CITATION: Carleton Condominium Corporation No. 519 v. Ottawa-Carleton Standard Condominium Corporation No. 656 et al., 2023 ONSC 1780
COURT FILE NO. CV-22-88881/CV-22-88777
DATE: 2023/03/16

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Carleton Condominium Corporation No. 519, Applicant

AND

Ottawa-Carleton Standard Condominium Corporation No. 656 and Carleton Condominium Corporation No. 522, Respondents

BEFORE: The Honourable Justice Charles T. Hackland

COUNSEL: Rodrigo Escayola and David Plotkin, for the Applicants

Jonathan Wright and Antoni Casalinuovo, for the Respondent Ottawa-Carleton Standard Condominium Corporation No. 656

Michelle Kelly, for the Respondent Carleton Condominium Corporation No. 522

HEARD: February 7, 2023 Ottawa, (by Zoom videoconference)

REASONS FOR DECISION

Background

[1] This is an application to determine whether the Respondent, Ottawa-Carleton Standard Condominium Corporation 656 ("656") and the Respondent, Carleton Condominium Corporation No. 522 ("522") are under a legal obligation to share in the costs of replacement of a major piece of electrical equipment, called an "electric switchgear" or "ESG" which is located on the land of the Applicant, Carleton Condominium Corporation 519 ("519"). The single electric vault and related systems, including the ESG, serves all three condominiums. These systems receive, manage, and distribute to the three condominiums the power supply brought in by Hydro-Ottawa.

[2] These three residential condominiums were built by the same entity, Rockwell Investments Ltd., which registered their respective Declarations. The condominiums are situated near each other in the City of Ottawa. 519 is a seven-story high rise structure containing 108 units

(Declaration registered in February 1991), 656 is a townhouse complex containing 92 units (Declaration registered December 2002), and 522 is a townhouse complex containing 44 units (Declaration registered December 1990).

[3] There is no dispute the ESG unit is over 30 years old and well past its required replacement date. It is at risk of failing at any time, which would leave the three condominiums without power and heat. Hydro Ottawa and 519's electric contractor has recommended urgent replacement. On November 18, 2021, the ESG failed twice, requiring emergency maintenance, which was paid for entirely by 519 at a cost of approximately $10,000. 656 and 522 have never shared in the costs of repair and maintenance of the ESG.

[4] 519 has diligently sought out proposals to replace the ESG unit and now wishes to proceed with a proposal to install a refurbished unit at a cost of $ 174,000 from Siemens Corporation. The parties have not questioned the need for or the appropriateness of this proposed expenditure or the urgency of carrying out this work. The plan is to install the equipment in April 2023. The dispute before this court is about whether 519 should bear the entire expense of this equipment replacement in addition to the past and future repair and maintenance costs or whether this cost should be shared by the three condominiums on an equitable basis.

[5] The court was advised by counsel for 522 that 522 now accepts responsibility to pay for its share of the ESG replacement on a formula agreed to with 519, which will reflect the proportionate number of units in each condominium. The three condominiums are not party to any shared facilities agreement or joint use and management agreement. As noted, the three condominiums are metered so that the costs of hydro are appropriately apportioned, whereas the issue before this court pertains to the capital costs of the ESG replacement and associated repair and maintenance costs.

[6] All three condominiums are dependent on the ESG to direct the power supply from Hydro Ottawa to their respective condominiums. Importantly, the ESG has two dedicated circuit breakers or switches: one directs the power exclusively to 656 and the other directs power to 519 and to a part of 522. The replacement equipment will furnish two new dedicated circuit breakers, one of which will continue to exclusively service the power needs of 656.

[7] 656 refuses to pay any part of the ESG replacement costs because, it contends, 656's Declaration does not require or authorize it to do so given the ESG equipment is located in the common area of 519. 656 submits 519 must repair or replace and maintain this equipment at its cost because 519's Declaration requires it to maintain its common areas where the equipment is located. This is notwithstanding the fact that one of the two circuit breakers in the ESG being replaced is for the exclusive benefit of 656.

The issues

[8] The position of the Applicant, 519 is that 656 must assume the costs of replacing the equipment which is exclusively for 656's own needs and benefit, based on the doctrine of unjust enrichment. 656 denies unjust enrichment has any application to the facts of this case. Further, the parties differ as to whether the Declarations of the two condominiums require 519 to pay for 626's share of the ESG replacement or its associated maintenance and repair costs.

Unjust enrichment

[9] The doctrine of unjust enrichment is well-established. The three-part test for invoking this remedy was set out by the Supreme Court of Canada in *Garland v. Consumers Gas Co*., 2004 SCC 25:

> a. Has there been an enrichment;
>
> b. Has there been a corresponding deprivation; and
>
> c. Is there a juristic reason for the enrichment? This means a reason/explanation for the enrichment that makes it fair and "just".

[10] At law, the provision of services will constitute a benefit in two situations: (a) where they were performed at the request of the defendant, or (b) where the defendant has been "incontrovertibly benefited". McLachlin J. explained the concept of incontrovertible benefit in *Peel v Canada,* 1992 CanLII 21 (SCC):

> An "incontrovertible benefit" is an unquestionable benefit, a benefit which is demonstrably apparent and not subject to debate and conjecture.

> Where the benefit is not clear and manifest, it would be wrong to make the defendant pay, since he or she might well have preferred to decline the benefit if given the choice.

[11] I am satisfied and find as a fact 656 has been incontrovertibly benefited by having 519 assume responsibility for the repair and maintenance of the ESG and such benefit would continue and become much greater if 519 were required to pay for the entire costs of the required ESG replacement and to assume ongoing repair and maintenance costs. The affiant for 656 has admitted on cross-examination that 656 obtains a benefit from using the ESG.

[12] Part of 656's argument in this case is that it would be oppressive for 519 to cut 656 off from using the ESG if 656 continues to refuse to contribute to the costs of maintaining and replacing this equipment. As I understand this argument, it is being asserted that to deprive 656 of its use of the ESG would be a wrongful denial of a significant benefit to which 656 reasonably believes it is entitled. In view of this, it can hardly be contended by 656 that it is not incontrovertibly benefited by its use of the ESG.

[13] In support of its claim that 656 is obligated to bear an equitable share of the replacement cost of the ESG, 519 relies on the case of *Middlesex Condominium Corporation 229 v. WMJO Limited et al.*, 2015 ONSC 3879, in which a condominium corporation pursued its neighbours for a pro rata contribution towards the operating and maintenance costs of a private sewage system. This sewage system was connected to the other residential properties and serviced their sewage needs. The court agreed that the joint use of the sewage system by each townhouse connected to it required the defendant to pay a pro rata share of the expenses to maintain and operate the plaintiff's private sew age system.

[14] *Middlesex Condominium Corporation 229* was upheld on appeal, see 2017 ONCA 27, in which the court stated (at para 10):

> There was ample evidence to establish that [the Appellant] receives the benefit of the use of the sanitary sewer pumping station, without having to pay operating or management costs. As a result, MCC 229 suffers the corresponding deprivation of increased costs for electricity, repairs and maintenance. It was also established at trial that the risk of breakdown of the sanitary sewer pumping station increases with the volume of sewage.

[15] So far as the application of the doctrine of unjust enrichment is concerned, the real issue in this case is whether there are juristic reasons justifying the non payment for the obvious benefits 656 has and will receive from its use of the ESG and related equipment. 656 submits the juristic reasons are the absence of any requirement in the Declaration of 656 to incur or share in the expenditure and the requirement in 519's Declaration to incur the replacement cost as part of its responsibility to maintain and repair the common areas of the condominium property. 656 also relies on the absence of any cost sharing or other contractual agreement between the parties imposing an obligation on 656 to share in these expenses.

[16] In *Kerr v. Baranow*, 2011 SCC 10 at para 43-45, Cromwell J. adopted a two-step analysis to determine the presence or absence of a juristic reason:

> a. The first step is to determine whether there exists a juristic reason from the established categories to justify the enrichment. These categories include: contracts, dispositions of law, donative intent or other valid common law, equitable or statutory obligation. If there is no juristic reason from an established category, then the plaintiff has made out a prima facie case under the juristic reason component of the analysis;
>
> b. The prima facie case is rebuttable if the defendant can show that there is another reason to deny recovery. As a result, there is a de facto burden of proof placed on the defendant to show the reason why the enrichment should be retained. Courts will look to all of the circumstances of the transaction, including the reasonable expectations of the parties and public policy considerations, to determine whether there is another reason to deny recovery.

[17] For the reasons I will explain, I have come to the conclusion that 656 has failed to discharge its de facto burden of proof to show any juristic reason the enrichment or benefit should be retained by 656, without being required to assume its fair share of the costs.

[18] Firstly, 519 argues, in my view correctly, that because there is no shared costs agreement between the parties, there is no contractual obligation on 519 to provide the benefit of the use of the ESG to 656. Stated otherwise, there is no contractual obligation (i.e., no juridical reason) between 519 and 656 that justifies requiring 519 to continue to supply the benefit of its electrical equipment to 656, free of charge.

[19] Secondly, there is no evidence before the court as to the intentions of the original declarant as to who would be responsible for the replacement of electrical equipment serving the needs of third parties resident outside of each condominium. The Declarations of 519 and 656 do not expressly address that issue. Each condominium corporation is required to maintain and repair its own common elements. 656 contends this means 519 must replace entirely at its own costs the EGC, including the circuit breaker therein, which exclusively serves the unit owners and common areas of 656.

[20] I am not persuaded there is any such obligation. It is also unclear on what basis 656 claims the right to attempt to enforce or benefit from the Declaration of 519, which is a declaration of the rights and obligations of the unit holders of 519 and of 519 as a condominium, inter se, or as between themselves. There is no provision in the *Condominium Act* or in the Declaration of 519 requiring 519 to continue to supply benefits to any third party, such as 656. The condominium corporation's obligation to maintain and repair its common areas is an obligation it owes to its own unit owners, unless it has expressly taken on this obligation to third parties.

[21] 656 relies on *Toronto Standard Condominium Corp. No.1633 v. Toronto Standard Condominium Corp. No. 1809,* 2017 ONSC 1372, where the Applicant sought contribution from the Respondent for the costs of maintenance and repair of a common laneway used by occupants of two neighbouring condominiums in the absence of any cost sharing agreement. Cavanagh J. confirmed that: i) the *Condominium Act* does not have a framework to impose a cost sharing agreement; and ii) the lack of a cost-sharing agreement is a juristic reason for one condominium corporation benefiting from the assets or services maintained and supplied at the costs of another. However, the court also relied on the established common law rule that the grantee of an easement has no obligation of maintenance and repair, as a juristic reason why the grantee was entitled to the benefit of the use of the laneway without sharing in the costs of upkeep. I respectfully disagree with the proposition that the absence of a costs sharing agreement constitutes a juristic reason for enjoying a benefit with no obligation to pay for it. If that were the law, the principle of unjust enrichment would be of no effect.

[22] I will also observe the factum of 656 is replete with allegations against 519 of high- handed conduct, lack of clean hands, threatening or oppressive behavior, and failure to co-operate with the

remediation efforts to date concerning the equipment problems. These allegations are not substantiated, were largely disclaimed by 656's own affiant, and were quite properly not raised by Respondent's counsel in argument. I find there has been nothing in 519's conduct that would disqualify it from the equitable relief it seeks, provided unjust enrichment is established.

The Declarations

[23] 656 states repeatedly in its factum that the obligation of 519 to replace the electrical equipment in issue here at its own expense is clearly set out in its Declaration. It is further stated that a promissory estoppel arises to prevent 519 from seeking contribution for the costs of purchasing the replacement ESG, because there has been no such request during the 30 years in which 656 has been using 519's electrical vault at no cost. I reject both those arguments.

[24] Firstly, the declarations of both 656 and 519 are anything but clear on the issue of hydro distribution between the three condominiums. On the evidence, it was not until the ESG failure in 2021 that the parties initially became aware of the urgent need to replace the ESG. Only with the intervention of the parties' electrical contractors and Hydro-Ottawa, the parties came to appreciate the unusual power distribution system connecting the three condominiums. Following the initial ESG failure in 2021, 519 immediately began a joint approach to addressing the equipment replacement issue and 656 participated in this, but ultimately declined to participate in cost sharing for the replacement equipment. I see no promissory estoppel, and no detrimental reliance on a lengthy status quo on the facts of this case.

[25] It is significant that 656 was granted an easement giving it the right to access the underground vault in 519, where the ESG and related switching equipment is located. That right of access suggests to the court that the parties contemplated 656 having a right and perhaps an obligation to inspect and maintain the equipment that services the power distribution to 656, or at least to engage with 519 in the exercise of those responsibilities.

[26] 519 submits that 656's own Declaration implies an obligation to share in the costs of the ESG. 656 has a statutory duty to manage the property and assets of this residential corporation on behalf of its unit owners. It also has a duty to manage the common elements and assets of the corporation. It must be implied that this requires that the units have a continuing supply of hydro

electric power. The Declaration provides that unit owners at 656 authorize the Corporation to pay for natural gas or hydroelectricity required to heat the unit and to charge back the costs of same to the unit owner, if the owner fails to pay for these services.

[27] Schedule E of 656's Declaration lists the common expenses payable by its unit owners. The lists expressly includes all sums of money levied against or charged to the Corporation on account of any and all services and equipment including: "Hydro and water for the common elements only (hydro, water and heating for each unit to be paid by each unit owner) and "shared expenses incurred with respect to the obligations incurred by the Corporation with any other person, firm or corporation". In other words, the 656 Declaration contemplates that between the corporation and its unit owners, the cost of supplying hydro power are specifically contemplated expenses. Accordingly, the cost of contributing to the replacement of the ESG, which supplies power to 656 would fall within the type of common expense costs contemplated by its Declaration.

[28] Ontario's *Condominium Act* was amended in 2015 to require condominiums to enter into "Shared facilities agreements" in circumstances where facilities or services are shared, to fairly apportion the costs. Regrettably, this amendment has not yet been declared in force, leaving parties to honour their obligations in good faith or to resort to the courts to enforce obligations imposed by the law of equity. This is such a case.

Disposition

[29] The court finds that the principles of unjust enrichment apply in this case to require both 656 and 522 to share equitably in the costs to be incurred by 519 for the replacement of the ESG, in costs previously incurred for emergency work in November 2021 when the ESG malfunctioned, and for the deposit to Hydro-Ottawa for planning/designing work in connection with the ESG replacement. The court further finds that equitable sharing of such costs does not contravene and is consistent with the respective Declarations of the three condominium corporations in this proceeding.

[30] The court directs a Reference to be held before an Associate Judge of this Court, or the parties may choose to proceed by mediation/arbitration, for the determination of the appropriate basis of cost sharing in respect to the ESG replacement (projected to be $174,000), the cost of

which will, due to the urgency of the required work, initially be assumed by 519, subject to contribution by 656 and 533. There will also be a Declaration that on an ongoing basis, each of the three condominium corporations will be responsible for their respective equitable share of all costs associated with the maintenance, repair, and replacement of the ESG and ancillary components and structure.

[31] With respect to the foregoing, the court points out that there was no active disagreement expressed at the hearing of this application about the proposed apportionment of costs based on the number of units in each of the three condominiums (para. 65 of 519's factum) or about the costs of the ESG replacement or costs incurred by 519 to address the 2021 power failure. It is hoped that these matters can be agreed on so as to avoid the need for a Reference. As for the agreement reached between 519 and 522, the same may be incorporated into the court order arising from the application herein.

[32] If 519 is seeking costs of the application herein, it shall provide a concise written submission within 30 days of the release of these reasons and 656 shall respond within 30 days of receiving 519's submission.

[33] For any issues arising about the terms of the order or its implementation, I ask counsel to arrange a case conference before me, through trial co-ordination.

Justice Charles T. Hackland

Date: March 16, 2023

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REASONS FOR DECISION

Justice Charles T. Hackland

Released: March 16, 2023