

Case Name:

**Wellington Condominium Corp. No. 7 v. Hughes**

Between

Wellington Condominium Corporation No. 7, applicant, and  
Pamela Hughes et al., respondents

[2004] O.J. No. 4072  
Court File No. 212/04

**Ontario Superior Court of Justice  
MacKenzie J.**

Heard: June 1, 2004.  
Judgment: October 5, 2004.  
(25 paras.)

**Counsel:**

Edward L. D'Agostino, for the applicant.

No appearances for the respondents.

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REASONS FOR JUDGMENT

**MacKENZIE J.:**—

The Issue

¶ 1 Does Wellington Condominium Corporation No. 7 (WCC No. 7) or the unit owners therein (the Owners), have the obligation to replace windows and exterior doors servicing each unit that have worn out through normal wear and tear? This is the question for the determination of the court on the application by WCC No. 7 under Rule 14.05(3)(d) of the Rules of Civil Procedure.

Overview

¶ 2 The answer to the question will depend on the interpretation of the pertinent sections of the Condominium Act 1998, S.O. 1998, c. 19 Part VI, ss. 89-95 and ss. 11, 12 and 17 of the Declaration of WCC No. 7, together with the evidence and submissions in the application.

¶ 3 The position of WCC No. 7 is that the obligation to replace windows and exterior doors which have worn out from normal wear and tear is on WCC No. 7 and not on the Owners in respect of the windows and exterior doors which service their individual units.

¶ 4 Although the Owners have been duly served with Notice of the Application, none of them has filed a Notice of Appearance to the Application. In the result, there is no material nor submissions based on such material in opposition to the position being taken by WCC No. 7.

#### Analysis

¶ 5 The Condominium Act, 1998 (the Act) deals with the obligations of maintenance and repair of the units and common elements of a condominium's real property. In this regard, s. 90 of the Act places an obligation on condominium corporations to maintain the common elements and an obligation on unit owners to maintain their respective units. Section 91 of the Act however allows for alteration of the obligations by the declaration of the condominium corporation. In particular, a declaration may alter the obligation to maintain or repair after damage by providing that unit owners shall maintain and repair those parts of the common elements of which the owner has the exclusive use. Section 91 provides as follows:

91. The declaration may alter the obligation to maintain or to repair after damage as set out in this Act by providing that:

- (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 exclusive use; and
- (d) the corporation shall maintain the units or any part of them.

¶ 6 Section 7(5) of the Act provides:

7(5) If any provision in a declaration is inconsistent with the provisions of this Act, the provisions of this Act prevail and the declaration shall be deemed to be amended accordingly.

¶ 7 Section 89 sets out the obligations on the condominium corporation and on unit owners to repair and maintain the condominium property. The pertinent parts of s.89 provide as follows:

89(1) Subject to ss. 91 and 123, the corporation shall repair the units and common elements after damage.

- (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. [my emphasis]

¶ 8 The foregoing provisions set out the general legislative framework for the issues raised in the question before the court.

¶ 9 Regard must now be had to the Declaration of WCC No. 7 (the Declaration) regarding the repair obligations of the condominium corporation and unit owners. Part IV of the Declaration entitled "maintenance" provides as follows:

s. 11 By the corporation

Subject to Clause 12 hereof, the corporation shall maintain all of the common elements including without limiting the foregoing:

- (a) all outside surfaces of the building including painted surfaces, roofs, eavestroughs that are constructed or installed at the date of registration of this Declaration and the description; [sic]
- (b) the partition walls between the units;
- (c) all lawns, shrubs and landscaped areas, sidewalks, walkways, driveways, parking spaces, all electrical wiring circuits and lighting fixtures and light bulbs, sewer and water pipes in the common elements, notwithstanding such maintenance may be required as a result of reasonable wear and tear or otherwise.

s. 12 By the unit owner

Each unit owner shall maintain his unit or units (which shall include exterior windows and doors servicing his unit or units) and that portion of the common elements, if any, of which he has exclusive use pursuant to clause 8 hereof. [my emphasis]

¶ 10 The Declaration creates an obligation on WCC No. 7 to repair after damage, in the following terms:

- s. 17 Subject to the provisions of the Act and the Declaration, the corporation shall repair the units and common elements after damage.

¶ 11 It is therefore necessary to determine the boundaries of the units and the description of the common elements in WCC No. 7.

¶ 12 The unit boundaries are described in Schedule C of the Declaration as follows:

- (a) Units 1 to 60, inclusive

Vertical [not applicable here]

Horizontal

All such units are bounded by the interior faces of the structural walls and their projections, the unfinished interior surfaces of the exterior doors (including garage doors in a closed position if garage is part of the unit), windows and window frames. [my emphasis]

...

(b) Units 61 to 98, inclusive

[the horizontal boundaries for these units do not refer to windows and are accordingly not pertinent in this application.

¶ 13 The definitions of "unit" and "common elements" are found in the Act. Section 1(1) of the Act defines "unit" as follows:

"Unit" means a part of the property designated as a unit by the description and includes the space enclosed by its boundaries and all of the land, structures and fixtures within this space in accordance with the declaration and description. [my emphasis].

S. 1(1) of the Act defines "common elements" as meaning "all the property except the units".

¶ 14 As noted above, the owners of units are responsible for maintaining their units and the condominium corporation is responsible for maintaining the common elements: s. 90(1) of the Act.

¶ 15 The obligation to maintain or to repair after damage may be altered by and tear but does not include the obligation to repair after damage: s. 90(2) of the Act.

¶ 16 The obligations to maintain or to repair after damage may be altered by the declaration. The declaration may also provide that unit owners maintain common elements or any part of them and maintain and repair after damage those parts of the common elements of which the owner has the exclusive use: See s.91(a), (b) and (c). In this case, the common elements of which the owner has the exclusive use are the windows and exterior doors servicing the owner's unit.

¶ 17 The Declaration in s.12 has altered the owners' maintenance obligations. Section 12 states, in part, that the unit owner shall "maintain his unit or units (which shall include the exterior window and doors [sic] servicing his unit or units) and that portion of the common elements (if any) of which he has exclusive use..."

¶ 18 It may be seen from the above provisions in the Act and Declaration that there is a distinction drawn between repair and maintenance, repair after normal wear and tear and repair after damage.

¶ 19 It is not in dispute that the windows and exterior doors servicing the units are exclusive use common elements and not part of the common elements and that the Owners have the obligation to repair windows and exterior doors after normal wear and tear. However, the gist of the position of the WCC No. 7 is that the terms "repair after damage" and "maintain" as used in the above sections and Declarations have different meanings. Counsel submits that "maintain" or "maintenance" includes the obligation to repair windows and exterior doors after normal wear and tear but falls short of and does not include the obligation to replace windows and exterior doors in any circumstance, including after normal wear and tear. He contends that under s.89(2) of the Act, the obligation to repair after damage expressly 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 [my emphasis]. (Sub-section 5 is a transitional provision which has no effect on the issue herein).

¶ 20 Counsel submits that the term "failure" in the context of s. 89(2) and the Act as a whole should be interpreted as a state where the article ceases to be operative as originally designed or intended and has no residual value, in terms of its repair costs being equivalent to or exceeding its replacement cost. On this interpretation, it is submitted that:

- (a) an item that has not yet failed would be maintained or repaired and covered under the heading of "maintenance"; and
- (b) an item that has failed and no longer performs its normal function could either be repaired or replaced and is covered under the heading of "repair after damage".

In other words, whether an item is to be "maintained" or "repaired after damage" would be determined whether there has been failure of the item according to the above interpretation.

¶ 21 I have not been referred to any authorities dealing with the issue arising in this application: counsel has informed me that as this is relatively new legislation, he is unaware of any authorities dealing with the question.

¶ 22 I am unable to give effect to the submission that "failure" as the term is used in s. 89 should be given the interpretation contended for, namely, that the item ceases to be operative as originally designed and has no residual value. In my view, the word "failure" used in s. 89(2) is equally susceptible of being interpreted as a cessation of function due to manufacturing or installation defects as it is to a cessation of function without residual value in terms of repair costs being equivalent to or exceeding replacement costs.

¶ 23 It remains open to WCC No. 7 (or any condominium corporation), to provide in its declaration to have WCC No. 7 (or any condominium corporation) assume the obligation to replace windows and exterior doors as a result of failure through normal wear and tear. In so doing, WCC No. 7 (or any condominium corporation) will be able to articulate the standard for "normal wear and tear" in context.

## Disposition

¶ 24 In the result, I find that the Owners have the obligation to replace windows and exterior doors servicing their units where such windows and exterior doors have worn out through normal wear and tear.

¶ 25 As this is a novel point of law and no costs were sought by the applicant, no award shall be made.

MacKENZIE J.

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