returned. She complained again, but she deposes that nothing was done.

[38] In 2013, there was a water leak in the ceiling of the master bedroom of Ms. Symonik's ceiling. The water damage was caused by a leak in the lobby radiator. The leak was repaired. The bulkhead of the ceiling was replaced. Filler was injected into the ceiling.

[39] In June 2013, there was also water damage caused by a heavy rainstorm. The damage to the unit was repaired at MTCC 572's expense, including painting and repairs to the walls, ceiling, and floor.

[40] In January 2014, Ms. Symonik complained again about water leaking into her apartment. Without retaining an engineer to investigate, as Ms. Symonik had wished, MTCC 572 retained a contractor, and once again the bulkhead in the ceiling and a small portion of the wall in her unit was repaired and replaced.

[41] At its meeting of April 28, 2014, the Board discussed Ms. Symonik's unit. The Board decided to retain Precise Renovations Inc. to repair the front exterior tiles at the building and to inject the concrete at the front exterior with waterproofing. The Board believed that this would remedy any problems. The work was carried out an expense of \$12,995.

[42] Ms. Symonik deposed that in November 2014, she developed respiratory ailments and complained to MTCC 572 that there might be mould behind the wall in her unit. She deposes that her complaints were ignored.

[43] In March 2015, there was another leak in the ceiling of the master bedroom, and in September 2015, MTCC 572 advised that it would be caulking the exterior of the building to address the leaking problems. After an investigation by Jakman Engineering, MTCC 572 retained J&K General Contracting for the recaulking. This cost \$536.75.

[44] In 2016, Ms. Symonik reported noisy pipes. MTCC 572 hired John Papadakos of J.P. Plumbing & Mechanical Ltd. to investigate. In March 2016, the Board approved plumbing pipe repairs for the unit and these were completed by Mr. Papadakos' company.

[45] Between March and June 2017, there were more incidents of leaks in the master bedroom. There are numerous controversies in the evidence of the parties about some of these incidents. In particular, the parties take opposite positions about whether a rainstorm caused water to enter the unit.

[46] At its meeting on May 30, 2017, the Board decided to obtain quotes from engineers to determine whether Ms. Symonik's complaints were associated with condensation from overheating her unit or from a leak in the structure of the building.

[47] Around 2018, Ms. Symonik was diagnosed with breast cancer. She was treated and continues to this day to have follow up treatments. It was not clear from the record whether the cancer was cured or is in remission, and it is not clear from the record whether the treatments are therapeutic or prophylactic. There is only vague hearsay evidence from treating physicians about the state of Ms. Symonik's physical or mental health.

[48] Again during 2018, there were more incidents of leaking in the master bedroom. MTCC

572 retained Insight Restoration Inc., a company that specializes in mould remediation, to assess whether there was mould in the unit. Mould was discovered. It was removed on May 30, 2018.

[49] MTCC 572 hired JK Contracting to assess the damage to Ms. Symonik's unit and to make repairs, which it did. The work was completed in November 2018. By this time, Ms. Symonik deposed that she had been using the living room as a room for sleeping for about a year.

[50] There are controversies in the evidence about the reliability and credibility of Ms. Symonik's use of the living room as a bedroom.

[51] Ms. Symonik's unit was discussed again at the Board's meetings of June 25, 2018 and August 29, 2018. Once again, a decision was made to retain quotes from engineers to determine what was the source of the alleged problems.

[52] Although Ms. Symonik had hoped that the problems had been resolved by the repair work that was completed in the fall of 2018, the water damage reappeared in early 2019.

[53] The Board of Directors discussed Ms. Symonik's unit at its meeting of April 24, 2019. The board members expressed frustration at the lack of progress made by the condominium managers in retaining engineers to investigate the problems.

[54] On July 4, 2019, Mr. Delillo of property management attended at the unit for an inspection. He found no mould and the only sign of water damage he noted was a small mark on the ceiling of the master bedroom.

[55] Mr. Delillo retained Insight Restoration to investigate Ms. Symonik's claim of water damage. Insight removed the drywall in the Unit. It found mould on the inside of the drywall on the west wall of the unit. Insight Restoration remediated the mould that it found. The Corporation retained J&K to replace all of the drywall in the Unit and to paint the entire unit.

[56] The Board again discussed Ms. Symonik's unit at its meeting of September 12, 2019. The members learned that little progress had been made in retaining an engineering firm.

[57] In October 2019, Ms. Symonik retained Carol Dirks from Fogler Rubinoff LLP and a letter of complaint was sent to MTCC 572 about the ongoing problems associated with her apartment unit.

[58] Meanwhile, in November 2019, MTCC 572 retained EDM General Contracting Limited to repair and replace the ceramic tiles in the lobby and the vestibule of the building. Once again, it was thought this might address the problems in Ms. Symonik's unit. The repairs cost \$2,994.50.

[59] Around this time, Ms. Symonik, who had asked for the information for some time, was provided with a confirmation that there was water damage to her unit. Ms. Symonik had requested the information to make a claim on her homeowner's insurance policy. MTCC 572 understood from Ms. Symonik that if it provided her with confirmation of water damage from the structure of the unit, she had accommodation coverage in her insurance policy. This understanding will later be discovered to be a misunderstanding.

[60] Meanwhile, when Ms. Symonik did not receive a meaningful response to Ms. Dirks' letter, she commenced her Application against MTCC 572 on January 29, 2020.

[61] Ms. Symonik deposed that there was more water damage in February 2020.

[62] At its meeting on February 24, 2020, the Board met with Demokrat Qordja of RDQ

Engineering Inc. to discuss the scope of work for investigating the source of the moisture issues in Ms. Symonik's unit.

[63] On February 29, 2020, a representative of RDQ Engineering and Mr. Delillo attended at Ms. Symonik's unit, and on March 3, 2020, at the engineer's instructions, a crew attended to remove all the drywall on the walls and in the ceiling in the master bedroom in furtherance of the investigation. As a result of the demolition work, Ms. Symonik could no longer use the master bedroom as a bedroom until the work was repaired.

[64] On March 5, 2020, the engineers and others attended at the unit to carry out testing for possible sources of leaks.

[65] On March 31, 2020, RDQ provided a report to MTCC 572. It was the engineer's opinion that the water damage to the unit was due to water penetrating the roof concrete slab due to improper application of the waterproofing system, moisture absorption and leaking in related structural components. The report signed on March 19, 2020 stated:

The extent of damages and deterioration is caused due to water penetration issues through the concrete slab and slab/wall joints around the vestibule and other relevant areas around the lobby. Obviously, due to improper application or failure of waterproofing system, moisture absorption and water infiltration, the structural integrity of concrete and reinforcement embedded inside of the concrete is compromised affecting the overall strength and durability of concrete slab and other related structural system.

[66] In light of RDQ's findings, MTCC 572 decided to undertake a repair and waterproofing project for the vestibule, the lobby and front entrance of the building, which are part of the common elements of the condominium. Ontario Renocon Group Ltd. was hired as the contractor at a project cost of \$85,761.35.

[67] Pausing here, it needs to be mentioned that the progress of anything in Ontario has been affected by the Covid-19 pandemic that continues to quite literally plague us all. I find as a fact that the condominium corporation cannot be faulted for the delay in implementing its plans to repair the common elements of the building.

[68] On September 14, 2020, Renocon Group commenced repairing the common elements located in the lobby, vestibule and front of the Property.

[69] Throughout the fall of 2020, the lawyers for the parties engaged in an exchange of correspondence in a futile effort to agree on when MTCC 572 might have access to Ms. Symonik's unit to make repairs and improvements to the unit following the completion of the work in the lobby.

[70] During the fall, Ms. Symonik retained Grande Environmental Projects Ltd. to conduct a mould and asbestos assessment of unit 312, and on September 23, 2020, Bernardino Grande, B.Sc., CRSP, AMRT attended at the apartment. He delivered a report dated October 5, 2020. He reported the presence of mould growth of toxic *Stachybotrys* and *Chaetomium*. The indoor airborne levels were not above the outdoor control sample of *Stachybotrys*. He reported that the ceiling texture coating located throughout the unit contained 2% Chrysotile asbestos. Mr. Grande made the following recommendations:

RECOMMENDATIONS

GEP recommends the following:

Removal of mould contaminated parquet flooring in the master bedroom using a Level 2 mould removal procedures, as outlined in the EACO Mould Guideline, 2015. A contractor who is trained in mould remediation must be retained for the work. The remediation procedure must include, but not be limited to, the use of plastic barriers to isolate work areas, a mould disinfectant such as Benefect or similar product, HEPA vacuums and HEPA negative air units. [...]

- Complete asbestos procedures to remove or repair ceiling textured plaster within the subject unit if required.
- Confirm if an Asbestos Survey or Designated Substance Survey Report for the common areas of the building is available to determine if other asbestos materials are potentially being disturbed during ongoing renovation work in the building.

[...]

CONCLUSION

The subject unit is experiencing mould amplification as confined by visual observation and sample analysis and the air quality is being significantly impacted by indicator mould species. Mould remediation is required, and appropriate repairs must be completed to the building envelope to eliminate source of water.

[71] Around this same time, the Ministry of Labour halted the lobby repairs due to safety concerns that the work was possibly dislodging asbestos in the building. To respond to this concern, the contractor covered the walls of Ms. Symonik's unit with polyseal plastic and installed shoring in the master bedroom to contain dust caused by the vibrations from the work in the lobby. There is a significant controversy between the parties about whether the polyseal plastic was ameliorating or aggravating the presence of toxic mold in Ms. Symonik's unit.

[72] Meanwhile while the impatient, mutually distrustful, and bitter antagonists were dealing with the lobby project, Ms. Symonik's Application was scheduled for a hearing in October 2020. As noted above, the parties agreed to an adjournment and Justice Pinto made an interim Order on October 19, 2020. The terms of that Order are set out above.

[73] Pausing here in the narrative, for the purposes of this interlocutory motion, I find as a fact that it was only after the commencement of Ms. Symonik's action that MTCC 572 understood that it had a repair obligation with respect to the lobby above Ms. Symonik's unit. As a result of the investigation made in March 2020, MTCC 572 understood that water from the lobby was causing damage to Ms. Symonik's unit.

[74] Having regard to the provisions of the condominium declaration, there was then and now a serious dispute between the parties as to what liability MTCC 572 has for the repairs to Ms. Symonik's unit. MTCC 572 did, however, appreciate that it was responsible for repairing what was causing the damage. It was in this context that the Order of Justice Pinto was crafted.

[75] I pause also to say that it will be an issue at the trial of this matter how to interpret and apply the repair covenants in the condominium's declaration.

[76] Returning to the narrative, the Application was adjourned, and as noted in the procedural history, more affidavits were filed for the rescheduled Application hearing.

[77] MTCC 572 again retained Insight Restoration, this time to carry out air quality sampling in Ms. Symonik's unit. On October 17, 2020, Insight Restoration attended at the unit. It found elevated mould in the master bedroom of the unit. In respect of the asbestos testing, Insight found

that the airborne particles were less than 0.005 fibers/cc. Insight noted in its report that the *Occupational Health and Safety Act* permissible exposure limit is 0.1 asbestos fibers/cc for 8 hours.

[78] On October 19, 2020, after Insight Restoration's air sampling, Renocon Group installed shoring in the master bedroom to stabilize the ceiling. Renocon Group sealed the master bedroom with a vapour barrier wrap. Once again, there is a serious disagreement between the parties about whether the vapour barrier wrap was helpful or harmful to fixing the environmental problems in Ms. Symonik's unit.

[79] Around this time MTCC 572 hired Safetech Environmental Ltd., an environmental consultant. Safetech carried out testing to determine whether the vapour barrier wrap of the master bedroom had contained the mould identified by Insight Restoration. On November 9, 2020, Safetech reported that the air sampling did not show amplification of airborne mould in the master bedroom of Ms. Symonik's unit.

[80] Also, in November 2020, while the lobby project was about to resume, MTCC 572 hired 911 Water Damage Experts, and on November 20, 2020, it entered Ms. Symonik's unit to paint fibre-lock, a paint primer, on the ceiling of the hallway and second bedroom. This was done in response to the Minister of Labour Report and in an effort to seal any asbestos in the ceiling of the unit.

[81] MTCC 572 says that 911 Water Damage Experts and Safetech's work was in furtherance of Justice Pinto's Order.

[82] On November 23, 2020, the lobby repairs resumed, and on November 24, 2020, 911 Water Damage Experts returned to the unit to install polyseal plastic over the ceiling.

[83] In late October extending into December, MTCC 572 asked Mr. Qordja of RDQ Engineering to prepare a report about the safeness of Ms. Symonik's unit and he reported the unit was structurally safe. He was not qualified to testify as to its environmental safety.

[84] Meanwhile, as noted above, on January 26, 2021, I converted the Application into an action and scheduled Ms. Symonik's motion for a mandatory injunction, the terms of which have become a malleable work in progress.

[85] In the run-up to the interlocutory motion for a mandatory injunction, the parties have addressed relocating Ms. Symonik while repairs are made to her unit and there has been a roiling dispute about whether the terms of Justice Pinto's Order have been complied with.

[86] In January 2021, the repair project for the lobby and vestibule was completed.

[87] It is an understatement to note that the parties have little patience and little trust in one another.

[88] Mr. Stadnik, a member of MTCC 572's Board of Directors, deposed that MTCC 572 has spent \$127,565.03 in efforts to remedy the repair problems associated with Ms. Symonik's unit, as follows:

- Joao Pedro Francisco \$ 900.00
- Jackman Engineering \$ 536.75
- Insight Restoration Inc. \$ 3,425.63
- J.P. Plumbing & Mechanical Inc. \$ 1,079.05

- J&K General Contracting Ltd. \$ 5,989.50
- EDM General Contracting Limited \$ 2,994.50
- RDQ Engineering Inc. \$ 11,401.50
- Ontario Renocon Ltd. \$ 85,761.35

[89] Ms. Symonik continues her request for a mandatory injunctive order that MTCC 572 obtain an expert's opinion that her family can live in her apartment unit and that it pay for temporary accommodation if the unit is found to be inhabitable and while it is being repaired.

[90] MTCC 572 says that an injunctive order is unnecessary because in February 2021, it had agreed to repair the unit in any event and to provide \$100 a day for accommodation for Ms. Symonik and her family. It says that it has arranged accommodation at a nearby hotel or bed and breakfast. MTCC 572 says that it has made this offer notwithstanding it has learned that Ms. Symonik misrepresented that her insurer would pay for accommodation.

[91] Put somewhat differently, MTCC 572's submission is that Justice Pinto's Order envisioned that expert evidence would be gathered to determine whether it was necessary for Ms. Symonik to leave the unit because it was inhabitable, but now it is conceded that she should leave the unit while it is being repaired and thus practically speaking Justice Pinto's Order has been satisfied.

[92] Thus, MTCC 572's undertaking, which during argument of the interlocutory motion it confirmed to the court, is that it will pay \$100 a day for Ms. Symonik's accommodation until her unit was fit for habitation. I understood this undertaking to mean all of her unit was to be fit for habitation not just the master bedroom of the unit.

[93] During argument, MTCC 572 confirmed that it would not withdraw its undertaking if I dismissed Ms. Symonik's motion. I was told it was eager to make repairs to the unit but that Ms. Symonik would not allow this to occur.

[94] Such is the factual background in this ongoing saga. I shall return to the matter of MTCC 572's undertaking in the discussion that follows.

C. Discussion and Analysis

1. Condominium Act, 1998

[95] For present purposes of the motion for interlocutory relief, the following sections of the *Condominium Act, 1998* are pertinent:

Objects

17. (1) The objects of the corporation are to manage the property and the assets, if any, of the corporation on behalf of the owners.

Duties

(2) The corporation has a duty to control, manage and administer the common elements and the assets of the corporation.

Standard of care

37. (1) Every director and every officer of a corporation in exercising the powers and discharging the duties of office shall,

- (a) act honestly and in good faith; and
- (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

Repair after damage

89. (1) Subject to sections 91 and 123, the corporation shall repair the units and common elements after damage.

Extent of obligation

(2) The obligation to repair after damage includes the obligation to repair and replace after damage or failure but, subject to subsection (5), does not include the obligation to repair after damage improvements made to a unit.

Determination of improvements

(3) For the purpose of this section, the question of what constitutes an improvement to a unit shall be determined by reference to a standard unit for the class of unit to which the unit belongs.

[...]

Maintenance

90. (1) Subject to section 91, the corporation shall maintain the common elements and each owner shall maintain the owner's unit.

Normal repairs included

(2) The obligation to maintain includes the obligation to repair after normal wear and tear but does not include the obligation to repair after damage.

Provisions of declaration

91 The declaration may alter the obligation to maintain or to repair after damage as set out in this Act by providing that,

- (a) subject to section 123, each owner shall repair the owner's unit after damage;
- (b) the owners shall maintain the common elements or any part of them;
- (c) each owner shall maintain and repair after damage those parts of the common elements of which the owner has the exclusive use; and
- (d) the corporation shall maintain the units or any part of them.

Work done for owner

92 (1) If the declaration provides that the owner has an obligation to repair after damage and the owner fails to carry out the obligation within a reasonable time after damage occurs, the corporation shall do the work necessary to carry out the obligation.

Same, maintenance

(2) If the declaration provides that the owner has an obligation to maintain the common elements or any part of them and the owner fails to carry out the obligation within a reasonable time, the corporation may do the work necessary to carry out the obligation.

Dangerous activities

117. No person shall permit a condition to exist or carry on an activity in a unit or in the common elements if the condition or the activity is likely to damage the property or cause injury to an individual.

Compliance with Act

119. (1) A corporation, the directors, officers and employees of a corporation, a declarant, the lessor of a leasehold condominium corporation, an owner, an occupier of a unit and a person having an encumbrance against a unit and its appurtenant common interest shall comply with this Act, the declaration, the by-laws and the rules.

Compliance order

134. (1) Subject to subsection (2), an owner, an occupier of a proposed unit, a corporation, a declarant, a lessor of a leasehold condominium corporation or a mortgagee of a unit may make an application to the Superior Court of Justice for an order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules or an agreement between two or more corporations for the mutual use, provision or maintenance or the cost-sharing of facilities or services of any of the parties to the agreement.

Oppression remedy

135. (1) An owner, a corporation, a declarant or a mortgagee of a unit may make an application to the Superior Court of Justice for an order under this section.

2. The Repair Obligations of a Condominium Corporation

[96] Pursuant to s. 89 (1) of the *Condominium Act, 1998*, a condominium corporation has an obligation to repair the common elements after damage. Pursuant to s. 90 (1) of the *Act*, a condominium corporation has a duty to maintain the common elements.

[97] In determining whether a condominium corporation has satisfied or breached its statutory duties to repair and maintain the common elements, the corporation is not held to a standard of

perfection, but courts apply a test of reasonableness.² The condominium corporation is charged with the duty of balancing the private interests of individual unit owners with the communal rights of all and some deference should be afforded to its repair and maintenance decisions.³

[98] In determining whether the condominium corporation has met the standard of care, the court must take into account a variety of factors including: (a) relationship between the condominium corporation and the unit owners; (b) the opinion of the unit owners; (c) the wording of their contractual arrangements; (d) the nature of the condominium development; (e) objective standards of quality and workmanship; (f) the replacement cost of the facility to be repaired; (g) economic and budgetary constraints; (h) the need for the repairs; (i) nature of the work required to effect the repairs; (j) the timetable for effecting the repairs; and (k) the benefit that may be acquired if the repairs are done compared to the detriment that may be occasioned by the failure to undertake the repairs.

[99] Pursuant to s. 134 of the *Act*, when there is non-compliance with the *Act*, the court may require the condominium corporation to pay: (a) the damages incurred as a result of the acts of non-compliance; (b) the costs incurred by the applicant in obtaining the order; or (c) such other relief as is fair and equitable in the circumstances.⁴

3. Ms. Symonik's Requests for a Mandatory Injunction

[100] To obtain a mandatory interlocutory injunction, the moving party must give an undertaking as to damages and he or she must satisfy a three-pronged test. First, he or she must demonstrate a strong *prima facie* case on the merits such that it is likely that he or she will succeed at trial in proving the allegations set out in the notice of motion. Second, he or she must demonstrate that irreparable harm will result if the relief is not granted, and third, he or she must demonstrate that the balance of convenience favours granting the mandatory injunction.⁵

[101] The first step of the test for a mandatory interlocutory injunction has a higher threshold than the test for a prohibitory interlocutory injunction.⁶ For a mandatory interlocutory injunction, the plaintiff must show a strong *prima facie* case. The motion judge must be satisfied after an extensive review of the evidence of the merits of the case that there is a strong likelihood on the law and the evidence presented that the moving party would ultimately be successful at trial in proving the allegations set out in the notice of motion.⁷ The test for a mandatory interlocutory

² *Mohamoud v. Carleton Condominium Corporation No. 25*, 2019 ONSC 7127; *Brasseur v. York*, 2019 ONSC 4043; *Weir v. Peel Condominium Corporation No. 485*, 2017 ONSC 6265 at para. 112; *Ryan v. York Condominium Corp. No. 340*, 2016 ONSC 2470; *Metropolitan Toronto Condominium Corp. No. 985 v. Cheney*, 2015 ONSC 7124; *Wu v. Peel Condominium Corporation No. 245*, 2015 ONSC 2801; *Mackay v. Metropolitan Toronto Condominium Corporation No. 985*, 2014 ONSC 2863 and 2015 ONSC 7124; *Leclerc v. Strata Plan LMS 614*, 2012 BCSC 74, at para. 61; *Roy v. York Condominium Corp. No. 310*, [1992] O.J. No. 4195 (Gen. Div.); *York Condominium Corporation No. 59 v. York Condominium Corporation No. 87* (1983) 42 O.R. (2d) 337 (C.A.).

³ *Mohamoud v. Carleton Condominium Corporation No. 25*, 2019 ONSC 7127 at para. 35; *Brasseur v. York*, 2019 ONSC 4043 at para. 108; *Metropolitan Toronto Condominium Corporation No. 985 v. Cheney*, 2015 ONSC 7124 at para. 33; *York Condominium Corp. No. 382 v. Dvorchik* (1997), 12 R.P.R. (3d) 148 at para 5 (Ont. C.A.).

⁴ *Ryan v. York Condominium Corp. No. 340*, 2016 ONSC 2470.

⁵ *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5.

⁶ *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5; *Ryerson Students' Union v. Ryerson University*, 2020 ONSC 1490 (Ont. S.C.J.); *Celenza v. Remax Premier Inc.*, 2016 ONSC 628.

⁷ *Ryerson Students' Union v. Ryerson University*, 2020 ONSC 1490 at para. 44 (Ont. S.C.J.); *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 at para. 17 (S.C.C.).

injunction has been described as requiring a high degree of assurance that at trial it will appear that the injunction was rightly granted.⁸

[102] In my opinion, Ms. Symonik does not satisfy any of the branches of the test for a mandatory interlocutory injunction.

[103] While Ms. Symonik may ultimately succeed in the litigation, she has not met the high threshold of the test of showing a strong *prima facie* case. This is particularly the case for the period before March 2020. It was only after March 2020 that it was determined that the source of the water leaking into Ms. Symonik's unit was the lobby of the building.

[104] Ms. Symonik's case after March 2020 is stronger than the case that underlies why she commenced the litigation in the first place. But, as the law articulated above indicates, the standard that a condominium corporation must satisfy is a fact-specific standard that addresses a host of factors, including, in the immediate case, the factual circumstance that after March 2020, Toronto has been in lock-down for large portions of time. In the circumstances of the immediate case, Ms. Symonik cannot be said to have a strong *prima facie* case that the efforts of the condominium corporation to repair the common elements have been dilatory or unreasonable.

[105] It is unfortunate, and it is sad that Ms. Symonik has cancer and that she has not had a peaceful place to reside to recuperate, but that sad state of affairs is not irreparable harm with respect to the condominium corporation's obligations, if any, to repair Ms. Symonik's condominium unit.

[106] The condominium corporation has already undertaken to repair the unit and to make it habitable. In the context of an interlocutory injunction, irreparable harm means a harm that cannot be compensated by damages. Ms. Symonik has no irreparable harm in the requisite sense of the law for interlocutory injunctions.

[107] Much the same thing can be said for the balance of convenience. The balance of convenience does not favour ordering a continuation of Justice Pinto's Order, which, practically speaking, is spent.

[108] In short, what is required in the immediate case is not a mandatory injunction but rather what is required is the implementation and completion of MTCC 572's undertaking as follows:

- a. First, Ms. Symonik and her family should move out of the unit. They should move to accommodation paid for by MTCC 572 at a rate of \$100 per day. (It would be a nice gesture, if MTCC 572 also paid the HST.)
- b. MTCC 572's contractors should repair Ms. Symonik's unit and make it habitable.
- c. When the unit is ready for her re-entry, Ms. Symonik should be invited to return to the unit. If she agrees, then that will end MTCC 572's undertaking.
- d. If she does not accept the invitation to re-enter, then the parties will need to return to court to determine whether MTCC 572 is discharged from its undertaking.
- e. If Ms. Symonik does not accept the invitation, it will be up to her whether she

⁸ *Quizno's Canada Restaurant Corp. v. 1450987 Ontario Corp.*, [2009] O.J. No. 1743 (S.C.J.); *Benjamin v. Toronto-Dominion Bank* (2006), 80 O.R. (3d) 424 (S.C.J.); *Barton-Reid Canada Ltd. v. Alfresh Beverages Canada Corp.*, [2002] O.J. No. 4116 (S.C.J.); *Dylex Ltd. v. Krugarand Corp.*, [1990] O.J. No. 223, (H.C.J.); *Ticketnet Corp. v. Air Canada*, [1987] O.J. No. 782 (H.C.J.).

wishes the unit to be tested for structural and or environmental habitability before she returns, and it will be up to MTCC 572 whether it is prepared to pay for that testing.

f. If the matter returns to court, then one or the other of the parties will have to provide evidence to determine whether or not the undertaking should be discharged.

[109] Put shortly, Ms. Symonik does not satisfy the stringent test for the extraordinary relief of a mandatory interlocutory injunction.

[110] Further, in so far as Ms. Symonik's notice of motion or factum seeks declarations and final judgments, these matters will be determined on their merits in the action.

D. Conclusion

[111] For the above reasons, Ms. Symonik's motion is dismissed, and the Order of Justice Pinto is vacated.

[112] The order dismissing the motion, should in its recital note set out the undertaking given by MTCC 572 to the court.

[113] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Ms. Symonik's submissions within twenty days from the release of these Reasons for Decision, followed by MTCC 572's submissions within a further twenty days.

[114] Although MTCC 572 was the successful party on this motion, I am asking for Ms. Symonik's costs submissions first. I do this because my present inclination is to award her some costs, notwithstanding that she was technically the unsuccessful party. My present inclination is to make the balance of the costs of the interlocutory motion to be costs in the cause of her action.

[115] If the parties cannot resolve the matter of costs, I will explain my present inclination at greater length. For present purposes, I will just say that my review of the record is that: (a) there is some divided success; (b) there is some conduct by the parties that neither party should be proud of; and (c) Ms. Symonik's request for interlocutory relief (or her request for a final judgment for that matter) has been a moving target and unlike most litigation, the case at bar has been more about what has happened since the commencement of the proceeding than what caused the proceeding to be commenced in the first place.

[116] Finally, I note that apart from the matter of costs, I am not seized of this matter, but I may be available to be assigned to hear the matter of the discharge of MTCC 572's undertaking to the court.

Perell, J.

Released: April 1, 2021

CITATION: Symonik v. Metropolitan Toronto Condominium Corp. No. 572, 2021 ONSC 2494
COURT FILE NO.: CV-20-635266
DATE: 20210401

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

SANDRA SYMONIK

Plaintiff

- and -

**METROPOLITAN TORONTO CONDOMINIUM
CORPORATION NO. 572**

Defendant

REASONS FOR DECISION

PERELL J.

Released: April 1, 2021