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Case Name:

York Region Standard Condominium Corp. No. 1076 v. Anjali Holdings Ltd.

APPLICATION UNDER sections 98, 116, 177, 119, 134 and 135 of the Condominium Act R.S.O. 1990, c. C.26
RE: York Region Standard Condominium Corporation No. 1076, and Anjali Holdings Limited and Bhardwaj & Baxi

[2010] O.J. No. 488

2010 ONSC 822

Court File No. CV-09-096484-00

Ontario Superior Court of Justice

P. Lauwers J.

Heard: February 2, 2010.
Judgment: February 3, 2010.

(13 paras.)

Counsel:

Erik Savas, for the Applicant.

Mukesh Bhardwaj, for the Respondents.

ENDORSEMENT

1 **P. LAUWERS J.**:-- The applicant seeks an order under section 134 of the *Condominium Act* requiring the respondents to permanently restore the rear overhead door to their condominium unit to its original condition within thirty days. Alternatively, the applicant seeks an order authorizing the applicant to undertake the remedial work itself and add costs to the common expenses for the unit occupied by the respondents.

2 The respondents use the commercial condominium unit as a law office. The overhead garage door at the rear of the unit has been altered by them; it was replaced by a wall with a set of windows. It is common ground that the door is an "exclusive use" common element.

3 Under section 98 of the *Condominium Act* and section 13(b) of the *Declaration*, the respondents are obliged to seek and obtain permission before making "an addition, alteration or improvement to the common elements."

4 The Court of Appeal considered section 98 in *Wentworth Condominium Corporation No. 198 v. McMahon* 2009 ONCA 870. The Court affirmed the application judge's conclusion that a hot tub is not an "addition" because "it is not

something that sensibly can be seen as being joined to or connected to the structure". The windows in this case and the overhead door are not like a hot tub. They are an "alteration" or, as Mr. Savas argued, an "improvement," which is "an improvement or betterment of the property". This definition was affirmed by the Court of Appeal and applies to the windows in view of the fact that they are both joined to or connected to the property and therefore are part of it, and the fact that the windows actually caused "an increase of the value of the property" according to real estate evidence proffered by the applicant.

5 Mr. Bhardwaj submitted that the fact that the door was an "exclusive use" common element somehow took it out of the ordinary application of section 98 of the *Condominium Act*. There is no basis for this submission and Mr. Bhardwaj was unable to point to any cases to support it. He relied instead on some language in *McMahon* at paragraphs 27-28 that section 98 "strikes an appropriate balance between the rights of individual owners and the rights of the owners collectively speaking through their board of directors". The balance, however is struck by section 98 of the *Act* itself and not by any residual discretion reposed in the court; as noted above, the respondents completely failed to take the steps required to obtain the permission of the condominium board for the changes that they made.

6 The president of the condominium board, Daniel Gallagher, deposed that "the Board of Directors is opposed to the change in and of itself and is not prepared to consent to the same". He added: "There are no units in the condominium corporation that contain windows in their rear overhead doors".

7 He also deposed:

> With regard to the windows and the overhead door of the subject unit, it is my information and belief from having been part of the discussions with the board on this matter, that the Board's review of them is that they are unappealing in appearance and generally detract from the complex overall. It is also my information and belief from having been part of the discussions with the Board on this matter, that the board's view of the subject windows is that allowing them to remain would set a precedent for other owners with overhead doors to insist on the same change if they so desire to change.

8 I find it hard to square this position with the evidence proffered by Mr. Savas that the installation of the windows was an improvement enhancing the value of the unit and the common elements. I do not find them "unappealing."

9 It is not my function as a trial judge, however, to assess the aesthetics of the changes made by the respondents, nor is that to be the basis for the decision on an application to the court: *East Gate Estates Essex Condominium Corporation No. 2 v. Kimmerly* [2003] O.J. No. 582 at paragraphs 7-12. As Cusinato J. said at paragraph 12: "It matters not as shown by the photos that the landscaping appears to be beautifully done, or that all other unit holders find it pleasing. Where the elected Board concludes that it is unacceptable for an area of a common elements, which they are elected to govern, their word as final. In a democracy, the manner in which to overturn such a determination is through the election process and there is no evidence the condo Board ever rescinded their initial approval [which limited the landscaped area]".

10 As Flynn J. said in *Halton Condominium Corporation No. 315 v. Sid Gucciardi* (Unreported April 15, 2004): "The Board of Directors of this condominium was elected by the unit owners to administer this condominium in the best interests and for the welfare for the whole corporation. It is not for the court to step into this fray". See also *Peel Standard Condominium Corporation No. 721 v. Derveni* [2007] O.J. No. 5585 where Van Rensburg J. said: "While there does not appear to be anything unsafe or unattractive about the walkway and while it may be very useful to the unit owners, nevertheless it contravenes the *Declaration* and the *Act* and must be removed".

11 In oral argument, Mr. Savas conceded that a condominium board must behave reasonably in exercising its responsibilities. That requires, in my view, that they keep an open mind in respect of an application. The affidavit of Mr. Gallagher is troubling in that it might lead one to assume that his mind and the mind of the board are closed.

12 An order will go requiring the respondents to permanently restore the rear overhead door to the unit to its condition immediately prior to the alteration by the respondents.

(i) Subject to paragraph (iii), this work will be completed within 180 days of this order;
(ii) Subject to paragraph (iii), if the respondents fail to comply with paragraph (i), the corporation may, on 24 hours written notice to the respondents, undertake the work and

add the expenses incurred in doing so to the common expenses for the respondents' unit; and

(iii) Before undertaking the work referred to in para (ii), the condominium board shall consider in good faith a new, properly framed application by the respondents for retroactive permission for the alterations.

13 The applicant has been largely successful and is therefore entitled to costs. If costs cannot be agreed between the parties, I will accept costs submissions from the applicant within 10 days and submissions from the respondents within an additional 10 days.

P. LAUWERS J.

cp/e/qllxr/qljxr