CITATION: Frankel v. York Region Condominium Corporation No. 664, 2025 ONSC 719
COURT FILE NO.: CV-24-00725968-0000
DATE: 20250131

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: JOSHUA FRANKEL, Applicant

AND:

YORK REGION CONDOMINIUM CORPORATION NO. 664, Respondent

BEFORE: Akazaki J.

COUNSEL: Megan Mackey, for the Applicant

Natalia Polis, for the Respondent

HEARD: January 23, 2025

REASONS FOR JUDGMENT

OVERVIEW

[1] All 80-year-old unit owner Joshua Frankel wants is a good night's sleep. Sleep deprivation is no trifling matter. His suite is the only one where an annoying sound intrudes the bedroom. Because the building management has failed to correct the problem and has breached a settlement agreement to correct it, he seeks a remedy under s. 135 of the *Condominium Act, 1998*, S.O. 1998, c. 19. Indeed, the building condition causing his loss of sleep must be considered a health hazard under s. 117: *TSCC 2519 v. Emerald PG Holdings et al*., 2021 ONSC 7222, at para. 120.

[2] The condition in question is a low frequency tonal component to mechanical noise coming from the building's hot water pumps. Based on a jointly commissioned acoustic study, the overall background noise, including the annoying tone, falls below industry guidelines. However, the frequency at 160 Hz is appreciably louder than the background noise and "can contribute to perceived annoyance." In other words, it stands out. Mr. Frankel is hard of hearing. It is not the loudness but the pitch of the sound that keeps him up at night. According to the acoustic engineer, "Attenuating the tonal component of the noise would be prudent as a best practice." This is a technical way of saying the sound must be reduced to blend into the background noise.

[3] During active attempts to resolve the problem, the parties identified the main source of the sound to be two ageing water pumps and the need for further sound isolation of piping and equipment. On the big-ticket item, the parties entered a settlement to have the condo install two new pumps at a cost of $87,290 plus HST, of which Mr. Frankel would pay $32,500

even though replacement was overdue, and the pumps served the whole building. Replacement of the pumps did not resolve the issue. It turned out the condo did not order the promised pumps but rather ones that were much cheaper.

[4] There are two questions defining the issues in this application:

1. Does Mr. Frankel have valid grounds to seek a remedy under the court's jurisdiction under s.135 of the Act?

2. If Mr. Frankel's grounds are valid, what is the appropriate remedy?

[5] Before I turn to the analysis of these questions, I will outline the events that brought the parties to court.

BACKGROUND

[6] Mr. Frankel's unit is located under the mechanical room where the water pumps and other building facilities are located. The condo points out that he did not notice the sound before he bought the unit in 2019 and did not complete a home inspection before doing so. How that point would pertain to a sound that he notices only when he tries to sleep is somewhat unfair. Given that his complaints started in January 2021, common sense should inform the parties that the sound started at around that time if he did not complain about it before. Ageing water pumps were eventually identified as the source of the sound. This, too, corroborated the timing of Mr. Frankel's complaints. The pumps did not bother him, until they did.

[7] There was no evidence that the condo failed to respond to Mr. Frankel's complaints. Its management performed numerous investigations, including turning pieces of equipment on and off and checking elevator hoisting equipment. In September 2021, the condo received a report from an engineer stating that the noise level in Mr. Frankel's unit was below ASHRAE[1] standards, but "the humming noise was still slightly audible." The condo consulted another engineering firm, who opined that noises within a unit were hard to isolate and resolve. In February 2022, the condo followed the received recommendations and installed isolating pads and springs in some of the HVAC and electrical equipment.

[8] After a hiatus without complaints from Mr. Frankel, he approached the condo management to retain Aercoustics, whose findings regarding noise level and the 160 Hz tone I have stated in para. 2 above. The report also isolated the source of the sound to the domestic hot water pumps as the main source of the "tonal component of background noise in the resident's suite." These pumps had already been identified in the condo's reserve fund study as 32-year-old recirculation pumps that were already 12 years past their lifespan. The

[1] American Society of Heating, Refrigerating and Air-Conditioning Engineers. There was also reference to World Health Organization (WHO) standards.

condo management's engineers had allocated $45,000 for their replacement within five years. The pump replacement was the main recommendation of the acoustic engineers, but they also listed further work to isolate the piping and other mechanical equipment from the building structure.

[9] In circumstances described by Mr. Frankel as duress, he and the condo entered into minutes of settlement on November 6, 2023. In fact, it was a four-way meeting with each side represented by the same lawyers appearing at the hearing before me. Despite Mr. Frankel's evidence that he felt pressured to sign it, there was no evidence that he failed to do so of his own free will. The minutes consisted of three paragraphs, which I reproduce here with my insertions in square brackets:

> 1. The Corporation agrees to carry out the work in the proposal from Complete Energy Solutions dated July 27, 2023. The Corporation shall place the order for the work within seven days of signing these minutes of settlement.
>
>   [The CES proposal had been for supply and installation of two new building pumps (Grunfos or equivalent), at a preferred price of $87,290 plus HST.]
>
> 2. The Unit Owner shall execute a full and final release in favour of the Corporation with respect to the Noise. [Remainder omitted.]
>
> 3. The Unit Owner shall pay $32,500 to the Corporation upon substantial completion of the work.

[10] The replacement of the pumps did not resolve the humming entering Mr. Frankel's bedroom. The condo has sued him in Small Claims Court for the $32,500, because he refused to pay it. It turned out the condo did not place the work order with CES as promised. Instead, it obtained a cheaper quote of $55,170 for two different pumps made by another company. Apart from the cost of the pumps being 37% cheaper, there was no evidence as to the relative quality of the different equipment. Mr. Frankel complains of a breach of the settlement agreement and refuses to pay for a cheaper set of pumps that failed to resolve the problem. Because the problem sound remains, he has brought this court application.

ISSUE #1: ***Does Mr. Frankel have valid grounds to seek a remedy under the court's jurisdiction under s. 135 of the Act?***

[11] Under s. 135 of the Act, Mr. Frankel can apply to the Superior Court for an oppression remedy against the condo corporation if (1) it has breached his reasonable expectations as a unit owner and (2) the breach arose out of oppression, unfair prejudice, or unfair disregard of his interests: *Metropolitan Toronto Condominium Corporation No. 1272 v. Beach Development (Phase II) Corporation*, 2011 ONCA 667, at para. 6; as recently applied in *Abeygunasekara v PCC No. 392*, 2024 ONSC 606, at para. 39.

[12] In *Metropolitan*, the Court of Appeal drew upon oppression remedies from corporate-commercial statutes and applied the principles to the residential condominium context. Given that the purpose of the Act is to establish ground rules for regulation of a residential community within a relatively new form of real property ownership, s. 135 requires the court to measure individual ownership interests against the needs of the whole community. As in the business corporation context, oppression remedies protect minorities. In condo cases, the corporation is managed by a board of directors and an appointed manager, usually an outside agency. Because the board is elected democratically by unit owners in the proportion of their holdings, management represents the majority or controlling interest. The statutory oppression remedy represents a positive right of a minority, including a minority of one, to invoke the state apparatus against the majority's freedom to decide what is best for the community. This feature of Rawlsian liberalism in Canadian jurisprudence generally informs legal norms regarding the line between state protection and interference: *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, [2021] 2 SCR 845, at para. 153.

[13] In more concrete terms, once Mr. Frankel proves the disturbance of his sleep is a significant enough to undermine his expectations of home ownership, the court must decide whether to protect his interests as inviolable or to disappoint him by allowing the board to decide they have done enough to help him.

[14] In many instances, it is easy to see where the lines are drawn by reference to the condo's declarations and by-laws for common building situations. In *Abeygunasekara*, the dispute arose from a certificate of lien after a unit owner failed to pay an insurance deductible for repair work after a flood. Here, the tension running through the chronology between Mr. Frankel and condo management is animated by the latter's position that the building cannot remodel its whole mechanical system to suit the sensitivities of one man. The source of this position appears aligned with common-law tort principles against the interference with "abnormal sensitiveness or delicacy" constituting an actionable nuisance: *1631370 Ontario Inc v. 805352 Ontario Inc.*, 2012 ONSC 2271, at para. 31.

[15] The difficulty with the condo's position is that there is no evidence to support the contention that Mr. Frankel is unusually sensitive to the tonal humming that prevents him from sleeping. The fact that Mr. Frankel suffers a hearing impairment was not in dispute. He wore a hearing aid and had to place his monitor on the courtroom dais to hear the court proceedings. In that regard, much of the evidence from both sides about the compliance with ASHRAE or WHO standards was irrelevant. A sound does not need to be loud to be annoying to the point of disturbing one's sleep. The joint expert evidence is that the 160 Hz tonal hum is a perceived annoyance and must be attenuated. The audiologist tested the building and the bedroom. He did not test Mr. Frankel. The objective evidence on point supports Mr. Frankel's position that the problem lies with the building and not with him.

[16] As I stated at the outset, a condition under s. 117 of the Act will be recognized as harmful provided it is not trifling. Sleep deprivation is not trifling. I do not require expert medical evidence to accept that it could lead to other adverse health conditions. Mr. Frankel has been driven out of his home. Fortunately, he also owns a cottage that serves as a second

home. However, that is beside the point. He is entitled to stay at the condo as an owner and resident. It is also important to emphasize that s. 117 prohibits a condition in the building likely to cause injury or illness "to an individual." It also refers to "any unreasonable noise that is a nuisance, annoyance or disruption to an individual in a unit." Therefore, s. 117 prohibits conditions affecting the health of a single resident – including an annoying sound.

[17] I therefore find that since the humming sound started to infiltrate Mr. Frankel's sleeping quarters, the uncorrected condition of the building breached his reasonable expectations as a unit owner. I therefore turn to the second part of the oppression analysis.

[18] During the initial phase of the chronology, it would be hard to say the condo disregarded Mr. Frankel's interests. Its staff and contractors conducted numerous investigations to find out the source of the disturbing sound. Indeed, their first engineer did track down the humming sound but did not identify the source. Although Mr. Frankel might have subjective reasons to complain about the progress of the efforts to address the problem with his unit, the evidence showed the management did respond to his complaint and tried to address it. This could not be considered an unfair disregard of Mr. Frankel's interests.

[19] A panoramic appreciation of all the evidence leads one to draw the inference that the board and manager were reluctant to perform major mechanical room work and equipment replacement to mollify the complaints of a single resident. It was also difficult to fault the condo for wanting to seek financial contribution from Mr. Frankel. In fact, he was willing to incur expenses to push management to complete the investigations and work. The jurisprudence generally requires courts to show deference to decisions by boards of condominium corporations: *3716724 Canada Inc. v. Carleton Condominium Corporation No. 375*, 2016 ONCA 650, at paras. 47-53. The so-called business judgment rule recognizes that elected board members are better placed to weigh owners' competing interests than the courts. I do not discount Mr. Frankel's frustration during the months when he could not spend nights at his home. However, the cause of the problem during this interval was the building and not the managers of it.

[20] At the end of the chronology, the parties settled the issue and entered minutes of settlement after a four-way meeting: namely, a meeting with assistance of legal counsel. Despite Mr. Frankel's perceived pressure, there was no evidence supporting his allegation of duress. He was offered new pumps at a cost of almost $100,000 inclusive of tax – double the cost of the budgeted replacements – and agreed to pay for a third of the cost. The fact that the reserve fund study allocated a much lower cost is not lost on the court. He agreed to pay for more expensive pumps. I find that Mr. Frankel entered the agreement willingly with the assistance and advice of his lawyer. Therefore, the presentation of the agreement in its form and substance did not constitute an oppression.

[21] The condo then breached the agreement by sourcing a cheaper model from a different contractor than the one promised in the minutes of settlement. Counsel for the condo argued the pumps met the same specifications and the contract proposal had certain timing advantages in Mr. Frankel's favour. I do not accept these arguments. The contract plainly

stated that the condo would issue a work order in accordance with a specific quote for a specific pump model or its equivalent.

[22] As a matter of common sense, I cannot imagine that a price difference of almost $40,000 could be attributed to the cost of the labour. The pumps the condo purchased had to be much cheaper. Although there was no evidence about the relative quality of the pumps, the fact that they met the same output and efficiency specifications meant that the price difference had to be related to some issue other than the ability to pump hot water. Given that Mr. Frankel's agreement to contribute to the cost was entirely related to the quietness of the replacement units, the fact that the ones installed failed to attenuate the problem mean they were no better than the old pumps beyond the end of their lifespan, from Mr. Frankel's vantage. The condo's performance of the contract clearly fell below Mr. Frankel's expectations, and the contractual breach cannot be justified under the business judgment rule.

[23] By breaching the settlement agreement by saving the cost of replacing the pumps with a cheaper model, the condo corporation unfairly disregarded the interests of Mr. Frankel. Indeed, by suing him for his contribution to pumps the condo had unilaterally switched, that conduct was further oppressive because the condo was clearly in the wrong. The further effect of the contractual breach is that Mr. Frankel is under no obligation to release the condominium corporation from the "Noise" under the second term of the agreement.

[24] The connection between the breach of the settlement agreement and the unresolved effect on Mr. Frankel's health is that by replacing the ageing pumps with a cheaper model than the one promised, the only way to determine whether the more expensive models would have restored the nocturnal acoustics of the bedroom to the pre-2021 condition is to tear out the cheaper replacements and install the promised model. Mr. Frankel has not asked the court to order the condo to do that. Instead, in the Small Claims Court action, he simply asks to be relieved of the obligation to contribute to the cost. The bottom line, on the balance of probabilities, is that the annoying hum remains because, and not despite, the condo's decision to breach the agreement and switch the pumps.

[25] I therefore find that the condo has oppressed Mr. Frankel for the purposes of the court's jurisdiction under s. 135 of the Act.

ISSUE #2: ***If Mr. Frankel's grounds are valid, what is the appropriate remedy?***

[26] Mr. Frankel sought various measures contained in expert reports, but he did not include a requirement that the condo honour its agreement to install the more expensive pumps. He also seeks $75,000 in compensation.

[27] Section 135 allows the court wide discretion to fashion a remedy for the oppression. That said, the authority vested in the court protects unit owners' legitimate interests and expectations regarding the community's safety, security, and welfare. It does not require a condo corporation to comply with individual "wish lists": *Hakim v. Toronto Standard*

Condominium 1737, 2012 ONSC 404, at para 38. Returning to the role of the courts in balancing the applicant's rights against the corporation's freedom to exercise business judgment, the court, in crafting the remedy, must consider the continuing relationship of the parties as a community and management's role in safeguarding the whole community's interests. This differs from the ordinary private law dynamic, where the courtroom is usually the last time the parties see each other.

[28] In the context of this case, returning to the opening paragraph of these reasons, what the condo ultimately owes Mr. Frankel is the ability to sleep in his bedroom. Whatever it takes to achieve that result, including replacing the pump units with the ones they had promised, is no more than what Mr. Frankel deserves for the main part of the oppression to be cured.

[29] It could be that if the building equipment was retrofitted with all the measures requested in Mr. Frankel's submissions, the sound would be attenuated or eliminated. Common sense and logic dictate that the degradation of the old pumps and the onset of the sound two years after Mr. Frankel moved in are connected. This could mean that the pumps must be replaced with quieter and more expensive models. If the condominium corporation does replace the pumps with the ones promised in the minutes of settlement, Mr. Frankel ought to contribute to cost as he promised.

[30] At the other extreme, implementation of only some of the measures could resolve the problem at a much lower cost to the condo, including Mr. Frankel's proportionate share. It is ultimately not for the court, or Mr. Frankel, to dictate what must be done, apart from removing the harmful condition under s. 117.

[31] As I discussed with counsel at the conclusion of the hearing, appropriate remedy once an oppression has been established is to order the condo management to do whatever is necessary to alleviate the harmful sound intrusion and to establish a timeline for achieving this outcome. This would allow the board and manager to find and effect a solution that finally helps Mr. Frankel with his need for sleep, while continuing to exercise sound fiscal management on behalf of the whole community.

[32] Finally, Mr. Frankel has made a claim for compensation under s. 135, for the oppressive conduct. He cites the $30,000 awarded for vibrations from elevator equipment in *Wu v Peel Condominium Corporation No. 245*, 2015 ONSC 2801, at para. 177. Add inflation and his out-of-pocket expenses for his own engineers, he asks for an award of $75,000. In support of that sum, he also relies on the award in *Gonzales v. York Condominium Corporation No. 242*, 2024 ONSC 6372, at para. 9. The oppression in *Gonzales* entailed fraud by the management in the preparation of a status certificate.

[33] Since the compensatory order under s. 135(3)(b) is for oppression and not directly for the harm under s. 117, I am unable to justify significant compensation for the nuisance for the period leading to the minutes of settlement when management was making good faith efforts to help relieve the problem. In the overall justice of the case, I find that an award of $32,500 in compensation would be appropriate. It is in line with the *Wu* case and is the amount he could have to pay, if the condominium were to install the more expensive

pumps. As a matter of happenstance, the figure is also approximately the amount the condo saved by breaching the agreement and installing cheaper pumps. If those pumps had been installed, Mr. Frankel would have been required to release the condo from the claim in this proceeding and there could be no claim for compensation.

CONCLUSION AND COSTS

[34] I therefore order, under ss. 117, 119, and 135, that the respondent condominium corporation shall immediately take measures to attenuate the 160 Hz tonal component of the mechanical background noise as described in the the joint Aercoustics Report dated March 31, 2023, at page 9. On completion of the work, the condominium corporation shall have Mr. Frankel's unit inspected by Aercoustics, at the respondent's sole cost, to certify that the 160 Hz tonal component has been reduced to the same level as the remaining background noise. The condominium corporation shall have three calendar months from the release date of this judgment to complete the work and another month to obtain the Aercoustics certificate.

[35] Under s. 135(3)(b), I also order the condominium corporation to compensate Mr. Frankel for the oppression by payment of $32,500.

[36] I have not specifically ordered the replacement of the pumps in accordance with the minutes of settlement. Nevertheless, the condominium's failure to perform its obligation is a component of my decision that Mr. Frankel is entitled to a remedy under s. 135. Accordingly, I have made findings regarding the contractual issue that could estop the condo's claim in the Small Claims Court action. In order not to interfere with the jurisdiction of that court, I will leave it to the parties to consider their next steps in that proceeding.

[37] The costs claimed by Mr. Frankel are roughly double the amounts in the respondent's costs outline. Part of this difference can be attributed to the relative experience levels of the lawyers. I only refer to the costs incurred by Mr. Frankel and not to the skill of the lawyers, both of whom were very able and who conscientiously assisted the court in navigating this complicated case. Mr. Frankel is to be compensated for costs based on the indemnity principle, having regard to what he spent and the reasonable expectations of both parties: *Boucher v. Public Accountants Council for the Province of Ontario,* 2004 CanLII 14579 (ON CA), at para. 35-37.

[38] Although not directly on point, I do observe that condominiums are used to collecting full indemnity costs, by operation of s. 134(5) where the corporation is the applicant enforcing a duty on the part of the owner. No such provision assists a unit owner who has obtained an order against the corporation. However, in measuring reasonable expectations, the respondent corporation must have had some idea that Mr. Frankel's success in obtaining an order would attract costs consequences in proportion with his actual legal expenses.

[39] I could not find any part of the record that warranted costs other than on a partial indemnity scale. In coming to that conclusion, I have considered the factors in rule 57.01, regarding the conduct of the parties in the litigation. I therefore award to Mr. Frankel his costs of the application in the amount of $30,000.00, inclusive of disbursements and HST.

Akazaki J.

Date: January 31, 2025