1 of 1 DOCUMENT

Case Name:

Middlesex Condominium Corp. No. 195 v. Sunbelt Business Centres (Canada) Inc.

Between
Middlesex Condominium Corporation No. 195, Plaintiff (Defendant to the Counterclaim), and
Sunbelt Business Centres (Canada) Inc., Douglas Good and Derek Quinn Tebbutt, Defendants (Plaintiffs by Counterclaim), and
Christine (Chris) Simmons, William (Bill) Howard, Marilyn Howard, Patricia (Trish) McKnight and Parkside Property Management Limited, Additional Defendants to the Counterclaim

[2016] O.J. No. 2839

2016 ONSC 1528

Court File No.: 3105-14

Ontario Superior Court of Justice

L.C. Leitch J.

Heard: December 9, 2015.
Judgment: May 31, 2016.

(102 paras.)

Counsel:

Benjamin Blay, for the plaintiff.

Nelson Amaral and J. Spataro, for the defendants.

E. Bawks, for the defendants by counterclaim, Christine (Chris) Simmons and Parkside Property Management Limited.

1 **L.C. LEITCH J.**:-- Middlesex Condominium Corporation No. 195 ("MCC 195") brought a motion for partial summary judgment pursuant to Rule 20 against the defendant, Sunbelt Business Centres (Canada) Inc. ("Sunbelt") on the basis that there is no genuine issue requiring a trial respecting a specific issue of liability.

2 The issue on this motion is the identification of the party or parties liable to pay hydro accounts related to commercial condominium units owned by Sunbelt on the first and second floors of a condominium and the cost of replacing the windows of these units.

3 MCC 195 seeks to recover the hydro expenses associated with the commercial units of the condominium for the period 2006 to 2013 (save and except for a two-year period when the amounts paid are unknown) on the basis that these accounts exclusively relate to commercial units owned by Sunbelt (but for the common element areas between the units, such as the hallways).

4 MCC 195 bases its claim on unjust enrichment and/or breach of the Declaration of MCC 195.

5 When this motion was heard, MCC 195 sought partial summary judgment against Sunbelt in the amount of $174,673.80 being the amount of $111,868.80 paid by MCC 195 for the hydro accounts in issue plus the amount of $35,805.00 paid by MCC 195 for window replacement. However, it was acknowledged at the hearing of this motion that this amount did not take into account that Sunbelt had already contributed to payment of these amounts to a certain extent through its payment of a proportionate share of common expenses. Also, one of the tenants of the commercial units pays the hydro account directly to London Hydro. Therefore, MCC 195 ultimately sought only a determination of the issue of liability.

Procedural history and materials filed on the motion

6 This motion, which included the affidavit of Mr. William Howard, the president of MCC 195, sworn June 30, 2015 was first returnable July 21, 2015. On the first return date the motion was set for a special appointment.

7 After the special appointment was scheduled, in response to Mr. Howard's affidavit, Sunbelt filed the affidavit of Mr. Quinn Tebbutt, Sunbelt's property manager and a former director of MCC 195, sworn August 29, 2015.

8 Mr. Howard swore a supplementary affidavit September 22, 2015.

9 Mr. Howard was cross-examined on his affidavits September 23, 2015.

10 Mr. Tebbutt was cross-examined on his affidavit September 24, 2015.

11 MCC 195 filed its factum October 15, 2015 in which it confirmed that it was seeking an order granting partial summary judgment pursuant to Rule 20 with respect to the issue of liability for the hydro accounts related to the condominium units owned by Sunbelt and the cost of replacing the windows of those units.

12 Sunbelt filed a responding factum dated November 16, 2015 seeking an order dismissing the motion or an order stating that the liability for the hydro accounts and the window replacement rested with MCC 195. In its responding factum, Sunbelt raised the issue of the limitation period.

13 Thereafter MCC 195 filed a reply factum dated December 2, 2015 addressing the issue of the limitation period raised by Sunbelt in its responding factum.

14 Sunbelt then filed what it described as a reply factum dated December 2, 2015.

15 Each of the parties filed briefs of authorities and supplemental books of authorities.

A brief summary of the pleadings

16 In its statement of claim, MCC 195 claimed against Sunbelt for unjust enrichment and/or breach of its Declaration and/or breach of the duties imposed pursuant to the *Condominium Act*, 1988 S.O. 1998 c. 19 (the "Act") and sought a declaration that Sunbelt had acted in a manner that is oppressive and unfairly prejudicial and that unfairly disregarded the interests of MCC 195 in its capacity as a creditor of Sunbelt and/or compensating the plaintiff as an aggrieved person.

17 In para. 24, the statement of claim MCC 195 alleged that the Act and the Declaration were breached because of direction, coercion, harassment or intimidation by Sunbelt and the other defendants.

18 In para. 25, MCC 195 pled, in the alternative, that its payment of the hydro accounts and window accounts conferred a benefit on Sunbelt or the other defendants for which it suffered a corresponding deprivation and there was no juristic reason for the plaintiff to have paid those amounts.

19 In its statement of defense, Sunbelt and the other individual defendants, denied any liability to MCC 195 for the hydro accounts and window expense and denied the allegations respecting unjust enrichment, non-compliance with the Declaration, breach of duty and oppression and specifically denied any acts of coercion, harassment or intimidation.

20 The defendants counterclaimed against MCC 195 and made claims against "additional defendants to the counter-claim" alleging that Sunbelt's interests in the condominium have been oppressed.

Background facts

21 MCC 195 is a seven-storey mixed-use (residential and commercial) condominium.

22 The first two floors of the condominium contain 28 commercial units owned by Sunbelt. Sunbelt leases its commercial units to various commercial enterprises. Many of the individual legally described condominium units have been combined to create so called "suites" for the commercial tenants.

23 The remaining floors and 45 residential units of the condominium are occupied by individual residential owners.

24 The residential units are supplied hydro through a bulk feed from the local hydro service. The commercial units on the second floor are provided power through 11 meters, which are separate from the bulk feed.

25 Since at least 2006, the accounts for hydro on the second floor of the building have been paid by MCC 195. On September 25, 2012 the board of directors of MCC 195 resolved to commence paying the hydro accounts for the first floor.

26 In 2014 MCC 195 retained an electrician, Black and McDonald, to determine the destination of the hydro feeds from the individual source meters in the utility room. According to the final Black and McDonald report dated May 13, 2014 each of the 11 hydro meters provided hydro to the commercial units and portions of the common elements.

27 After receipt of the Black and McDonald reports, the board of directors of MCC 195 resolved to rescind the earlier motions that they pay these hydro accounts. As a result, MCC 195 discontinued paying hydro for the 11 meters servicing the commercial units on or about January 1, 2014 and London Hydro began billing Sunbelt directly.

28 The secretary of the Board of Directors of MCC 195 compiled a summary of the hydro charges paid by MCC 195 for the first and second floors of the condominium on account of hydro provided through the 11 commercial meters. This summary was later revised and delivered to Sunbelt with Mr. Howard's supplementary affidavit immediately prior to the cross-examination of Mr. Howard.

29 In relation to the window issue, in 2012 MCC 195 commissioned engineers, Gray and Fick, to conduct a condition survey at the condominium. The report concluded that lateral movement of the building walls had caused a deflection that had placed stress on the aluminum framed window openings set in the concrete walls. These engineers concluded that the windows would need to be replaced to allow for movement of the concrete and to avoid placing further load on the window framing.

30 In para. 3.3.3. of their report, they stated the following:

> ... Because of the deflection of the cantilevered concrete slab and no expansion space above the window, the existing aluminium framed window require replacement, with a required vertical slip type connection to allow movement of the slabs and not put load on the window framing.

31 MCC 195 obtained a legal opinion in relation to the issue of its responsibility for the window repair. According to minutes of a meeting of the board of directors of MCC 195 on September 26, 2012, after considering this opinion and further input from Gray & Fick, it was decided that MCC 195 would pay the entire invoice for the window replacement in the sum of $35,805.00.

Position of MCC 195

32 MCC 195 asserted that summary judgment is appropriate in this case which it submits is document driven with limited contentious factual issues that can be resolved fairly and justly without a trial. In other words, the position of MCC 195 is that there is no genuine issue requiring a trial because these motion materials provide the evidence necessary to

fairly and justly resolve the dispute, there are no credibility issues and summary judgment is a timely, affordable and proportionate procedure.

33 MCC 195 took the position that Sunbelt is liable for the hydro accounts by operation of the Declaration and is liable for the window replacement by operation of the Declaration and the *Condominium Act*, 1988 S.O. 1998 c. 19 (the "Act").

34 MCC 195 contended that it had no responsibility for paying hydro charges that are separately metered for each unit and that it "had been unjustly paying for the hydro for the Sunbelt Units", as expressed by Mr. Howard in para. 15 of his affidavit sworn June 30, 2015.

35 MCC 195 relied on Article V of the Declaration and to a lesser extent Schedule C, set out below, as a basis for its assertion that the owners of the commercial units were responsible for the repair of the windows that was clearly required according to the Grey and Fick report. Furthermore, MCC 195 asserted that the damage to the second floor window frames was a foreseeable consequence of the building aging.

Position of Sunbelt

36 Sunbelt submitted that the materials on the motion are insufficient to allow a proper determination of the issues through the summary judgment process. According to Sunbelt, because of inaccurate information, inconsistencies and credibility issues, further evidence needs to be submitted and a full trial is in the interest of justice.

37 As a result, Sunbelt asserted that the motion should be dismissed or in the alternative, that MCC 195 should be found liable to pay for the hydro accounts that are not separately metered; that Sunbelt should be found responsible only for separately metered hydro accounts (Units 7 and 15, level 2) dating back to about July 2012; and, that MCC 195 should be found liable to pay the full costs of the window replacement pursuant to its repair and maintenance obligation.

38 Sunbelt submitted specifically that one of the key factual issues on which liability for the hydro accounts relies is which hydro meters serve which units. According to Sunbelt, while the original Black and McDonald report purported to identify which commercial units are serviced by the 11 hydro meters, this report failed to reference all of the commercial units. The final report listed more commercial units than the previous report but still failed to reference three of them, namely units 10, 11 and 12, level 2.

39 Sunbelt submitted that the evidence on this motion is inadequate and probably erroneous and can only be resolved by further investigation and submission of other clarifying evidence. Further, Sunbelt submitted that a full and accurate accounting of the actual amounts paid must be provided to adequately address the amount MCC 195 is entitled to recover.

40 Sunbelt noted that the oppression claim is not before the court on this motion and will be proceeding to trial and the facts of this motion are intertwined with the facts and issues on the oppression claim. The result is, according to Sunbelt, that the issues to be determined on this motion must be examined within the context of the litigation as a whole.

41 Furthermore, Sunbelt submitted that the claims are statute barred in its responding factum although no limitation period defence was pled in its Statement of Defence.

Overview of the law relating to Rule 20 motions

42 The Supreme Court of Canada decision in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 5 made clear "that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims."

43 The court also stated at para. 32 that the principle of proportionality "means taking account of the appropriateness of the procedure, its cost and impact on the litigation, and its timeliness, given the nature and complexity of the litigation."

44 As the court observed at para. 34, the summary judgment motion "is an important tool for enhancing access to justice because it can provide a cheaper, faster alternative to a full trial."

45 The court explained at para. 43, the issue to be determined on a summary judgment motion is "whether there is a genuine issue requiring a trial' and "the new rule, with its enhanced fact-finding powers, demonstrates that a trial is not the default procedure."

46 The court further explained at para. 49 that there will be no genuine issue requiring a trial "when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result."

47 It is appropriate for the court to assume on a summary judgment motion that the parties have placed before the court, in some form, all of the evidence that will be available for trial.

48 The issue is whether this record allows the court to make the necessary findings of fact, apply the law to the facts and thereby achieve a fair and just adjudication of the case on the merits. There must be enough evidence to reach that level of satisfaction or confidence in the fairness of the court's conclusion.

49 All of these principles must be considered, taking into account, as the court instructed at para. 56, "proportionally, timeliness and affordability."

50 I observe that a timely and affordable resolution of the issues on this motion should be encouraged.

The limitation issue

51 Sunbelt relied on s. 4 of the *Limitations Act*, 2002, S.O. 2002 c. 24, Sched. B, which provides that a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

52 Sunbelt also referred to s. 5(1)(b) of the *Limitations Act*, which provides that a claim is discovered on the earlier of the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known that the loss or damage had occurred.

53 Sunbelt noted that MCC 195 is asserting a claim for reimbursement of the hydro accounts commencing in 2006 in these proceedings that were commenced on April 15, 2014, far later than two years after MCC 195 and/or its property manager ought to have discovered them.

54 I will first address the argument of MCC 195 that s. 22(2) of the *Limitations Act*, 2002, S.O. 2002 c. 24, Sched. B, is applicable. That section provides that a limitation period under the *Limitations Act*, 2002 may be varied or excluded by an agreement made before January 1, 2004. MCC 195 submitted that the Declaration and specifically Article X, s. 5 operate to extend the limitation period applicable to MCC 195's claim for reimbursement of the hydro accounts.

55 Article X of the declaration of MCC 195 contains the following provision:

> **5. Waiver**
>
> The failure to take action to enforce any provision contained in the Act, this declaration, the bylaws or any other rules and regulations of the corporation, irrespective of the number of violations or breaches which may occur, shall not constitute waiver of the right to do so thereafter, nor be deemed to abrogate or waive any such provision.

56 MCC 195 correctly noted that a registered declaration is a "core document" upon which owners and prospective owners can rely (see *Walia Properties Ltd. v. York Condominium Corp. No. 478*, [2007] O.J. 3032, 60 R.P.R. (4th) 203 (S.C.)), at para. 15 and the declaration is "a sort of constitution that binds" all unit holders (see *Peel Condominium Corp. No. 108 v. Young,* 2011 ONSC 1786, 4 R.P.R. (5th) 162, at para. 27).

57 *Lexington on the Green Inc. v. Toronto Standard Condominium Corporation No.* 1930, 2010 ONCA 751, 102 O.R. (3d) 737, dealt with the issue of whether the right of a condominium's first board of directors elected by purchasers of units in the condominium project could terminate the condominium corporation's obligation to buy a manager's residence unit arising from the condominium corporation's declaration on the basis that such an obligation arose from an agreement entered into by the corporation before its election. In *Lexington*, the Court of Appeal concluded at paras. 28 and 29 that:

> The ordinary meeting of the word "agreements" does not include "declarations". The word "agreements" when used in a legal context generally refers to legally binding contracts entered into by two or more parties. Declarations, on the other hand, are statutorily prescribed documents that are prepared and registered by developers...
>
> ...Declarations become legally affective upon registration. Unlike agreements, they are not "entered into" with another person.

58 Also in *Lexington* at para. 43, the Court of Appeal stated the following:

> In summary, the Act treats declarations and agreements entered into by a condominium corporation differently in a number of respects. They are created differently: a developer prepares and registers a declaration; whereas once created, condominium corporations may enter into agreements with others to carry out their objects. The Act gives declarations legal effect on registration. The legal effect of agreements arises from contract law. Declarations and agreements are enforced differently; those with an interest in a condominium corporation have a statutory right to enforce compliance with the declaration, whereas parties to an agreement involving a condominium corporation do not have a statutory right to enforce, but are left to pursue remedies under the law of contract.

59 For the purpose of determining whether it can be concluded that there is no genuine issue for trial in relation to the limitation period, I agree with the submission of Sunbelt that a Declaration is not an agreement to which s. 22(2) of the *Limitations Act*, 2002 can apply.

60 In addition, I note the Court of Appeal has addressed the requirements of an agreement to shorten or contract out of a limitation period noting that there must be clear language describing the limitation period, identifying the scope of the application of that limitation period and excluding the operation of other limitation periods (see *Kassburg v. Sun Life Assurance Co. of Canada*, 2014 ONSC 1523, 119 O.R. (3d) 620, at para. 18 and *Boyce v. The Co-operators General Insurance Co.*, 2013 ONCA 298, 116 O.R. (3d) 56, at para. 20.)

61 Therefore, I cannot conclude there is no genuine issue for trial in relation to the limitation period based on MCC 195's reliance on the waiver provision in the Declaration because in my view the Declaration is not an "agreement" within the meaning of s. 22(2) of the *Limitations Act*, 2002 and the provisions of the purported agreement would not meet the requirements necessary to contract out of the statutory limitation period.

62 It is necessary therefore to consider MCC 195's alternative position, which, in fact, was the position most forcefully advanced at the hearing of the motion -- that is, that MCC 195 only became aware that the hydro accounts were properly chargeable to Sunbelt in late 2013 and it has pursued its claim within the applicable limitation period.

63 In para. 9 of Mr. Howard's affidavit sworn June 30, 2015, he stated the following:

> By 2007, a significant number of the residential units were owned by individuals. The residential owners gathered sufficient votes to elect three residential owners, of whom I was one, to the board. By that time, however, the decision that the condominium should pay for the second floor hydro had already been made by a prior board of directors.

64 On his cross-examination, Mr. Howard was asked at question 83 whether the issue of having Sunbelt pay hydro was ever canvassed in 2007. Mr. Howard responded that at the annual general meeting in that year it was announced that there was a 20 percent increase in the condo fees "due primarily to increases in utilities, mainly hydro" and "there was no other discussion other than that and it was, at that time there was a lot of talk about energy prices increasing and everybody just assumed that's what the reasoning was."

65 Mr. Howard added that "it wasn't until quite recently that I was told that it was, in fact, due to them switching the hydro to the corporation."

66 Mr. Howard was asked further if there had been any investigation at that point and he responded to question 84 by indicating that Black and McDonald were hired to do a survey and "we found that those meters did indeed go into a commercial space and that they were all in the name of Sunbelt."

67 At question 86, Mr. Howard was again referred to para. 9 of his affidavit and it was suggested to him that "there was knowledge of this change as it were in 2007." Mr. Howard again responded "just that our condo fees were going up 20 per cent and that it was due to increased hydro. We had no idea that that was the reason. We were never told that was the reason for the change."

68 I am satisfied that there is no genuine issue for trial in relation to the limitation period. Mr. Howard explained the reference to 2007 when cross-examined on his affidavit. As he deposed in para. 12 of his affidavit, on recommendation of its property manager in late 2013 MCC 195 sought legal counsel with respect to its obligations for the hydro accounts. There is no evidence in relation to the knowledge of its property manager prior to that time and in any event, I am not satisfied that it would be appropriate to impute knowledge of the property manager to MCC 195. I disagree with the submission of Sunbelt that *Larlyn Property Management Limited v. Waterloo North Condominium Corp.*, No. 71 [2007]

O.J. No. 1044, at para. 13 (Small Claims Court) is authority for the proposition that knowledge had by the property manager should be imputed to the Board of Directors.

The effect of past decisions of the board of directors of MCC 195

69 According to s. 7(5) of the Act, if there are inconsistencies between the Act and a Declaration, the provisions of the Act prevail.

70 Pursuant to s. 17(3) of the Act, MCC 195 has a duty to take all reasonable steps to ensure that the Act, the Declaration, the by-laws and the rules are complied with by owners and occupants of units.

71 The fact that the Act is paramount is reestablished by s. 176 which provides that its provisions apply despite any agreement to the contrary.

72 As noted in *York Condominium Corp. No. 288 v. Harbour Square Commercial Inc.*, 1988 Carswell 663, [1988] O.J. No. 2852, 49 R.P.R. 264 (Dist. Ct.), at para. 36 referencing *Carlton Condominium Corp. No. 279 v. Rochon*, (1987), 59 O.R. (2d) 545, 37 D.L.R. (4th) 430, per Finlayson J. at p. 552:

> The declaration, description and by-laws, including the rules, are therefore vital to the integrity of the title acquired by the unit owner. He is not only bound by their terms and provisions, but he is entitled to insist that the other unit owners are similarly bound.

And further at p. 555:

> A condominium corporation is a creature of statute and has no greater authority than as set out in the *Condominium Act*.

73 Therefore, an estoppel defence was not open to the defendants because the condo corporation was obliged to fulfill its statutory duties and the defendants were obliged to perform their statutory duties.

74 Therefore, I agree with the submission of MCC195 that the decisions of the board over the years and the reasons for its decisions do not deprive MCC 195 from pursuing its claim on this motion.

The hydro issue

75 In Schedule "E" of the Declaration, common expenses are defined to include "all sums of money levied or charged to the Corporation on account of any and all public and private suppliers of insurance coverage, taxes, utilities and services including, without limiting the generality of the foregoing, levies or charges for" ... (v) fuel including gas, oil and electricity, unless these utilities are separately metered for each unit."

76 Up to 2014, the hydro accounts in issue were charged as common expenses. Since late 2013, MCC 195 has taken the position that the 11 meters or feeds are separately metered for each unit.

77 The Black and McDonald report certifies that the 11 meters provide hydro to all of the 28 commercial units except it does not list Units 10, 11, and 12 on level 2. As set out in para. 6 of Sunbelt's factum:

> In accordance with such final report the 11 hydro meters service 25 of the commercial units and portions of the common elements, being the two panels in the West end hallway. Units 10, 11 and 12, Level 2 are not referenced in either report.

78 The evidence also establishes that as set out in Sunbelt's factum at para. 7:

> Partition walls between some of the commercial units have been moved or relocated resulting in the creation of "suites" that are made up of multiple "legal units". The creation of the "suites" has not altered the legal boundaries of the units as set out in the Declaration and description of MCC 195.

79 I do not accept the contention of Sunbelt that the non-reference to three units renders the evidence "clearly inadequate and probably erroneous, which can only be resolved by further investigation and submission of other clarifying evidence" as claimed in para. 15 of Sunbelt's factum.

80 On his cross-examination, Mr. Howard stated the following at questions 42 and 48:

> A: From what I understand the meters are in the name of Sunbelt and that Black and McDonald confirmed that they all go into commercial units, the separate meters and that there is a bulk meter.
>
> THE DEPONENT: I understood that they confirmed that all the meters, separate meters that are in Sunbelt's name ended up in a commercial unit.

81 The two maps and the document briefs filed on this motion, show how the 28 commercial units are utilized. Various suites are comprised of whole or partial units. Therefore, a number of the hydro meters serve one or more units. These circumstances are summarized in para. 34 of Sunbelt's factum:

> The Final Black & McDonald Report shows 8 of the 11 meters each servicing at least 2 of the commercial units, 1 meter servicing 7 of the commercial units and a portion of the common elements, and 2 meters that service only 1 commercial unit each. Meter #600178 services only Unit 7, Level 2 and meter #600177 services only Unit 15, Level 2.

82 These circumstances do not result in the hydro liability in issue being imposed on MCC 195. Sunbelt argues that it is only responsible to pay the hydro accounts when one meter services one unit. Its argument is set out at para. 33 of its factum as follows:

> In order for utilities to be "separately metered for each unit" a hydro meter must service only one legal unit. The term "each" is defined as "used to refer to every one of two or more people or things, when you are thinking about them separately". Applying this definition to the language of the Declaration "separately metered for each unit" should be interpreted as "separately metered for every one unit."

83 However, I do not agree with that interpretation of the Declaration, nor is there any authority for such a proposition.

84 Further, it is clear that all commercial units are owned by Sunbelt and as Mr. Tebbutt acknowledged on his cross-examination, Sunbelt had control over the configuration of its units. Mr. Tebbutt disclosed on his cross-examination that but for one alteration that was discussed with the property manager of MCC 195, it was likely a number of alterations had been made to the physical layouts of the commercial units, including relocation of walls and electrical feeds, without notice to or knowledge of the Board and that the changes included changes to the electrical wiring between units.

85 When it was put to Mr. Tebbutt at question 177 that Sunbelt had "control ...over where the walls are put up or taken down in order to make the commercial suites", he responded, "I think it's correct to say the configuration of commercial suites, but we have not changed boundaries to what is a legally described unit".

86 I am satisfied there is no genuine issue requiring a trial in relation to which party is responsible for the hydro accounts in issue. I find Sunbelt is responsible for the hydro accounts servicing the commercial units. The exact amounts of that liability must now be calculated by the parties with the assistance of counsel.

The window issue

87 Article V of the Declaration states that "the owners of the commercial units shall be solely responsible for the maintenance and repair of all windows enclosing their Units, all doors and doorframes, as well as the maintenance and repair of all glass, plastic or other material utilized in the full or partial enclosure thereof."

88 According to Schedule C of the Declaration, the vertical boundaries of units 1 to 18 inclusive on level 2 are defined to include "the unfinished unit side surface of exterior doors, door frames, windows, window frames, and the exterior of any glass panels therein."

89 MCC 195 recognized that the provisions of Schedule C are ambiguous and it is difficult to describe an "unfinished unit side surface" of windows. In addition as Sunbelt argued, the words "the unfinished unit side surface" only modify the words "exterior door". In my view the window frames are not part of the units and are a common element. Appropriately, the main thrust of MCC195's argument was article V of the Declaration.

90 Pursuant to s. 89 of the Act, but subject to s. 91, a condominium corporation must repair the units and common elements after damage, which includes the obligation to repair and replace.

91 Also, pursuant to s. 90 of the Act, but subject to s. 91, a condominium corporation must maintain the common elements, which includes the obligation to repair after normal wear and tear but does not include the obligation to repair after damage.

92 Section 91 permits a condominium corporation in its Declaration to alter the maintenance and repair obligations after damage by providing;

a. subject to s. 123, each owner shall repair the owner's unit after damage;

b. the owners shall maintain the common elements or any part of them;

c. each owner shall maintain and repair after damage those parts of the common elements of which the owner has the exclusive use; and

d. the corporation shall maintain the units or any part of them.

93 Therefore, the Act does not grant a condominium corporation the authority to impose on a unit owner the obligation to repair common elements after damage, except for common elements designated for the exclusive use of an owner.

94 Section 91 is equivalent to s. 41 of the predecessor Act which originally applied to the Declaration.

95 I am satisfied that what Grey and Fick described in its report is maintenance and repair after damage.

96 MCC 195 asserts that it properly shifted the repair after damage obligation to Sunbelt pursuant to the Declaration and specifically Article V.

97 However, the Declaration does not contain a Schedule F, which is required in a Declaration where exclusive use common elements are to be specified according to s. 5 (7) of Ontario Regulation 48/01.

98 Further, there is no Part II, being an exclusive use portions survey, in the description, which according to s. 2(1)(b) and the definition is s. 1 of O. Reg 49/01 is required if the property includes exclusive use portions.

99 I find that the windows are not common elements over which Sunbelt has exclusive use. Therefore, MCC195 has the obligation to maintain those common elements.

100 MCC195 relied on *Manton v. York Condominium Corporation No. 461*, 49 O.R. (2d) 83, 10 C.L.R. 266. However, in *Manton* the court found that the obligation to maintain the common elements was broad enough to include the obligation to correct a structural defect in such common elements.

101 I am satisfied that there is no genuine issue requiring a trial with respect to responsibility for the window replacement and find that MCC 195 is responsible for the cost of the window replacement .

102 I request that counsel endeavour to resolve the issue of costs but, if necessary, counsel may make brief written submissions within 30 days.

L.C. LEITCH J.