Court of King's Bench of Alberta

Citation: Judge v Condominium Plan No 8322264, 2024 ABKB 666

Date: 20241115
Docket: 2003 08626
Registry: Edmonton

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Between:

David Judge and Colleen Judge

Respondents/Cross-Applicants

- and -

The Owners: Condominium Plan No 8322264

Applicant/Cross-Respondent

Reasons for Judgment
of the
Honourable Applications Judge L.R. Birkett

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[1] The plaintiffs, David Judge and Dr. Colleen Judge, [the Homeowners] purchased a condominium unit within the condominium building, known as the Arcadia. The defendant, The Owners: Condominium Plan No. 8322264 is the condominium corporation [the Condominium], constituted pursuant to the provisions of the *Condominium Property Act*, RSA 2000, c C-22 [the *Act*] on registration of the Condominium Plan.

[2] The Homeowners sued the Condominium for the loss and damages they suffered because they were delayed in being able to renovate and occupy their unit. In response to the Covid-19 pandemic, the Condominium had placed a temporary moratorium on construction, including the Homeowners planned renovations.

[3] The Homeowners say the Condominium engaged in improper conduct in restricting construction in their unit. The Condominium says it was objectively reasonable to place the moratorium on construction activities until the Covid-19 pandemic improved. The Board acted to protect the health and safety of the residents.

[4] The Condominium applied for summary dismissal of the Homeowners' claims; the Homeowners applied for summary judgment against the Condominium.

[5] I have sufficient confidence in the record to resolve this dispute summarily as a proportionate, expeditious, and less expensive means to achieve a just result. I am able to make the necessary findings of fact and apply the law to those facts to reach a fair and just determination on the merits.

[6] Although the Condominium may not have responded in the same disciplined way as others did in the face of the Covid-19 health crisis, the temporary moratorium placed on construction was in keeping with their desire to minimize the impact of the pandemic on the residents. Although the Homeowners were uniquely affected by the moratorium on construction as they were the only owners undergoing renovations at the time, they were not singled out and targeted by the Condominium.

[7] I find that the Condominium did not act in a manner that was oppressive or unfairly prejudicial to or that unfairly disregarded the interests of the Homeowners.

Facts

[8] The Homeowners purchased their condominium unit with a possession date of December 18, 2019 and with the plan to renovate before moving in, remaining in their home until the renovations were complete. On the advice of their realtor, they did not immediately list their home for sale and opted to wait until they knew the condominium renovations would be completed so they could provide a specific possession date to any purchaser.

[9] On February 5, 2020, in keeping with the Condominium's renovation policy, the Homeowners submitted their renovation plans for approval of the Condominium Board. The Board approved the renovations as requested on March 13, 2020, based on the third-party consultant's report that the Homeowners had met all of the renovation policy requirements to proceed.

[10] On March 17, 2020, the Lieutenant Governor in Council declared a state of public emergency in Alberta due to the Covid-19 pandemic.

[11] On March 24, 2020, the Homeowners were advised in an email from the Condominium Manager: "Due to the Covid-19 crisis and in order to reduce the impact of contractors entering the building the Board of Directors have postponed all renovations until further notice."

[12] The representative for the Corporation, Board member Graeme Alston deposes that at the time the Homeowners sought to commence the renovations in March 2020 "… the Covid-19 pandemic had just begun to spread significantly in our region. At that time, not much was known about the virus, exactly how it was transmitted, how it affected impacted individuals, and no vaccines were available yet. The Board was concerned with the health and well-being of the residents of the Building, and made decisions based on the information available at the time."

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[13] At the March 30, 2020 meeting, the Condominium Board ratified the decisions they had made in response to the pandemic, including the decision to postpone the Homeowners' renovations. It is clear from the minutes of the meeting that Covid-19 was impacting the decisions made. Some examples are detailed here:

- The plumbing project involving realignment of water lines and insertion of valves on the 6th floor and parkade was shut down, to be resumed once it was safe to allow contractors back in the building.
- Due to Covid-19 protocol, the lobby renovations were put on hold.
- The email decision of March 14, 2020 was ratified to implement enhanced building cleaning of high traffic areas seven days a week due to the Covid-19 crisis, until further notice.
- The email decision of March 23, 2020 was ratified to alter the location of security staff (deemed essential contractors) to further reduce contagions being introduced into the building.
- The email decision of March 24, 2020 was ratified to cease all non-essential construction in the building until further notice due to the Covid-19 crisis. Construction personnel must exit the building and no new renovations to commence. This includes the front lobby renovation project.
- The management and behaviour of the condominium staff will be in accordance with the regulations and rules set by the Government of Alberta with regard to any and all Health issues including those arising out of the Covid-19 crisis.

[14] On April 21, 2020, the Homeowners sent an email to the Property Manager requesting a construction schedule. The Homeowners confirmed they had obtained the required building permits from the City of Edmonton and had paid the security deposit. They advised that their construction manager could establish a schedule which would ensure only one trade would be working on the unit at any given time, would enter and exit through the back door and not use the elevator or be in common area when other people were present. This email was forwarded to the Board for their upcoming meeting.

[15] When the Board met on April 27, 2020, Covid-19 continued to impact the business of the Corporation as set out in the following excerpts from the meeting minutes:

- The April 2, 2020 approval of the request by a unit holder for a storage locker in their titled parking stall was ratified with the additional motion that: "No contractors are permitted in the building until such time as the Covid-19 crisis permits and the current ban is lifted. Unit Y may order their proposed storage unit in anticipation of the time when the Covid-19 conditions allow for access and installation in the parkade."
- Inspections of a sample single level unit and a sample two level unit Standard Insurable Unit Descriptions were required to be done virtually due to Covid-19.
- Covid-19 delayed the installation of lobby located security monitors. It was noted that the carpets purchased for the lobby renovation were expected to arrive in mid June, however, it was unlikely that they would be able to install them at that time.

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- Specific to the Homeowners, the April 27, 2020 Board minutes reflect: "Unit Owner's request for permission to immediately commence a renovation project was denied on the basis of Covid-19 concerns. The board committed to monitor future Covid-19 stats and health authority recommendations for future consideration of 'project commencement' approval."

[16] On April 28, 2020, the Homeowners were advised verbally of the Board's decision to deny permission to commence the renovation project. The rationale for the refusal was provided by the Property Manager in writing on April 30, 2020:

> While the board sympathizes with your situation and understands the challenges you are experiencing with holding your renovation in abeyance, the primary concern that exists is for the health and safety of the current residents… Please understand that the Board does not take this decision lightly but must balance many different factors. This is an unprecedented situation and it is incumbent on the board to proceed cautiously.… As with many Albertans the board is watching and listening to the provincial health professionals. They will continue to monitor the situation and this decision will be reviewed by the board of directors as the circumstances progress.

[17] With respect to the proposal put forward by the Homeowners to minimize exposure to Covid-19, the April 30, 2020 letter states:

> As you described in your email request there are processes, procedures and rules that could be put in place to minimize this exposure however the corporation does not have the resources or manpower to ensure these rules are being adhered to. Therefore, at this point the board believes the potential exposure to Covid-19 outweighs moving forward with the construction.

[18] In response to the April 30, 2020 letter, legal counsel for the Homeowners, Todd A. Shipley, wrote to the Property Manager advising that "The Condominium Corporation and its Board do not have the authority or the jurisdiction to refuse to permit the Judges to proceed with the renovations."

[19] Legal counsel for the Corporation, Roberto Noce, KC, responded on May 11, 2020 confirming "Our client has reconsidered the situation, and we can advise that the decision not to permit any renovations at this time shall stand.… Unfortunately, with third-party contractors coming and going throughout any renovation project, the Board is not satisfied that it can ensure appropriate safety and security measures will be in place and enforced."

[20] Mr. Noce advised that the Corporation is carrying out its statutory duties to enforce the Bylaws and ensure the safety and well-being of the owners and their collective condominium property. Article 49(a) of the Corporation's Bylaw was quoted as follows:

> No Owner shall do anything or permit anything to be done that is contrary to any of the provisions, rules or ordinances of any statute or municipal By-Law or the regulation of the Units or in any way in violation of any laws whatsoever.

[21] That letter was not received by Mr. Shipley prior to writing to Mr. Noce on May 13, 2020 advising that the Homeowners are entitled to exercise their rights as owners and the Board is not entitled or authorized to prevent them from exercising those rights. Further:

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> Our clients' loss and added costs of keeping two homes, risk of added construction costs, and serious disruption of their lives are the product of your clients' wrongful refusal to allow the Judges to exercise their homeowner's lawful rights. With respect, that unlawful action has to stop. Please confirm ASAP that the board's refusal is now withdrawn."

[22] After receiving Mr. Noce's letter of May 11, 2020, Mr. Shipley advised on May 15, 2020 that they would be proceeding to issue a statement of claim.

[23] Mr. Noce responded May 19, 2020 that:

> Prior to receiving your letter and the threat of a lawsuit, the Board authorized us to advise you/your clients that they are working towards a benchmark date for approving the resumption of renovations.… Following the advice and direction of the Chief Medical Officer, the Board will be monitoring the public health reports over the next 14 days as the reopening progresses and as we may start to see a resurgence of Covid-19. Assuming that the public health reports over the next couple of weeks are positive, the Board will aim to permit/approve the commencement of renovations no later than June 4, 2020, with renovations actually then being able to proceed as early as June 8, 2020.… If renovations are permitted, any contractors and trades persons will be expected to comply with the Corporation's pandemic health and safety protocol (which has yet to be finalized by the Board). …"

[24] As previously advised by Mr. Shipley, the statement of claim was issued on May 21, 2020 and served on June 2, 2020.

[25] As previously advised by Mr. Noce, the Board met on June 4, 2020 to permit/approve the commencement of the Homeowners' renovations. The Minutes reflect:

> Following an extensive discussion on the matter, the following motion was duly made and seconded. In light of the improved statistics surrounding the Covid-19 Pandemic for Edmonton and the Province of Alberta, the Board of Directors has agreed to ease the restrictions placed on "Construction Activities" including "Renovations" effective June 8, 2020."

[26] On June 8, 2020, Mr. Noce confirmed the Homeowners may proceed with their approved renovations. "In accordance with the Corporation's new renovation protocols, we require that prior to the commencement of any renovations, your clients and their contractors review and sign off on the enclosed Renovations Guide, acknowledging that they will ensure compliance with our client's safety protocols."

[27] On June 11, 2020, the Homeowners responded through their lawyer: "We wish to inform you of our clients' position that this document is not valid and the request for signing by our client owner and their contractor is not a valid request or requirement of the Board…" On June 15, 2020, specific concerns were raised: "Item 30 in particular is unreasonable and not within the capacity of the board. It is increasingly becoming apparent that this board is determined to prevent our client from exercising their lawful rights and entitlement as owners. The damages stemming from the wrongful actions continue to mount."

[28] On June 16, 2020, Mr. Noce confirmed: "The Board has reviewed your client's notes/markups on the Addition to the Renovation Guidelines and is agreeable to amending the

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Addition to the Renovation Policy to clarify the expectations of the various parties. Your clients will also be permitted to proceed in accordance with the old Renovation Policy, approved August 26, 2019, subject to compliance with Covid-19 protocols."

[29] On June 18, 2020, Dr. Judge returned the signed specific and supplemental guidelines for renovations and advised that preliminary renovation activities were expected to begin on June 22 with demolition beginning the week of June 29. Dr. Judge further advised: "Since the renovation is expected to take approximately 16 weeks to complete and the board requires [the Covid-19 site procedures form] to be completed daily by trades people, please forward 250 hard copies of the form to us.… I will expect to see the supplemental renovation guidelines as well as the Covid-19 site procedures form distributed in a timely manner to all unit owners as required by section 73.6 of the Condominium Property Regulation AR 168/2000. Otherwise, I will consider the documents to be of no force or effect."

[30] The renovation of the condominium unit commenced on June 22, 2020 and was completed on October 18, 2020, within the 16-week time frame originally expected. The Homeowners say there was approximately a five-month period when they could not use their unit from the point they initially submitted their renovation request until late June when they had received approval and sufficient notice to be able to proceed.

[31] The delay as a result of the temporary moratorium during the pandemic is about two and a half months (75 days) from the Homeowners obtaining the building permit on April 8, 2020 until renovations commenced on June 22, 2020.

[32] The Homeowners signed a listing agreement with the realtor to list their home beginning July 6, 2020 with a proposed possession date of "90 days negotiable". The house sold in September with the purchasers obtaining possession on November 30, 2020.

The litigation

[33] This litigation, commenced by statement of claim filed May 21, 2020 continued with an exchange of particulars and statement of defence filed July 10, 2020. The Condominium's representative, Graeme Alston, was questioned for discovery September 16, 2021.

[34] The action was discontinued against the individual Board members on September 12, 2022.

[35] The Condominium's application for summary dismissal and supporting affidavit of Graeme Alston were filed September 12, 2022. Graeme Alston provided a reply affidavit filed July 26, 2023. Mr. Alston has not been questioned on his affidavits.

[36] The Homeowners' application for summary judgment and supporting affidavit of Colleen Judge were filed February 13, 2023. Colleen Judge was questioned on her affidavit on April 14, 2023.

[37] Dr. Judge deposes that "As a result of the 5 week delay by the Board in considering our request, the Board's refusal to implement the approval we were granted in March 2020 and the continued uncertainties regarding whether or, if so, when we could begin our renovation, David and I could not list our Grandview home for sale."

[38] The affidavit in support of the Homeowners' application for summary judgment says that expenses were incurred for carrying two properties during the period of the Board's delay.

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Tables for each of the months of July through October 2020 summarize the additional costs associated with the second property in the total amount of $9,465.51.

[39] In addition, the Homeowners state they could not access sale proceeds as a result of not being able to sell their home during the period their renovation was denied by the Board; they had $725,000 of capital tied up in a condominium unit which they were not able to use; and they experienced emotional suffering and heightened stress as a result of the Board's untoward conduct which singled them out in an oppressive manner. An additional $30,000 is claimed for the Board engaging in improper conduct.

[40] The Condominium brought its application to dismiss the Homeowners' action pursuant to rule 7.3 of the *Alberta Rules of Court*, Alta Reg 124/2010 on the grounds that there is no merit to the plaintiffs' claim for improper conduct.

[41] The Homeowners brought their application for summary judgment pursuant to rule 7.3 on the grounds that there is no defence to the plaintiffs' claim that the Board engaged in improper conduct.

[42] Both parties submit that a just and fair determination in their favour can be made on the existing evidentiary record; there is no genuine issue requiring a trial.

The law on summary judgment and summary dismissal

[43] The parties submit that the matters at issue in these applications can be addressed on a summary basis. Both rely on ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49, para 47 setting out the key considerations in the approach to summary dispositions.

[44] Counsel for the Homeowners says "The issues are largely legal; the parties generally agree on the facts but disagree as to the legal implications flowing from them. The court can confidently proceed in confirming improper conduct occurred on the basis of the record before it."

[45] Counsel for the Condominium says "that the record before this Court provides sufficient evidence upon which to summarily resolve the dispute. The evidence is undisputed and establishes that at all times, the Board acted responsibly, lawfully and reasonably."

The issues

[46] The legal issues to be resolved are straightforward. Did the Corporation engage in improper conduct and if so, what damages flow from the Corporation's improper conduct?

[47] The challenge is to sift through the evidentiary record to make the necessary findings of fact and to apply the law to those facts to meet the three-part test for summary judgment as set out in ***Hryniak v Mauldin***, 2014 SCC 7, at para 49.

The law on improper conduct

[48] The law to be applied to the facts in this action is set out in section 67 of the *Condominium Property Act*, RSA 2000, c C-22 [the *Act*]:

> Court ordered remedy

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67(1) In this section,

(a) “improper conduct” means

(i) non-compliance with this Act, the regulations or the bylaws by a developer, a corporation, an employee of a corporation, a member of a board or an owner,

(ii) the conduct of the business affairs of a corporation in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party,

(iii) the exercise of the powers of the board in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party,

(iii.1) the conduct of an owner that is oppressive or unfairly prejudicial to the corporation, a member of the board or another owner,

(iv) the conduct of the business affairs of a developer in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party or a purchaser or a prospective purchaser of a unit, or

(v) the exercise of the powers of the board by a developer in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party or a purchaser or a prospective purchaser of a unit;

(b) “interested party” means an owner, a corporation, a member of the board, a registered mortgagee or any other person who has a registered interest in a unit.

(2) Where on an application by an interested party the Court is satisfied that improper conduct has taken place, the Court may do one or more of the following:

(a) direct that an investigator be appointed to review the improper conduct and report to the Court;

(b) direct that the person carrying on the improper conduct cease carrying on the improper conduct;

(c) give directions as to how matters are to be carried out so that the improper conduct will not reoccur or continue;

(d) if the applicant suffered loss due to the improper conduct, award compensation to the applicant in respect of that loss;

(e) award costs;

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> (f) give any other directions or make any other order that the Court considers appropriate in the circumstances.
>
> (3) The Court may grant interim relief under subsection (2) pending the final determination of the matter by the Court.

[49] The Homeowners apply to the Court as an interested party for a finding of improper conduct and for compensation for their loss and damages.

[50] The Condominium applies to the Court for a finding that it was objectively reasonable that the Condominium protect the health and safety of the residents by placing a moratorium on construction activities until the Covid-19 pandemic improved. The Board did not act in a manner that was oppressive or unfairly prejudicial to or that unfairly disregarded the interests of the Homeowners.

[51] Counsel each provided case law in support of their clients' respective positions.

[52] The meanings of the words and phrases found in s 67 of the *Act* were canvassed by Chrumka, J in ***934859 Alberta Inc v Condominium Corporation No 0312180***, 2007 ABQB 640 [***934859 Alberta Inc***] at paras 92 to 97:

> In section 67 (1)(a) of the *Condominium Property Act* "improper conduct" means the conduct of the business affairs of the corporation or the exercise of powers of the board in a manner that is oppressive or unfairly prejudicial or that unfairly disregards the interests of an interested party. The interested party in this case is the owner 934859.
>
> Oppression or oppressive conduct has been defined and discussed in a number of the cases cited above. It has been defined to be conduct that is burdensome, harsh or wrongful or which lacks probity or fair dealing.
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> The term "unfairly prejudicial" has been defined to mean acts that are unjustly or inequitably detrimental.
>
> The term "unfairly disregards" may be defined as unjust and inequitable. Unfairly itself has been defined as "in an unfair manner, inequitably, unjustly". Fair has been defined as "just, equitable, free of bias or prejudice, impartial". Prejudice means "injury, detriment or damage caused to a person by judgment or action in which the person's rights are disregarded: hence injury, detriment or damage to a person or a thing likely to be the consequence of some action". Prejudicial means "causing prejudice; detrimental damaging "to rights, interests, etc."
>
> …
>
> The term 'significantly unfair' encompasses conduct that is oppressive, unfairly prejudicial or which unfairly disregards the interests of an interested party.

[53] The Court of Appeal agreed "that this is an appropriate description of oppressive conduct for the purposes of s 67(1)(a)(iii.1) of the *Act*." See ***Ryan v Condominium Corporation No 0610078***, 2021 ABCA 96 at para 11.

[54] To determine whether there has been oppressive conduct in the corporate context, a two-part legal test applies. Was there a breach of reasonable expectations? If so, is the conduct complained of oppressive, unfairly prejudicial or does it unfairly disregard the interests of the

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interested party? See ***Laakso v Condominium Corporation No 8011365***, 2013 ABQB 153 [***Laakso***] at paras 25 and 26:

> Counsel are agreed that section 67 of the *C.P.A.* is similar to corporate oppression provisions and accordingly, have attracted courts to apply corporate oppression principles to this legislation. See *934859 Alberta Inc v Condominium Corporation No. 0312180*, 2007 ABQB 640, paras 73 *et seq.* I am satisfied to do the same.
>
> That being the case, a two-pronged approach in analysing the oppression remedy is required. The decision of *Metropolitan Toronto Condominium Corporation No. 1272 v Beach Development (Phase II) Corporation* [2010] O.J. No. 5025 (OntSupCt of Justice) is helpful in this regard. Two paragraphs are reproduced here:
>
> > 13 In *BCE Inc. v. 1976 Debentureholders*,2008 SCC 69, [2008] 3 S.C.R. 560, the Supreme Court held that the best approach to analyzing the oppression remedy is a two-pronged test. At the first stage, the Plaintiffs must establish a breach of reasonable expectations. If successful, the court must go on to consider whether the conduct complained of amounts to oppression, unfair prejudice or unfair disregard.
> >
> > . . .
> >
> > 19 The concept of reasonable expectations is objective and contextual, taking into account the facts of the specific case, the relationships at issue and the entire context. The actual expectation of a particular stakeholder is not conclusive. The Plaintiff must identify the expectations that were allegedly violated and establish that those expectations were reasonably held, based on factors that may include general commercial practice, the nature of the corporation, the relationship between the parties, steps that the claimant could have taken to protect itself, the fair resolution of stakeholders' conflicting interests and, importantly, representations and agreements.

[55] Once it is established that the expectations which were allegedly violated were reasonably held, "the Court will then determine whether the conduct complained of did, in fact, amount to oppression, unfair prejudice or unfair disregard. If the court finds improper conduct, whether it be through non-compliance with the *Act* or through conduct that is oppressive, or unfairly disregards the interests of an interested party, then it may grant the s 67(2) remedies. These remedies are discretionary." See Ackerl J in ***Condominium Corporation No 0312235 v Scott***, 2015 ABQB 171 at paras 44 through 48.

[56] Ackerl J referred to Master Schlosser's discussion of the remedy for improper conduct in ***Leeson v Condominium Plan No 9925923***, 2014 ABQB 20 at paras 17 to 19:

> The source of the remedy is the recognition that there are different, sometimes competing, interests within any group. Not every interest can prevail, so the law requires due consideration and fair treatment of the various stakeholders.

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> The relationship between the Board and the owners is democratic and consensual. The idea of the statute is to acknowledge this, not to provide a vehicle to give individual interests precedence over the wishes of the majority.
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> This case, like others, is fact driven. The section 67 remedy is discretionary. In this case, six condominiums leaked. As far as we know they were all dealt with in the same fashion. The absence of a complaint from other members of this group is not determinative of whether the Board's treatment of them was unfair or oppressive. However, I do not see that the Board's action or (inaction) falls within the ambit of oppressive or unfairly prejudicial treatment of the Applicants. No doubt the Board and the Property Manager were less than perfectly attentive to the wishes of the Applicants but it seems to me that subsections 67(1)(a)(ii) – (v) require a marked departure from an acceptable standard of fair conduct. I do not think this has been made out on the evidence.

[57] The *Act* sets out the various remedies available to an interested party for improper conduct which include compensation for loss or other damages. General damages were awarded by Master Robertson and upheld by Friesen J in ***Lauder v Condo Corp No 932 1565 (Grand Carlisle)***, 2022 ABQB 382 as discussed in paras 52 through 63. However, Dunlop J in ***Duperron v Condo Plan No 792 2641***, 2022 ABQB 436 declined to award general damages where the owners did not suffer a loss or use and enjoyment of their unit personally. They suffered a loss of rental income and increased expenses for which they were awarded special damages.

[58] As explained by Master Schlosser in ***Leeson***, improper conduct cases are fact driven. The purpose of the oppression remedy in s 67 of the *Act* is to protect the objectively reasonable expectations of an interested party from oppressive or unfair prejudicial treatment.

[59] Master Schlosser noted in ***Leeson***, that courts give deference to decisions of condominium boards; the decision is presumed to be reasonable until proved otherwise. See also Chrumka J in ***934859 Alberta Inc*** at paras 54 and 55:

> A review of the cases submitted indicates that a court should defer to elected Boards as a matter of general application. In a number of the cases, from the various provinces, the decisions related to situations where there is a provision similar to Section 67 of the Condominium Property Act. The authorities cited, by Condo Corp, in support of the proposition that a Court should not lightly interfere in the decision of the democratically elected board of directors, acting within its jurisdiction and substitute its opinion about the propriety of the board of directors opinion unless the board's decision is clearly oppressive, unreasonable and contrary to legislation are: [citations omitted]…
>
> In my view, as a matter of general application, Courts do defer to duly elected condominium boards. However if improper conduct is alleged and a Court is satisfied that improper conduct has taken place, the Court, pursuant to Section 67(2) of the Condominium Act, may then direct and/or grant any of the remedies set out therein.

[60] The Homeowners must establish a breach of reasonable expectations. As set out in ***Laakso***: "The concept of reasonable expectations is objective and contextual, taking into account

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the facts of the specific case, the relationships at issue in the entire context. The actual expectation of a particular stakeholder is not conclusive."

[61] It is only after establishment of a breach of reasonable expectations that the Court then considers whether the conduct complained of amounts to oppression, unfair prejudice or unfair disregard.

[62] The Condominium asks: Was it objectively reasonable for the Condominium to place a moratorium on construction activities to protect the health and safety of the residents until the Covid-19 pandemic improved? Was it objectively reasonable for the Homeowners to expect to be able to proceed with their renovations during a global time of crisis?

[63] The Homeowners argue their reasonable expectations were that the Board would conduct themselves in a manner that was not oppressive or that did not unfairly prejudice or disregard the Homeowners' interests in completing the renovations. The Homeowners reasonably expected the Board would make its decisions based on the facts and information available to it in a non-arbitrary manner and that they would be treated in the same regard as all other owners. The Homeowners reasonably expected that the Board would only act under the powers and authority afforded them and not reach outside that scope.

[64] The expectations expressed by the Homeowners seem to be reasonable; however, their expectations must be examined objectively taking into account the facts of the case in the entire context to determine if a breach has been established and the Board's conduct can be examined.

Analysis

[65] The reasonable expectations as expressed by the Homeowners invite an analysis of these three questions:

1. Did the Board act under the powers and authority afforded them?
2. Did the Board make its decisions based on the facts and information available to it in a non-arbitrary manner?
3. Were the Homeowners treated in the same regard as all other owners?

Did the Board act under the powers and authority afforded them?

[66] The definition of improper conduct in s 67(1)(a)(i) of the *Act* includes non-compliance by the Board with the *Act*, the regulations or the bylaws.

[67] The Homeowners say that the Board proceeded without any concern for grounding its actions in authority. Acts of a condominium corporation which are not rooted in a legislative grant of authority are *ultra vires* and illegal.

[68] In defending the action against them, the Board relies on its obligation to enforce the Bylaws, particularly Article 49, to ground its decision to implement a temporary moratorium on new construction in the wake of the Covid-19 pandemic to ensure the safety and well-being of the owners. Article 49(a) of the Corporation's Bylaw is:

> No Owner shall do anything or permit anything to be done that is contrary to any of the provisions, rules or ordinances of any statute or municipal By-Law or the regulation of the Units or in any way in violation of any laws whatsoever.

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[69] The authority and obligations of the Board are set out in ***Condominium Corporation No 0312235 v Scott***, 2015 ABQB 171 at paras 16 and 17:

> Condominiums involve a unique form of ownership. The majority of owners control the administration and management of property in a manner that may infringe upon certain property rights enjoyed by a fee simple owner of real property :***Condominium Plan No 7721806 v Gobeil,*** 2011 ABQB 318 at para 9. However, that authority is not unfettered.
>
> As creatures of statute, condominium corporations do not have the same powers as business corporations, are not treated as "persons" in the law, and can only undertake actions that the *Act* specifically authorizes: ***Condominium Plan No 8222909 v Francis,*** 2003 ABCA 234 at paras 26-27 [***Francis***]. The unit holders decide how they want their condominium run through their bylaws, and courts will not intervene unless such bylaws run contrary to the *Act*: ***Devlin v Condominium Plan No 9612647***, 2002 ABQB 358 at paras 2-3 [***Devlin***]. Condominium corporations cannot create mechanisms or schemes that run contrary to the *Act* and if they do so, such actions will be invalid as they are *ultra vires* to the condominium's authority: ***Francis*** at para 34.

[70] Condominium corporations act through their Boards who exercise and perform the corporation's duties. Section 25 of the *Act*.

[71] Every member of a Board, in exercising the powers and performing the duties of the office of member of the board, shall act honestly and in good faith with a view to the best interests of the Corporation, and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. Section 28 of the *Act*.

[72] The bylaws regulate the Corporation and provide for the control, management and administration of the units, the real and personal property of the Corporation, the common property and managed property. The owners of the units are bound by the bylaws. Section 32 of the *Act*.

[73] The Corporation is responsible for the enforcement of its bylaws and the control, management and administration of its real and personal property, the common property and managed property. Section 37 of the *Act*.

[74] The Board may, by resolution, make, amend or repeal rules respecting procedures used in the administration of the Corporation or the real and personal property of the Corporation, the common property and managed property. The rules must be reasonable and consistent with the *Act*, the regulations and the bylaws. The rules must not restrict the uses of units. The Board must inform owners of any rules made, amended or repealed. Section 32.1 of the *Act*.

[75] The Homeowners argue the moratorium was a rule and its implementation was *ultra vires* and thereby constituted improper conduct. There were no steps taken to notify the other owners of this rule as required. Given that the moratorium was a restriction on the use of units, it would not be a valid rule.

[76] The Board responds that the moratorium on new construction was necessary, responsible and reasonable to ensure health and safety during the early stages of the unpredictable and unprecedented Covid-19 pandemic. The temporary moratorium was not a rule as contemplated by the *Act*.

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[77] The impact of the Covid-19 pandemic was described by Judge Collinson in ***R v Boyko***, 2022 ABPC 27 at paras 23 and 25:

> In early March 2020, the global COVID-19 Pandemic ("the Pandemic") made its way into Canada. Loss of life and emergency hospitalizations across the country rose at alarming rates, overwhelming hospitals, and other public services. Countless businesses either shut down or were forced to operate under restrictive government guidelines. Similarly effected were places of worship, long-term care facilities, and a range of community services. Schools and universities transitioned to on-line learning. Travel, movement and gathering of people were severely restricted. All of these measures were in a collective effort to contain the spread of the virus. …
>
> Without exception, courts across Canada have treated the Pandemic as a discrete exceptional circumstance. …

[78] Counsel for the Condominium provided four cases from the Ontario Superior Court of Justice each recognizing the impact of the Covid-19 pandemic on the decisions made by a condominium board.

[79] In ***Halton Condominium Corp No 77 v Mitrovic***, 2021 ONSC 2071 at paras 17 and 18 the Court comments: "Canada is currently confronted with a grave public health crisis without parallel in recent decades. Courts have taken judicial notice of this in a number of ways…".

[80] In ***Toronto Standard Condominium Corporation No 1704 v Fraser***, 2020 ONSC 5430 at paras 19 and 20 the Court held: "I conclude the Policy was well within the range of reasonable responses to the global pandemic.… I also find that the Corporation was reasonable in maintaining the Policy over the past four months."

[81] In ***Symonik v Metropolitan Toronto Condominium Corp No 572***, 2021 ONSC 2494 at para 67 the Court states: "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."

[82] And in ***Worsoff v MCC No 1168***, 2022 ONSC 1902 at paras 31 and 33, the Court reviews the Ontario oppression remedy in the context of the Covid-19 pandemic:

> The plaintiff Mr. Worsoff's claim is based on his assertion that the defendants acted oppressively towards him in that, by treating other unit owners differently than him, they undermined his reasonable expectations through conduct that was coercive, abusive and that unfairly disregarded his interest. In considering the plaintiff's position on this motion, that when he issued the statement of claim on December 15, 2020, he was asserting a *bona fide* cause of action, it is important to note the following passage from *McKinstry v. York Condominium Corp. No. 472*, *supra* (at para. 33):
>
> > 33 This new creature of statute [the oppression remedy in s. 135 of the *Condominium Act*] should not be unduly restricted but given a broad and flexible interpretation that will give effect to the remedy it created. Stakeholders may apply to protect their legitimate expectations from conduct that is unlawful or without authority,

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> and even from conduct that may be technically authorized and ostensibly legal. The only prerequisite to the court's jurisdiction to fashion a remedy is that the conduct must be or threaten to be oppressive or unfairly prejudicial to the applicant, or unfairly disregard the interests of the applicant. . . . *It must be remembered that the section protects legitimate expectations and not individual wish lists, and that the court must balance the objectively reasonable expectations of the owner with the condominium board's ability to exercise judgment and secure the safety, security and welfare of all owners and the condominium's property and assets*. [emphasis added]
>
> **…**
>
> The onset of the Covid-19 pandemic in Canada was in March, 2020 and the events in issue in this action occurred during the following months. The defendants' policies, first prohibiting renovations and then allowing the MCC 1168 Board to require unit owners conducting renovations to arrange and pay for security and disinfection of the premises, were, in the face of the pandemic, reasonable and entirely in keeping with their "ability to exercise judgment and secure the safety, security and welfare of all owners" as contemplated by Juriansz J. in *McKinstry, supra*.

[83] Counsel for the Homeowners argues that we must proceed with caution in applying the Ontario condominium cases. The Ontario condominium legislation offers corporations in that province a very different suite of powers than those in Alberta enjoy. And while the Ontario courts certainly recognize the unprecedented challenges Covid-19 presented, they proceeded by first ensuring the corporations had the authority to take the steps to make the decisions they did.

[84] Section 58 of the Ontario legislation permits condominium boards to make or amend rules to promote the safety, security and welfare of owners and residents. Section 32.1 of the Alberta legislation allows the Corporation to make rules for the administration of the Corporation or the real and personal property of the Corporation, the common property and managed property. The Homeowners argue the Ontario legislation provides greater authority to corporations to make decisions regarding the health and welfare of the residents.

[85] The Bylaws of the Corporation offer nothing approaching a general requirement to be responsible for the health and welfare of residents. Bylaw 3(e) prohibits Owners from using their Units in any manner or for any purpose which may cause nuisance or hazard, or may be illegal or injurious. Bylaw 49(a) prohibits Owners from doing anything injurious to health or contrary to any rule or ordinance or statute. The Homeowners argue it is not credible to suggest the Board had an obligation pursuant to the legislation or Bylaws to prohibit them from proceeding with their renovations when they did not otherwise limit visitors to the building.

[86] With no basis in the *Act* or the Bylaws to issue a temporary moratorium, the Board had no authority to take that decision and deny the Homeowners the ability to proceed with their renovations.

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[87] The Board says it acted in the best interests of all parties based on the information and knowledge they had at the time in question, at the beginning of an unprecedented pandemic, while keeping the health and safety of the residents their primary concern. The local, provincial, and federal health orders, mandates, policies, declarations, case counts, trends, and projections were in a constant state of fluctuation during the relevant time period. The Condominium was required to balance the interests, health and safety of all unit owners collectively with the interests of the Homeowners.

[88] I find that the Board did act under the powers and authority afforded them. The Condominium had the power and authority derived from Sections 25, 28, 32 and 37 of the *Act* to make decisions regarding construction in the condominium building. Pursuant to Section 37, the Corporation is responsible for the enforcement of its Bylaws, including Bylaw Article 49(a).

[89] Given the local, provincial and federal health orders and mandates to manage the unprecedented Covid-19 pandemic in real time, I find the Board had the authority to issue a temporary moratorium on new construction as a means of enforcing Bylaw Article 49(a) to protect the health and well-being of the owners.

[90] Implementation of the temporary moratorium on new construction was not *ultra vires* and not improper conduct as contemplated by Section 67(1)(a)(i) of the *Act*.

[91] The Homeowners also maintain that implementation of the temporary moratorium on new construction was improper conduct as contemplated by Section 67(1)(a)(iii) of the *Act*, in that the Board exercised its powers in a manner that was oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party.

[92] The Homeowners reasonably expected the Board would make its decisions based on the facts and information available to it in a non-arbitrary manner and that they would be treated in the same regard as all other owners.

Did the Board make its decisions based on the facts and information available to it in a non-arbitrary manner?

[93] The Homeowners maintain that the Board did not review any public health orders or directives from the Province. Making a decision without the full information as to the facts, that is, of the contents of the public health orders or the impact to the Homeowners by the delay or in the view of their mitigation plan, shows disregard for probity and fair dealing. The Board's implementation and maintenance of the moratorium on new construction was ill-informed and arbitrary.

[94] The Homeowners say they offered thoughtful plans to address concerns relating to Covid-19 notwithstanding the renovation work was not prohibited under the provincial health orders. The Board had not reviewed these orders while professing to be monitoring health authority recommendations and to be tasked with ensuring the health of residents. The Board failed to consider what the Homeowners proposed.

[95] In support of their position, the Homeowners point to excerpts of the transcript from the questioning for discovery of Graeme Alston. Mr. Alston was asked if he went to specific orders and directions that had been issued and considered them before he exercised his vote as a Board Member in this specific matter. Mr. Alston responded "No, I just looked at what the advice was that we were getting on a daily basis from various people in authority. I looked at the makeup of our building. And I looked at where our responsibilities lay.… We were seeing that people over

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the age of 70 were at greater risk than younger people. We have a building that is predominantly filled with people over the age of 70. We didn't know what was causing the spread of this.… We had a fragile population and so that less contact the better. So we all know who each other is, we all live in the building together, but just err on the side of safety we decided all outside [construction] contractors would not be given access to the building."

[96] It was put to Mr. Alston that the Board did not undertake to determine whether or not residential construction was allowed or approved. Mr. Alston had confirmed they were aware of other construction and responded: "We felt that we were in a different position. We were in an existing building. We were talking about residential construction, we were talking about a renovation project in the building with the bulk of the people over the age of 70 who were deemed to be more at risk from Covid so therefore we were going to err on the side of caution."

[97] When asked if the Board was aware as to whether there was a legal prohibition or a stop order that the provincial government or any other authority had issued in regards to that type of work, Mr. Alston responded: "This wasn't a matter of legalities. This was us looking after the residents in our building."

[98] Mr. Alston confirmed: "The Board had made a decision prior to this and we were going to hold to that until such time as the province indicated that the emergency was abating and that we could open up society as we know it." When asked what he understood it meant that the Board wasn't going to change until the emergency had abated, Mr. Alston responded: "Just as I said, that we were working from home, we couldn't dine out, we couldn't get a haircut. There was a whole litany of items you couldn't do. If you rode on a city bus, you came in through the back door. There was a myriad of health measures in place. And so what we understood was that this wasn't a forever situation, that eventually at some time in the future, date to be decided, these measures would gradually be lifted and so it was on that basis that we felt that it was prudent to hold our position on April 27 with a view that sometime in early May things would start to relax."

[99] When pressed about the specific discussions the Board had about the details of the construction schedule proposed in April 2020, Mr. Alston couldn't say whether the details of what was proposed were discussed, "But by and large in the light of the fact that the board have decided that there is not going to be any construction activities until such time as Covid restrictions are abated, it's irrelevant because it wasn't going to happen."

[100] When asked what restrictions he was referring to, responded: "Well, at April 27 you couldn't go out and dine. There was only curbside pickup. There was a whole series of restrictions. So we were looking to see next steps from the province because the province was talking about as we move forward this isn't a forever thing, that eventually someday we will be able to slowly work towards living our lives normally and that's what we were looking for." Until such time as those restrictions were removed the Board was not going to approve the work: "… because it's indicative of the constraints or restrictions that were generally imposed on the population."

[101] The Homeowners had been advised that the Corporation did not have the resources or manpower to ensure that the possible processes, procedures and rules proposed to minimize exposure during the renovation were adhered to. Mr. Alston confirmed that those resources would be over and above what they currently had, which was their resident manager and his wife who were cleaning the building. When asked what the Board understood they would have to do

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to ensure that the proposed procedures were being adhered to, Mr. Alston replied: “That’s semantics.… The decision had been made and it had been relayed and we all understood or we thought we all understood what the situation was and the circumstances that would require further things to change. So from that point onward it then became a war of attrition who could write the smarter letter to each other or make the smarter demand of each other but the situation remained unchanged.”

[102] When asked what led the Board to decide ultimately it would allow the Homeowners renovations to go forward, Mr. Alston responded: “in the middle of May the province started relaxing Covid restrictions and so we decided at that time that we would give it a two week period and then at the end of the two week period if things were progressing the way the province and everybody anticipated then we would lift our moratorium and allow construction to proceed.”

[103] It was put to Mr. Alston that the Board did not seek out to understand the interests or the impact its decision would have on the Homeowners. Mr. Alston’s response was “We understood that it would delay the proposed construction. It would delay the proposed move.”

[104] The Homeowners suggested that emails between the Board from this period of time betrayed the attitude of the Board towards the Homeowners and how little it understood their requests or the Board’s own obligations. One member of the Board referred to the Homeowners as prospective tenants applying for admission to the Arcadia at a difficult time and wondered if they were the type of tenant for the condominium. That email is dated June 15, 2020, after the temporary moratorium was lifted and the Homeowners were advised the renovations could proceed. The email was in response to a need for the opinions of some of the other board members on the draft Covid-19 addendum to the renovation guidelines to be finalized with the Homeowners.

[105] Reading that email in context, it appears that this board member was expressing frustration with the dealings so far including the legal action taken by the Homeowners against the board members. It does not appear, when this email is examined in the thread of email exchanged among the Board, that this one board member’s attitude influenced the outcome of the draft the Covid-19 addendum ultimately proposed, modified, and accepted by the Homeowners prior to commencing the renovations.

[106] Having considered the contents of the parties’ affidavits and records and the questioning transcript of Mr. Alston, I find that the Board made its decisions based on the facts and information available to it. It was reasonable to consider the general restrictions that the public was made aware of during the pandemic as a basis for the decision to place a moratorium on new construction, including the Homeowners’ renovations.

[107] I find that the Board was aware that delay in construction would impact the Homeowners and that the motivation for the temporary moratorium was to strike an appropriate balance between that impact and the concern for the health of the residents. The May 2020 email exchange between the Board members discussing a reasonable benchmark for approval of resumption of renovations illustrates the Board’s understanding that the effect of the moratorium was to “continue to stonewall the Judges” and its intention to “go cautiously and remain vigilant.”

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[108] I find the Board's decision was motivated by their belief that the potential for exposure to Covid-19 outweighed moving forward with the construction. Knowing the capacity of the resident manager and his wife, including Covid-19 cleaning, informed the Board's conclusion that they did not have the resources to monitor additional processes and procedures for new construction.

[109] I find the Board made its decision to lift the moratorium and allow the renovation based on the facts and information available to them through monitoring the next steps that the province was taking in relaxing Covid restrictions.

[110] The Board held fast to its decision to maintain the moratorium on new construction temporarily until the Covid restrictions were lifted. The record does not support the suggestion that the Board maintained the moratorium based on frustration with the Homeowners or the suggestion that the Board withdrew the moratorium because of the threat of a lawsuit by the Homeowners.

[111] I find that the Board did make its decisions based on the facts and information available to it in a non-arbitrary manner. The Board did not unfairly disregard the interests of the Homeowners.

[112] The Homeowners further submit that the Board acted in a manner that was oppressive and unfairly prejudicial to them as they were the only ones affected by the temporary moratorium on new construction.

Were the Homeowners treated in the same regard as all other owners?

[113] The Homeowners claim that they were singled out and held against a standard that applied to no one else in the condominium building. There is no basis on which the Board can defend depriving the Homeowners of the ability to have third parties attend their Unit while maintaining their ability, and the ability of all other owners, to have third parties attend.

[114] The Homeowners argue that at the same time the Board was denying them the ability to have contractors carry out their work, it did nothing to address any other service providers such as cleaners. No other invitees were limited in any way. The Corporation offered no satisfactory explanation for the preferential treatment afforded to all other owners.

[115] The Board states that the Homeowners were the only unit owners contemplating a renovation who submitted an application at the relevant time. Accordingly, they were the only unit owners advised of the moratorium on new construction following the March 24, 2020 determination.

[116] The Board denies that the Homeowners were otherwise singled out or held against a standard that applied to no one else in the condominium building.

[117] Other renovation projects in the building were also put on hold until further notice due to the proximity of trades people coming and going to and from units and common property areas and the risk that presented to the owners.

[118] The minutes of the April 27, 2020 Board meeting reflect the decision that although the Board ratified their April 2, 2020 approval of the request by a unit holder for a storage locker in their titled parking stall, they passed the additional motion that: "No contractors are permitted in the building until such time as the Covid-19 crisis permits and the current ban is lifted. Unit Y

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may order their proposed storage unit in anticipation of the time when the Covid-19 conditions allow for access and installation in the parkade."

[119] Those minutes and the minutes from the Board meeting held March 30, 2020 reflect that the Board applied the temporary moratorium to its own projects, including the front lobby renovation project and the plumbing project. Construction personnel were required to exit the building.

[120] Graeme Alston deposed in his September 12, 2022 affidavit: "In addition, work on the hot water boiler project was suspended, phase 3 of the balcony brickwork project was postponed and no contractors were permitted in the building until the status of the Covid-19 pandemic abated and the moratorium on construction was lifted."

[121] Colleen Judge deposed in her February 6, 2023 affidavit: "During the period of time that we were denied the ability to complete renovations to our Unit, the Board imposed no restrictions on any service providers attending to other occupants, such as housecleaners.… Neither did the Board restrict who was attending generally and put up no notice on March 24, 2022 restrict or limit access to the building. Further, a review of the visitor parking log (attached as an exhibit) demonstrates that not only were visitors continuing to attend the Building, but that Board members continue to have guests attend their own Units."

[122] When questioned, Mr. Alston acknowledged that there are a number of residents aged 70 and older who regularly have family members or other care providers come to the building and service providers such as cleaning people come to assist them. When asked why they were not prevented from attending the building, Mr. Alston explained: "because they're essential for the care of the various residents. Some of them were in latter stages of life, one lady in early stages of dementia. It's completely unreasonable to say that they have to be denied caregivers or cleaners because of the moratorium on construction activities."

[123] Mr. Alston confirmed that the Board did not police the building or monitor the visitor log to assess who was coming to the building and what the nature of their business was. The Board did not formally request that occupants limit their contact with individuals outside of the building as "… realistically the building is full of adults. They were all cautious about their own care. Many of them self-isolated without having to be instructed what to do."

[124] I find that the Homeowners were uniquely affected by the temporary moratorium on construction as they were the only owners with plans to renovate their unit before occupancy at the time. However, I do not find that the Homeowners were singled out and held against a standard that applied to no one else in the condominium building.

[125] The temporary moratorium on construction also applied to a unit owner who planned to put a storage locker in their parking stall and to several projects underway or planned by the Board. The same standard regarding construction was applied to other construction projects in addition to the Homeowners' renovation construction.

[126] The Board drew a distinction between third-party construction workers and third-party visitors to individual unit owners, such as family members, caregivers and service providers. The Board dealt with issues that were under their control, relying on individual residents to be cautious about their own care. The Board implemented enhanced cleaning of the high traffic areas of the building. In addition to limiting construction personnel, the Board relocated the security staff to further reduce contagions being introduced into the building.

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[127] I find the Board took reasonable measures that were within their control to reduce the exposure of the residents to Covid-19 through restricting construction workers, relocating security and enhanced cleaning.

[128] These steps taken by the Board in the face of the pandemic do not indicate preferential treatment afforded to the other owners over that of the Homeowners.

[129] I find that the Board did not act in a manner that was oppressive and unfairly prejudicial to the Homeowners even though they were the only owners with renovation plans affected by the temporary moratorium on new construction.

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Conclusion

[130] As noted by Counsel, the parties generally agree on the facts and that the record provides sufficient evidence to summarily resolve the dispute of whether the Board engaged in improper conduct in restricting the Homeowners from proceeding with their renovations or acted responsibly, lawfully and reasonably in the face of the Covid-19 pandemic. The issue is largely legal.

[131] I have made the necessary findings of fact and applied the law to those facts with the intent to reach a fair and just determination on the merits. I have sufficient confidence in the evidentiary record to resolve this dispute summarily as a proportionate, expeditious, and less expensive means to achieve a just result. There are no genuine issues for trial.
Hryniak v Mauldin and ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***

[132] As observed in ***R v Boyko***, "without exception, courts across Canada have treated the Pandemic as a discrete exceptional circumstance."

[133] Did the Covid-19 pandemic create such an exceptional circumstance that the Condominium Board was justified in restricting the Homeowners right to renovate their unit by placing a temporary moratorium on construction? Or did the Board engage in improper conduct when their actions and rational are further examined?

[134] As found by Master Schlosser in ***Leeson v Condominium Plan No 9925923***: "This case, like others, is fact driven. The section 67 remedy is discretionary. ... No doubt the Board and the Property Manager were less than perfectly attentive to the wishes of the Applicants but it seems to me that subsections 67(1)(a)(ii) – (v) require a marked departure from an acceptable standard of fair conduct."

[135] The Ontario cases cited describe decisions made by condominium boards during the Covid-19 pandemic and the measures taken to comply with their duties and balance the interests of the individual unit owner with those of the majority. The boards were not found to have engaged in improper conduct.

[136] As expressed by Chrumka, J in ***934859 Alberta Inc***: "... a Court should not lightly interfere in the decision of the democratically elected board of directors, acting within its jurisdiction and substitute its opinion about the propriety of the board of directors opinion unless the board's decision is clearly oppressive, unreasonable and contrary to legislation...".

[137] The Condominium may not have responded perfectly or in the same disciplined way as other boards in reacting to the Covid-19 health crisis, however, the temporary moratorium placed on construction was in keeping with their desire to minimize the impact of the pandemic on the

residents. While the Homeowners were uniquely affected by the moratorium as they were the ones undergoing renovations at the time, they were not singled out and targeted by the Condominium.

[138] The Board did not unfairly disregard the interests of the Homeowners. The Board did not act in a manner that was oppressive or unfairly prejudicial to the Homeowners. The Board did not engage in conduct that was "burdensome, harsh or wrongful or which lacks probity or fair dealing" ***934859 Alberta Inc***

[139] To find improper conduct, the Homeowners' reasonable expectations must have been breached by the conduct of the Board and the conduct complained of must be oppressive, unfairly prejudicial or unfairly disregard their interests. See ***Laakso***. I find this two-part test has not been met.

[140] I conclude after analysis of the reasonable expectations as expressed by the Homeowners that the Board acted under the powers and authority afforded them; that the Board made its decisions based on the facts and information available to it in a non-arbitrary manner; and that the Homeowners were treated in the same regard as all other owners.

[141] There is no merit to the Homeowners claim that the Condominium or its Board engaged in improper conduct as set out in s 67 of the *Act*.

[142] The application by the Condominium for summary dismissal of the Homeowners claim is granted.

[143] The application by the Homeowners for summary judgment against the Condominium is dismissed.

[144] As this decision was reserved, the issue of costs was not argued before me. The Condominium seeks costs of the application and action. The Homeowners sought solicitor-and-own-client costs. Recent amendments to the Bylaws have a bearing on nature and enforcement of legal costs by the Condominium against an owner.

Costs

[145] The Homeowners submit that after they initiated legal proceedings to prompt the Corporation to deal with them equitably, the Board further targeted them by pursuing amendments to the Bylaws to deal with legal costs. Bylaw Article 3(o) was added to allow the Corporation to recover their costs from an owner who was "substantially unsuccessful" in a lawsuit against the Corporation. Article 66(d) was added to authorize an assessment of costs against an owner where it would be inequitable to assess costs based on unit factors.

[146] The Bylaws were amended by a special resolution ballot circulated in August, 2021, following an informational town hall meeting. Most of the amendments were because of legislative changes, 3 were initiated by the Board, including this amendment to the owners' liability for costs:

> By adding the following subparagraph (o) to Article 3 of the by-laws of the Corporation as previously registered with respect to the duty of owners under the heading "An Owner shall":

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> In the event the Owner is substantially unsuccessful in prosecuting any claim or legal proceeding initiated by such Owner against the Corporation, the Board or the Manager in respect of a dispute regarding breach of contract or any duties pursuant to the Act or these Bylaws, then such Owner shall pay to the Corporation all costs expended or incurred by the Corporation in responding to or taking all steps necessary to defend any such claim on a solicitor-and-client basis.

[147] Further, the amendment to the Bylaws added this provision as Article 66(d):

> Notwithstanding anything herein to the contrary, if the allocation of expenses, costs or charges would be inequitable if assessed on the basis of Unit factors, the Corporation may, and is hereby authorized to weigh allocate and assess against the Owners and their respective Units such expenses, costs and charges in such equitable manner as the Board shall from time to time resolve.

[148] Colleen Judge attaches the Minutes of the April 25, 2022 Board Meeting to her Affidavit to show how the Corporation used its 84 unit factors to pass these amendments and deposes to her belief that the Bylaws were amended in response to their lawsuit and in a further attempt to target them and shield the Corporation from the result of the Board's improper conduct.

[149] Those Minutes note that the Special Resolution resulted in 7,567/10,000 and 31 (out of 40) units in favour of all the amendments proposed. The Corporation's 84 unit factors and the unit it owns would have been contributed to the special resolution being passed. Those Minutes reference the ongoing claim by the Homeowners regarding the temporary suspension and an ongoing claim by another owner regarding water leakage.

[150] I find the amended Bylaws were passed in the ordinary course of the business of the corporation, after a town hall meeting to discuss the proposed changes and a special resolution. The amendments initiated by the Board had the potential to impact the ongoing litigation of 2 separate unit owners, not just the Homeowners, and would allow recovery where it would be inequitable for the costs to be assessed against all unit owners.

[151] Counsel for the Homeowners notes that although Bylaw Article 3(o) would be subject ultimately, to the Court's discretion on costs, it could have a chilling effect on any owners seeking to vindicate their rights.

[152] The Homeowners' litigation was initiated before the Bylaws were amended. The summary judgment applications were filed after the amendments. The Corporation seeks costs of the applications and the action, without reference to the amended Bylaws.

[153] The Homeowners continued to seek to vindicate their rights after the Bylaws were amended; they do not address the potential for costs against them if they were substantially unsuccessful in that pursuit. The Homeowners asked for a direction that the Corporation not charge back any damages or costs awarded against the Corporation to the Homeowners using the amended Bylaws Article 66(d).

[154] Without these amendments, the Corporation would be entitled as the successful litigant to costs pursuant to the *Rules of Court*. The Bylaws prior to the 2022 amendment allow the Corporation to claim costs on a solicitor-and-client basis in the context of the Corporation having a lien and charge against the interest of an owner for any unpaid assessment, installment or payments. This is not that context.

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[155] The Bylaws currently contain Article 3(o) and Article 66(d). I am not prepared to predetermine the Corporation's discretion to allocate its expenses and costs of this litigation on a basis other than unit factors. Nor am I prepared to order solicitor and client costs where they have not been argued.

[156] I suggest the Corporation prepare its Bill of Costs for consideration by the Homeowners. If an agreement cannot be reached on the quantum, the matter should proceed to a review by the assessment officer. If the parties otherwise require a ruling on costs, they may appear before me in morning Chambers to argue the issue.

[157] I acknowledge, with appreciation, the efforts of the parties and their respective Counsel in presenting a thorough record, brief of law, and argument in support of their respective positions.

Heard on the 5th day of December, 2023.
Dated at the City of Edmonton, Alberta this 15th day of November, 2024.

L.R. Birkett
A.J.C.K.B.A.

Appearances:

Reynolds Mirth Richards & Farmer LLP
Todd Shipley and Heidi Besuijen
for the Respondents/Cross-Applicants (Plaintiffs)

McLennan Ross LLP
Anthony Espejo
for the Applicant/Cross-Respondent (Defendant), The Owners: Condominium Plan No 8322264

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