CITATION: Ryan v. York Condominium Corporation No. 340, 2016 ONSC 2470
COURT FILE NO.: CV-15-537979
DATE: 20160413

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
PETER JOHN BART RYAN	)	*Joshua Milgrom* for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
YORK CONDOMINIUM CORPORATION NO. 340	)	*Carol A. Dirks* for the Defendant
	)	
	)	
Defendant	)	
	)	
	)	**HEARD**: April 7, 2016

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] The Applicant, Peter John Bart Ryan, is the owner of Unit 14, Level 17 of York Condominium Plan No. 340, known municipally as Suite 1814, 362 The East Mall, Etobicoke, Ontario. He submits that YCC has failed and continues to fail to maintain and repair the common elements of the condominium building and that his Unit has been damaged by water penetration and has been uninhabitable since April 2011 because of mould. Mr Ryan seeks a declaration that the Respondent York Condominium Corporation No. 340 ("YCC 340") has breached its maintenance and repair obligations under the *Condominium Act, 1998*, S.O. 1998, c. 19 and that its conduct has been oppressive to him. Mr. Ryan seeks, among other things: (a) a mandatory order that YCC 340 restore his Unit to a habitable state; (b) $78,896.63 in special damages; and (c) $150,000 in general damages for mental distress, anxiety and psychological and emotional damages.

[2] For the reasons that follow, I award Mr. Ryan damages of $69,691.39 plus pre-judgment interest in accordance with the *Courts of Justice Act*, R.S.O. 1990, c. 43. This award does not include any compensation for mental distress, anxiety, or psychological and emotional damages, and I do not make any mandatory order.

B. PROCEDURAL BACKGROUND

[3] Mr. Ryan commenced this proceeding by Notice of Application on October 7, 2015.

[4] The application came on for a hearing on February 9, 2016, at which time YCC 340 requested an adjournment so that Mr. Ryan's complaints could be dealt with by mediation and arbitration. I refused the adjournment request for mediation and arbitration, but I converted the application into an action and then adjourned the application to be replaced by a summary judgment motion.

[5] On February 9, 2016, I made the following endorsement:

> This is an application for an oppression remedy and to enforce certain rights under the *Condominium Act*. The respondent, which did not comply with the timetable, requests leave to file its materials late and it seeks an adjournment in order to prepare its argument and in order that the issues be resolved by mediation and arbitration as required by the *Condominium Act*. The applicant opposes the filing of the material and opposes the request for an adjournment.
>
> In my opinion, the respondent has provided an adequate explanation for filing its material late, and [I] shall accept the material. The case is not appropriate for mediation/arbitration and should be resolved by the court, particularly because the core of the matter is the oppression claim. I, therefore, shall not adjourn the matter for the purposes of mediation/arbitration. I, rather, adjourn the application because it is not ready to be heard by application and should instead be converted into an action with a summary judgment motion.
>
> I shall remain seized of the matter and I schedule the summary [judgment] motion for April 7, 2016. ….

[6] For completeness, I now add that an applicant for an oppression remedy under the *Condominium Act, 1998* need not first resort to mediation and arbitration before applying to the Superior Court for an oppression remedy: *McKinstry v. York Condominium Corporation No. 472* (2003), 68 O.R. (3d) 557 (S.C.J.) at paras. 35 to 46.

C. EVIDENTIARY BACKGROUND

[7] Mr. Ryan supported his summary judgment motion with the following evidence:

- An affidavit sworn November 2015. Mr. Ryan was cross-examined on March 10, 2016.
- Affidavits from Marilyn Bird dated October 2, 2015, February 19, 2016, and April 7, 2016. Mrs. Bird is Mr. Ryan's sister and holds a continuing power of attorney for him. Mrs. Bird, along with her husband, is an owner of another Unit in YCC 340, and she has been a member of its Board of Directors from time to time. Mrs. Bird was cross-examined on March 10, 2016.

[8] YCC 340 resisted the summary judgment motion with the following evidence:

- An affidavit from Ognjen Sokolovic, President of the Board of Directors, sworn on February 7, 2016. Mr. Sokolovic was cross-examined on March 10, 2016.

D. FACTUAL BACKGROUND

[9] YCC 340 is a non-profit residential condominium corporation that was established in 1977 to manage a condominium project consisting of 701 residential units in three highrise buildings with some adjacent townhouse units.

[10] Not long after the condominium units began to be occupied, it became apparent that there was a serious construction defect. The highrise buildings were defectively constructed because there was no proper building envelope installed for the upper floors. Thus, throughout the history of the condominium, there has been a widespread intermittent water penetration issue largely related to weather conditions. Over the years, various Boards of Directors of YCC 340 have directed temporary fixes in an attempt to rectify the problem, while considering how to bring about a permanent solution.

[11] In August 1980, Mr. Ryan purchased his two-bedroom Unit in YCC 340, and his Unit is one of the units that have been plagued with water penetration problems. Mr. Ryan's sister, Mrs. Bird, and his other sister Mary Kowalczyk, are also the owners of units in the condominium complex.

[12] In March 2010, there was a storm and water penetrated into Mr. Ryan's Unit and damaged some plaster and the parquet flooring, and on March 18, 2010, Mrs. Bird wrote YCC 340 to advise it about the incident.

[13] By April 8, 2010, YCC 340 had retained a contractor to repair around the exterior windows of the damaged Unit, and by letter, it advised Mrs. Bird about the repairs.

[14] On May 3, 2010, Mr. Ryan wrote YCC 340 to inquire whether his exterior wall would also be repaired, and on May 11, 2010, YCC 340 wrote Mr. Ryan to advise that arrangements would be made to do wall repairs.

[15] On May 18, 2010, Mrs. Bird phoned Property Management and outlined the water penetration issues. She was advised that YCC 340 was in the process of hiring a contractor to complete repairs to the Unit.

[16] In May 2010, Mr. Ryan underwent a radical prostatectomy for his Stage III prostate cancer and since that time he has been receiving ongoing treatments to prevent the spread of cancer. Around this time, Mr. Ryan moved to his family's farm property in Dacre, Ontario to recuperate from the surgery, and because of his absence, it was not possible to make immediate arrangements for the wall repairs.

[17] Pausing here, it should be noted that since May 2010, Mr. Ryan has commuted from Dacre to attend at the Credit Valley Cancer Centre for periodic treatments for his cancer. Dacre, Ontario is approximately 350 km from Toronto, 200 km from Ottawa and 125 km from Kingston, Ontario.

[18] Returning to the narrative, in November 2010, the Board of Directors of YCC 340 provisionally approved a major exterior repair project as recommended by its professional engineering consultant, Construction Control Inc. The project, however, was conditional on YCC 340 being able to arrange financing for the $4.0 million project. At that time, YCC 340 had only $500,000 in its reserve fund account and it already had loan indebtedness of $2.5 million.

[19] In December 2010, the Board of Directors directed its engineering consultant to prepare a report about the scope of work to repair all the buildings.

[20] On March 27, 2011, Mrs. Bird advised YCC 340 that dampness had been noted in Mr. Ryan's Unit and the floorboards had been removed in the den area. She pointed out that there was mould in the Unit. She wanted the water penetration issue to be resolved before the floor was restored.

[21] On April 16, 2011, Mrs. Bird discovered water damage and mould growth in Mr. Ryan's Unit. She reported the water damage in the den and the living room of the Unit to building maintenance staff. The maintenance staff attended at the Unit and confirmed that exterior repairs were needed. Around this time, Mr. Ryan made a decision not to return to the Unit because he believed it to be uninhabitable.

[22] Mr. Ryan decided to live at the family's farm property, of which he is a co-owner, until his condominium Unit was repaired. Prior to making the farm his home, Mr. Ryan paid half of the cost of its utilities, insurance, and taxes, but upon taking up residence at the farm, he paid all of these expenses. Meanwhile, he continued to pay his common area expenses, the special assessment, and his utility and realty tax expenses for his condominium Unit.

[23] On April 25, 2011, and again on May 2011, after a rainfall, Mrs. Bird inspected the Unit and found the floors and walls wet. She notified YCC 340 but heard nothing until July 2011 when she spoke to Management about the damage to the Unit.

[24] In October 2011, the Board of Directors sent a notice to all the Unit holders at the condominium that there would be no resolution of the building envelope problems until 2012 at the earliest.

[25] On October 17, 2011, the Board of Directors accepted a tender bid from Brada Construction to carry out exterior repair work to the project's buildings. The contract would be signed several months later.

[26] On October 20, 2011, there was another incident of water penetration at the Unit, and on October 24, 2011, Mrs. Bird reported to YCC 340 that there had been flooding in the Unit with water damage to both bedrooms and to the den.

[27] On October 30, 2011, Mrs. Bird inspected the Unit and found the floors remained wet.

[28] On November 23, 2011, Mrs. Bird spoke to the Property Manager, Nathalie Zupanovic, about more water being found at the Unit.

[29] On December 5, 2011, YCC 340 signed a construction contract with Brada Construction.

[30] Sometime after signing the contract, the Board of Directors levied a special assessment against all owners to pay for the exterior repair project. The assessment per Unit averaged $5,000 to be paid over a two-year period.

[31] On January 30, 2012, Mrs. Bird advised the Board of Directors of more water damage to the Unit. In her letter, she enclosed photographs. With this communication, the Board of Directors learned for the first time that Mr. Ryan had not been living in the Unit for over a year because he felt he was unable to do so.

[32] On February 3, 2012, Ms. Zupanovic attended at the Unit to review the damage.

[33] On February 14, 2012, YCC 340 directed Brada Construction to make temporary repairs until the major repair project commenced, the details of which were still being formulated. (The full scope of work was not finalized until the summer of 2013.)

[34] Meanwhile, temporary repairs were made to the Unit, and Mrs. Bird spoke to a Brada Construction employee who told her that the cement base of the Unit was cracked and there was deterioration with respect to the brick, mortar, and caulking. The employee provided Mrs. Bird with photos showing the problems.

[35] On February 18, 2012, the Board of Directors discussed the report of damage to Mr. Ryan's Unit. The minutes of the meeting note that a Board member suggested that everything be done to address the issue.

[36] On March 5, 2012, YCC 340 wrote Mr. Ryan to advise that temporary repairs to the exterior of the building at his Unit had been completed.

[37] After April 11, 2012, there were communications between Mrs. Bird and Mr. Sokolovic about the cost of repairing the Unit to "occupiable standards". Mrs. Bird complained that the condition of the Unit made it unfit for Mr. Ryan, particularly in light of his continuing treatment for cancer. She demanded a resolution of the problem, including an apology from the condominium corporation.

[38] On June 3, 2012, Mrs. Bird advised Mr. Sokolovic that the temporary repairs had not succeeded in arresting the water damage and another incident had occurred on June 2, 2013.

[39] In July 2012, Mrs. Bird accepted YCC 340's offer to pay $1,492.00 to have its contractors do the painting and plastering to Mr. Ryan's Unit, and she signed a release and waiver agreeing to indemnify and save harmless YCC 340 from any future claims.

[40] In February 2013, Mrs. Bird became a member of the Board of Directors of YCC 340.

[41] On April 7, 2013, water again penetrated into the Unit, resulting in damage, and on April 18, 2013, Mrs. Bird notified YCC 340 about the damage.

[42] On May 13, 2013, Mrs. Bird reported that there was water damage to Mr. Ryan's Unit in April 2013 after five days of heavy rain.

[43] On June 28, 2013, and July 8, 2013, water again penetrated into the Unit, and yet again, Mrs. Bird notified YCC 340.

[44] In August 2013, Brada Construction reported to the Board of Directors that it was in the process of completing the repairs to the building in which Mr. Ryan's Unit was located.

[45] On April 29, 2014, Mrs. Bird reported rainwater coming into Mr. Ryan's Unit, and the Unit was inspected by the building's Superintendent.

[46] On April 30, 2014, Mrs. Bird wrote YCC 340 and enclosed photographs of the damage and the presence of mould.

[47] On May 17, 2014, CCI Group Inc., an engineering consultant retained by YCC 340, inspected Mr. Ryan's Unit, and on May 27, 2014, it issued a report. Mrs. Bird was advised that a copy of its report would be sent to her, which did not occur until much later.

[48] On June 16, 2014, Mrs. Bird wrote about water - now in her own Unit - and about the water penetration issue in Mr. Ryan's Unit. She asked for a detailed response about the plans for repairs.

[49] On June 18, 2014, Mr. Sokolovic wrote Mrs. Bird and requested her permission to review the corporation's file, which he did not have access to without her permission because of privacy regulations. She, however, was not comfortable in providing this permission.

[50] On June 23, 2014, YCC 340 advised Mrs. Bird that Brada Construction was sending a scope of work in line with the engineer's recommendations.

[51] On July 18, 2014, Mrs. Bird retained a lawyer, Karen Kisel, to act for her in an attempt to resolve the ongoing water penetration issues. Mr. Ryan also engaged Mike Holmes Inspections to investigate and his report was sent to the Board of Directors some months later in October 2014.

[52] On August 6, 2014, Mrs. Bird's lawyer wrote the Board of Directors with respect to the problems in respect of her own Unit and with respect to Mr. Ryan's Unit.

[53] On August 15, 2014, CCI Group Inc. conducted a water test at Mr. Ryan's Unit. Mrs. Bird deposed that she saw water penetrating into the Unit following the testing.

[54] On August 25, 2014, CCI Group Inc. issued a report.

[55] On August 27, 2014, YCC 340 advised Mrs. Bird that quotes were being obtained for repairs to Mr. Ryan's Unit.

[56] By November 2014, a new window, new exterior bricks, a new flashing membrane, and replacement bricks were installed for Mr. Ryan's Unit in accordance with CCI Group Inc.'s recommendations.

[57] There have been no reports of water penetration since this work was completed in the fall of 2014.

[58] On April 1, 2015, Mr. Ryan's lawyer demanded that YCC 340 perform a pressurized water test of Mr. Ryan's Unit. Mr. Ryan's position was that he did not wish to restore the flooring in his Unit until confident that the expense would not be wasted by a further infiltration of water.

[59] On May 20, 2015, the engineering firm of Reid Jones Christofferson performed a water test (but not a pressurized test) at Mr. Ryan's Unit, and it found no evidence of leakage while its representative was on the premises. However, the representative invited Mrs. Bird to report if she discovered any infiltration after he left the premises. This is, in fact, what occurred, and Mrs. Bird photographed the walls where moisture could be noted and forwarded copies to YCC 340.

[60] On June 29, 2015, Mr. Ryan's lawyer demanded a copy of the engineer's report and demanded repairs to all deficiencies including the removal of any mould.

[61] In July 2015, the Board of Directors approved remediation for Mr. Ryan's Unit and in August 2015, it retained Spectrum, a mould specialist, to determine whether mould was present in Mr. Ryan's Unit. Spectrum confirmed the presence of visible and non-visible mould growth including elevated spore counts in the bedrooms and the den of Mr. Ryan's Unit.

[62] In August 2015, YCC 340 retained IBS Services to undertake mould remediation and the work was completed by September-October 2015 at a cost of $4,079.73.

[63] In December of 2015, YCC 340 retained another engineering consultant, Momentus Engineering, to inspect the Unit. It conducted a visual inspection and did not discover any evidence of water penetration or wetness in the Unit.

[64] There is no evidence that Mr. Ryan suffers from any mental health problem. There was no evidence of his receiving treatment from a psychologist or psychiatrist. He is not taking any medication for anxiety or stress.

[65] Mr. Ryan requests an award of damages of $78,897.63, representing the out-of-pocket costs incurred because his Unit has been uninhabitable and he submits in a dangerous state, plus $150,000 for mental distress, anxiety and psychological and emotional damages.

[66] Mr. Ryan calculates his special damages claim of $78,897.63 as follows:

- $37,457.07 - Common area expenses for the condominium Unit for 2011 to 2015
- $4,206.24 – Special assessment for building repairs for the condominium Unit
- $7,456.84 – Municipal realty taxes for the condominium Unit for 2011 to 2015
- $20,000 – Utilities and maintenance expenses for farm property
- $3,780 – Gas mileage expense for medical appointments 2011-2015 (28 trips)
- $5,997.48 – Legal expense.

E. DISCUSSION AND ANALYSIS

1. Statutory Provisions

[67] Mr. Ryan's claims rely on sections 17, 89, 90, 119, 134, and 135 of the *Condominium Act, 1998*, which state:

> *Objects*
>
> 17. (1) The objects of the corporation are to manage the property and the assets, if any, of the corporation on behalf of the owners.
>
> *Duties*
>
> (2) The corporation has a duty to control, manage and administer the common elements and the assets of the corporation.
>
> *Ensuring compliance*
>
> (3) The corporation has a duty to take all reasonable steps to ensure that the owners, the occupiers of units, the lessees of the common elements and the agents and employees of the corporation comply with this Act, the declaration, the by-laws and the rules.
>
> …
>
> *Repair after damage*
>
> 89. (1) Subject to sections 91 and 123, the corporation shall repair the units and common elements after damage.
>
> *Extent of obligation*
>
> (2) The obligation to repair after damage includes the obligation to repair and replace after damage or failure but, subject to subsection (5), does not include the obligation to repair after damage improvements made to a unit.
>
> *Determination of improvements*
>
> (3) For the purpose of this section, the question of what constitutes an improvement to a unit shall be determined by reference to a standard unit for the class of unit to which the unit belongs.

Standard unit

(4) A standard unit for the class of unit to which the unit belongs shall be,

(a) the standard unit described in a by-law made under clause 56 (1) (h), if the board has made a by-law under that clause;

(b) the standard unit described in the schedule mentioned in clause 43 (5) (h), if the board has not made a by-law under clause 56 (1) (h).

Transition, existing corporations

(5) A corporation that was created before the day this section comes into force and that had the obligation of repairing after damage improvements made to a unit before the registration of the declaration and description shall continue to have the obligation unless it has, by by-law, established what constitutes a standard unit for the class of unit to which the unit belongs.

Maintenance

90. (1) Subject to section 91, the corporation shall maintain the common elements and each owner shall maintain the owner's unit.

Normal repairs included

(2) The obligation to maintain includes the obligation to repair after normal wear and tear but does not include the obligation to repair after damage.

…

Compliance with Act

119. (1) A corporation, the directors, officers and employees of a corporation, a declarant, the lessor of a leasehold condominium corporation, an owner, an occupier of a unit and a person having an encumbrance against a unit and its appurtenant common interest shall comply with this Act, the declaration, the by-laws and the rules.

…

Compliance order

134. (1) Subject to subsection (2), an owner, an occupier of a proposed unit, a corporation, a declarant, a lessor of a leasehold condominium corporation or a mortgagee of a unit may make an application to the Superior Court of Justice for an order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules or an agreement between two or more corporations for the mutual use, provision or maintenance or the cost-sharing of facilities or services of any of the parties to the agreement.

Pre-condition for application

(2) 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.

Contents of order

(3) On an application, the court may, subject to subsection (4),

(a) grant the order applied for;

(b) require the persons named in the order to pay,

(i) the damages incurred by the applicant as a result of the acts of non-compliance, and

(ii) the costs incurred by the applicant in obtaining the order; or

(c) grant such other relief as is fair and equitable in the circumstances.

Order terminating lease

(4) The court shall not, under subsection (3), grant an order terminating a lease of a unit for residential purposes unless the court is satisfied that,

(a) the lessee is in contravention of an order that has been made under subsection (3); or

(b) the lessee has received a notice described in subsection 87 (1) and has not paid the amount required by that subsection.

Addition to common expenses

(5) If a corporation obtains an award of damages or costs in an order made against an owner or occupier of a unit, the damages or costs, together with any additional actual costs to the corporation in obtaining the order, shall be added to the common expenses for the unit and the corporation may specify a time for payment by the owner of the unit.

Oppression remedy

135. (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.

Grounds for order

(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.

Contents of order

(3) On an application, the judge may make any order the judge deems proper including,

(a) an order prohibiting the conduct referred to in the application; and

(b) an order requiring the payment of compensation.

2. Repair and Maintenance

[68] Pursuant to s. 89 (1) of the *Condominium Act, 1998*, YCC 340 has an obligation to repair the common elements after damage. Pursuant to s. 90 (1) of the *Act*, YCC 340 has a duty to maintain the common elements.

[69] In determining whether a condominium corporation has satisfied or breached its statutory duties to repair and maintain the common elements, courts apply a test of reasonableness: *York Condominium Corporation No. 59 v. York Condominium Corporation No. 87* (1983), 42 O.R. (2d) 337 (C.A.); *Roy v. York Condominium Corp. No. 310*, [1992] O.J. No. 4195 (Gen. Div.); *Wu*

v. Peel Condominium Corporation No. 245, 2015 ONSC 2801. See also *Mackay et al. v. Metropolitan Toronto Condominium Corporation No. 985*, 2014 ONSC 2863 and 2015 ONSC 7124.

[70] In *York Condominium Corporation No. 59 v. York Condominium Corporation No. 87*, the Court of Appeal described how the court should approach determining whether or not a condominium corporation has met the reasonableness standard for repairs. Justice Cory stated:

> 13. The concept of repair in such a situation should not be approached in a narrow legalistic manner. Rather, the court should take into account a number of considerations. They may include the relationship of the parties, the wording of their contractual obligations, the nature of the total development, the total replacement cost of the facility to be repaired, the nature of the work required to effect the repairs, the facility to be repaired and the benefit which may be acquired by all parties if the repairs are affected compared to the detriment which might be occasioned by the failure to undertake the repairs. All pertinent factors should be taken into account to achieve as fair and equitable a result as possible.

[71] As appears from the approach directed by the Court of Appeal, whether a condominium corporation has breached its repair and maintenance obligations is a fact-specific inquiry in the particular circumstances.

[72] In the immediate case, one difficulty of applying this contextual approach to reasonableness is that if one does a step-by-step analysis, then at any given step the conduct of the condominium corporation and the choices it made between making urgent repairs, temporary repairs, or permanent repairs was arguably reasonable; however, with the benefit of hindsight, i.e., a sort of "the proof of the pudding is in the eating" approach, the conduct of YCC 340 is shown to be unreasonable.

[73] If one examines the whole history and does not approach the facts incrementally, what emerges is that YCC 340 has had a known water penetration problem for over thirty years and has not fixed the problem. This is patently not reasonable. Even if one ignores YCC 340's state of knowledge acquired before 2010 about the existence of a water penetration problem, the stark fact emerges that Mrs. Bird and Mr. Ryan advised YCC 340 about the water infiltration problem in April 2010 and repeatedly thereafter, but it took YCC 340 until November 2014 (4.5 years) to effect repairs that appear so far to have arrested the water infiltration problem and another year to remediate the presence of mould.

[74] In my opinion, while one may have sympathy for the difficulties confronting YCC 340 in appropriately responding to the serious water infiltration problem, they did not address those difficulties reasonably and they breached their duty to repair damage.

3. Oppression Remedy

[75] The oppression remedy in the *Condominium Act, 1998* grants the court the jurisdiction to protect condominium owners, corporations, declarants, and mortgagees from unfair treatment. In *McKinstry v. York Condominium Corp. No. 472* (2003), 68 O.R. (3d) 557 (S.C.J.) at para. 33, Justice Juriansz (as he then was) described the nature of the court's jurisdiction as follows:

> 33. …. 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.

[76] The test for oppression has two parts: (1) the claimant must demonstrate that there has been a breach of its reasonable expectations; and (2) that, considered in its context, the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard": *Metropolitan Toronto Condominium Corporation No. 1272 v. Beach Development (Phase II) Corp.*, 2011 ONCA 667 at para. 6.

[77] The oppression remedy addresses three kinds of unfair conduct: (1) oppressive conduct; (2) unfairly prejudicial conduct; and (3) conduct that unfairly disregards the interests of the claimant.

[78] Oppressive conduct is coercive, harsh, harmful, or an abuse of power. Unfairly prejudicial conduct is conduct that adversely affects the claimant and treats him or her unfairly or inequitably from others similarly situated. Unfair disregard means to ignore or treat the interests of the complainant as being of no importance: *Niedermeier v. York Condominium Corp. No. 50*, [2006] O.J. No. 2612 (S.C.J.); *Walla Properties Ltd. v. York Condominium Corporation No.* 478, [2007] O.J. No. 3032 (S.C.J.), varied 2008, ONCA 461; *1240233 Ontario Inc. v. York Region Condominium Corp. No. 852*, [2009] O.J. No. 1 (S.C.J.); *Metropolitan Toronto Condominium Corporation No. 1272 v. Beach Development (Phase II) Corp., supra*; *Hakim v. Toronto Standard Condominium 1737*, 2012 ONSC 404; *Dyke v. Metropolitan Toronto Condominium Corp. 972*, 2013 ONSC 463; *Grigoriu v. Ottawa-Carleton Standard Condominium Corporation No. 706*, 2014 ONSC 2885; *Wu v. Peel Condominium Corporation No. 245, supra*; *3716724 Canada Inc. v. Carleton Condominium Corp. No. 375*, 2015 ONSC 6626.

[79] In *Walla Properties Ltd. v. York Condominium Corporation No. 478, supra*, at paras. 23-24, Justice Harvison Young described conduct that falls within the oppression remedy of the *Condominium Act, 1998* as follows:

> 23. In the corporate law context, oppressive conduct requires a finding of bad faith, while conduct that is unfairly prejudicial or that unfairly disregards the interests of the applicant does not: see *Brant Investments v. Keeprite Inc.* (1991), 3 O.R. (3d) 289 (C.A.) at 305-306. Oppressive conduct has been described as conduct that is burdensome, harsh and wrongful. Unfair prejudice has been held to mean a limitation on or injury to a complainant's rights or interests that is unfair or inequitable. Unfair disregard means to unjustly ignore or treat the interests of the complainant as being of no importance: see *Niedermeier, supra*, and *Consolidated Enfield Corp. v. Blair* (1994), 47 A.C.W.S. (3d) 728, [1994] O.J. No. 850 (Gen. Div.) at para. 80. Loeb suggests that in the context of condominium law:
>
> > ... "unfairly prejudicial" more appropriately describes deception, or different treatment for what may seem to be similar categories, whether financial or otherwise. "Unfairly disregards," however, may more accurately describe an alleged failure to take into account a legitimate minority interest or viewpoint: see Audrey M. Loeb, *Condominium Law and Administration*, looseleaf (Scarborough, Ontario: Thomson Carswell, 1998) at 23-23.

> 24. When determining whether conduct falls within the meaning of s. 135, the court must be mindful that the oppression remedy protects the reasonable expectations of shareholders or unit owners. Reasonable expectations should be determined according to the arrangements that existed between the shareholders or unit owners of a corporation: see *Naneff v. Con-Crete Holdings Ltd*. (1995), 23 O.R. (3d) 481 (C.A.). In addition, the court must examine the cumulative effect of the conduct complained of.

[80] A non-exhaustive list of some of the factors a court ought to consider when dealing with oppression in the context of the *Condominium Act, 1998* include: (a) the history, the size, structure and nature of the condominium corporation; (b) the type of interest affected; (c) general practice; (d) nature of the relationship between the complainant and the alleged oppressor; (e) the extent to which the impugned acts or conduct were foreseeable; (f) the expectations of the complainant; and (g) the detriment to the interests of the complainant. See *1240233 Ontario Inc. v. York Region Condominium Corp. No. 852, supra*, at para. 37.

[81] I have already found that YCC 340 breached its repair obligations. However, I find no evidence that its failures constituted oppressive conduct of any of its three possible manifestations. There never really was a dispute between Mr. Ryan and YCC 340.

[82] YCC 340 did not disagree that something had to be done to fix the water infiltration problems, and it did try to remedy the problems. Its conduct was ineffective until recently but it was not abusive or oppressive. I, therefore, dismiss Mr. Ryan's oppression remedy claim.

4. Quantification of Compensation

[83] I have found that YCC 340 has breached its repair obligations under the *Condominium Act, 1998*. Pursuant to s. 134 of the *Act*, when there is non-compliance with the *Act*, the court may require the condominium corporation to pay: (a) the damages incurred as a result of the acts of non-compliance; (b) the costs incurred by the applicant in obtaining the order; or (c) such other relief as is fair and equitable in the circumstances.

[84] Exercising the court's jurisdiction under s. 134 of the *Act*, I award Mr. Ryan $69,691.39, which may be broken down as follows:

- $37,457.07 –Common area expenses for the condominium Unit for 2011 to 2015
- $7,456.84 – Municipal realty taxes for the condominium Unit for 2011 to 2015
- $3,780 – Gas mileage expense for medical appointments 2011-2015 (28 trips)
- $5,997.48 – Legal expense
- $15,000 – For repairs to the interior of the condominium unit

[85] The explanation for this award is that because of YCC 340's failure to repair the damage to the common elements, Mr. Ryan's quiet enjoyment of his Unit has been disrupted and he was unable to enjoy the benefits of ownership. The expense he incurred for common area expenses and for municipal realty taxes was a wasted expense. He, therefore, is entitled to recover $37,457.07 and $7,456.84 respectively.

[86] He is also entitled to recover the travel expense to his medical appointments and his legal expenses. These were expenses he would not have incurred had YCC 340 complied with its obligations under the *Condominium Act*.

[87] Mr. Ryan, however, is not entitled to recover his $20,000 claim for utilities and maintenance expenses for the farm property. These expenses were not wasted, and it would be double counting to make an award on this account. He is also not entitled to recover his claim for the $4,206.24 special assessment, which is or will be used to effect repairs to the condominium buildings. As a unit holder, Mr. Ryan remains obliged to pay this expense, which will be for his benefit.

[88] I did not award Mr. Ryan any damages for mental distress, anxiety and psychological and emotional damages because he proved no loss under this head of damages.

[89] It is unfortunate that the ongoing history of water penetration problems at the condominium has added to the stress of his battling cancer, but absent his cancer, Mr. Ryan would not be entitled to damages for non-pathological mental distress occasioned by the condominium corporation's breach of its repair obligation, and sympathy for his medical condition is not a legal justification for making YCC 340 pay damages for additional mental distress. Here, it should be noted that there is no evidence that Mr. Ryan is even suffering a mental illness from his fight to survive cancer.

[90] I, however, have awarded Mr. Ryan $15,000 in general damages for him to make repairs to the interior of the Unit. Mr. Ryan has delayed making repairs because he wanted the assurance of additional water testing. While in one sense this was a reasonable or sensible request, it was, in my opinion, not a request for which the condominium corporation was obliged to do any more than it already has done. There has been no water intrusion reported after any storms since 2014 and YCC 340 dealt with the mould problem in the fall of 2015. I do not find that the photographs that Mrs. Bird sent to YCC 340 in 2014 prove that further repairs are necessary.

[91] Back in 2012, Mrs. Bird settled with YCC 340 about the damages that had occurred in Mr. Ryan's Unit up until then, and during argument YCC 340 conceded that the release it obtained from Mrs. Bird on Mr. Ryan's behalf does not cover the damages suffered since 2012. Further, it appears that repairs to the floor have never been completed. I believe that an award of $15,000 comes within the court's jurisdiction under s. 134 of the *Condominium Act, 1998*, to grant such other relief as is fair and equitable in the circumstances.

F. CONCLUSION

[92] For the above reasons, I award Mr. Ryan $69,691.39, plus pre-judgment interest in accordance with the *Courts of Justice Act*, calculated from the commencement of these proceedings.

[93] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Mr. Ryan's submissions within 20 days of the release of these Reasons for Decision, followed by YCC 340's submissions within a further 20 days.

Perell, J.

Released: April 13, 2016

CITATION: Ryan v. York Condominium Corporation No. 340, 2016 ONSC 2470
COURT FILE NO.: CV-15-537979
DATE: 20160413

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

PETER JOHN BART RYAN

Plaintiff

– and –

YORK CONDOMINIUM CORPORATION NO. 340

Defendant

REASONS FOR DECISION

PERELL J.

Released: April 13, 2016