Case Name:

McKinstry v. York Condominium Corp. No. 472

Between
William McKinstry and Beverly Ann Dempster, plaintiffs, and
York Condominium Corporation No. 472 and William Verrier,
defendants

[2003] O.J. No. 5006
Court File No. 01-CV-219697CM

Ontario Superior Court of Justice
Juriansz J.

Heard: October 9-10 and 14-17, 2003.
Judgment: December 8, 2003.
(80 paras.)

Counsel:

Robert B. Cohen, for the plaintiffs.
Lloyd Cadsby, for the defendants.

¶ 1 **JURIANSZ J.**:— This case raises for the first time the interpretation and application of ss. 132 and 135 of the Condominium Act, S.O. 1998, c. 19 (the "Act"), and their relationship to each other.

The Facts

¶ 2 The defendant, York Condominium Corporation No. 472 ("YCC 472"), is one of two buildings in an upscale condominium complex known as Granite Place in Toronto. The defendant, William Verrier, was the president of the Board of Directors of YCC 472 at the time of the events.

¶ 3 The plaintiffs, William McKinstry and Beverly Ann Dempster, are long-time residents of the complex and who, from time to time, have purchased, renovated, and resold condominium units in the complex and elsewhere.

¶ 4 The plaintiffs purchased suite 302 in YCC 472 with the intention of renovating and reselling it. They became the registered owners of suite 302 on August 10, 2001. Suite 302 was somewhat notorious in the building. Ms. Dempster described it as "unique in its decoration". There were loud colors on the walls and floors. The electrical and plumbing services and some internal walls had been altered. Significantly, the master bedroom and the main bathroom had been made into an open area and a Jacuzzi had been installed. Some heating vents and air-conditioning intake vents had been blocked. Carpeting had been glued to the balcony damaging it, and tinting had been applied to the windows. Radiator leaks had damaged some of the wood flooring. The unit had been on the market for some seven months. The plaintiffs bought it for $380,000.

¶ 5 Suite 302 was on the southwest corner of the building. The living room was on the west side, overlooking a parking lot. The master bedroom and the bedroom/den were on the south side, overlooking a cemetery. The unit's terrace was on the west side connected to the living room.

¶ 6 With the knowledge and consent of building manager, the plaintiffs proceeded with dismantling the alterations made by the previous owners and rectifying the plumbing and electrical services. They testified the wall

between the bedroom and the bedroom/den, had been moved a couple of feet to the east by the previous owners, and had to be torn down because it was blocking a vent. When the plaintiffs removed that wall, the plaintiffs remarked that the resulting larger space would make an attractive living room with a southern view, and that the existing living room could be split to create a bedroom and bedroom/den on the west side. They made the decision to reconfigure the suite on August 22. They considered the new layout so attractive that they decided to live in the unit rather than sell it, and listed their own residence for sale.

¶ 7 The plaintiffs proceeded to erect the metal studding framework for the walls of the new layout. Their work on the renovation continued until September 5 when the Board of Directors of YCC 472 ordered them to cease the work immediately. Thereafter, on September 10, 2001, the Board of Directors resolved that it would not approve the plaintiffs' proposed reconfiguration of suite 302 and required the plaintiffs to complete their renovation in accordance with the suite's "as constructed" layout; that is with the living room facing west and the bedroom and bedroom/den facing south.

¶ 8 On September 11, the next day, the plaintiffs agreed to comply with the Board's requirements. They removed the metal studding framework they had already installed and completed the renovation of the suite in accordance with its original layout. However, they no longer wished to live there. After completing the renovation they sold the suite 302 for $530,000.

¶ 9 The house rules of YCC 472 provide that planned alterations that are expected to take longer than four weeks require the written approval of the Board of Directors. The building manager can approve renovations expected to take less than four weeks. It is not contested that the plaintiffs' renovation, with the reconfiguration of the suite, would have taken longer than four weeks. The plaintiffs recognize that they proceeded without express Board approval of the renovation. They claim that there was an established past practice of the Board not enforcing the house rules regarding renovations and so they had a reasonable expectation that the rules would not be enforced strictly in their case. They claim that the building manager of YCC 472 had approved their construction. They claim that Mr. Verrier, the president of the Board, represented to them that the Board that would approve their plans. They claim that by relying on the approval of the building manager and the representation of Mr. Verrier, they incurred construction, financing, and legal costs, suffered a loss of profit on the resale of the suite, and had to pay capital gains tax on the sale proceeds. They also seek punitive damages.

¶ 10 The position of the defendant Verrier is that he acted as president of the Board of Directors at all times and that he is not personally liable for the plaintiffs' claims. At the end of the trial the plaintiffs consented to a dismissal of their claims against him.

¶ 11 The position of the defendant YCC 472 is that its refusal to approve the plaintiffs' proposed reconfiguration of the unit was a reasonable exercise of its authority. Mr. Verrier and another director testified that the decision was based on three concerns. First and primarily, the Board was concerned that the relocation of the living and dining room areas of suite 302 would increase the noise heard in the bedrooms of the unit owners on the floors immediately above and below the suite. Second, the Board did not want to set a precedent. The Board was concerned that if it permitted this renovation, it would have to approve other future major renovations and that uncontrolled major changes to the standard unit layouts would result in a reduction in the value of all units in the building. Third, the Board was concerned that major deviation from the "as constructed" layout of walls would interfere with designed airflows, perhaps leading to excessive heat, and that future purchasers of the unit might be able to hold the Board responsible for such deficiencies because it had approved the changes.

¶ 12 The plaintiffs also claim that YCC 472 failed to fulfill its obligation to correct deficiencies in the windows and terrace of the unit. YCC 472's position is that the deficiencies were caused by unapproved alterations made by the previous owners, and were apparent at the time the plaintiffs purchased the unit.

¶ 13 The defendants take the position that the court lacks any jurisdiction to entertain the plaintiffs' claim

because the plaintiffs did not resort to mediation and arbitration as required by s. 132(4) of the Act which provides:

> Every declaration shall be deemed to contain a provision that the corporation and the owners agree to submit a disagreement between the parties with respect to the declaration, by-laws or rules to mediation and arbitration in accordance with clauses (1)(a) and (b) respectively.

¶ 14 The plaintiffs take the position that the defendants have waived the application of s. 132(4) by not raising it earlier.

¶ 15 As well, the plaintiffs are seeking an oppression remedy pursuant to s. 135 of the Act. They claim that the Board's refusal to approve the reconfiguration of the unit was unreasonable, beyond the authority of YCC 472, and that it was oppressive, unfairly prejudicial to them, and unfairly disregarded their interests. They claim compensation under s. 135 of the Condominium Act, 1998. Section 135 provides:

> (1) An owner, a corporation, a declarant or a mortgagee of a unit may make an application to the Superior Court of Justice for an order under this section.
>
> (2) On an application, if the court determines that the conduct of an owner, a corporation, a declarant or a mortgagee of a unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant, it may make an order to rectify the matter.
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> (3) On an application, the judge may make any order the judge deems proper including,
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> (a) an order prohibiting the conduct referred to in the application; and
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> (b) an order requiring the payment of compensation.

¶ 16 The defendants take the position that the mediation and arbitration requirement of s. 132(4) applies to s. 135 and that the plaintiffs cannot resort to the oppression remedy until they have exhausted mediation and arbitration. The plaintiffs submit that s. 132(4) does not apply to s. 135, and that even if they cannot proceed with their ordinary claims because of their failure to arbitrate, they can nevertheless proceed under s. 135.

Interpreting Sections 132 and 135 of the Condominium Act, 1998

¶ 17 It is appropriate that I express a first impression of these provisions before applying them to the facts of this case.

¶ 18 Section 10 of the Interpretation Act, R.S.O. 1990, c. I.11 requires that these provisions be given a fair, large and liberal construction and interpretation.

Subsection 132(4)

¶ 19 The Legislature's objective in enacting s. 132 is to enable the resolution of disputes arising within a condominium community through the more informal procedures of mediation and arbitration. To attain this objective, the phrase "with respect to the declaration, by-laws or rules" in s. 132(4), which applies to disagreements between owners and the condominium corporation, should be given a generous interpretation. It applies, in my view, to disagreements about the validity, interpretation, application, or non-application of the declaration, by-laws and rules. It must be noted that s. 132(4) does not require owners and condominium corporations to submit

disagreements with respect to the Act to mediation and arbitration.

¶ 20 The first issue is whether s. 132(4) applies where the initiating party wishes to claim damages resulting from the disagreement as well as resolving the dispute. The term "disagreements" in s. 132(4) should be interpreted broadly to encompass claims for damages arising from the subject matter of the disagreement. Such a broad interpretation is most consistent with the provision's objective of resolving disputes by informal procedures rather than by court action. A great many disagreements about declarations, by-laws and rules will be about responsibility for expenditures or about damage caused by failings or neglect. Imposing mediation and arbitration to resolve these disagreements, but requiring court action to claim money somehow at issue because of the disagreement, would frustrate the provision's aim to have disputes resolved quickly and efficiently.

¶ 21 The Arbitration Act, S.O. 1991, c. 17 applies to arbitration required by s. 132(4). The terms of s. 132(4) refer to "arbitration in accordance with clauses (1)(a) and (b)" of s. 132. Subsection 132(1) refers to arbitration under the Arbitration Act, 1991. In any event, s. 2(3) of the Arbitration Act, 1991 provides that the Arbitration Act, 1991 applies to arbitration conducted in accordance with another Act, unless provided otherwise. Section 6 of the Arbitration Act, 1991 indicates that a court's ability to intervene in matters governed by the Arbitration Act, 1991 is extremely limited.

¶ 22 That the Arbitration Act, 1991 applies supports an interpretation of s. 132(4) as encompassing a claim for damages. The Arbitration Act, 1991 ensures the parties' rights to fair procedures, has a number of provisions that make it clear duplication between an arbitration and court action is to be avoided, and provides a process for enforcement of an arbitrator's decision.

¶ 23 Section 138 of the Courts of Justice Act, R.S.O. 1990, c. C.43 lends further support for the interpretation that arbitration under s. 132(4) may decide claims for damages by providing that "[a]s far as possible, multiplicity of legal proceedings shall be avoided". It makes little sense to have two separate proceedings, one to resolve the disagreement and a second to deal with damages arising from the disagreement.

¶ 24 Counsel for the defendants, relying on Weber v. Ontario Hydro, [1995] 2 S.C.R. 929, submitted that s. 132(4) of the Condominium Act, 1998 deprives the court of any jurisdiction to deal with matters to which it applies, just as the mandatory arbitration clause does in the labour regime. I find that this is not entirely the case. The distinction is that the Arbitration Act, 1991 does not apply to arbitrations pursuant to the mandatory arbitration provision of the Labour Relations Act, R.S.O. 1995, c. 1, whereas it does to arbitrations pursuant to the Condominium Act, 1998. The Arbitration Act, 1991 contemplates situations where the court may entertain a proceeding about matters subject to arbitration. Subsection 7(1) of the Arbitration Act, 1991 does provide that the court shall, on motion, stay a proceeding that is commenced in respect of a matter to be submitted to arbitration. However, s. 7(2) provides that the court may refuse to stay a proceeding for a number of reasons, such as undue delay in bringing the motion to stay the proceeding or the matter is a proper one for default or summary judgment. Thus it is clear that matters subject to arbitration may proceed in court in some circumstances.

¶ 25 Section 7 of the Arbitration Act, 1991 has been applied in the context of other statutory regimes. For example, in Boucher v. Soo Homes Inc. (1980), 16 R.P.R. 119, the court had before it an action where there had not been compliance with s. 17(4) of The Ontario New Home Warranties Plan Act, S.O. 1976, c. 52 [now Ontario New Warranties Plan Act, R.S.O. 1990, c. O.31 which provided:

> Every agreement between a vendor and prospective owner shall be deemed to contain a written agreement to submit present or future differences to arbitration, subject to appeal to the Supreme Court [now Divisional Court, as of R.S.O. 1990, c. O.31], and the Arbitrations Act applies.

¶ 26 Stortini D.C.J. found that the defendant had waived its right to arbitration by failing to move for a stay of action prior to delivery of its statement of defence. He relied upon Cole v. Can. Fire Ins. Co. (1908), 15 O.L.R. 336,

a decision of the Divisional Court of Ontario that held that the power given to the court to stay proceedings under the Arbitrations Act is upon an application after appearance and before pleading or any other step in the proceedings. He concluded that a motion to stay brought after delivery of the statement of defence must be refused. In Cole, Riddell J. states, at p. 338, that the fact that the right to arbitration is given by legislation does not make that right, when given, any higher than if it had been obtained by private contract. Riddell J. also states that if the defendants choose to put in a pleading rather than move for a stay, they must be held to have elected that method of having their rights determined, and to have waived the provision for arbitration.

¶ 27 Boucher was followed more recently in Chewins v. El-Equip Inc., [1996] O.J. No. 1865 (Ont. Gen. Div.). The principles articulated in these cases should apply in the context of the Condominium Act, 1998.

Section 135

¶ 28 The legislative objective of s. 135 is to grant the court the jurisdiction to protect condominium owners, corporations, declarants, and mortgagees from unfair treatment. The text of s. 135 has much in common with the corporate oppression remedy. Section 248 of the Business Corporations Act, R.S.O. 1990, c. B.16 provides:

> (1) A complainant and, in the case of an offering corporation, the Commission may apply to the court for an order under this section.
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> (2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,
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> (a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;
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> (b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or
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> (c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,
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> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

¶ 29 Lord Wilberforce in Ebrahimi v. Westbourne Galleries Ltd., [1972] 2 All E.R. 492 (H.L.) at 535 indicated that a statutory provision such as this provides a bridge to the principles of equity and gives the court a broad jurisdiction to subject the exercise of legal rights to equitable considerations:

> Acts which, in law, are valid exercises of powers conferred by the articles may nevertheless be entirely outside what can fairly be regarded as having been in the contemplation of the parties when they became members of the company.

¶ 30 This passage shows that the parties' reasonable expectations are worthy of protection, and reasonable expectations have become a benchmark in the application of the corporate oppression remedy. Farley J. observed in 820099 Ontario Inc. v. Harold E. Ballard Ltd., [1991] O.J. No. 266, (1992), 3 B.L.R. (2d) 113 123, at para. 129:

> Shareholder interests would appear to be intertwined with shareholder expectations. It does not appear to me that the shareholder expectations which are to be considered are those that a shareholder has as his own individual "wish list". They must be expectations which could be said to have been (or ought to have been considered as) part of the compact of the shareholders.

¶ 31 The Supreme Court of Canada adopted the following often-quoted description of the corporate remedy in Loewen, Ondaatje, McCutcheon & Co. c. Sparling (1992), 97 D.L.R. (4th) 616 at 631-632 from D.H. Peterson, Shareholder Remedies in Canada (Toronto: Butterworths, 1989) at para. 18.1, p. 18.1.:

> The oppression remedy may be considered the Charter of Rights and Freedoms of corporate law. It is a relatively new creature of statute, so it is little developed. It is broad and flexible, allowing any type of corporate activity to be the subject of judicial scrutiny. The potential protection it offers corporate stakeholders is awesome. Nevertheless, the legislative intent of the oppression remedy is to balance the interests of those claiming rights from the Corporation against the ability of management to conduct business in an efficient manner.

¶ 32 After quoting this passage, the Supreme Court said of the corporate remedy in the Canada Business Corporations Act, R.S.C. 1985, c. C-44:

> This remedy thus requires an interpretation consistent with its purpose. Cory J.A., as he then was, summarized this principle in Sparling v. Royal Trustco Ltd., (1984), 45 O.R. (2d) 484 , supra, at p. 693: "Here the C.B.C.A. has sought to provide a remedy. An interpretation which gives effect to the remedy is preferable to one which seeks to restrict or eliminate the remedial provision of the Act." And at p. 694: "Where a statute provides a remedy, its scope should not be unduly restricted. Rather, the courts should seek to provide the means to effect that remedy."

¶ 33 This interpretative principle and the foregoing passages apply to s. 135 of the Condominium Act, 1998. This new creature of statute 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, 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. Once that prerequisite is established, the court may "make any order the judge deems proper" including prohibiting the conduct and requiring the payment of compensation. This broad powerful remedy and the potential protection it offers are appropriately described as "awesome". 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.

¶ 34 I reject the defendants' submission that the words "is or threatens to be" in s. 135(2) limits the remedy to conduct that is present or prospective. Section 4 of the Interpretation Act, R.S.O. 1990, c. I.11 provides that "the law shall be considered as always speaking and, where a matter or thing is expressed in the present tense, it is to be applied to the circumstances as they arise, so that effect may be given to each Act and every part of it according to its true intent and meaning". Moreover, s. 135(3) allows the court to prohibit the conduct or to make an order requiring the payment of compensation. Prohibiting the conduct would be appropriate where the conduct is threatened or taking place. Ordering compensation would be appropriate when the conduct has already taken place.

The Relationship of Subsection 132(4) and Section 135

¶ 35 While s. 132(4) applies to "disagreements" and s. 135 applies to "conduct", there are circumstances where both provisions might seem to apply. For example, where an owner and a condominium corporation disagree about the meaning and proper application of the rules, the owner might allege that conduct that the corporation was taking or was threatening to take on its view of the rules was oppressive. Subsection 132(4) would apply to the disagreement, and s. 135 would apply to the threatened conduct. There is much scope for overlap as s. 135 could be invoked to impugn a decision or course of action purportedly taken or threatened to be taken under the declaration, by-laws or rules.

¶ 36 This leads to the question of whether s. 132(4) requires an applicant to submit to mediation and arbitration the subject matter of a s. 135 application where the conduct or threatened conduct is related to the declaration, by-laws or rules. The question is of considerable importance to the ambit of both sections. The Arbitration Act, 1991 provides for the binding determination of the dispute between the parties. That is, if the arbitration were required before a s. 135 application could be brought about conduct or threatened conduct related to the declaration, by-laws or rules, then s. 135 would not be practically available in many cases. On the other hand, if resort to mediation and arbitration were not required, then the legislative goal of resolving disputes within the condominium corporation by these informal procedures would be significantly circumscribed.

¶ 37 There are several reasons why I conclude that s. 132(4) does not require an applicant under section 135 to first resort to mediation and arbitration where the conduct complained of is related to a disagreement with respect to the declaration, by-laws or rules.

¶ 38 First, section 135 states, without qualification, that an application may be made to the Superior Court of Justice.

¶ 39 Second, many section 135 applications will be about a broad pattern of conduct, only a part of which is subject to s. 132(4). For example, a s. 135 application may complain of conduct both with respect to "the declaration, the by-laws or rules" and other conduct. I have already noted that s. 132(4) does not apply to disagreements between the parties with respect to the Act. A s. 135 application may be about conduct related to both the Act and by-laws. Making one part of such a broad application subject to mediation and arbitration would result in multiple proceedings.

¶ 40 Third, the legislative intent that s. 132(4) does not apply to applications under s. 135 is apparent from the statute itself. Sections 132 and 135 are in Part IX, titled "Enforcement", of the Act. Another section in that Part, subsection 134(1), contemplates an application to the Superior Court of Justice for an order enforcing compliance with any provision of the Act, declaration, by-laws or rules. Subsection 134(2) states: "If the mediation and arbitration processes described in section 132 are available, a person is not entitled to apply for an order under subsection (1) until the person has failed to obtain compliance through using those processes". There is no similar provision in s. 135 (or in ss. 130(1), 131(1), and 133(2) which also contemplate applications to the Court). The pointed inclusion of an explicit requirement to exhaust mediation and arbitration in s. 134, but not in s. 135, implies the Legislature did not intend that applicants seeking the oppression remedy must first resort to mediation and arbitration.

¶ 41 Fourth, s. 135 applies to conduct or threatened conduct, and under section 135(3)(a) the court may prohibit the conduct. This makes clear that parties may resort to s. 135 with respect to conduct that has not taken place as yet, in order to prevent it from taking place. Such an application must be brought with dispatch and determined promptly in order to be effective. The time required to schedule and proceed with mediation and arbitration are not compatible with the dispatch that many section 135 applications would require.

¶ 42 I conclude that a s. 135 applicant does not have to first resort to mediation and arbitration even though the conduct complained of may be related to a disagreement about the declaration, by-laws or rules.

Application to this Case

¶ 43 In this case the plaintiffs proceeded by way of action and invoked the court's jurisdiction under s. 135 of the Condominium Act, 1998 by way of an amendment to their statement of claim. The defendants responded by pleading in their Amended Statement of Defence that the condominium Board acted within its authority and reasonably. In closing argument the defendants, for the first time, argued that this court was without jurisdiction to give a remedy under section 135 because the plaintiffs had proceeded by way of action and s. 135 contemplates the making of "an application". I did not have the benefit of extensive argument of this issue, and neither side provided any authorities. Defendants' counsel did not provide any policy reason why it was important that a s. 135 applicant must proceed by way of application. Nor did defendants' counsel identify any prejudice to the defendants resulting from the fact the plaintiffs proceeded by way of action in this case. The defendants have had full discovery of the plaintiffs' position. In the circumstances of this case I regard the defendants' argument as unduly technical. I consider that the plaintiffs have made an application to the court under s. 135 within their action.

¶ 44 In this case, the defendants must be taken to have waived the application of s. 132(4) as they raised it for the first time in their Amended Statement of Defence, amended February 2003, after all examinations for discovery had been completed. That was too late for the defendants to raise the issue. In any event, the plaintiffs' s. 135 application, brought within their action, is not subject to s. 132(4).

¶ 45 The foregoing results in the situation where the plaintiffs are claiming damages for causes of action, such as detrimental reliance, and applying for relief under section 135 in respect of the same conduct. There is only one dispute between the parties. Section 135 is broad enough to encompass all the claims except for punitive damages. As I have concluded that all the plaintiff's claims, however characterized, must be dismissed I do not distinguish between the plaintiffs' action and s. 135 application in my analysis of the evidence and issues.

The Merits of the Plaintiffs' Claims

The House Rules

¶ 46 Article VII of YCC 472's house rules deals with "alterations, traditions and renovations" in the following terms:

> (1) Any owner/tenant having alterations done in his or her suite shall not permit anything to be done that will obstruct to interfere with the rights of other owners/tenants or in any way have a detrimental effect on other suites in the common elements. Noise and nuisance should be kept to a minimum. It is also an imperative that the appearance of the building be protected and that its structural integrity be safeguarded. Any owner/tenant having work done is expected to follow not only the letter of this Article but also its spirit.
>
> (2) Any owner/tenant planning alterations must have his/her plan approved in writing by the manager before any work is begun. Depending on the nature of the alterations, Board approval may be required and the manager will advise the owner/tenant accordingly. If the planning alterations will take longer than four (4) weeks, written Board approval is required.
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> ...
>
> (7) In the event that there is a change in or deviation from the plans approved by the manager or the Board, as the case may be, such change or deviation, however slight, cannot be

proceeded with until the manager has approved the change or deviation in writing.

(8) Management has the right to monitor work being done in a suite. In enforcing the declaration and house rules, the manager or a member of the building staff may enter the suite and may order that work be halted.

(Underlining added)

¶ 47 I am satisfied that these rules are a proper exercise of the Board's authority, granted by s. 58 of the Condominium Act, 1998.

Alleged Approval of the Renovation by Building Management

¶ 48 The evidence of the building manager, Mr. Bill Colucci, and of building maintenance staff, Mr. Ernesto Frugoni, that they did not represent to the plaintiffs that their plans to reconfigure the suite was acceptable was uncontradicted. Mr. Frugoni explained he did not see it as his role to discuss the project with the plaintiffs at all. Rather, his duty was to make periodic inspections and make reports to building management.

¶ 49 At one point of her cross-examination, Ms. Dempster indicated that Bill Colucci had given approval to the plaintiffs' reconfiguration plan on or about August 22. When pressed for details, she indicated that she was not in the suite when Mr. Colucci allegedly gave approval. A few answers later, she indicated that she did not even have personal knowledge that Mr. Colucci was there at that time, and suggested the question be addressed to Mr. McKinstry. Mr. McKinstry did not testify that Mr. Colucci expressed any approval of the plans to reconfigure the suite.

¶ 50 The plaintiffs pointed to the notices Mr. Colucci had posted in the building advising other residents of the construction. Certainly building management was aware of the fact that the plaintiffs were renovating suite 302. Building maintenance and management were there from time to time and other residents and board members must be taken to have read the notices. Mr. Verrier himself visited the suite on at least one occasion before August 22 while demolition was taking place.

¶ 51 A critical observation is that when Mr. Colucci posted the notices on August 14 and 21, he could not have been aware of the plaintiffs' proposed reconfiguration of the suite, as the plaintiffs testified that they did not decide to reconfigure the suite until the afternoon of August 22. The plaintiffs simply could not have understood these notices as approval of the reconfiguration of the layout of the suite.

¶ 52 Mr. Colucci had discretion under the house rules to approve alterations that would take less than four weeks. The notice dated August 14 indicates that the work was expected to take approximately three weeks. Mr. Colucci testified that this information came from the plaintiffs. The notice dated August 21 advises that there will be construction noise "over the next few weeks" and that demolition will take place on August 22, when noise may be louder than at any other time. There was no evidence whatsoever that Mr. Colucci expressed approval of a renovation expected to take more than four weeks and which involved the reconfiguration of the suite.

Alleged Approval of the Renovation by President of the Board

¶ 53 Ms. Dempster testified that at a meeting of August 22, about 4:30 p.m., she discussed with Mr. Verrier the plan to relocate the walls in the suite. She said that Mr. Verrier wanted clarification and suggested that Mr. Frugoni provide her with the floor plan of the original layout of the suite so that she could indicate on it where they planned to place the walls. She said that he asked that this be prepared by the time he returned from vacation just before the next Board meeting. She said that Mr. Verrier told her that as long as Mr. Colucci and Mr. Frugoni

remained involved, Board approval would be a formality.

¶ 54 Later that day, Ms. Dempster sent Mr. Verrier an e-mail at 8:47. The e-mail was in evidence. Ms. Dempster testified that Mr. Verrier then left a voice-mail telephone message for her at 10:30 p.m. that night. Ms. Dempster testified that Mr. Verrier said in the voice-mail that the plaintiffs had obviously gone beyond what was required and there should be no problem with the renovation. She testified that the plaintiffs' decision to live in the unit rather than sell it was based on the approval of their plan to reconfigure the suite given in the voice-mail. Mr. McKinstry testified that Ms. Dempster conveyed to him the content of Mr. Verrier's voice message, and he relied on the message to proceed with erecting the partition walls in the existing living room area.

¶ 55 Mr. Verrier agreed in his testimony that he met with Ms. Dempster on August 22, and he agreed that he left her a voice-mail late that evening in which he said that as long as building maintenance and property management were content that all requirements were being met, then it was alright with him. However, Mr. Verrier testified that when he left this message, his understanding was still that the plaintiffs intended to restore the suite to the basic standard layout, and that he did not learn of their plans to reconfigure it until his return from vacation on September 5.

¶ 56 I do not accept Ms. Dempster's versions of the meeting and of Mr. Verrier's voice message for several reasons.

¶ 57 First, if Mr. Verrier had said in the afternoon meeting with Ms. Dempster that Board approval was a mere formality, his voice-mail added little. Yet, Mr. McKinstry did not testify about understanding that the reconfiguration plan had been approved at the afternoon meeting. He was clear that he understood from his communication with Ms. Dempster that the approval was given in the voice-mail later that night. I consider it highly likely that had Mr. Verrier said to Ms. Dempster in the afternoon that the Board's approval was a mere formality, she would have conveyed that to Mr. McKinstry.

¶ 58 Second, if Ms. Dempster had disclosed the plaintiffs' decision to reconfigure the suite at the afternoon meeting, and if Mr. Verrier had said at that meeting that Board approval was a mere formality, I would expect that Ms. Dempster would have made some reference to these communications in her later e-mail. That is not the case. The second paragraph refers to the "changes that we thought we'd have to make to bring the structure, plumbing, electrical, and vent/ducts back to the original suite design". The fourth paragraph said the plaintiffs had "requested a copy of the original suite plumbing/electrical/vent/duct drawings ... We will sign off that this is the plan that we are using (returning to)." The sixth paragraph referred to the "extended time we'll require to bring this back to Granite Place intention (6-8 weeks)". It is possible to read these statements of intention to return to the original design as limited to the building services and not applying to the layout of the walls. But the e-mail makes no reference to the decision to reconfigure the walls, a matter that was supposedly discussed with Mr. Verrier. To the contrary the e-mail also says "only today did we finalize with a designer where we would need to position the walls to ensure we could utilize the original facilities". This single oblique reference to the walls' position is interesting. The walls placed in their original "as constructed" location would utilize the original facilities. The plaintiff's planned placement of the walls was not a question of need but a matter of the plaintiffs' wishes. The further statement "we've been working from the visual within the suite to be able to assess just how extensive this renovation (in the true sense of the word!) will be" implies no final plan had been adopted.

¶ 59 Had the matter of a major relocation of the walls been discussed at the afternoon meeting, and had Mr. Verrier assured her that the Board's approval was a formality, I consider it certain that Ms. Dempster would have recapitulated that in the e-mail. I find the content of the coyly worded e-mail is inconsistent with what Ms. Dempster says took place at the afternoon meeting.

¶ 60 Third, Ms. Dempster's memory of the meeting does not seem strong. She initially said that Mary Wasser, Ernesto Frugoni, and "Bill", meaning Mr. McKinstry, were also at the meeting. She admitted in cross-examination

that Mr. McKinstry was not at the meeting.

¶ 61 Fourth, Mr. Frugoni's testimony does not support Ms. Dempster's version. Mr. Frugoni did recall a meeting with Ms. Dempster and Mr. Verrier in Ms. Wasser's office. However, he could not say when the meeting he had in mind took place, but he was emphatic it was after the new wall dividing the living room had been partially constructed. Since I accept the plaintiffs' evidence that they did not start construction of the new walls until after August 22, I conclude that Mr. Frugoni recollected a different and later meeting. What is helpful in resolving the credibility issue is Mr. Frugoni's testimony, which I accept, in which he seemed to vividly recollect that he did not learn of the new walls until he saw the new wall dividing the living room almost completely built. I accept his testimony that no one told him new walls were going to be built in the apartment. This is inconsistent with Ms. Dempster's testimony that she indicated the plaintiffs' plans at the August 22 meeting with Mr. Verrier where Mr. Frugoni was present.

¶ 62 Fifth, I consider it unlikely that Mr. Verrier would informally indicate approval of a major project without the submission of a construction plan and without the Board's sanction one day after he circulated his Chairman's Report, reviewed above, that "no contractor will be allowed access to the building until a renovation plan has been approved by Management."

¶ 63 Finally, I found Mr. Verrier's testimony credible. I do not accept plaintiff's counsel submission that Mr. Verrier's testimony at trial was impeached on numerous occasions as inconsistent with his examination for discovery. The matters on which Mr. Verrier was challenged were of such inconsequence that I found it difficult to understand what was alleged to be inconsistent.

¶ 64 I find as a fact that Ms. Dempster did not disclose the plaintiffs' plans to reconfigure the suite at the August 22 afternoon meeting and Mr. Verrier did not say at that meeting that Board approval of their plan to reconfigure the suite would be a formality.

¶ 65 This finding of fact has a determining effect on the question of whether Mr. Verrier conveyed approval in his voice-mail left later that night. Since Ms. Dempster did not indicate the walls were to be relocated at the afternoon meeting, and her later e-mail did not do so either, it may be concluded that Mr. Verrier did not know of the plaintiff's plans when he left the voice-mail. Whatever he said in that voicemail could not have related to the plaintiffs' plan to reconfigure the layout of the suite.

¶ 66 I conclude that Mr. Verrier did not indicate the Board would approve the plaintiffs' plan to reconfigure the suite, or indicate that as long as the building manager and building maintenance were kept involved, the plan to reconfigure the suite would be acceptable.

Unfairness

¶ 67 It remains to consider whether the Board's refusal to permit the plaintiffs to reconfigure the unit, while within the Board's legal authority, was oppressive or conduct that unfairly prejudiced them or unfairly disregarded their interests.

¶ 68 The plaintiffs assert an interest worthy of protection, as their claim relates to the use and enjoyment of their property. They point out that the floor layouts attached to the condominium's declaration show only demising walls and not internal walls. As such, they say they had a reasonable expectation that they would be able to rearrange the internal walls however they wished. I note that the plaintiffs' decision to purchase the unit was not dependent on getting approval to reconfigure it. Their communications to building management prior to August 22 are liberally sprinkled with references of how they "would be bringing this back to the original intended design". The impact of the Board's decision was that they had to revert to what was their original plan. I accept that once they had adopted the plan to reconfigure the suite, they decided to live there, and that the Board's decision greatly disappointed them. The Board's decision clearly interfered with how the plaintiffs wished to use and enjoy their

property.

¶ 69 I have already explained why the plaintiffs could not have an objectively reasonable expectation that the house rules regarding renovations would not be enforced. In this case, I am satisfied that the three reasons given by the Board for disapproving the plaintiffs' proposed renovation are each a reasonable and legitimate concern of a condominium board saddled with the responsibility of balancing the interests of individual unit holders against the welfare of other unit owners and the building itself.

¶ 70 It is true, as the plaintiff points out, that the layout of a condominium unit cannot prevent the occupants from creating noise that disturbs other residents. It is also true that at several locations in the building, as it was designed, bedrooms are located immediately above or below living rooms. These situations arise at points between groups of floors in the building that have different unit layouts. Nevertheless, the concern that a living room beneath a bedroom contributes to noise disturbance is far from arbitrary, and in my view, a reasonable one. The units within a condominium abut each other closely, and Mr. Verrier explained that the mechanical aspects of the building, pipes, vents and so forth, conduct sound from one unit to another. Limiting the instances where a bedroom is above or below a living room to those points in the building where the floor layout changed from one group of floors to another group of floors may not eliminate noise problems but may reasonably be considered to reduce noise problems.

¶ 71 It is also true that one or two single units in the building had been turned into double units. There was no evidence as to whether these projects had been approved or not. The earlier renovation of suite 302 by the previous owners had not been approved. However, there was no change of rules in midstream that discriminated against the plaintiffs. Mr. Verrier was a new president of a new Board. The Board passed a resolution decrying the earlier unapproved construction projects, and gave all tenants notice of an intention to stiffen the enforcement of the house rules. There was no evidence that the plaintiffs were treated any differently than any other unit holder would have been. I regard as a legitimate consideration, the Board's concern that if it approved the plaintiffs' reconfiguration of their unit, the Board would have to treat other unit holders in the same way, and that this could diminish the overall value of the building because of haphazard and uncontrolled renovation. Suite 302 is an apt example. The plaintiffs emphasized the unconventional renovation of the previous owners. The unit was on the market for a prolonged period and the plaintiffs bought it for what seems an attractive price. The plaintiffs also emphasized that the previous renovation created hazardous conditions because building services were not handled properly.

¶ 72 I also consider as reasonably within the purview of the Board, its concern that relocating the internal walls of a unit might potentially interfere with the building's services, such as ventilation. I do not accept the plaintiffs' submission that it was up to the Board to retain experts in this regard.

¶ 73 Nor did the plaintiffs persuade me that YCC 472's decision not to rectify the deficiencies in the windows and the terrace, since those deficiencies were due to unapproved alterations made by the previous owners of the unit, was oppressive, unfairly prejudicial to them, or unfairly disregarded their interests.

¶ 74 The plaintiffs have not satisfied me that the Board's conduct in this case considered as a whole was oppressive, unfairly prejudicial to them, or unfairly disregarded their interests.

Damages and Compensation

¶ 75 The plaintiffs claim a loss in the value of the suite. They argue that if the living room had a southern view, the suite would be worth some $80,000-$120,000 more. I did not find the testimony or report of the plaintiff's expert persuasive in this regard. The expert had never been inside the suite and did not appreciate its actual layout before he prepared his opinion. For example, he had not considered that the plaintiffs' proposed reconfiguration would not have permitted access to the terrace from the living room. In any event, suite 302 eventually sold for $402 a square foot, which compares favorably with the highest comparable unit identified by the expert as having sold for

$404 per square foot. I was not persuaded that a reconfigured suite 302 would have had a greater market value.

¶ 76 The plaintiffs claim a loss of the capital gains exemption for a permanent residence because they decided not to live in suite 302 as a result of the Board's decision. While they may have lost the capital gains exemption on suite 302, they did enjoy the capital gains exemption on the unit in which they lived. As they led no evidence of the capital gain on that unit during the relevant time, they have failed to place before the court sufficient evidence to calculate any damage suffered in this regard.

¶ 77 The plaintiffs testified that they installed a multitude of fixtures and accoutrements of superior quality in suite 302 because they planned to live there. Mr. McKinstry did indicate his opinion that the cost of an upgrade in quality of a fixture could not be recovered in a subsequent sale. He was not qualified as an expert so his opinion was not strictly admissible. In any event, he did not state that there would be no enhancement in the selling price where an entire renovation was done with superior quality fixtures.

¶ 78 Had I been persuaded that the plaintiffs' claim had merit, I would assess their damages in the amount of $21,500. The evidence was that there was some $8,500 to $9,500 in lost construction costs, and about $13,000 in additional financing charges, condominium fees, and property taxes.

Conclusion

¶ 79 The plaintiff's action and application under section 135 of the Condominium Act, 1998 are dismissed.

¶ 80 The parties may schedule a date, through my secretary, to address costs.

JURIANSZ J.

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Case Name: McKinstry v. York Condominium Corp. No. 472

Court: 2003 Ontario Superior Court of Justice

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