CITATION: Wu v. Peel Condominium Corporation No. 245, 2015 ONSC 2801
COURT FILE NO.: CV-14-146-00
DATE: 2015-05-06

2015 ONSC 2801 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: JIAKANG WU and
PEEL CONDOMINIUM CORPORATION NO. 245

BEFORE: LEMON J.

COUNSEL: Megan Mackey, for the Applicant

Michael A. Spears and Mark Willis-O'Connor, for the Respondent

JUDGMENT

The Issue

[1] Ms. Wu says that she has been oppressed by Peel Condominium Corporation No. 245. She alleges that it has failed to maintain the common elements at her condominium. In particular, she states that the elevators are causing excessive noise and vibrations in her unit. She claims that Peel attempted to interfere with test results confirming the existence of the problem.

And, finally, she says that Peel has failed to produce documents that she is entitled to review.

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[2] If I find that Ms. Wu has been oppressed by Peel, she seeks an order that:

a. Peel follow its consultant's recommendations and take whatever steps necessary to bring the level of noise and vibrations experienced within her unit to an acceptable level, with the repairs to be completed within the next 60 days;

b. Peel not dismiss the problems as resolved until its acoustic engineers and, if necessary, an independent expert acoustic consultant confirm that the levels of noise and vibrations being experienced within her unit are within acceptable levels;

c. Peel direct all engineers and professionals involved with her unit, including Valcoustics, to release any and all information and or documents about her unit directly to her, and an Order directing Peel to instruct its engineers and professionals to answer Ms. Wu's questions relating to their reports and recommendations;

d. Peel pay a $500 penalty fee to her in accordance with subsection 55(8) of the *Condominium Act, 1998* for refusing to provide relevant documents within a reasonable amount of time;

e. Peel return the $150 payment that she made relating to production of documents.

f. Peel pay $150,000 per annum compensation for the ongoing physical suffering, mental anguish and distress she and her family have been enduring, for the loss of comfort and quiet enjoyment of their home, and for the traumatic impact on them going forward as a result of the respondent's failure to comply with the *Condominium Act, 1998* and its Declaration;

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[3] The parties confirmed that they wished to proceed on the written record. They did not wish to call witnesses or avail themselves of cross-examination, except as they had carried out on the affidavits.

[4] For the following reasons, I find that Ms. Wu has been oppressed by Peel and her interests have been unfairly prejudiced and unfairly disregarded. On the materials I have to date, the remedy is harder to find.

Legal Authorities

[5] The most significant issue in this proceeding is whether Ms. Wu was oppressed by Peel. Before setting out the factual background, the reader might be assisted by a review of what oppression is in the area of condominium law.

[6] In *Hakim v. Toronto Standard Condominium 1737*, 2012 ONSC 404, B. O'Marra J said:

> **OPPRESSION REMEDY**
>
> [30] On application to the Superior Court, if it is found 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, an order to rectify the matter may be made. The judge may make any order deemed proper including:
>
> a) an order prohibiting the conduct referred to in the application; and
> b) an order requiring the payment of compensation. s.135(1) (2) & (3)
>
> [31] Section 135 of the Act came into effect in 2001. Courts in Canada have dealt with oppression remedies for many years in the context of company law. Those cases have considered whether the conduct complained of falls under the three types enumerated under statute, namely:
>
> i) oppression;
> ii) unfair prejudice; or
> iii) unfair disregard.
>
> [32] The courts have not drawn clear lines between any of the three statutory tests and have often found that conduct may fit into one or more of the categories. Unfair prejudice and unfair disregard are less rigorous tests than oppression. *Niedermeier v. York Condominium Corporation No. 50* (2006), 45 R.P.R. (4th) 182, at para. 4 ("*Niedermeir*")
>
> [33] *Oppression* is conduct that is coercive or abusive. Oppression has also been described as conduct that is burdensome, harsh and wrongful, or an abuse of power which results in an impairment of confidence in the probity with which the company's affairs are being conducted.
>
> [34] *Unfair Prejudice* has been found to mean a limitation on or injury to a complainant's rights or interests that is unfair or inequitable.
>
> [35] *Unfair Disregard* means to ignore or treat the interests of the complainant as being of no importance. *Niedermeier*, *supra*, at paras. 5-8.
>
> [36] Courts in Ontario have held that the use of the word "unfairly" to qualify the words "prejudice" and "disregard" suggest that some prejudice or

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disregard is acceptable provided it is not unfair. *Niedermeier*, *supra*, at para. 9.

[37] The oppression remedy is broad and flexible, allowing any type of corporate activity to be subject of judicial scrutiny. 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. *McKinistry v. York Condominium Corporation No. 472* (2003), 2003 CanLII 22436 (ON SC), 68 O.R. (3d) 557 (S.C.), at para. 31 ("*McKinstry*")

[38] Section 135 protects legitimate expectations and not individual wish lists, and 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 assets. *McKinstry*, *supra*, at para. 33.

[39] The duties of the condominium Board include the following:

1. The corporation has a duty to control, manage and administer the common elements and the assets of the corporation. s.17(2)

2. The corporation has an obligation to enforce the Act, Declaration, bylaws and rules against owners and occupiers of a unit. s.17(3)

3. The 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 the Act, the declaration, the bylaws and the rules. s.119(1)

[40] It must be recognized that the Board is charged with the responsibility of balancing the private and communal interests of the unit owners, and their behaviour must be measured against that duty. The court does not look at the interaction between the Board and the applicant in isolation. The conduct of the corporation must be viewed in light of the behaviour of the applicant. *Orr v. Metropolitan Toronto Condominium Corporation No. 1056,* 2011 ONSC 4876, at paras. 158-160, 165 & 166 ("*Orr*")

[41] The court in exercising its discretion must balance the reasonable expectations of an owner with the duties of the Board to the ownership at large. *Orr*, *supra*, at para. 171.

[42] The test for oppression is two-pronged. The claimant must first demonstrate that there has been a breach of its *reasonable* expectations. If that is established, the court must consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard". *BCE Inc. v.*

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1976 Debentureholders, 2008 SCC 69, at para. 56 ("*Debentureholders*")

> [43] The concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue and the entire context, including the fact that there may be conflicting claims and expectations. *Debentureholders*, *supra*, at para. 62.

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Background

[7] Although the parties argued that I should make findings of credibility or motive on the materials before me, I cannot do so. I have therefore utilized counsel's factums to set out their sides of the story as amended by me for readability.

[8] Ms. Wu purchased Unit 10, Level 24 within the Peel condominium on February 28, 2008 for $158,000. Her unit is on the highest residential floor. It is a one bedroom apartment with an enclosed room partitioned off from the original living room. The unit is shown in one of Peel's documents to be 838 square feet. The mechanical, elevator, and HVAC equipment which service the entire building are located on the level above her unit.

[9] Peel is a non-profit condominium corporation whose purpose is to manage and administer the property. The property comprises 278 residential units and their common interests. Peel is run by a volunteer board of directors

elected by the condo-unit owners in the building. There is one on-site property manager.

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[10] Since February 28, 2008, Ms. Wu has owned and occupied the unit with her parents. For the first six months of their occupancy, they did not experience any problems with noise or vibration. However, in September 2008, noise and vibration began to affect Ms. Wu's unit. She described the noise and vibrations separately.

[11] She sets out in her affidavit that the noise sounds like a subway train is passing by overhead, or like a helicopter flying above, or like a motorcycle roaring right in front of her. There is a constant loud noise in the main bedroom, like a sudden change of gears, and on windy days something can be heard dropping and rolling above the ceiling in the main bedroom.

[12] The first time she felt the vibrations, she thought there was an earthquake. Her bed was moving under her. When on her bed, she feels like she is sleeping on a moving train. When she sits in her unit, she can feel something vibrating under her feet and chair. The vibrations are worse when the building's heating and central air are on, even when Ms. Wu shuts off those

systems within her own unit. Ms. Wu's furniture has moved so much over time that it has left marks on the floor.

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[13] The vibrations are so problematic that Ms. Wu cannot sleep, do work at her desk or enjoy peace in her unit. Since September, 2008 a big part of Ms. Wu's living area has become a storage area as this is the area closest to some of the sources of the problems. Ms. Wu has been sleeping on a couch in her living room and has moved one of her desks away from the living area to another spot in the unit because noise coupled with the vibrations make it impossible for her to work in the area she was originally using.

[14] Ms. Wu reported the problem to Peel in September of 2008. Peel initially denied there was a problem and did nothing to address Ms. Wu's concerns. When these discussions were unsuccessful, Ms. Wu filled out a work order describing the problem. The problem remains unresolved more than six years later.

[15] In response, Peel says that it has undertaken investigations and repairs on an ongoing basis. All investigations and repairs have been taken on the advice of professional engineers, consultants, and contractors.

[16] Between 2009 and 2013, board members, property management, and security staff inspected the unit in Ms. Wu's presence on at least 6 different occasions. Not once did any of them report that noise and vibration levels were excessive, objectionable, or beyond normal background noise.

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[17] Peel says that no other Peel resident has reported noise and vibration complaints similar to Ms. Wu's. This includes the residents of the 23 units directly below Ms. Wu's 24th floor unit – and those units share the same original design and proximity to the make up air unit and elevators as Wu's unit.

[18] Ms. Wu has consistently maintained that the unit was very quiet between February and September 2008. Ms. Wu has since reported "constant", "excessive" noise and vibration from the make up air unit and elevators into the unit. No make up air unit or elevator repairs or modifications were made in or after September 2008. Peel submits that Ms. Wu has not provided any explanation for this discrepancy.

<u>What did Ms. Wu do?</u>

[19] From 2009 to 2013, Ms. Wu repeatedly followed up with Peel but nothing was resolved.

[20] In an effort to get Peel to repair the common elements and stop the noise and vibrations from entering her unit, she:

a. Called the property manager's superior twice in March, 2009;

b. Invited the Board of Directors to her unit to see the problem in March of 2009;

c. Showed up at the door of a board member on March 25, 2009 and attempted to speak to directors at the March 2009 board meeting;

d. Had the superintendent visit her unit twice in March of 2009 and make another visit in September, 2011;

e. Had the property manager into her unit on December 14, 2010 and in September of 2011;

f. Verbally followed up repeatedly thereafter;

g. Wrote 16 letters and emails to Peel between March 18, 2009 and August 15, 2012;

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h. Opened her unit so that Peel's engineers could conduct sound testing in August, 2009, May 2, 2013, and June 2014;

i. Followed up on multiple occasions with Peel and the engineers directly in an attempt to secure copies of the reports from the tests performed by Peel's engineers; and

j. Hired a lawyer, served a Notice of Dispute, and attended a meeting with Peel and the lawyers in March of 2013.

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[21] Peel acknowledges that between November 18, 2008, and August 15, 2012, there were 17 identifiable requests and concerns from Ms. Wu to Peel to investigate and repair the sources of noise and vibration.

What did Peel Do?

[22] Peel's investigations and repairs have been ongoing since March 2009. Between March 19, 2009, and December 22, 2014, Peel says that there were 33 identifiable steps that it has undertaken to investigate and repair the sources of alleged noise and vibration.

[23] Following Ms. Wu's March 15, 2009 complaint, Peel retained Honeywell Limited to investigate the noise complaint and carry out repairs. That occurred on March 18, 2009.

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[24] On March 26, 2009, its security service attended Ms. Wu's unit on two separate occasions. Security reported a normal sound level and did not feel or hear any vibrations.

[25] Between April 3 and 10, 2009, Honeywell isolated the make up air unit and installed new duct work, high grade insulation, and noise mufflers above the unit. Honeywell also installed a new isolation spring for the chiller.

[26] Peel retained acoustical engineers to conduct a test to determine whether or not there was a problem. On August 20, 2009, Valcoustics Canada Ltd. performed site visits to the unit to investigate noise complaints and take sound level measurements.

[27] One issue between the parties is that Ms. Wu says that Peel instructed its engineers to test only for noise and not vibration, which was a bigger problem. She says that Peel attempted to alter the test results by shutting down the elevator closest to Ms. Wu's unit which creates the most noise.

[28] Even though that elevator was not working during the test, Peel's acoustical engineers found the level of noise entering Ms. Wu's unit above the appropriate criterion. The report dated December 10, 2009 makes recommendations as to what Peel can do to resolve the problem. Valcoustics recommended a two-stage approach regarding the unit (stage 2 conditional on stage 1 not working). Stage 1 work was completed and the unit was re-tested to confirm whether the repairs resolved the issue. After re-testing the unit, Valcoustics advised that performing the work in Stage 2 would not significantly reduce noise transmission and different noise mitigation repairs were recommended instead.

[29] On February 1, 2010, KONE Inc. was consulted to ensure that sound proofing measures formed part of the elevator modernization project that was already planned for the building.

[30] On March 29, 2010, Peel retained Honeywell to isolate the existing make up air unit duct work; install new duct work with high grade insulation and noise mufflers; and install a new isolation spring for the chiller.

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[31] On April 1, 2010, the elevator modernization project commenced, including replacing all three elevators, the equipment in the machine room, and appurtenant work.

[32] On June 30, 2010, Honeywell inspected Ms. Wu's unit's valve motor, fan motor, and thermostat. Honeywell reported that everything was operating satisfactorily.

[33] On November 29 and December 13, 2010, Peel requested Takamaki Consultants Inc. to inspect noise concerns regarding elevators #2 and #3.

[34] On December 27, 2010, Takamaki delivered its report recommending replacement of the guide shoes and elevator door.

[35] On January 4, 2011, Takamaki delivered a report regarding repairs to terminal slow down switches and ordering new circuit boards.

[36] On March 2011, KONE replaced the guide shoes in the elevators.

[37] In September of 2011, the property management and superintendent attended the unit and reported a normal sound level for a living room.

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[38] By letters dated October 3, 2011 and December 5, 2011, Peel advised Ms. Wu that it would not do any work because her unit was alleged to be "non-standard".

[39] On October 18, 2011 Peel again retained Valcoustics to perform post-remedial sound measurements after completion of stage 1 repairs in the unit.

[40] On June 12, 2012 there was a site visit from Honeywell regarding vibrations from the cooling tower piping in the chiller room.

[41] On August 24, 2012, Peel requested another opinion from Valcoustics regarding noise and vibration in the living room. On the same date, HVAC Dimensions Ltd. repaired the cooling tower piping in the chiller room.

[42] By letter dated October 9, 2012, Peel advised Ms. Wu that "The Board feels that the Corporation has done as much as it can to resolve your noise/vibration complaint."

[43] Ms. Wu retained counsel in 2013 and a meeting was held between the parties and their lawyers in March, 2013. During that meeting, Peel agreed to fix the problem.

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[44] Despite agreeing to fix the problem in March 2013 and obtaining another test which confirmed the problem persisted, Ms. Wu says that Peel took no steps to abate the noise and vibration in her unit.

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[45] On May 2, 2013, Valcoustics performed a second sound investigation in the unit. The original report from the May 2013 sound test is dated May 27, 2013. However, Peel did not produce this report to Ms. Wu until August 28, 2013. She submits that Peel had instructed its engineers to alter the report and remove on-site observations and other data from the report. The version of the report produced to Ms. Wu was approximately the sixth version of the report. Ms. Wu believes that Peel did not want her to see how they had edited the report.

[46] Two days before the May 2, 2013, test, Peel performed maintenance on the roof, greasing the fresh-air-makeup unit (which had been a large source of complaints) and other items. During the test, elevator 2 again appeared to Ms. Wu to be shut down as it remained stuck on the 22nd floor.

[47] On August 28, 2013, Valcoustics delivered a final copy of its Sound Measurements Report.

[48] On November 8, 2013, Valcoustics collected vibration and sound level measurements from the elevator machine room in order to assess the effectiveness of the existing vibration isolation of the elevator machines.

[49] By letter dated November 15, 2013, Ms. Wu wrote to Peel and told them she would bring this application for oppression if Peel did not address the problem by December 31, 2013. Peel did nothing in response to this letter.

[50] On December 19, 2013 Valcoustics delivered its Elevator Noise Mitigation Report recommending that the elevator machines be decoupled and vibration isolated from the structure.

[51] On December 23, 2013, Peel retained Takamaki and KONE to review Valcoustics' report and supervise the elevator repair project.

[52] On February 25, 2014, following a review of Valcoustics' report, Takamaki Consultants and KONE attended on site to make observations and collect data.

[53] On April 27, 2014, Takamaki and KONE recommended replacing the machine isolation pads on Elevator #3, prior to exploring other options should they be necessary.

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[54] On June 3, 2014, KONE attended on site to replace the machine isolation pads on Elevator # 3.

[55] Apparently after being served with this Notice of Application on June 18, 2014, Peel replaced elevator pads underneath elevator number 3 which did not alleviate the problem. Ms. Wu says that replacing some elevator pads is the only step Peel has taken to abate the noise and vibration since they agreed to fix the problem in March 2013.

[56] On June 19, 2014, Valcoustics collected follow-up vibration measurements in the elevator machine room.

[57] On June 27, 2014, Valcoustics collected sound measurements in the unit.

[58] On July 9, 2014, Valcoustics delivered its Elevator Noise Mitigation Follow-up Measurements Report recommending further investigations and repairs to reduce the transmission of noise to the unit.

[59] On July 11, 2014, Peel retained CDMca Ltd., which specializes in the design, manufacture, and implementation of customized noise and vibration solutions.

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[60] On September 25, 2014, CDM delivered a "Site Visit Summary" concluding that most of the vibration is attributable to elevator number 2 and recommending a two-step solution to be implemented by the manufacturer under CDM's supervision.

[61] Peel states that it intends to follow these recommendations but could not answer when the specifications for this work would be ready or when the work was expected to be done. As of the date of the argument, Peel did not have a quotation for the work.

[62] In Cross-examination on December 19, 2014, the representative of Peel, Mr. Nolevski said:

> Q. No. I asked you what have been done since March 12 of 2013. That is my question.
>
> A. That's correct.
>
> Q. And you've just told me some elevator pads that were replaced on June 3rd, 2014?
>
> A. Right.
>
> Q. Were there any other steps?
>
> A. There were not.
>
> Q. No. So between March 12, 2013 and today, the only thing that the corporation has done to try and fix the problem is replace some elevator pads under elevator three?
>
> A. That is correct.
>
> Q. So you say here PCC 245 agreed to resolve the problem?
>
> A. Yes.

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> Q. Have they met what you say they agreed to do? Have they accomplished that?
>
> A. We are continuing to work towards it, yes.
>
> Q. So they haven't accomplished it?
>
> A. We are continuing to work towards resolving the issue.

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[63] On December 22, 2014, Peel received an Email from another engineer specializing in noise and vibration reduction who confirmed a likely source of noise and recommended a repair methodology.

[64] Peel has spent $31,273.57 for engineers, consultants, and contractors to address Ms. Wu's noise and vibration complaints. This amount does not include $437,203.42 incurred by Peel for the elevator remodernization project that incorporated repairs to address Ms. Wu's complaints.

Unit Not Designed for a Second Bedroom

[65] The discussion now needs to leave the chronology and focus on a different issue that relates to Peel's position in this proceeding.

[66] Peel says that the noise problems may relate to a room that was created by closing in part of the living room in Ms. Wu's unit. In the Valcoustic report of December 10, 2009, it is said that if the first stage were unsuccessful:

> Additional layers of gypsum wall board (gwb) and/or resilient clips could be added to the existing demising partition between the mechanical/elevator shaft and the suite PH10. This will increase the transmission loss of the wall and decrease the amount of noise entering the suite. If this step is considered necessary, a later assessment of the expact construction should be done when the architectural drawings become available. Note, any additional structure would have to be added to the suite side of the wall and this would ultimately reduce the useable space in the suite.

[67] This suggests that some of the solution needed to be carried out in Ms. Wu's unit and by her. Accordingly, the history of the renovations in her unit is necessary.

[68] It is agreed that Ms. Wu's living room was altered to create a second bedroom/den. This occurred in 2006 or 2007. That alteration was done by one of the present board members. By letter dated December 5, 2011, Peel advised Ms. Wu that it would not perform any work in her unit because Peel had conducted some "research" and determined that Ms. Wu's unit did not comply with a City by-law.

[69] The unit was originally designed to include only one bedroom. The condominium plans describe this bedroom as a "master bedroom". The master bedroom is located furthest from the make up air unit and elevators. Ms. Wu's parents occupy the master bedroom. The second bedroom is located closest to

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the make up air unit and elevators. It directly abuts the make up air unit and two elevators.

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[70] Among the 278 residential units comprising the building, Ms. Wu's unit is the only one with a bedroom directly abutting a make up air unit or an elevator. The 23 units directly below Ms. Wu's 24th floor unit exhibit the same original design, but their living rooms have not been converted into a second bedroom.

[71] Ms. Wu's living room as originally designed contained a window that opened to the outside air and light. The second bedroom is enclosed by drywall from the original living room and does not contain any windows or skylights that open to the outside.

[72] Peel submits that the second bedroom, therefore cannot be used as a "habitable room" or for "human habitation", in contravention of subsection 42(3)(b) of The Corporation of the City of Mississauga's Property Standards By-law 654-98 (the "Property Standards By-law"). The second bedroom also violates subsection 22(1) of O. Reg. 517/06 under the *Residential Tenancies Act, 2006*.

[73] Ms. Wu is also in violation of Rule 7 under the "SAFETY" portion of Peel's Rules and Regulations. Rule 7 states that a resident shall not permit his or her unit to conflict with any statute or municipal by-law.

[74] Peel's status certificate expressly states that a prospective purchaser is responsible for reviewing Peel's declaration and description to determine whether any modifications have been made to the unit. Ms. Wu's realtor advised her prior to her purchase of the unit that the original design had been altered.

[75] Although two individual board members knew about the alteration shortly after it was completed in 2006-2007, it was never brought to the entire board's attention or approved. Peel's board of directors first became aware in 2011 that the second bedroom violates the Property Standards By-law and Rule 7. Had the two board members known about these restrictions in 2006-2007, the altered second bedroom would have been brought to the board's attention and would not have been permitted.

[76] In 2011, the board asked Ms. Wu to consult with the City to resolve her non-compliance. To date, Wu has apparently taken no steps to contact the City.

The Valcoustic Reports

[77] As set out above, Valcoustics performed three sound level tests in the unit. Those tests were carried out August 20, 2009, May 2, 2013 and June 19, 2014. Those reports are relied on by both parties.

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[78] Peel submits that the sound levels measured in all three tests fall within the acceptable range for a living room. There are no legislated indoor sound limits. However, Valcoustics reports that the American Society of Heating, Refrigerating and Air-Conditioning Engineers suggests noise criteria ("NC") levels between NC-25 to NC-35 for residences, apartments, and condominiums. It is generally understood that bedrooms should be at the lower end of the range and non-sleeping (i.e. living rooms) at the higher end of the range.

[79] Peel says that all three tests measured the sound levels in the altered second bedroom between NC-25 to NC-35. In Valcoustics' first two reports dated December 19, 2009, and May 27, 2013, Valcoustics refers to this room as a "small bedroom" and it is not evident whether it knew that it had been altered from a living room.

[80] No control unit was measured to determine if the sound levels were similar to those measured in the unit. It is unknown whether the living rooms in the 23 units directly below Ms. Wu's 24th floor unit (none of which had been converted into a second bedroom) encountered similar noise from the abutting elevators and make up air unit.

[81] Ms. Wu points out that all three reports confirm noise levels above NC-35.

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Positions of the Parties

Repair

Ms. Wu

[82] Ms. Wu submits that Peel has a duty to maintain and repair the common elements pursuant to Sections 89 and 90 of the *Condominium Act, 1998* S.O. Those sections state that the corporation shall repair the units and common elements after damage and shall maintain the common elements. The duty to maintain includes a duty to repair or replace components when necessary as a result of normal wear and tear. See: *Laidis v. MTCC No. 727,* 2005 CarswellOnt 2977 at paras 17-19.

[83] Ms. Wu's position is that where a condominium corporation fails to respond to unit owner complaints with "sufficient dispatch", the condominium corporation is not in compliance with its obligations under ss. 89 and 90 of the *Condominium Act, 1998.*

[84] Ms. Wu submits that Peel has a statutory obligation to undertake any maintenance, or to effect any repair or replacement to the common elements or equipment that is necessary to bring noise and vibration levels in her unit to within an acceptable range. Having not yet taken these steps, despite being

notified of the noise and vibration issues in the fall of 2008, Peel is in breach of its obligation to repair under the *Act*.

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Peel

[85] In response, Peel submits that it has, at all times, taken timely, but unsuccessful, steps to detect and alleviate the source of noise and vibration problems. Peel says that it has acted reasonably and attempted to address the difficulties through professional engineers and contractors.

[86] Peel says that a test of reasonableness must be followed to assess whether a condominium corporation has complied with its obligation to maintain and repair the common elements. See: *Buskell v. Linden Real Estate Services Inc.*, 2003 MBQB 211 at para. 19. Under that test, I should look at whether the corporation acted reasonably and without negligence. See: *Starostine v. Peel Condominium Corporation No. 151 et al.*, Court File No. SC-13-99443 at pages 5-6. The corporation is not an insurer and is not burdened with strict liability. There is no standard of perfection in these circumstances.

[87] Peel submits that it is entitled to rely upon and be guided by professional advice. Should it turn out that those they hire to carry out work fail to do so effectively, the corporation cannot be held responsible as long as it acted

reasonably in the circumstances. The presence of a problem within the unit does not, on its own, prove liability.

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[88] Finally, there can be "good, better or best" solutions available. Choosing a "good" solution rather than the "best" solution does not render that approach unreasonable such that judicial intervention is warranted. In carrying out its duty, the corporation must act in the best interests of all the owners and endeavour to achieve the greatest good for the greatest number. That involves implementing necessary repairs within a budget that the owners as a whole can afford and balancing competing needs and priorities. See: *Weir v. Strata Plan NW 17*, [2010] B.C.J. No. 1057 at paras. 28-31

Relief from Oppression

Ms. Wu

[89] By reason of Peel's repeated and ongoing breaches of the *Condominium Act, 1998*, Ms. Wu submits that Peel is "oppressive or unfairly prejudicial" to her and the conduct of Peel "unfairly disregards" her interests.

[90] She says that the following illustrates how Peel has acted and continues to act in an oppressive or unfairly prejudicial manner and has unfairly disregarded her interests:

(a) Ms. Wu has been suffering for more than six years;

(b) Peel has ignored, denied, and trivialized the noise and vibration problems in Ms. Wu's unit and has accused Ms. Wu of being overly sensitive despite objective evidence from Valcoustics in 2009 and 2013 that noise levels in the unit are significant and above acceptable levels;

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(c) Peel interfered with the independent analysis of the noise and vibration problems by shutting down equipment during the test and also by failing to test vibration levels notwithstanding that vibration was one of Ms. Wu's main complaints;

(d) Peel has suggested that the noise and vibrations problems in Ms. Wu's unit are the result of unauthorized/unapproved renovations, although the changes were undertaken by a condominium corporation director with the knowledge and acquiescence of other board members and prior to Ms. Wu purchasing the unit;

(e) Peel stated that it is Ms. Wu's responsibility to pay for the repairs necessary to bring the noise and vibration down to acceptable levels despite Peel's statutory duty to repair and maintain the common elements and equipment under the *Condominium Act, 1998*;

(f) As will be discussed below, Peel has failed to fulfill Ms. Wu's requests for certain records and documents to which she, as an owner, is entitled;

(g) Peel charged Ms. Wu a fee of $150.00 for production of documents, which Ms. Wu paid to avoid a lien being placed against her unit, even though Peel failed to produce all documents requested and instead produced unsolicited duplicate and irrelevant documents;

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[91] Ms. Wu submits that where the actions of a condominium corporation unfairly disregard the interests of one unit owner, that amounts to oppression even where the Board of Directors was acting in good faith. See: *Grigoriu et al v. Ottawa-Carleton Standard Condominium Corporation No. 706,* 2014 ONSC 2885 at paras 35-40.

Peel

[92] Peel submits that its ongoing investigations, repairs, and responses to Ms. Wu's noise and vibration concerns do not infringe the *Act*. Notwithstanding Ms. Wu's non-compliance with the Property Standards By-law and Rule 7, $468,476.99 has been spent for professional inspections, reports, and repairs. Peel's efforts have been taken seriously and on the strength of professional

advice. There is no evidence in the record which satisfies the necessary conditions for oppression, unfair prejudice, or unfair disregard. There is also no evidence that Peel has been unreasonable or negligent in discharging its maintenance and repair obligations.

[93] Section 135 of the *Act* protects legitimate expectations, not individual wish lists. The court must balance the objectively reasonable expectations of the owner with the board's ability to exercise judgment and secure the safety, security, and welfare of all owners. The board is charged with the responsibility of balancing the private and communal interests of the unit owners, and their behaviour must be measured against that duty. The interaction between the board and Ms. Wu is not to be examined in isolation. The conduct of the corporation must be viewed in light of Ms. Wu's behaviour.

[94] Peel submits that 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.

[95] Ms. Wu has not identified the expectations that were allegedly violated or established that those expectations were reasonably held. Ms. Wu's submissions

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do not consider the different factors that have emerged from the case law that are useful in determining whether a reasonable expectation exists.

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[96] The Supreme Court of Canada has defined oppressive conduct as conduct that is "burdensome, harsh or wrongful or which lacks probity or fair dealing." Oppressive conduct requires a finding of bad faith. Stated another way, there may be no oppression remedy when the board has acted in good faith. See *Nystad v. Harcrest Apartments Ltd.*, [1986] B.C.J. No. 3145 at para. 19.

[97] "Good faith" is defined "to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation", or "An honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together with absence of all information, notice, or benefit or belief of facts which render transactions unconscientious." See:*Nystad.*

[98] Peel says that there is no evidence that it has acted in bad faith. Nowhere does Ms. Wu allege bad faith or conduct that is burdensome, harsh or wrongful or which lacks probity or fair dealing.

[99] "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 prejudice

describes an injustice secured through partiality or deception. In the context of condominium law, this describes differential treatment for what may seem to be similar categories.

[100] There is no evidence that Peel has singled out Ms. Wu or treated her any differently than it would other owners in similar circumstances. Nowhere does Ms. Wu allege such differential treatment.

[101] "Unfair disregard" means to ignore or treat the interests of Ms. Wu as being of no importance. Courts have held that unfair disregard would likely apply to a total absence of awareness or concern.

[102] As set out in the timeline of investigations and repairs, Peel says that it has devoted considerable efforts and resources to address Ms. Wu's concerns.

[103] Courts have held that the use of the word "unfairly", to qualify the words "prejudice" and "disregard", suggests that some prejudice or disregard is acceptable provided that it is not unfair.

[104] There is no evidence in the record that Peel has acted in an oppressive manner, or has unfairly prejudiced or disregarded Ms. Wu's interests. Rather, the

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evidentiary record establishes that Peel has taken each and every request made by Ms. Wu into consideration and has made efforts to deal with those issues.

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[105] Ms. Wu was fully aware that the unit had been altered from its original design prior to purchasing it and that the altered second bedroom directly abutted the make up air unit and two elevators. In 2011, Peel asked Ms. Wu to consult with the City of Mississauga in order to resolve the second bedroom's non-compliance. Ms. Wu never consulted with the City. The second bedroom is not considered fit for habitation and it is the only room Ms. Wu asked to be tested. The lack of elevator noise and vibration complaints from the 23 units directly below Ms. Wu's 24th floor unit suggests that, but for this altered second bedroom, there may not exist any noise and vibration issue.

[106] Peel says that despite a statutory obligation to enforce compliance with its Rules, and Ms. Wu's disregard for addressing the matter with the City, Peel's investigations and repairs of her noise concerns have continued unabated, at significant cost to the owners. No enforcement steps have been taken against Ms. Wu with respect to her breach of Rule 7 of Peel.

Monetary Damages

Ms. Wu

[107] Ms. Wu seeks monetary damages as compensation for the oppression that she says that she suffered at the hands of Peel. She says that where a unit owner experiences mental suffering as a result of a condominium corporation's delay or failure to fulfill its maintenance, repair or replacement obligations the *Condominium Act, 1998* permits the recovery of general damages. See:*Thompson v. Waterloo South Condominium Corp. 29,* 1998 CarswellOnt 5963 at para 27.

[108] She says that the noise and vibrations are taking a toll on her health. She is suffering from insomnia, headaches, and signs of hearing loss, as are her parents. Ms. Wu now has tinnitus which she attributes to the stress and lack of sleep caused by the constant noise and vibrations in her home, and the distress and emotional anguish she has suffered as a result of Peel's oppression.

[109] In addition, the noise and vibration in her unit have significantly interfered with Ms. Wu's use and enjoyment of the property. Added to this is the distress, inconvenience, and frustration that Ms. Wu has endured in trying to reach a fair

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and amicable resolution with an uncooperative and oppressive condominium corporation. On this basis of this suffering, Ms. Wu seeks a monetary award.

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[110] In terms of the quantum of Ms. Wu's damages, she says that her case is factually similar to *Kenny v. Schuster Real Estate Co*, 1990 CarswellBC 1754 at paras 32, 47, 51-53, 55; upheld on appeal 1992 CarswellBC 898 (BCCA). There, the plaintiff was awarded $7,500 (in 1990) for a one-year interference with her enjoyment of the unit. This occurred after an exhaust fan was installed in the restaurant immediately below her unit causing intolerable noise and smell. In the *Kenny* case, the fan emitted a "constant whirring or humming sound" and ran almost non-stop for upwards of 18 hours a day. The plaintiff indicated that the "noise was a source of constant aggravation to her" and that the smell was "really offensive" and permeated the whole of the unit.

[111] Ms. Wu had lived happily in her unit for some time before the noise and vibrations began. After the problems started, Ms. Wu was unable to have them rectified by Peel and was ultimately forced, along with her parents, to endure considerable aggravation, discomfort, and even illness.

[112] Ms. Wu says that her experience has been worse than that experienced by the plaintiff in *Kenny*. Ms. Wu, for example, has experienced insomnia,

hearing loss, and tinnitus as a result of the noise and vibration levels. Her parents have also suffered sleep and health related problems as a result of the noise and vibration, and were even forced to leave the unit and find alternative accommodation for a significant period of time.

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[113] In argument, Ms. Wu acknowledged that her request as pleaded was not supportable on the evidence and law, and instead, requested an award of damages totalling $150,000 in compensation.

Peel

[114] In response, Peel submits that Ms. Wu has never provided the board with any medical documents or invoices evidencing her claims or damages. It denies that she has suffered any compensable damages. At most, it submits that damages should be assessed at $7,500.00

Production of Documents

Ms. Wu

[115] Ms. Wu says that Peel has refused to produce documents. It then threatened to lien her unit unless she paid a $150 charge for copying documents.

[116] Ms. Wu submits that Peel has a clear statutory obligation to provide her the following corporate records:

(a) a complete and unaltered copy of the Second Report prepared by Valcoustics on or about May 29, 2013.

(b) complete and unaltered copies of all correspondence and agreements between Peel and Valcoustics in regards to sound and/or vibration testing on Peel's premises.

(c) records or documents detailing maintenance, repair or other work completed, scheduled, proposed or otherwise contemplated in relation to the building's elevators, HVAC or mechanical systems.

[117] Section 55 of the *Condominium Act, 1998* imposes a general obligation on Peel to prepare and maintain particular corporate records. This section also entitles every owner to access these records "at a reasonable time" for "all purposes reasonably related to the purposes of this *Act*" provided the owner has given the condominium corporation reasonable notice in writing. The penalty for non-compliance (failing to produce a document) is $500.

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[118] The rights of access conferred in section 55 are broad. There is little that would be found in the files of the Corporation that would be exempt from right of inspection by unit owners. This section should receive broad interpretation to allow unit owners open and liberal access to corporation documents and records. See: *Miehm v. Doering*, [2001] O.J. No. 5187 at para 94.

[119] Further, by consent order dated July 2, 2014, Peel was ordered to produce documents no later than July 15, 2014. Four large cerelox volumes of documents were delivered, in August and October, 2014. A further report dated September 25, 2014 was produced in Peel's motion record for an order staying this application.

[120] Ms. Wu submits that she is entitled to be compensated in the amount of $500 for this non-compliance.

Peel

[121] Peel replies that even in circumstances where the right to examine records did not apply, Peel has never denied Ms. Wu permission to examine the corporate records.

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[122] On August 18, 2013, after this litigation matter had commenced, Ms. Wu's counsel requested copies of the following documents under subsection 55(6) of the *Act*:

(a) All records relating to the vibration/sound issue for Ms. Wu's unit.

(b) The agreement between Peel and Valcoustics for the May 3 [*sic*], 2013, sound test.

(c) Minutes of all board meetings since December 2009 at which this issue was discussed.

[123] Under subsection 55(6) of the *Act*, a pre-condition to providing records is that the owner pays a reasonable fee to compensate the corporation for the labour and copying charges. This payment was not provided along with Ms. Wu's counsel's request.

[124] Under subsection 55(4)(b) of the *Act*, the right to examine records does not apply to records relating to actual or pending litigation. This dispute had already been submitted to mediation and arbitration when the request was made. The requested records related to this litigation dispute. When the request was made, Ms. Wu did not have a court order requiring production.

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[125] Notwithstanding that the right to examine records did not apply, Peel delivered to Ms. Wu 500-750 pages of documents relating to the request. The requests were overly broad but Peel's property manager nevertheless performed a diligent search and prepared the package of documents.

[126] Ms. Wu refused to pick up the package of documents at the security desk. Ms. Wu's counsel received electronic copies via email but repeatedly requested further documents despite Ms. Wu's non-payment of Peel's reasonable labour and copying fees of $150.00. Eventually, Ms. Wu paid under protest.

[127] Peel submits that it has never refused to produce documents except where they were subject to solicitor-client or litigation privilege. The original package included copies of the draft Second Valcoustics Report dated June 24, 2013, and board meeting minutes dated June 27, 2013, which reference the May 29, 2013, draft Second Valcoustics Report. The disclosure of these documents belies any intention to conceal the existence of correspondence or draft reports from Valcoustics. Any omission of documents which may have occurred was not intentional but due to the broadness of the request and the sheer volume of documents to be searched in order to respond to the request.

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Analysis

Preliminary

[128] The materials and argument referred to a great deal of hearsay. I have ignored those references.

[129] Both parties have certain "beliefs" about the motives of the other, usually without any real evidence to support those beliefs. I have ignored those references.

[130] I accept the principles of law and authorities relied upon by the parties as set out in their positions, above.

[131] Both parties spent some time disputing the credibility of the other. On a paper record, I cannot make those determinations. Fortunately, that is not necessary to determine the real issue between the parties.

[132] Peel has obtained a number of expert reports. Both parties rely on the contents of those reports. So will I.

[133] Ms. Wu alleges that Peel has delayed providing the Valcoustic reports to her and has improperly edited the reports to its advantage. She complains that elevators were serviced ahead of time or put out of service at the time of the

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testing in order to obtain a "clean" report. Peel denies that it attempted to thwart a proper investigation of the complaints. Further, it says that it had a right to review and edit the reports before releasing them. It says that Ms. Wu may have improperly influenced the reports.

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[134] Although I find Peel's conduct with the independent reports unsettling, I need not determine either of these issues. I cannot make a finding of either Ms. Wu's or Peel's allegations on this record. Even if Peel took the steps that Ms. Wu alleges, the reports are much to the advantage of Ms. Wu and devastating to Peel. If Ms. Wu influenced the reports, Peel was in a position to investigate its own expert. It led no evidence from Valcoustic to suggest that Ms. Wu had such an impact. I can infer that she did not. I shall use the reports as independent, objective evidence.

[135] I need not determine Ms. Wu's credibility on whether there is a noise and vibration problem. As set out below, Peel's expert says that there is one.

[136] Further, Peel's senior property manager says that there is a problem. At his cross examination on December 19, 2014, he said:

> A. On November 28th, 2014, I sent an email to Mr. Peros.
> "The corporation would like to engage your services to assist with determining the cause of the noise from the elevator mechanical room and related equipment

into unit penthouse 10. Please advise if you are interested in trying to determine and resolve this issue on our behalf." (as read)
Q. And are they interested?
A. Mr. Peros replied:
"I will be in Mississauga area on Wednesday and plan to visit the elevator at 3700 Kaneff. Please let the superintendent know that I am coming. I will need access to the elevator machine room." (as read)
Q. And he did come?
A. He did come, yes.
Q. What's happening now?
A. He's in the process of doing calculations in order to increase the padding of the elevator mechanical equipment.
Q. So currently there's an engineer designing specifications for work to be done?
A. Yes.
Q. And when is that – when are the specifications expected and when is the work expected to be done?
A. I don't have an exact time on that.
Q. Do you have a quotation from CDM?
A. No, I do not.

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[137] At another stage in his examination, he was asked about a discussion about mediation or arbitration after this application was brought.

Q. What were the discussions?

A. Quite honestly, [Peel's then lawyer]Mark's instruction to the board was to resolve the issue.
Q. To fix the problem?
A. To fix the problem. Just to fix the problem.
Q. So he told you, just fix it?
A. Absolutely. And the board did not disagree with that. The board agreed with that. However, it takes time to fix a problem of this nature. It's a multi-layered approach. And the Valcoustics reports do show that we have considerably reduced the sound levels in Mrs. Wu's unit.

[138] Peel submits that no one else complained about noise problems. Yet in the 2009 study commissioned by Peel, one other penthouse unit was having noise problems. Emails from Mr. Nolevski confirm other complaints of noisy

elevators in 2010 from “several residents”. While I cannot determine who made complaints or why there were made, clearly others complained.

Renovations to the Room

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[139] There is no evidence that the second room is part of the problem or part of the solution. Although the 2009 Valcoustic report referred to remedies that might occur within Ms. Wu’s unit, there is no suggestion of such a necessity in any other report.

[140] There is a reference in the minutes of the October 2011 meeting about this topic:

> **PH10:** A lengthy discussion took place regarding the noise complaints received from the Owner of PH 10 and the remedies implemented by the Corporation to date. Mr. Nolevski had no received a response to any of his communications to Valcoustics; therefore, he was looking into other engineering firms that evaluate the sound levels within a unit.
>
> He noted that the area of the unit converted for use as a bedroom required a smoke detector and the Code requires for the fire alarm, 75 decibel at bed-rest level. In order to accommodate the Code requirements the speaker would have to be relocated. The other concern is that there is nothing on record approving the changes made to the unit. The changes themselves may be the contributing factor to the noise that the Owner hears in an area that is not meant to have walls or be used as a bedroom. Ms. Fernando stated that an evaluation is required of a comparable unit noting that the storage unit within her own unit is noisy although it is not meant to be used as a bedroom.
>
> Mr. Nolevski stated that once a re-evaluation is conducted, it may confirm that that the standards have now been met with the remedies implemented by the Corporation. The Chair stated that she did not want all Owners to be responsible for the cost to accommodate one Owner when the changes the Owner has implemented may never meet noise standards as the area was not intended for use as a bedroom. Ms. L’Heureux suggested that the new walls, if not attached

> properly, could be contributing to the noise problem. The Manager was obtaining costs to insulate the walls of the converted area.
>
> Directors discuss the manner in which the unit was described in the Status Certificate. It was agreed that any reference to the converted area would be as a den and that the unit was a non-standard one bedroom unit. It was further agreed that a new noise level study would be arranged through a new engineering firm and the Owner would be advised that a second study would be scheduled and the Board would consider any action resulting from the Study. Mr. Nolevski stated that he would provide the engineering firm with the study conducted by Valcoustics.

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[141] Although the Board may have had that theory in 2011, all reports thereafter do not support this theory.

[142] In Peel's documents, Mr. Nolevski wrote to someone by the name of "Borts" on August 24, 2012. I am advised that this was a representative of Valcoustics. Mr. Nolevski asked:

> Kindly comment on how noise and vibration is affected by the dimensions of room with respect to its intensity. In this particular case the room size was decreased and a second room created for a sleeping area, as you may be aware this room abuts the elevator shaft and MAU shaft. Your insight would will [sic] be greatly appreciated.

[143] I am interested in the answer to that question as well. Apparently, it was not forthcoming or Peel has decided not to produce the answer.

[144] In its factum, Peel argues that no control unit was measured to determine if sound levels were similar to those measured in the unit. For example, it says, it is unknown whether the living rooms in the 23 units below Ms. Wu's unit

encountered similar noise from the abutting elevators. Who better than Peel to find that out? While the onus is upon Ms. Wu to prove her case, a lack of evidence that could only be in Peel's possession is not helpful to Peel's case.

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[145] In my view, the complaint by Peel regarding the second bedroom is a red herring with respect to the noise problem. While there may be a by-law infraction to be dealt with in another forum, it does not relate to this dispute. To the extent that Peel tries to combine the two issues, that supports Ms. Wu's allegation of unfairness.

[146] The fact that there were no problems for six months is supportive of Ms. Wu's case. First, subsequent reports show that there is a problem. Second, this shows that the addition of the new room (in 2006/07) before she moved in must not be cause for the noise complaint. It was there long before the noise problem started.

Repair

[147] In *Roy v York Condominium Corp. No. 310*, [1992] O.J. No. 4195, this court explained the legal obligation to repair common elements and stated at para. 4:

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The Condominium Corporation has the legal obligation to repair the common elements. The duty to repair and its legal significance was examined by the Court of Appeal in *York Condominium Corporation No. 59 v. York Condominium Corporation No. 87* (1983) 42 O.R. (2d) 337:

- 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.

[148] In Peel's materials, there is an attack on Ms. Wu's credibility as to whether there were any problems at all. Mr. Nolevski, the senior property manager for Peel, filed an affidavit on behalf of Peel. He said:

> I am not aware of any management or security report confirming Wu's reports that noise levels are excessive or objectionable, or anything beyond normal background sound.
>
> To my knowledge, no other PCC 245 resident has reported noise and vibration complaints similar to Wu's. This includes the residents of the 23 units directly below Wu's 24th floor unit which share the same original design and whose living rooms also directly abut the make up air unit and elevators.

[149] And yet, given all of the reports, there is no doubt that the problem exists.

[150] Peel's expert, Valcoustics, found in 2009 that:

> Applicable Criteria
>
> ASHRAE recommends that the background sound level from the building services not exceed NC 25 to NC 35 within a residential unit. For penthouse units, as in this case with PH6 and PH10, the lower end of the range would typically be considered the objective. **Thus, NC25 to NC 30 would be an appropriate background sound level criteria for the two suites.**

> The measurement made close to the make up air unit has a peak in the 500 Hz octave band. **In the suite, with the make up air unit operating the sound level is about NC 40 in the 125 Hz octave band, about NC 34 in the 250 Hz octave band and below NC 30 in all other bands.**
>
> ....
>
> As can be seen in Figure 2, there is a difference in sound level in the suite when the unit is turned on and off. **The sound levels measured in the suite with the unit on are above the NC 30 criterion.** [Emphasis mine]

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[151] A further investigation was done in May of 2013. The report of August 28, 2013 said:

- Elevator #2 – **The average sound level small room during the pass-bys was about 32 dBA with an NC level of about NC 33.** The resulting sound spectrum is not balanced and shows a peak in the 125 Hz to 500 Hz octave bands.
- Elevator #3 – **The average sound level in the small den during the pass-bys was about 39 dBA with the NC level of NC 35.** The resulting sound spectrum is not balance and shows a peak in the 64 Hz to 250 Hz octave bands. [Emphasis mine]

[152] In Peel's copy of this report, it goes on to say:

> As seen in Figures 3 through 5, there is noticeably more energy in the low frequency region of the measured sound level spectrum during elevator operation. Sound from the elevator operation occurs primarily at frequencies below 500 Hz. **This type of sound spectrum would be perceived as having a "rumbly" characteristic and would also be considered more objectionable than a well balanced spectrum with the same NC rating**. These characteristics were substantiated by the subjective observations in the suite.
>
> The operation of elevators #2 and #3 resulted in measured sound levels that were at or just below the maximum recommended criterion of NC 35. It is noted, however, that NC ratings are intended for evaluating continuous background sound from mechanical systems. Intermittent sounds that occur on a frequent basis, such as the elevator, would typically be perceived as being more disruptive than a continuous sound with the same overall level. **In these cases the upper end of the ASHRAE criteria range would not be considered appropriate and the lower end of the spectrum would typically be used to define compliance.**

> The impact of intermittent noises may also be evaluated by comparing the sound level to the ambient, i.e. the sound level when the noise is not present. During the operation of elevator #3 the increase in sound level over the ambient was around 9dBA. An increase in sound level of 10 dBA would be subjectively equivalent to a doubling of loudness. Thus, ths increase in sound level is considered significant. During the operation of elevator #2 the increase in sound level was about 8 dBA, which is also condsidered significant. The increase in sound level during the operation of elevator #1 was about 2 dBA, which is minor.
>
> **Thus the resultant sound levels measured in the suite during the operation of elevator #2 and #3 are not considered acceptable. Additional mitigation measures for the elevator machines are warranted and should be investigated further.** [Emphasis mine]

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[153] The December 19, 2013 report relating to this same investigation said:

> **Recommendations 4.0**
>
> **The on-site observations, vibration measurements, and sound level measurements all indicate that the sound transmission from the elevator machines into the suite is primarily structure borne rather than air borne.**
>
> **To reduce the structure-borne noise transmission, the elevator machines must be decoupled and vibration isolated from the structure.** The existing isolation concept may still be used, however, a greater number of isolator pads (or pads capable of supporting greater loads) will be required to properly account for the weight of the elevator machine being supported.
>
> **In addition, isolation pads providing greater static deflection should be used.** Elastomers are typically designed to deflect 10 to 15% of the undeflected height. The existing 12.5 mm pads would be expected to deflect 1.3 to 1.9 mm. The used of isolators that can provide greater static deflection will improve the vibration isolation. **The isolation material is recommended to be at least 50 mm (2") thick.** This will provide approximately 5 to 7.5 mm of static deflection. We recommend using an isolation material such as CDM (available locally through CDMca, contact: Jonas Salkauskis, tel: 905-265-7401).
>
> **The vibration isolation of the elevator machines is not a trivial matter, as safety will be a significant factor in the isolation system. For**

> **maximum isolation, the isolators need to have significant resilience (deflection). For proper elevator operation, the supports should be as rigid as possible.**
>
> Some compromise must be found. A tolerance for elevator position as a function of cab loading must be established.[Emphasis mine]

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[154] The report then went on to list eight other considerations in an effort to find a way to reduce the noise and vibrations.

[155] Another report was done in June of 2014. It included a vibration study. It found that:

> The results of the vibration and sound measurements done on June 19 and 27, 2014, post retro-fit work being done on elevator machine #3, are very similar to those done on May 2 and November 8, 2013, pre retro-fit work.
>
> **It is concluded that the transmitted sound levels in to Suite PH10 due to the operation of elevator #3 have not been reduced by these latest retro-fit measure.**
>
> **We will continue to be of service in determining methods to reduce the noise emissions to Suite PH10. Once you have had a chance to digest the above, we should set up a time to discuss and figure out next steps.** [Emphasis mine]

[156] Despite the recommendation that isolation material be 2" thick, the repair done in September 2014, used material that was only 1" thick. To the extent that Peel relies on following its own advisors to support its actions, that is not borne out by the documents.

[157] Peel points out that, as part of the actions that it took, it retained Valcoustics to perform work and give opinions in October of 2011 and August of 2012. It is true that the supporting documents confirm that it contacted Valcoustics but those same documents do not show that Valcoustics did anything other than request a properly executed retainer agreement. It appears that the retainer was not actually completed until 2013 when Valcoustics carried out its second investigation. Peel's documents show that it did not move forward to solve the problem throughout 2011 and 2012.

[158] Peel has done a lot of investigation but it has done little to no work to solve the problem. There are not even any quotes for me to consider if the work is appropriate. There are no financial statements to consider balancing the interests of Ms. Wu with those of the rest of the residents. All I have is a promise to do work that is needed. Since Peel has done virtually nothing since 2011, I am not considering "good, better, best" solutions; I am considering no solution at all. Peel has failed to maintain and repair the elevators. It is in breach of its obligations.

Oppression

[159] The parties disagree as to whether I need to find bad faith on the part of Peel to find that Ms. Wu was oppressed. From my review of the case law, while

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bad faith is a factor to consider, a lack of bad faith is not determinative. Rather, the test, as set out in *Hakim,* is contextual. Determining "just and equitable" results must not turn on any one factor alone.

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[160] Even if I am wrong in that, I will apply the reasoning in *Nystad* as submitted by Peel. For the following reasons, I am satisfied that Peel has been unfaithful to its duty and obligation to Ms. Wu.

[161] As I said above, in its October 2011 minutes, Peel's directors decided to arrange a new noise level study "and the Owner would be advised that a second study would be scheduled and the Board would consider any action resulting from the Study." Mr. Nolevski stated that he would provide the engineering firm with the study conducted by Valcoustics.

[162] However, on December 5, 2011, the president of Peel wrote to Ms. Wu and said:

> During the conversation you and I had last month, I said that the Board would reconsider undertaking the stage two recommendations from the Valcoustics report. The Board has reviewed and researched the issue again. Our additional research has led to information that the modification to your unit is not in compliance with the City of Mississauga Property Standards By-Law 654-98. I would suggest that you consult with the City regarding your unit. The Board believes and has agreed that the Corporation cannot undertake any work on your suite (or any individual suite) until the issue of compliance to the By-Law is clarified and resolved.

[163] It appears that the president did not advise Ms. Wu that a further study was under way. Rather, Ms. Wu was told that she had to deal with the city before Peel would live up to its obligations.

[164] Despite that November 2011 decision, the next thing Peel did was to ask Honeywell to solve a vibration in the cooling tower piping. Honeywell apparently advised that it "Also found out that there was a sound engineer report done in 2010. Recommend looking at that report to see were [sic] it felt the problem were [sic] before going any further." The records before me suggest that Peel did not take any further steps on that advice.

[165] After that, on Peel's evidence, it did nothing to investigate the problem until Valcoustic was actually hired in 2013. This was after a mediation meeting between the parties and their counsel. At that meeting, Peel agreed to solve the problem.

[166] Given the advice that Peel had, it is reasonable for Ms. Wu to expect that Peel would act.

[167] Instead, Peel attempted to put the blame on Ms. Wu – even to the point of this application. The fact that Peel belaboured Ms. Wu's credibility on whether

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there was a problem at all provides support to her argument that she has been treated unfairly by Peel.

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[168] Peel submits that it has "taken each and every request made by Ms. Wu into consideration and has made efforts to deal with those issues". I do not accept that submission. The records are clear that as of 2011, Peel stopped work on this issue unless pushed, or prodded or Ms. Wu acquiesced to their demands that she deal with the renovation issue.

[169] Peel's failure to respond to concerns of Ms. Wu, confirmed by Valcoustics, impairs any confidence in the manner in which Peel conducts its affairs.

[170] There is nothing produced by Peel to set up competing interests to be balanced. There is nothing to suggest that the board considered competing interests. Since Peel has effectively not acted, I cannot consider that it acted reasonably.

[171] While I cannot find, on a balance of probabilities, that Peel acted out of any personal animus towards Ms. Wu, neither can I find that it has balanced her interests against others and has fairly chosen the other. Without that evidence, I

am left with only clear evidence that Ms. Wu has been treated harshly and wrongfully by Peel.

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[172] Given the elevator modernization planned for 2010, it was reasonable for Peel to wait to see if that would fix the problem. I find no fault to that point. However, since 2011, Peel has been dragging its feet. There is no reasonable explanation given as to why this took so much time. Having been prodded by counsel and this application, Peel got underway again. It now promises to take further steps that it should have taken long before. I find that Ms. Wu has been oppressed, unfairly prejudiced and unfairly disregarded.

[173] Having found oppression, and unfair prejudice and disregard, pursuant to the *Act*, I may make “any order deemed proper”. Peel says that it intends to move ahead with repairing the problem. The reports to date often comment that a complete solution may not be possible. I am not prepared to order that the problem be fixed if, on the evidence, that is not a certainty. But it is clear that Peel has not been moving on. Accordingly, I shall remain seized of this matter. Peel, on notice to, and at the convenience of, Ms. Wu and her counsel, shall attend before me within the next 45 days to provide details and supporting documentation of what is to be undertaken to fix the problem. Ms. Wu and her counsel shall be immediately copied on all written contact between Peel and its

contractors and advisors (other than legal) since February 22, 2015 and forward. Studies are over; action is necessary.

Damages

[174] While I accept that the reports confirm that there is a problem, the reports do not support Ms. Wu's dramatic description of life in her unit. Those reports are objective evidence of what the circumstances are in her home. Ms. Wu and her parents have remained in the home for more than seven years. There is no evidence that she has attempted to sell the unit. No one but Ms. Wu has provided evidence of such an atrocious situation. Her parents are not parties or supporting witnesses. I can draw the inference that the extent of this problem is not as described by Ms. Wu. The noise and vibration need to be fixed but I cannot find that they are to the level alleged by her.

[175] *In TMS Lighting Ltd. v. KJS Transport Inc.,* 2014 ONCA 1 at para 61, the Court of Appeal stated:

> It is also beyond controversy that a plaintiff bears the onus of proving his or her claimed loss and the quantum of associated damages on a reasonable preponderance of credible evidence.
>
> Further, as the trial judge recognized in this case, a trial judge is obliged to do his or her best to assess the damages suffered by a plaintiff on the available evidence even where difficulties in the quantification of damages render a precise mathematical calculation of a plaintiff's loss uncertain or impossible. Mathematical exactitude in the calculation of damages is neither necessary

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nor realistic in many cases. The controlling principles were clearly expressed by Finlayson J.A. of this court in *Martin v. Goldfarb*, [1998] O.J. No. 3403, 112 O.A.C. 138, at para. 75, leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 516:

> I have concluded that it is a well established principle that where damages in a particular case are by their inherent nature difficult to assess, the court must do the best it can in the circumstances. That is not to say, however, that a litigant is relieved of his or her duty to prove the facts upon which the damages are estimated. The distinction drawn in the various authorities, as I see it, is that where the assessment is difficult because of the nature of the damage proved, the difficulty of assessment is no ground for refusing substantial damages even to the point of resorting to guess work. However, where the absence of evidence makes it impossible to assess damages, the litigant is entitled to nominal damages at best.

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[176] I do not see this case as similar to *Kenny.* There, the plaintiff attended to give *via voce* evidence at an assessment of damages. Here, I am asked to determine Ms. Wu's loss only from the written record. There are no corroborating records. What other evidence there is, as set out above, does not corroborate her upset. There is no medical evidence to support her medical diagnosis or any treatment. Ms. Wu's parents are not applicants. I cannot award damages to Ms. Wu for any hardship that may have occurred to them.

[177] However, Ms. Wu has been left in a difficult situation for almost five years since the elevator modernization. She has had to put up with elevated noise levels and Peel's belittling conduct. In my view, Peel has been oppressive and unfair to her for approximately 5 years. Based on what I have, I assess damages at $30,000.00.

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Production of Records

[178] On this record, I cannot determine what was produced and when. It appears that some of the production issues arose within the contemplated litigation itself. That is a topic for costs and not a free standing order. That claim is dismissed.

[179] An expense of $150 to pick up the records is authorized by the *Act* and is reasonable. Ms. Wu should have picked up the documents without complaint. That claim is dismissed.

Costs

[180] While the proceeding is still on going, we should dispose of costs to date. If the parties cannot otherwise agree on costs, written submissions may be made to me. Ms. Wu shall make her submissions within the next 15 days. Peel shall provide its response within 15 days thereafter. Each submission shall be no more that 5 pages not including any offers to settle or bills of costs.

Lemon J

DATE: May 6, 2015

CITATION: Wu v. Peel Condominium Corporation No. 245, 2015 ONSC 2801
COURT FILE NO.: CV-14-146-00
DATE: 2015-05-06

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: JIAKANG WU and PEEL CONDOMINIUM CORPORATION NO. 245

BEFORE: LEMON J.

COUNSEL: Megan Mackey, for the Applicant

Michael A. Spears and Mark Willis-O'Connor, for the Respondent

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JUDGMENT

LEMON J

DATE: May 6, 2015

2015 ONSC 2801 (CanLII)

Case Name:
Wu v. Peel Condominium Corp. No. 245

**RE: Jiakang Wu, Applicant, and
Peel Condominium Corporation No. 245, Respondent**

[2015] O.J. No. 3354

2015 ONSC 4101

Court File No.: CV-14-146-00

Ontario Superior Court of Justice

G.D. Lemon J.

June 24, 2015.

(24 paras.)

Counsel:

Ms. Megan Mackey, for the Applicant.

Mr. Mark Willis-O'Connor, for the Respondent.

COSTS ENDORSEMENT

G.D. LEMON J.:--

The Issue

1 On May 6, 2015, I found that Ms. Wu had been oppressed by the respondent, Peel. Among other orders, I also required Peel to pay $30,000 in general damages. I completed my judgment as follows:

> If the parties cannot otherwise agree on costs, written submissions may be made to me. Ms. Wu shall make her submissions within the next 15 days. Peel shall provide its response within 15 days thereafter. Each submission shall be no more than 5 pages not including any offers to settle or bills of costs.

2 I have now received those submissions from both parties. Ms. Wu seeks costs in amounts ranging from $41,413.28 for full indemnity costs to $34,138.90 for partial indemnity costs. In response, Peel submits that costs should be fixed on a partial indemnity basis in the amount of $10,000.

Legal Principles

3 Rule 57.01 of our *Rules of Civil Procedure* sets out the factors that the court may consider when determining costs. The relevant factors that I should consider here are:

(a) the result in the proceeding;

(b) the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

(d) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

(e) the amount claimed and the amount recovered in the proceeding;

(f) the complexity of the proceeding;

(g) the importance of the issues; and

(h) the conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding.

4 Modern costs rules are designed to foster three fundamental purposes:

(1) to partially indemnify successful litigants for the cost of litigation;

(2) to encourage settlement; and

(3) to discourage and sanction inappropriate behaviour by litigants: *Fong v. Chan,* 1999 CanLII 2052, [1999] O.J. No. 4600, 46 O.R. (3d) 330 (Ont. C.A.) at para. 22.

5 Costs awards, at the end of the day, should reflect "what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties": see *Boucher v. Public Accountants Council for the Province of Ontario* 2004 CanLII 14579, [2004] O.J. No. 2634, 71 O.R. (3d) 291 (Ont. C.A.) at para. 24.

Analysis

6 There is no doubt that Ms. Wu has been successful on the most significant issue; she wanted Peel to acknowledge and fix her noise problems.

7 Despite some serious errors in judgment set out below, Ms. Wu's counsel showed a great deal of expertise in an area that required it.

8 Except as set out below, I am satisfied that the rates charged and the time spent are reasonable. This required more than a day to argue, the materials made up more than a banker's box, there were cross examinations and lengthy factums. But for the hard work of counsel, this could easily have been a three or four day trial, rather than a long motion. While expensive, it was much cheaper than a trial and counsel should be given credit for that.

9 While I found Peel to have oppressed Ms. Wu and I ordered general damages against Peel, those were the issues for my determination. The fact that Peel was unsuccessful on those issues cannot form the basis of increased costs. (See: *Hunt v. TD Securities Inc. (c.o.b. TD Evergreen)*, [2003] O.J. No. 3245, 175 O.A.C. 19 (C.A.). It appears that Peel took a variety of steps that Ms. Wu finds objectionable. Peel has already been ordered to pay costs for those steps. I am not to penalize them again in this costs order.

10 There is nothing in this litigation that would present the rare outrageous conduct required to take it out of the partial indemnity range.(See: *Drewlo Holdings Inc. v. Kitchener (City)*, [2007] O.J. No. 2706, 158 A.C.W.S. (3d) 889, 2007 CarswellOnt 4361 (Ont. Sup. Ct.).

11 I am to determine "the costs of or incidental to a proceeding or a step in a proceeding". The costs of steps incurred prior to the commencement of the application are not to be included. Meetings and mediations before the commencement of the application are not incidental to, or a step in, the proceeding.

12 Ms. Wu's counsel submits that I should reconsider and increase two interim costs orders against Peel. Those decisions have been completed and cannot be revisited.

13 The respondent has filed its own bill of costs that it would have filed if it had been successful; that too should be encouraged. (See: *Portuguese Canadian Credit Union Ltd. v. CUMIS General Insurance Co.*, 2010 ONSC 6701, 67 A.C.W.S. (3d) 348). That bill of costs outlines partial indemnity costs of $17,670.71 through to full indemnity costs of $29,361.92. Although less than what Ms. Wu is seeking, it is clear that Peel could reasonably expect to pay the costs now in issue.

14 Despite the success set out above, Ms. Wu unsuccessfully claimed $150,000 annually for general damages "going forward". In her offer to settle, she proposed that Peel would pay $150,000 compensation within 60 days and $60,000 a year until the problems were resolved along with reimbursement of alternate living arrangements for Ms. Wu and her family. Only at the hearing was this claim reduced to $150,000 in total. With respect to that part of her claim, Ms. Wu was certainly unsuccessful.

15 In her costs submissions, Ms. Wu's counsel submits that while the general damage recovery "is less than what Ms. Wu was asking for, that is the highest damage award for oppression by a condominium corporation that counsel is aware of." In short, counsel is admitting that the general damages claim put forward had very little, if any, legal basis. Her costs submissions are similarly barren of authority to support them. That conduct should be discouraged.

16 It should be noted however that there was also very little in evidence to support the damage claim. A claim put forward with little evidence and less law would not add much to the legal expense of either party.

17 Ms. Wu was also unsuccessful on two other minor issues.

18 This was a very complex proceeding and was a difficult decision to determine. The issues were exceedingly important to both sides.

19 Ms. Wu, in her costs submissions, complains of the conduct of Peel that has already been dealt with in my determination. She seeks to have me make credibility findings that I have already explicitly declined to make.

20 Both parties made offers to settle. The terms of each are such that they do not trigger any costs consequences. However, as can be seen above, Ms. Wu's offer was an offer that Peel capitulate rather than an effort to compromise in an effort to settle the case. That conduct should be discouraged.

21 My endorsement was clear in my request for five pages of costs submissions. Instead, from Ms. Wu, I received 11. That conduct should be discouraged. Some judges have quit reading at the ordered length (See: *Kalkanis v. Kalkanis,* 2014 ONSC 205, *Brown v. Baum,* 2015 ONSC 2483). Some judges have simply torn off the offending pages. (See: *Elieff v. Elieff,* 2007 CanLII 15787 ONSC, [2007] O.J. No. 1802, 157 A.C.W.S. (3d) 130, [2007] W.D.F.L. 4291 (Ont. Sup. Ct.) [*Elieff*]. Some judges have ordered a penalty to be paid by the offending party. (See: *Elieff*). Generally speaking, when faced with this disregard for my ruling, I presume that counsel has overworked the file as much as they have the costs submissions and I assess the costs accordingly.

22 There did not appear to be any issues with respect to the disbursements.

23 As a member of the corporation, Ms. Wu will effectively have to pay some part of the costs through her fees.

24 Taking all of that into consideration, Peel shall pay costs fixed in the amount of $20,000 all-inclusive.

G.D. LEMON J.