Court File No. CV-14-10493-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF Section 101 of the *Courts of Justice Act* and Section 243 of the *Bankruptcy and Insolvency Act*

BETWEEN:

TREZ CAPITAL LIMITED PARTNERSHIP and COMPUTERSHARE TRUST COMPANY OF CANADA

Applicants

- and -

WYNFORD PROFESSIONAL CENTRE LTD. and GLOBAL MILLS INC.

Respondents

SUPPLEMENTARY RESPONDING MOTION RECORD OF THE APPLICANTS, TREZ CAPITAL LIMITED PARTNERSHIP and COMPUTERSHARE TRUST COMPANY OF CANADA

March 2, 2015

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H.	*Stafford v. Frontenac Condominium Corp. No. 11,* 1994 CarswellOnt 730.

TAB 1

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ONTARIO
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IN THE MATTER OF Section 101 of the *Courts of Justice Act* and Section 243 of the *Bankruptcy and Insolvency Act*

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Respondents

AFFIDAVIT OF AUDREY LOEB
(sworn February 20, 2015)

I, Audrey Loeb, of the City of Toronto, MAKE OATH AND SAY:

1. I am associate counsel with, and the head of, Miller Thomson LLP's Condominium Practice Group. I have practiced in the area of real estate and condominium law in Ontario for 41 years and I am the author of two textbooks on condominium law: *Condominium Law and Administration* (binder service, Thomson Carswell) and *The Condominium Act: A User's Manual* (softcover, Thomson Carswell). Copies of my curriculum vitae and Acknowledgement of Expert's Duty are attached hereto as **Exhibit "A"**. As such I have knowledge of the matters to which I hereinafter depose. Where such knowledge is based on information and belief, I have stated the source of the information and verily believe it to be true.

2. I have been retained by the lawyers for the Applicants to review the matters at issue in this motion and to provide my opinion on the reasonableness and legal effect of the steps

taken by the Applicants and their counsel in reviewing the Status Certificates (as hereinafter defined).

3. In preparing to swear this Affidavit, I have reviewed and considered the following materials, copies of which were provided to me by counsel to the Applicants, and to which I refer in this Affidavit (collectively, the "Motion Materials"):

(a) the Motion Record of Metropolitan Toronto Condominium Corporation No. 1037 ("MTCC 1037") in these proceedings dated January 30, 2015 (the "Motion Record") containing the Affidavit of Daleechand Naraine sworn January 14, 2015 (the "Naraine Affidavit) and the Exhibits thereto;

(b) the Affidavit of Gaetano Coscia sworn February 9, 2015 (the "Coscia Affidavit") and the Exhibits thereto;

(c) the Affidavit of Robert Cohen, Q.C. sworn February 10, 2015 (the "Cohen Affidavit") and the Exhibits thereto; and

(d) the Supplementary Affidavit of Daleechand Naraine sworn February 15, 2015 (the "Supplementary Naraine Affidavit").

BACKGROUND

4. From my review of the Motion Materials, I am informed, and do verily believe that, for the purposes of the opinions I express in this Affidavit, the uncontested relevant facts on this motion are as follow:

(a) In or around February 2013, the applicant Trez Capital Limited Partnership ("Trez") through its counsel, Blaney McMurtry LLP ("Blaneys"), were preparing for a transaction (the "Transaction"), wherein Trez would loan the sum of $9,850,000 (the "Loan") to Wynford Professional Centre Ltd. ("Wynford"). The Loan would include as security a first mortgage (the "Mortgage") registered against title to the 380 condominium units (83 commercial and 297 parking) owned by Wynford in MTCC 1037 (the "Wynford Units").

(b) As part of its due diligence on the Transaction, Blaneys requested and received two status certificates from MTCC 1037, one in respect of Wynford's commercial condominium units (the "Commercial Status Certificate") and one in respect of Wynford's parking condominium units (the "Parking Status Certificate") [collectively, the "Status Certificates"], which provided as follows:

(i) that Wynford was not in default of common expense payments for the Wynford Units (paragraph 5 of Commercial Status Certificate; paragraph 1 of Parking Status Certificate);

(ii) an appended list of all Wynford Units with the corresponding statement that they were "Not in default" of common expense payments;

(iii) assurances at paragraphs 13-17 of the Commercial Status Certificate that MTCC 1037's Reserve Fund was adequate and being administered in compliance with the *Condominium Act, 1998* (the "Act").

(c) The Status Certificates were signed by Norma Walton ("Norma") as President of the Board of MTCC 1037.

(d) Blaneys conducted title searches of the Wynford Units prior to the closing of the Transaction, which revealed no liens for common expense payment arrears, which a condominium corporation is permitted to registered against delinquent units under section 85 of the Act.

(e) Provided with the Status Certificates were a copy of the audited Financial Statements for MTCC 1037 for the year ending December 31, 2010 (the "2010 Financial Statements"), of which I have been provided a copy by counsel to Trez, and a copy of which is attached hereto as **Exhibit "B"**.

(f) The Transaction closed and Trez advanced the Loan to Wynford on March 7, 2013.

(g) In or around late 2013, Trez discovered that Norma and her husband Ron Walton ("Ron") were in a dispute with their business partner in Wynford and other businesses, Dr. Stanley Bernstein. As a result of the dispute, a manager, and eventually a receiver were appointed by court order to oversee Wynford's affairs.

(h) As a result of these proceedings, it was discovered in late 2013 or early 2014 that, contrary to the Status Certificates, Wynford had failed to pay common expenses on account of the Wynford Units for large portions of 2011, 2012 and 2013, and owed arrears to MTCC 1037 of approximately $1.25 million.

(i) Under the Act, a condominium corporation has the right to lien a unit for up to 90 days of arrears, which lien takes priority over a mortgage on title. Accordingly, in or around March 2014, the Receiver issued a cheque to MTCC 1037 for the common expenses for the Wynford Units for February, March and April 2014, and has kept common expense payments current since that time.

(j) Following that payment by the Receiver there remain common expense arrears in the amount of $1,284,508.23 on account of the Wynford Units. As these arrears are older than 90 days, MTCC 1037 is unable to register a lien against the Wynford Units under the Act.

5. From my review of the Motion Record, I understand that, in light of the foregoing, MTCC 1037 has taken the position that - despite the Mortgage being registered in first position on title to the Wynford Units and MTCC 1037 having no liens registered on title to the Wynford Units - its original lien rights and their priority ought to be revived and/or it be granted an "equitable lien" for the Wynford Units' common expense arrears before Trez can collect from any sale proceeds.

STATUS CERTIFICATES AND THE ACT

6. A significant purpose of the Act is consumer protection. The Act contains detailed provisions to provide information to the purchasers and mortgagees of both newly-built condominium units and re-sale units. For new units, this is attempted to be done by the

"disclosure statement" regime at sections 72 to 75 of the Act and a status certificate under section 76; for re-sale units it is done by way of a status certificate under section 76 of the Act. A copy of section 76 of the Act is attached hereto at **Exhibit "C"**.

7. Any person (including those not affiliated with the condominium corporation) may request a status certificate in respect to a condominium unit on the payment of a prescribed fee, currently $100. Upon receipt of the fee, the condominium corporation has ten days to provide a status certificate in the prescribed form, a copy of which is attached hereto as **Exhibit "D"**, which must, pursuant to section 76(1) of the Act, contain a variety of organizational and financial information about the both the unit and the condominium corporation as a whole, including:

(a) s. 76(1)(a) - a statement of common expenses for the unit, including arrears, if any;

(b) s. 76(1)(b) - a statement of the increase, if any, in the common expenses for the unit that the board has declared since the date of the budget of the corporation for the current fiscal year and the reason for the increase;

(c) s. 76(1)(c) - a statement of the assessments, if any, that the board has levied against the unit since the date of the budget of the corporation for the current fiscal year to increase the contribution to the reserve fund and the reason for the assessments;

(d) s. 76(1)(f) – a copy of the current declaration, by-laws and rules;

(e) s. 76(1)(i) - a copy of the budget of the corporation for the current fiscal year, the last annual audited financial statements and the auditor's report on the statements;

(f) s. 76(1)(m) - a statement with respect to,

(i) the most recent reserve fund study and updates to it,

(ii) the amount in the reserve fund no earlier than at the end of a month within 90 days of the date of the status certificate, and

(iii) current plans, if any, to increase the reserve fund under subsection 94 (8);

(g) s. 76(1)(n) - a statement of those additions, alterations or improvements to the common elements, those changes in the assets of the corporation and those changes in a service of the corporation that are substantial and that the board has proposed but has not implemented, together with a statement of the purpose of them; and

(h) s. 76(1)(q) - a statement of the amounts, if any, that this Act requires be added to the common expenses payable for the unit.

8. The effect of the status certificate, which was originally known as an "estoppel certificate" is set out at section 76(6) of the Act:

> The status certificate binds the corporation, as of the date it is given or deemed to be given, with respect to the information that it contains or is deemed to contain, as against a purchaser or mortgagee of a unit who relies on the certificate.

9. In his decision in *Durham Condominium Corporation No. 63 v. On-Cite Solutions Ltd.* ("*On-Cite*"), a copy of which is attached hereto as **Exhibit "E"**, Justice Lauwers confirmed, at paragraph 21, the consumer protection nature of a status certificate in adopting the language from my looseleaf book:

> This document is intended to ensure that prospective purchasers and mortgagees of units are immediately given sufficient information regarding the property to make an informed buying or lending decision.

10. In the *On-Cite* case, a condominium corporation failed to disclose in a status certificate certain unauthorized unit alterations of which it was found to have known prior to the issuance of the status certificate. When, after closing, the condominium corporation attempted to force the purchaser to pay to restore the alterations, the court found that the

condominium corporation was estopped from this relief on the basis that the purchaser was entitled to rely on the omission of this issue from the status certificate.

11. Similarly, in *Fisher v. Metropolitan Toronto Condominium Corp. No. 596* ("*Fisher*"), a copy of which is attached hereto as **Exhibit "F"**), a condominium corporation was ordered to reimburse a unit owner for a special assessment levied against the purchaser's unit, which the court found the condominium corporation to have known about and failed to include in the status certificate provided prior to purchaser.

12. Most recently, in *Orr v. Metropolitan Toronto Condominium Corporation No. 1056*, a copy of which is attached hereto as **Exhibit "G"**, a purchaser of a townhouse condominium unit was given a status certificate stating that there were "no continuing violations of the declaration, by-laws, and/or rules of the Corporation". After closing, it was discovered that the townhouse unit she purchased contained an unauthorized third-floor built into the common element attic, in violation of the declaration. The Court of Appeal found that the condominium corporation's negligent misstatement in the status certificate estopped it from demanding that the purchaser close up the third floor to restore the unit to its two-storey configuration and that she pay occupancy rent for her use of the common element space.

13. The consumer protection nature of the Act, its explicit provisions, and the case law on status certificates all provide that a purchaser or mortgagee is entitled to rely on the information contained in a status certificate, and that a condominium corporation is bound by the same as against the purchaser or mortgagee.

14. Based on the cases above, the recipient of a status certificate is entitled to rely on the information contained in (or omitted from) the status certificate.

15. While there are a number of documents appended to the prescribed status certificate form – a copy of the budget for the current fiscal year, a copy of the last annual audited financial statements, copies of certain types of agreements, etc. – these are provided for information purposes only, and do not trump the explicit statements made in the status certificate.

16. If the recipient of a status certificate were given the onus of confirming the statements by the condominium corporation by cross-referencing and analyzing the corporation's documents, then the very purpose of the status certificate would be severely diluted. Few, if any, purchasers or mortgagees would take any comfort in the status certificate if they knew that, at some point in the future, they may be held to account for their efforts to cross-check and verify the corporation's representations. The case law has recognized that this onus ought to remain on the party with the information advantage which is best able to handle the task – the condominium corporation.

17. The only time that a status certificate recipient may be required to "look behind" the status certificate would be if the status certificate, on its face, contained information which a reasonable recipient would further investigate.

18. This was the case in *Stafford v. Frontenac Condominium Corp. No. 11* ("*Stafford*"), a copy of which is attached hereto as **Exhibit "H"**, in which the subject status certificate stated that:

> the condo had no knowledge of circumstances which might increase common expenses, except for inflation, taxation, and "the results of present engineering tests on the balconies by J.L. Richards & Associates"

19. In *Stafford*, the purchasers attempted to avoid paying their proportionate share of a special assessment to pay for balcony repairs levied after closing on the basis that it was not disclosed on the status certificate. The court denied this relief on the basis that the possibility of the balcony repairs was clearly disclosed in the status certificate but the purchasers had made no efforts to inquire as to the potential cost or other impact on their unit.

20. Therefore, unless the representations made on a status certificate clearly point to an issue for which a reasonable recipient would make further inquiries, that recipient is entitled to rely on that information and is protected from proceedings commenced by the condominium with regard to same.

21. This corresponds with the following sections of the *Land Titles Act*, which provide:

> Effect of unregistered instruments

72(1) No person, other than the parties thereto, shall be deemed to have any notice of the contents of any instruments, other than those mentioned in the existing register of title of the parcel of land or that have been duly entered in the records of the office kept for the entry of instruments received or are in course of entry.

and

Registration

...

Priorities

78(5) Subject to any entry to the contrary in the register and subject to this Act, instruments registered in respect of or affecting the same estate or interest in the same parcel of registered land as between themselves rank according to the order in which they are entered in the register and not according to the order in which they were created, and, despite any express, implied or constructive notice, are entitled to priority according to the time of registration.

THE STATUS CERTIFICATES FOR THE WYNFORD UNITS

22. The statements contained in the Status Certificates would offer no suggestion whatsoever to Blaneys that the Wynford Units were in arrears.

23. Paragraph 19 of MTCC 1037's Notice of Motion makes a number of allegations against Blaneys as to "due diligence", on which I comment as follows:

(a) **Trez relied on a status certificate executed by Norma**

There is nothing unusual about the President of the board of directors of a condominium corporation signing a status certificate. Indeed, Article 5.01 of MTCC 1037's By-law No. 1 ("General Operating By-law", reproduced at Tab E of the Motion Record, states that the "affairs of the Corporation shall be managed by a board of directors". This would include the issuance of status certificates.

MTCC 1037's motion materials also raise the issue that it was irregular for Norma to sign the status certificate as she was both President of the condominium corporation and the borrower in the Transaction. In my experience, this raises no concerns. I understand that Wynford was the owner of some 70% of the units in MTCC 1037 so it is quite understandable that one of its principals would sit as President of MTCC 1037's Board.

(b) **Trez did not inquire further with the "Minority Directors"**

This suggestion presupposes that Trez or its counsel had any suspicion regarding the alleged wrongdoing of Norma and Ron and the alleged exclusion of the Minority Directors from MTCC 1037's governance. Unless there is some evidence of this, which my review of the Motion Record has failed to locate, it would be well beyond the normal practice of a condominium purchaser's lawyer to make inquiries with all of the members of a board of directors as to the affairs of the condominium corporation.

(c) **Trez relied on old financial statements**

The case law makes it clear that a recipient is entitled to rely on the statements made in a status certificate. It is these statements, not the appended documents such as financial statements, on which the Act permits a recipient to rely.

In any event, financial statements do not disclose specific information regarding unit ledgers. That information is solely within the possession of the condominium corporation, whose obligation it is to disclose it at the appropriate paragraphs of a status certificate.

My review of the 2010 Financial Statements shows that MTCC 1037 had a surplus of $164,881 for the year ending December 31, 2010 and, in my opinion based on my experience with condominiums, do not disclose any information which would reveal financial issues with MTCC 1037. These financial statements only helped to confirm and provide greater comfort to the statements in the Status Certificate on which Trez was already permitted to rely.

(d) **Trez did not request updated financial statements from 2011 and 2012 which would have disclosed the arrears**

Section 76(4) of the Act states that if a status certificate omits material information that it is required to obtain, then it shall be deemed to include a statement that there is no such information. Accordingly, as I stated earlier, there was no onus on Trez under

the act to make inquiries to confirm whether later financial statements existed in order to confirm the clear representations that the Wynford Units had no arrears.

Further, it would appear from paragraph 25 of the Naraine Affidavit that at the time the Transaction closed early 2013, the 2011 and 2012 audited financial statements were not prepared. Therefore, the Status Certificates did append the "last annual audited financial statements" as provided for the in the prescribed status certificate form.

I understand also from paragraph 15 of the Naraine Affidavit that, in January 2013, shortly prior to the closing of the Applicants' Transaction for the Wynford Units, a company called IVedha, with which Naraine seems affiliated, purchased 7 units in MTCC 1037. The status certificates provided to IVedha at the time of the purchase and also signed by Norma are produced at Tab F of the Motion Record. They are almost identical in form to the Status Certificates provided to Blaneys. There is no evidence in MTCC 1037's materials that IVedha or its counsel made any further inquiries following receipt of those status certificates.

Finally at paragraph 10 of the Supplementary Naraine Affidavit, the deponent comments on the numerous steps currently being taken by counsel to the new purchaser of the Wynford Units with regard to financial statements. In my opinion, this is in keeping with the ratio in *Stafford* whereby a purchaser with actual knowledge of potential issues may need to make further inquiries. Here, that is the knowledge that the Wynford Units are being purchased out of receivership in a condominium corporation where there have been allegedly severe financial issues. These circumstances are markedly different than those in which Trez closed its Transaction on the comfort of the clean Status Certificates.

24. In light of the foregoing, it is my opinion that it was reasonable for the Applicants and their counsel to rely on the Status Certificates and that they contained no representations which would raise suspicions on the part of Blaneys or otherwise shift the onus to the Applicants or their counsel to "look behind" the Status Certificates.

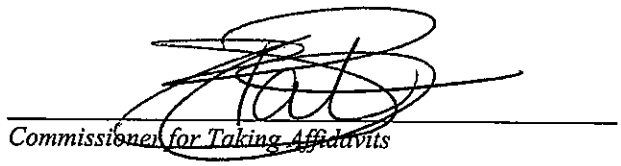
SWORN BEFORE ME at the City of Toronto on February 20, 2015.

Commissioner for Taking Affidavits

AUDREY LOEB

TAB A

THIS IS EXHIBIT "A" TO THE
AFFIDAVIT OF AUDREY LOEB
SWORN BEFORE ME on February 19, 2015



Commissioner for Taking Affidavits

Audrey Loeb, LSM, B.A., LL.B., LL.M.

Audrey Loeb is an accomplished academic, professor of law, practicing lawyer, consumer advocate and energetic leader who achieves outstanding results in professional and community fundraising endeavours through vision, enthusiasm and determination.

An articulate spokesperson, lecturer and author whose leadership and problem-solving skills and commitment to public education have been established over the course of a high-profile career teaching law; becoming one of Canada's foremost experts in condominium law; advising government and communities; writing both consumer materials and leading legal texts.

Academic Background

LL.M., London School of Economics & Political Science	1972
LL.B., Osgoode Hall Law School, York University	1971
B.A., McGill University	1968
The Institute of Corporate Directors and The Joseph L. Rotman School of Management, Financial Literacy Program for Directors and Executives	2007
The Institute of Corporate Directors and The Joseph L. Rotman School of Management, Governance Essentials Program for Directors of Not-For-Profit Organizations	2007

Career Highlights

Ryerson University, Professor of Law, School of Business Management	1976 – 2006
Ryerson University Professor Emeritus School of Business Management	2006 – current
Author of the leading texts on condominium law- **"Condominium Law and Administration"** and **"The Ontario Condominium Act: A User's Manual"**	1980 – current
Miller Thomson LLP, Co-Chair, Condominium Practice Group	2001 – current
Humber College, Guest Lecturer	1988 – current
Toronto and Mississauga Real Estate Boards, Lecturer	1995 – current
Recipient of the Ontario Bar Association, Real Property Section Award of Excellence awarded to one individual each year who has made a distinguished contribution in the Real Property law field	2008
Recipient of the Communication and Leadership Award from District 60 of Toastmasters International	2008
Recipient of the Law Society Medal	2008

The Law Society Medal, established in 1985, recognizes outstanding Ontario lawyers whose service reflects the highest ideals of the profession for her significant contributions to the profession, and to her community as the founder and Chair of the "Weekend to End Breast

Cancer" benefitting the Princess Margaret Hospital Foundation. Fewer than 100 Canadian lawyers have received The Law Society Medal since it was struck in 1985.

Recipient of the Gold Key Award from **Osgoode Hall Law School** for Professional Achievement 2012

Ms. Loeb has also served on the Consumer Advisory Committee of the board of directors of the Tarion

Home Warranty Program, the board of directors of the Restate Estate Council of Ontario.

Community Leadership Highlights

Bridgepoint Health and Hospital, Board of Directors 2006 - 2010

Member of the Development and Investment Committees

Princess Margaret Hospital Foundation, Board of Directors 1996 – 2006

While a member of the Foundation's board of directors Ms. Loeb founded and chaired **the Weekend to End Breast Cancer** (now the Weekend to End Women's Cancers) (see ***www.endcancer.ca***)

The Toronto event is the most successful single fund raising event in Canadian history and the event which is now national has raised in excess of $120 million dollars for PMHF since its inception. 2002 - 2006

Miss Loeb, as the founder of the WEBC, was the keynote speaker at the annual meeting of the Association of Professional Fund Raisers of Ontario, where she described the process of transforming the WEBC idea to reality. 2005

Member of Audit and Accountability and Governance Cttees and Chair of the **Campbell Family Breast Cancer Institute,** Advisory Board 2004 – 2006

Yonge Street Business Improvement Association, Committee Member 2002 – 2004

John Tory Mayoralty Campaign, Community Co-Chair 2003

The Canadian Women's Breast Cancer Association, Founding Board Member

Professional Memberships

- Law Society of Upper Canada 1974 – current
- Ontario Bar Association 1980 – current
- Ontario Council of University Faculty Associations 1976 – current
- Canadian Association of University Teachers 1976 – 2006
- Member of the Canadian Legal Lexpert Directory and Best Lawyers for Property Law Canada 2002 – current

Professional Experience

Ryerson, University, Professor Emeritus of Law, School of Business Management

Miller Thomson LLP
Chair, Condominium Practice Group and one of Canada's foremost experts in the field of condominium law, acting as advisor to industry, government and consumers

- Firm is legal counsel to over 750 condominium corporations in Ontario
- Consumer protection and education focus of personal practice
- Extensive writings focus on consumer access to legal information
-

Humber College, Guest Lecturer 1988 – current
Registered Condominium Management Program

Legal Information Ontario 1998
Developed and wrote public education materials for this non-profit organization which provides Ontario residents with easy to understand legal information

Condominium Dispute Resolution Centre, Founding Member 1997
Conceived and implemented this initiative to ensure consumer access to fair and consistent application of the law

Ontario Ministry of Consumer and Commercial Relations, Legal Counsel 1974 – 1979

- As a member of the Ontario Residential Condominium Study Group, guided development of recommendations to amend the Act – 98% of which were adopted
- Prepared, drafted and processed amendments to the Condominium Act, 1978
- Principal administrator of the Act working with the development and property management industries, condominium boards of directors and legal, accounting and engineering professions
- Developed and implemented public education program

Condominium Ontario, Legal Counsel 1979 – 1981

Government funded arms-length organization furthering interests of condominium owners

- Trained dispute resolution officers; trained and assisted public inquiry officers

Ontario Ministry of Housing, Legal Counsel 1979 – 1980

Community Experience

Bridgepoint Health, Board Member 2006 - 2011

Princess Margaret Hospital Foundation, Member Board of Directors 1996 – 2006
Member of Board Committees: Governance, Audit and Finance, Development, Strategic Planning, Weekend to End Breast Cancer

Weekend to End Breast Cancer, Founder and Chair 2002 – 2006
Conceived and spearheaded Canada's largest ever fundraising event – the Weekend to End Breast Cancer, Toronto – which started in September 2003, on behalf of the Princess Margaret Hospital Foundation.

- In 2007 Princess Margaret Hospital Foundation raised $17.2 million for breast cancer research and patient care
- Mobilized support teams of more than 500 crew and 700 volunteers
- With the support and recommendations to other cities the Model was franchised to Vancouver, Montreal, Edmonton, Ottawa, Winnipeg, Calgary and Halifax. To date the

combined total raised by the WEBC is $180,000,000 and generated support from over 350,000 individual donors
- Assembled, chaired and managed team of board members and staff
- Negotiated contract and ownership rights; developed risk management, event and media plans, registration and request for information forecasts, budget and financial targets

Institute for Breast Cancer Research at Princess Margaret Hospital, Advisory Board
2004 – 2006

- The 2003-2007 Weekend to End Breast Cancer walk provided seed funding of $25 million for this new Institute. The Weekend to End Breast Cancer" is very valuable in supporting breast cancer research, treatment and care at The Campbell Family Cancer Research Institute at The Princess Margaret. As one of the world's top 5 cancer research centres, The Princess Margaret utilizes funds from The Weekend to carry out breakthrough initiatives. These include cutting-edge research under the direction of Dr. Tak Mak, the purchase of a Breast MRI machine to support clinical care at The Princess Margaret, the creation and support of a tumor bank, and the creation of the world-class Survivorship Program. Looking to the future, we are hopeful for breakthroughs in the understanding of the genetics and the metabolism behind the disease from Dr. Tak Mak and a team of over 130 people focused on breast cancer, further clinical enhancements led by Dr. David McCready and further development of the Survivorship Program, directed by Dr. Pam Catton.

Yonge Street Business Improvement Association, Member Operations Committee
2002 – 2004

John Tory Mayoralty Campaign, Community Co-Chair 2003

The Canadian Women's Breast Cancer Association, Founding Board Member

Professional Activities (Selected since 2000)

- Ontario Real Estate Lawyers Association current
- Member, Canadian Bar Association of Ontario Real Property Subsection 1985 - current
- Co-Chair, Real Property Subsection Condominium Committee Ontario Bar Association 1990 – current
- Member, Ministry of Consumer & Business Services Real Property Registration Committee 1994 – current
- Member, Board of Directors, Real Estate Council of Ontario 2002 – 2003
- Member, National Board of Directors Canadian Condominium Institute 2000 – 2002
- Member, Advisory Board, Ontario New Home Warranty Program as Consumer Representative for the Condominium Industry 1999 – 2002
- Ms. Loeb has been instrumental in the development and implementation of condominium law in Ontario since 1974, first as a member of the government and once she went into private practice as a representative of the Ontario Bar Association and the Canadian Condominium Institute legal committee. She has been involved in the policy and drafting of the Ontario Condominium Acts of 1974, 1978, and 1998.

Publications (Selected)

Condominium: the Law and Administration, 1st edition, 1980, *Loeb & McLellan*

Condominium: the Law and Administration, 2nd and 3rd loose leaf editions, 1989, 2001 which is updated five times a year, *Loeb*

The Annotated Ontario Condominium Act, 1995, 1996, 1997, 1998, 1999, *Loeb*

The Condominium Act: A User's Manual, *2001, 2005, 2010 Loeb*

Appendix A: Publications, Writings & Lectures

Publications

Condominium: the Law and Administration, 1st edition, 1980, *Loeb & McLellan*

Condominium: the Law and Administration, 2nd edition, 1989, *Loeb*

Condominium: the Law and Administration, 3rd edition, 2001, *Loeb*

The Annotated Ontario Condominium Act, 1995, 1996, 1997, 1998, 1999, *Loeb*

The Condominium Act: A User's Manual, 1st to 4th editions, 2001-2013, *Loeb*

Buying a Condominium: Condominium Ownership & What You Need To Know, *Canadian Condominium Institute 2002, Toronto Real Estate Board*

Living in a Condominium: Condominium Ownership & What You Need To Know, *Canadian Condominium Institute 2002* – The two final works were given to CCI and TREB to provide their members with information that will help educate consumers about the complex "world of condominium buying & living"

Writings

- "Condominium Manual", Canadian Bar Association (Co-author), 1978
- Real Estate and Landlord and Tenant Condominium Chapters, Bar Admission Course materials, (Co-author)
- Toronto Real Estate Board News, columnist since January 1997
- "Ontario Residential Real Estate Practice Manual", Chapter 14: Purchase of a Condominium Unit, *Butterworths*
- Periodic columnist, Toronto Star and Globe and Mail, since 1980s
- The Lawyers Weekly
  - "Lien Priority: The Condominium Act, 1998", February 2001
  - "New Condominium Concepts: The Condominium Act, 1998", April 2001
  - "Condo Interest Requirement Not a Trust Obligation", October 2000
- The Six-Minute Real Estate Lawyer, Law Society of Upper Canada
  - "Regulations under the Condominium Act, 1998", 2001
  - "Status Certificates", 2001
  - "The Highlights of the Condominium Act, 1998", 1999
  - "Condominium Liens", 1998
- "Developers are Obliged to Play Fair", Condo Business Magazine, June 2000
- "Loeb on Law", Globe and Mail, bi-weekly column, 1984 – 1986
- "Real Property Law Casebook", Condominium Chapter, Reiter and Risk, 1978

Lectures etc.

- Deloitte Touche lecture for retired partners
- Ontario Living CBC Radio

- "By-laws and their Implementation", Association of Condominium Managers of Ontario - Condominium Law, Humber College
- "The Condominium Act for Realtors", Toronto Real Estate Board
- Canadian Condominium Institute, regular, topical lectures since 1990
- Ontario Bar Association Continuing Legal Education Institute, January, 2002
- "The Fundamentals of Commercial Real Estate Law – Condominiums", Ontario Bar Association, 2002
- "The Condominium Act, 1998 for the Practitioner", Canadian Bar Association of Ontario Continuing Legal Education Institute, 2001
- "The New Condominium Act: What's New for Directors", Canadian Condominium Institute, May 2001
- "Planning for the New Forms of Development Seminar", Region of Halton, May 2001
- "The Condominium Act, 1998", Del Property Management Inc., June 2001
- "Land Titles and Condominiums", Canadian Bar Association of Ontario Land Titles: It's Going to be the Only Game in Town, September 2000
- "The Condominium Act, 1998: The top 10 Changes Practitioners Need To Know", Canadian Bar Association of Ontario Continuing Legal Education Institute, 2000
- "Land Titles and the Purchase of a Condominium Unit", Canadian Bar Association of Ontario,
- "The Condominium Act, 1998 and Its Impact on The Role of The Judiciary", Superior Court of Justice Fall Education Seminar Changing Role of the Court: New Issues, 1999
- "Disclosure, Status Certificates and Recovery and Collections", Humber College, 1999
- "The Condominium Act, 1998", Morris/Rose/Ledgett Seminar, 1999
- "Developers and the Condominium Act, 1998", Condominium Dispute Resolution Centre, 1999
- "The Condominium Act, 1998", Law Society of Upper Canada and the Canadian Bar Association of Ontario, 1999
- "Commercial and Industrial Condominium Sales", Toronto Real Estate Board, 1998
- "Residential Condominium Sales", Toronto Real Estate Board – 1993, 1995, 1998
- "Title Insurance", Law Society of Upper Canada, May 1997
- "Bullet proofing the Condominium Declaration", Condominium Development Conference, 1995
- "How to Conduct Board Meetings/Members' Meetings of Condominium Corporation's" - The Nuts and Bolts of Running Company Meetings, Canadian Bar Association, 1994
- "Tough 'Acts' to Follow: A Potpourri of New and Not-So-New Statutory Remedies Litigators Need to Know", Continuing Legal Education, 1993
- "Estoppel Certificates", Association of Condominium Managers of Ontario, 1993
- "Surviving the New Practice of Real Estate", Law Society of Upper Canada, 1993
- "Insight Seminar" - Bill 81, Condominium Corporation Act of Ontario, 1992
- "Deal Breaking Title Problems - Condominiums", Law Society of Upper Canada, 1990
  "Ontario New Home Warranty Program - Condominiums", Canadian Bar Association, 1990
- "Condominium for Real Estate Agents", Toronto Real Estate Board and Ontario Real Estate Association, 1985 – 1987
- "Trying to Keep Up: Recent Legislation and Case Law of Importance to Condominium Lawyers",
- Law Society of Upper Canada, October 1987
- "Interprofessional Relations", National Canadian Condominium Conference, 1987

"Advising the Board of Directors of a Condominium Corporation", Law Society of Upper Canada, November 1984.

Court File No. CV-14-10493-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF Section 101 of the *Courts of Justice Act* and Section 243 of the *Bankruptcy and Insolvency Act*

BETWEEN:

TREZ CAPITAL LIMITED PARTNERSHIP and COMPUTERSHARE TRUST COMPANY OF CANADA

Applicants

- and -

WYNFORD PROFESSIONAL CENTRE LTD. and GLOBAL MILLS INC.

Respondents

ACKNOWLEDGMENT OF EXPERT'S DUTY

1. My name is Audrey Loeb. I live at 12 Shorncliffe Avenue, Toronto, in the Province of Ontario.

2. I have been engaged by or on behalf of the Lawyers for the Applicants to provide evidence in relation to the above-noted court proceeding.

3. I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:

   (a) to provide opinion evidence that is fair, objective and non-partisan;

   (b) to provide opinion evidence that is related only to matters that are within my area of expertise; and

   (c) to provide such additional assistance as the court may reasonably require, to determine a matter in issue.

4. I acknowledge that the duty referred to above prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged.

February 19, 2015

_____
AUDREY LOEB

TREZ CAPITAL LIMITED PARTNERSHIP *et al* Applicants	and	WYNFORD PROFESSIONAL CENTRE LTD. *et al* Respondents	Court File No: CV-14-10493-00CL

000021

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at TORONTO

ACKNOWLEDGMENT OF EXPERT'S DUTY

ROBINS APPLEBY LLP
Barristers and Solicitors
2600 – 120 Adelaide Street West
Toronto, ON M5H 1T1

Irving Marks LSUC #19979H
Tel: (416) 360-3329

Dominique Michaud LSUC #56871V
Tel: (416) 360-3795
Fax: (416) 868-0306

Lawyers for the Applicants

TAB B

THIS IS EXHIBIT "B" TO THE
AFFIDAVIT OF AUDREY LOEB
SWORN BEFORE ME on February 19, 2015

Commissioner for Taking Affidavits

METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 1037

STATEMENT OF FINANCIAL POSITION

DECEMBER 31, 2010
(With 2009 Comparisons)

	2010	2009 (Note 8)
ASSETS		
CURRENT		
Cash - operations	$ 165,325	$ 83,449
Cash - reserve	417,257	214,407
Accounts receivable	4,412	61,440
Prepaid expenses	29,248	27,045
	616,242	386,341
LONG TERM		
Term deposits - reserve (Note 4)	1,135,910	1,134,200
TOTAL ASSETS	**$ 1,752,153**	**$ 1,520,541**
LIABILITIES		
CURRENT		
Accounts payable and accrued liabilities	$ 72,317	$ 34,537
Sales tax payable	10,890	1,985
TOTAL LIABILITIES	83,207	36,522
FUND BALANCES		
Reserve fund (Note 3)	1,364,202	1,199,321
General fund	304,743	284,698
	1,668,945	1,484,020
TOTAL LIABILITIES & FUND BALANCES	**$ 1,752,153**	**$ 1,520,541**

APPROVED ON BEHALF OF THE BOARD

_____ Director

_____ Director

The accompanying summary of significant accounting policies and notes are an integral part of these financial statements.

STATEMENT 1

METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 1037

STATEMENT OF RESERVE FUND OPERATIONS AND FUND BALANCE

FOR THE YEAR ENDED DECEMBER 31, 2010

(With 2009 Comparisons)

	2010 Budget (Note 7) (Unaudited)	2010 Actual	2009 Actual (Note 8)
REVENUE			
Owners' contribution to the reserve fund	$ 202,850	$ 202,850	$ 184,410
Interest	-	1,979	379
	202,850	204,829	184,789
MAJOR REPAIRS AND REPLACEMENTS			
Cooling tower	-	4,725	-
Entrance and lobby repairs	-	13,825	-
Front door replacement	-	-	25,747
Parking light repairs	-	1,131	-
Reserve fund study	-	3,450	-
Roof repairs and replacement	-	16,817	-
	-	39,948	25,747
Excess of revenue over expenses for the year	$ 202,850	164,881	159,042
Fund balance, beginning of year		1,199,321	1,040,279
Fund balance, end of year		$ 1,364,202	$ 1,199,321

The accompanying summary of significant accounting policies and notes are an integral part of these financial statements.

STATEMENT 2

METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 1037

STATEMENT OF GENERAL FUND OPERATIONS AND FUND BALANCES

FOR THE YEAR ENDED DECEMBER 31, 2010

(With 2009 Comparisons)

	2010 Budget (Note 7) (Unaudited)	2010 Actual	2009 Actual (Note 8)
REVENUE			
Owners' contribution	$ 685,290	$ 685,802	$ 691,016
Less: contribution to reserve fund	(202,850)	(202,850)	(184,410)
Owners' contribution to general fund	482,440	482,952	506,606
Interest and other income	-	1,215	29
	482,440	484,167	506,635
COMMON EXPENSES			
ADMINISTRATION			
Administrative	5,140	4,102	7,628
Insurance	33,000	26,402	28,395
Interest and penalty	-	2,581	-
Management fees	54,000	54,000	54,000
Professional fees	21,600	20,044	24,109
Superintendant	36,000	36,000	34,400
MAINTENANCE AND REPAIRS			
Cleaning supplies	-	10,870	9,977
Elevator	16,500	14,502	15,859
General	66,000	46,013	82,831
Janitorial services	38,000	31,371	20,950
Landscaping and snow removal	10,800	10,589	8,935
Security service	4,400	3,133	8,095
UTILITIES			
Gas	70,000	34,994	57,052
Hydro	95,000	108,296	100,120
Water	32,000	61,227	35,112
	482,440	464,122	487,463
Excess of revenue over expenses for the year	$ -	20,045	19,172
Fund balance, beginning of year		284,698	265,526
Fund balance, end of year		$ 304,743	$ 284,698

The accompanying summary of significant accounting policies and notes are an integral part of these financial statements.

STATEMENT 3

METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 1037

STATEMENT OF CASH FLOWS

FOR THE YEAR ENDED DECEMBER 31, 2010

(With 2009 Comparisons)

	2010	2009 (Note 8)
OPERATING ACTIVITIES		
Cash from operations		
Net under expenditure for the year	$ 20,045	$ 19,172
Decrease (Increase) in accounts receivable	57,028	(60,796)
(Increase) in prepaid expenses	(2,202)	(27,045)
Increase (Decrease) in accounts payable and accrued liabilities	37,780	(1,532)
Increase (Decrease) in sales tax payable	8,905	(5,813)
Interest paid	-	-
Taxes paid	-	-
	121,556	(76,014)
Cash from Reserve Operations		
Net under expenditure for the year	164,881	159,042
INVESTING ACTIVITIES		
(Increase) in term deposits	(1,710)	(379)
CHANGES IN CASH AND EQUIVALENTS DURING THE YEAR	**284,727**	**82,649**
CASH AND EQUIVALENTS, JANUARY 1,	**297,856**	**215,206**
CASH AND EQUIVALENTS, DECEMBER 31,	**$ 582,582**	**$ 297,856**
CASH AND EQUIVALENTS REPRESENTED BY:		
Cash - operations	$ 165,325	$ 83,449
Cash - reserve	417,257	214,407
	$ 582,582	$ 297,856

The accompanying summary of significant accounting policies and notes are an integral part of these financial statements.

STATEMENT 4

METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 1037

NOTES TO THE FINANCIAL STATEMENTS

DECEMBER 31, 2010

1. Purpose of the Organization

The Metropolitan Condominium Corporation No. 1037 (the "Corporation") was registered without share capital in 1994 under the laws of the Condominium Act of Ontario, the "Act". The Corporation was formed to manage and maintain, on behalf of the owners, the common elements of 119 commercial units located in the Don Mills.

For Canadian income tax purposes the Corporation qualifies as a not-for-profit organization which is exempt from income tax under the Income Tax Act.

2. Summary of Significant Accounting Policies

(a) Fund Accounting

The corporation follows the restricted method of accounting for contributions.

The general fund reports the contributions from owners and expenses related to the operations and administration of the common elements.

The reserve fund reports the contributions from owners and expenditures for major repair and replacement costs of the common elements and assets. The basis for determining the fund's requirements is explained in Note 3. Only major repairs and replacements of the common elements are charged directly to this reserve fund. Minor repairs and replacements are charged to repairs and maintenance of the general fund. The Corporation segregates amounts accumulated for the purpose of financing future charges to the reserve fund in special accounts, for use only to finance such charges. Interest earned on these amounts is credited directly to the reserve fund.

(b) Use of Estimates

The preparation of financial statements in accordance with Canadian generally accepted accounting principles requires management to make estimates and assumptions that affect the reported amounts of assets and liabilities as the date of the financials statements, and the reported amounts of revenues and expenses during the reporting period. Actual results could differ from management's best estimates as additional information becomes available in the future.

(c) Common Elements

The common elements of the corporation are owned proportionately by the unit owners and consequently are not reflected as assets in these financial statements.

(d) Revenue Recognition

The Corporation recognizes revenue from common element assessment on the first day of each month.

METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 1037

NOTES TO THE FINANCIAL STATEMENTS

DECEMBER 31, 2010

3. Reserve Fund

The Corporation, as required by the Condominium Act, 1998, has established a reserve fund for financing future major repairs and replacements of the common elements and assets.

The Corporation has used the updated comprehensive reserve fund study (with site visit) dated January 2011 prepared by Genivar Consultants Limited and such other information that was available to them in evaluating the adequacy of annual contributions to the reserve fund for major repairs and maintenance. The reserve fund study suggests an annual contribution of $202,850 for 2010 and projects a reserve fund balance of $866,800 as at December 31, 2010. The plan for expenditures from the reserve fund for 2010 was $586,110.

The reserve is evaluated on the basis of expected repair and replacement costs and life expectancy of the common elements and assets of the Corporation. Such evaluation is based on numerous assumptions as to future events.

4. Term Deposits - Reserve

	Rate %	Maturity	Amount
TD Mortgage Corporation G.I.C	0.5000	March 24, 2011	$ 353,329
TD Mortgage Corporation G.I.C	0.5000	March 24, 2011	42,762
TD Mortgage Corporation G.I.C	0.5000	May 11, 2011	132,043
TD Mortgage Corporation G.I.C	0.5000	December 13, 2011	126,332
TD Mortgage Corporation G.I.C	0.5000	December 13, 2011	234,450
TD Mortgage Corporation G.I.C	0.5000	December 13, 2011	51,752
TD Mortgage Corporation G.I.C	0.5000	December 16, 2011	70,163
TD Mortgage Corporation G.I.C	0.5000	December 29, 2011	99,615
TD Mortgage Corporation G.I.C	0.5000	December 29, 2011	25,466
			$ 1,135,910

5. Remuneration of Directors and Officers

No remuneration was paid to Directors and Officers during the year.

6. Financial Instruments

The Corporation's financial instruments consist of cash, investments, accounts receivable, accounts payable and accruals. Unless otherwise noted, it is the Board's opinion that the Corporation is not exposed to significant interest rate, currency or credit risks arising from its financial instruments. The fair value of these financial instruments approximate their carrying values, unless otherwise noted.

METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 1037

NOTES TO THE FINANCIAL STATEMENTS

DECEMBER 31, 2010

7. Budget Information

The budget figures presented for comparison purposes are unaudited and are those approved by the directors. They have been reclassified to conform with the financial statement presentation.

8. Comparative Figures

The comparative figures are for the year ended December 31, 2009. They were also compiled by Wong, Kwok and Company, Chartered Accountants and are subject to their auditors' report dated April 13, 2010.

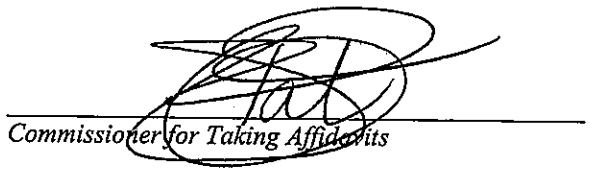
Figures have been reclassified to conform with the financial statement presentation.

9. Subsequent Event

Effective February 7, 2011, the Corporation changed its management company from Pennant Realty Corporation to Hazelton Property Management Limited.

TAB C

THIS IS EXHIBIT "C" TO THE AFFIDAVIT OF AUDREY LOEB SWORN BEFORE ME on February 19, 2015



Commissioner for Taking Affidavits

76. (1) The corporation shall give to each person who so requests a status certificate with respect to a unit in the corporation, in the prescribed form, that specifies the date on which it was made and that contains,

(a) a statement of the common expenses for the unit and the default, if any, in payment of the common expenses;

(b) a statement of the increase, if any, in the common expenses for the unit that the board has declared since the date of the budget of the corporation for the current fiscal year and the reason for the increase;

(c) a statement of the assessments, if any, that the board has levied against the unit since the date of the budget of the corporation for the current fiscal year to increase the contribution to the reserve fund and the reason for the assessments;

(d) a statement of the address for service of the corporation;

(e) a statement of the names and address for service of the directors and officers of the corporation;

(f) a copy of the current declaration, by-laws and rules;

(g) a copy of all applications made under section 109 to amend the declaration for which the court has not made an order;

(h) a statement of all outstanding judgments against the corporation and the status of all legal actions to which the corporation is a party;

(i) a copy of the budget of the corporation for the current fiscal year, the last annual audited financial statements and the auditor's report on the statements;

(j) a list of all current agreements mentioned in section 111, 112 or 113 and all current agreements between the corporation and another corporation or between the corporation and the owner of the unit;

(k) a statement that the person requesting the status certificate has the rights described in subsections (7) and (8) with respect to the agreements mentioned in clause (j);

(l) a statement whether the parties have complied with all current agreements mentioned in clause 98 (1) (b) with respect to the unit;

(m) a statement with respect to,

(i) the most recent reserve fund study and updates to it,

(ii) the amount in the reserve fund no earlier than at the end of a month within 90 days of the date of the status certificate, and

(iii) current plans, if any, to increase the reserve fund under subsection 94 (8);

(n) a statement of those additions, alterations or improvements to the common elements, those changes in the assets of the corporation and those changes in a service of the corporation that are substantial and that the board has proposed but has not implemented, together with a statement of the purpose of them;

(o) a statement of the number of units for which the corporation has received notice under section 83 that the unit was leased during the fiscal year preceding the date of the status certificate;

(p) a certificate or memorandum of insurance for each of the current insurance policies;

(q) a statement of the amounts, if any, that this Act requires be added to the common expenses payable for the unit;

(r) a statement whether the Superior Court of Justice has made an order appointing an inspector under section 130 or an administrator under section 131;

(s) all other material that the regulations made under this Act require.

Fee for certificate

(2) The corporation may charge the prescribed fee for providing the status certificate.

Time for giving certificate

(3) The corporation shall give the status certificate within 10 days after receiving a request for it and payment of the fee charged by the corporation for it.

Omission of information

(4) If a status certificate that a corporation has given under subsection (1) omits material information that it is required to contain, it shall be deemed to include a statement that there is no such information.

Default in giving certificate

(5) A corporation that does not give a status certificate within the required time shall be deemed to have given a certificate on the day immediately after the required time has expired stating that,

(a) there has been no default in the payment of common expenses for the unit;

(b) the board has not declared any increase in the common expenses for the unit since the date of the budget of the corporation for the current fiscal year; and

(c) the board has not levied any assessments against the unit since the date of the budget of the corporation for the current fiscal year to increase the contribution to the reserve fund.

Effect of certificate

(6) The status certificate binds the corporation, as of the date it is given or deemed to have been given, with respect to the information that it contains or is deemed to contain, as against a purchaser or mortgagee of a unit who relies on the certificate.

Examination of agreements

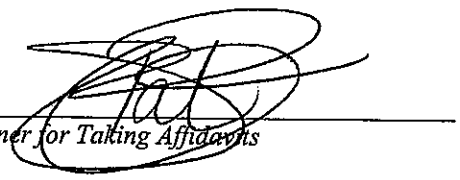
(7) Upon receiving a written request and reasonable notice, the corporation shall permit a person who has requested a status certificate and paid the fee charged by the corporation for the certificate, or an agent of the person duly authorized in writing, to examine the agreements mentioned in clause (1) (k) at a reasonable time and at a reasonable location.

Copies of agreements

(8) The corporation shall, within a reasonable time, provide copies of the agreements to a person examining them, if the person so requests and pays a reasonable fee to compensate the corporation for the labour and copying charges.

TAB D

THIS IS EXHIBIT "D" TO THE AFFIDAVIT OF AUDREY LOEB SWORN BEFORE ME on February 19, 2015



Commissioner for Taking Affidavits

Form 13

Condominium Act, 1998

STATUS CERTIFICATE
(under subsection 76 (1) of the *Condominium Act, 1998*)

..... *(name of condominium corporation)* Condominium Corporation No. ..... (known as the "Corporation") certifies that as of the date of this certificate:

Instruction for a common elements condominium corporation

(If the Corporation is a common elements condominium corporation, change all references in this certificate to terms in Column 1 to references to the terms in Column 2.)

COLUMN 1	COLUMN 2
unit(s)	common interest(s) in the Corporation
unit owner(s)	the owner(s) of a common interest in the Corporation

General Information Concerning the Corporation

1. Mailing address: .....
2. Address for service: .....
3. Name of property manager: .....

   Address: .....

   Telephone number: .....
4. The directors and officers of the Corporation are:

   Name Position Address for service Telephone Number

   .....

Common Expenses

[If the Corporation is any condominium corporation but a common elements condominium corporation:

5. The owner of Unit ..... Level ..... (Suite number ..... address .....)
   of .....*(identify condominium plan)*, registered in the Land Registry Office for the Land Titles (or Registry) Division of .....*]*

   [If the Corporation is a common elements condominium corporation:
   The owner of the common interest in the Corporation attached to ..... *(provide description, as set out in Schedule D to the declaration, of the parcel of land to which the common interest in the Corporation is attached)*, registered in the Land Registry Office for the Land Titles (or Registry) Division of ....., (known as the "Parcel")*]*

   (Strike out whichever is not applicable:
   is not in default in the payment of common expenses.

   OR

   is in default in the payment of common expenses in the amount of $ .....*)*

   [If applicable add:
   and a certificate of lien has been registered against

   (if the Corporation is any condominium corporation but a common elements condominium corporation: the unit*)*

   (if the Corporation is a common elements condominium corporation: the Parcel*)].*

6. A payment on account of common expenses for the unit in the amount of $..... is due on ..... *(next due date)* for the period ..... *(date)* to ..... *(date)*. This amount includes the amount of any increase since the date of the budget of the Corporation for the current fiscal year as described in paragraph 10.
7. The Corporation has the amount of $..... in prepaid common expenses for the unit.
8. There are no amounts that the *Condominium Act, 1998* requires to be added to the common expenses payable for the unit *[if applicable add:* except ..... *(set out details and provide brief description)].*

Budget

9. The budget of the Corporation for the current fiscal year is accurate and may result in

(Strike out whichever is not applicable:
a surplus of $.....

OR

a deficit of $.....).

10. *[Strike out whichever is not applicable:*

Since the date of the budget of the Corporation for the current fiscal year, the common expenses for the unit have not been increased.

OR

Since the date of the budget of the Corporation for the current fiscal year, the common expenses for the unit have been increased by $..... per month because ..... *(set out the reason for the increase)].*

11. *[Strike out whichever is not applicable:*
Since the date of the budget of the Corporation for the current fiscal year, the board has not levied any assessments against the unit to increase the contribution to the reserve fund or the Corporation's operating fund or for any other purpose.

OR

Since the date of the budget of the Corporation for the current fiscal year, the board has levied the following assessments against the unit to increase the contribution to the reserve fund or the Corporation's operating fund or for any other purpose: ..... *(set out the amounts and the reason for the assessments)].*

12. The Corporation has no knowledge of any circumstances that may result in an increase in the common expenses for the unit *[if applicable add:* except ..... *(give particulars of any potential increase, including any assessment levied by the board against the unit, and the reason for it)].*

Reserve Fund

13. The Corporation's reserve fund amounts to $..... as of .....*(specify a date that is no earlier than at the end of a month within 90 days of the date of this certificate).*

14. *[Strike out whichever is not applicable:*
The most recent reserve fund study conducted by the board was a ..... *(specify the class of reserve fund study)* ..... dated ..... and prepared by ..... *(name of person who conducted the reserve fund study).*
The next reserve fund study will be conducted before ..... *(set out the date by which the next reserve fund study must be conducted as required by the regulations made under the Act).*

OR

(If no reserve fund study has been conducted by the board, state:
A reserve fund study will be conducted before ..... *(set out the date by which the reserve fund study must be conducted as required by the regulations made under the Act)].*

15. *(If a notice has not been sent to the owners under subsection 94 (9) of the Condominium Act, 1998, include the following paragraph:)*
The balance of the reserve fund at the beginning of the current fiscal year was $ ..... In accordance with the budget of the Corporation for the current fiscal year, the annual contribution to be made to the reserve fund in the current fiscal year is $ ....., and the anticipated expenditures to be made from the reserve fund in the current fiscal year amount to $..... . The board anticipates that the reserve fund will/will not be adequate in the current fiscal year for the expected costs of major repair and replacement of the common elements and assets of the Corporation.

16. *[If a notice has been sent to the owners under subsection 94 (9) of the Condominium Act, 1998, include the following statements and a copy of the most recent notice for the unit with this certificate and mention it in the list of documents forming part of this certificate:*
The board has sent to the owners a notice dated ..... *(date of the most recent notice)* containing a summary of the reserve fund study, a summary of the proposed plan for future funding of the reserve fund and a statement indicating the areas, if any, in which the proposed plan differs from the study. The proposed plan for future funding of the reserve fund has not been implemented because ..... *(give reason).*

OR

The proposed plan for future funding has been implemented and the total contribution each year to the reserve fund is being made as set out in the Contribution Table included in the notice *(if applicable add:* except ..... *(set out why contributions are not being made in accordance with the Contribution Table and whether this will be addressed)].*

17. There are no plans to increase the reserve fund under a plan proposed by the board under subsection 94 (8) of the *Condominium Act, 1998,* for the future funding of the reserve fund *[if applicable add:* except ..... *(give details of any increase, including any increase in the common expenses payable for the unit or assessment against the unit)].*

Legal Proceedings, Claims

18. There are no outstanding judgments against the Corporation *[if applicable add:* except ..... *(give amount of judgment and brief particulars)].*

19. The Corporation is not a party to any proceeding before a court of law, an arbitrator or an administrative tribunal *[if applicable add:* except ..... *(give brief particulars and the status of those proceedings to which the Corporation is a party)].*

20. The Corporation has not received a notice of or made an application under section 109 of the *Condominium Act, 1998* to the Superior Court of Justice for an order to amend the declaration and description, where the court has not made the order *[if applicable add:* except .....*(give particulars)].*

21. The Corporation has no outstanding claim for payment out of the guarantee fund under the *Ontario New Home Warranties Plan Act, [if applicable add:* except ..... *(give brief particulars and the status of any claims that have been made)].*

22. *[Strike out whichever is not applicable:*
There is currently no order of the Superior Court of Justice in effect appointing an inspector under section 130 of the *Condominium Act, 1998* or an administrator under section 131 of the *Condominium Act, 1998.*

OR

There is currently an order of the Superior Court of Justice in effect appointing an inspector under section 130 of the *Condominium Act, 1998* or an administrator under section 131 of the *Condominium Act, 1998. (If applicable, include a copy of the order with this certificate and mention it in the list of documents forming part of this certificate)].*

Agreements with owners relating to changes to the common elements

23. *[Strike out whichever is not applicable:*
The unit is not subject to any agreement under clause 98 (1) (b) of the *Condominium Act, 1998* relating to additions, alterations or improvements made to the common elements by the unit owner.

OR

The unit is subject to one or more agreements under clause 98 (1) (b) of the *Condominium Act, 1998* relating to additions, alterations or improvements made to the common elements by the unit owner. To the best of the Corporation's information, knowledge and belief, the agreements have been complied with by the parties *(if applicable add:* except ..... *(give particulars).*

(If applicable, include a copy of the agreements with this certificate and mention them in the list of documents forming part of this certificate.)]

Leasing of Units

24. *[Strike out whichever is not applicable:*
The Corporation has not received notice under section 83 of the *Condominium Act, 1998*, that any unit was leased during the fiscal year preceding the date of this status certificate.

OR

The Corporation has received notice under section 83 of the *Condominium Act, 1998*, that ..... *(set out the number)* unit(s) was (were) leased during the fiscal year preceding the date of this status certificate.*]*

Substantial changes to the common elements, assets or services

25. There are no additions, alterations or improvements to the common elements, changes in the assets of the Corporation or changes in a service of the Corporation that are substantial and that the board has proposed but has not implemented *[if applicable add:* except .....*(give a brief description and a statement of their purpose)].*

Insurance

26. The Corporation has secured all policies of insurance that are required under the *Condominium Act, 1998.*

Phased condominium corporations

27. *(Strike out whichever is not applicable:*
The declarant has completed all phases described in the disclosure statement that the Corporation has received from the declarant under subsection 147 (5) of the *Condominium Act, 1998* with respect to the phase that contains the unit.

OR

The declarant has not completed all phases described in the disclosure statement that the Corporation has received from the declarant under subsection 147 (5) of the *Condominium Act, 1998* with respect to the phase that contains the unit.*)*

28. *(Strike out whichever is not applicable:*
The declarant does not own any of the units in the phases, including units that are part of the property designed to control, facilitate or provide telecommunications to, from or within the property.

OR

The declarant does not own any of the units in the phases, except for units that are part of the property designed to control, facilitate or provide telecommunications to, from or within the property.

OR

The declarant owns one or more of the units in the phases, but not units that are part of the property designed to control, facilitate or provide telecommunications to, from or within the property.

OR

The declarant owns one or more of the units in the phases, including one or more of the units that are part of the property designed to control, facilitate or provide telecommunications to, from or within the property.

Vacant land condominium corporations

29. If the Corporation is a vacant land condominium corporation, all buildings, structures, facilities and services shown in Schedule H to the declaration have been completed, installed and provided, except ..... *(list which items, by reference to Schedule H, have not yet been completed, installed and provided).*

Leasehold condominium corporations

30. Name of lessor: .....

Address: .....

Telephone number: .....

31. *[Strike out whichever is not applicable:*
The provisions of the leasehold interests in the property are in good standing and have not been breached.

OR

The provisions of the leasehold interests in the property are not in good standing and have been breached in the following ways: .....*(provide details)].*

32. The lessor *(strike out whichever is not applicable:* has/has not*)* applied under section 173 of the *Condominium Act, 1998* for an order terminating the leasehold interests in the property.

Attachments

33. The following documents are attached to this status certificate and form part of it:

(a) a copy of the current declaration, by-laws and rules, *(if applicable, add:* which include an occupancy standards by-law*)*;

(b) a copy of the budget of the Corporation for the current fiscal year, its last annual audited financial statements and the auditor's report on the statements;

(c) a list of all current agreements mentioned in section 111, 112 or 113 of the *Condominium Act, 1998* and all current agreements between the Corporation and another corporation or between the Corporation and the owner of the unit;

(d) a certificate or memorandum of insurance for each of the current insurance policies.

[if applicable add the following items:

(e) a copy of all applications made under section 109 of the *Condominium Act, 1998* to amend the declaration or description for which the court has not made an order;

(f) a copy of the schedule that the declarant has delivered to the board setting out what constitutes a standard unit, if there is no by-law of the Corporation establishing what constitutes a standard unit;

(g) a copy of all agreements, if any, described in clause 98 (1) (b) of the *Condominium Act, 1998* that bind the unit;

(h) a copy of a notice dated ..... *(date of the most recent notice)* containing a summary of the reserve fund study, a summary of the proposed plan for future funding of the reserve fund and a statement indicating the areas, if any, in which the proposed plan differs from the study;

(i) a copy of an order appointing an inspector under section 130 of the *Condominium Act, 1998* or an administrator under section 131 of the *Condominium Act, 1998*;

(j) a copy of the disclosure statement that the Corporation has received from the declarant under subsection 147 (5) of the *Condominium Act, 1998* with respect to the phase that contains the unit unless the declarant has completed all phases described in the disclosure statement and the declarant does not own any of the units in the phases except for the part of the property designed to control, facilitate or provide telecommunications to, from or within the property;

(k) a copy of an application by the lessor for a termination order under section 173 of the *Condominium Act, 1998*;

(l) if the leasehold interests in the units of the Corporation have been renewed and an amendment to the declaration has not yet been registered under subsection 174 (8) of the *Condominium Act, 1998*, a copy of the provisions that apply upon renewal.*]*

Rights of person requesting certificate

34. The person requesting this certificate has the following rights under subsections 76 (7) and (8) of the *Condominium Act, 1998* with respect to the agreements listed in subparagraph 33 (c) above:

1. Upon receiving a written request and reasonable notice, the Corporation shall permit a person who has requested a status certificate and paid the fee charged by the Corporation for the certificate, or an agent of the person duly authorized in writing, to examine the agreements listed in subparagraph 33 (c) at a reasonable time and at a reasonable location.

2. The Corporation shall, within a reasonable time, provide copies of the agreements to a person examining them, if the person so requests and pays a reasonable fee to compensate the Corporation for the labour and copying charges.

Dated this ..... day of ..... , ...

..... Condominium Corporation No. .....

.....

(signature)

.....

(print name)

.....

(signature)

.....

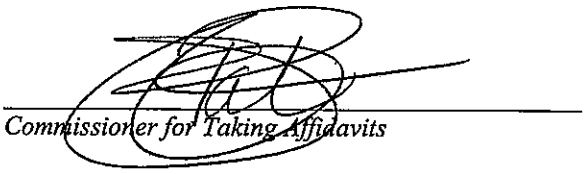
(print name)

(Affix corporate seal or add a statement that the persons signing have the authority to bind the corporation.)

O. Reg. 48/01, Form 13.

TAB E

THIS IS EXHIBIT "E" TO THE
AFFIDAVIT OF AUDREY LOEB
SWORN BEFORE ME on February 19,
2015



Commissioner for Taking Affidavits

CITATION: Durham Condominium Corporation No. 63 v. On-Cite Solutions Ltd., 2010 ONSC 6342
DURHAM COURT FILE NO.: 65164/10
DATE: 20101202

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
DURHAM CONDOMINIUM CORPORATION NO. 63	
Applicant	Paul Chornobay, for the Applicant
- and -	
ON-CITE SOLUTIONS LTD.	
Respondent	Kyle Armagon, for the Respondent
	HEARD: November 17, 2010

REASONS FOR DECISION

LAUWERS J.

[1] The applicant, Durham Condominium Corporation No. 63 (the "Corporation"), has existed since February 6, 1978 and is responsible for 35 industrial use units and the common elements in Durham Condominium Plan number 63.

[2] The respondent, On-Cite Solutions Ltd., has owned unit 10, level 1 on Durham Condominium Plan number 63, known municipally as unit 10, 1730 McPherson Court, Pickering, Ontario, since October 31, 2008. Inside the unit is a 10-inch thick load-bearing wall made of concrete block that divides the office and the warehouse. The wall supports the roof trusses. Originally the wall had a doorway about 36-inches wide, but at some undetermined point in the past it was widened to 10 feet.

[3] The Corporation applies for an order under the *Condominium Act, 1998*, S.O. 1998, c. 19 (the "Act"), requiring On-Cite Solutions Ltd. to restore the wall to its original condition, or, alternatively, an order permitting the Corporation to do so at the expense of On-Cite Solutions Ltd.

The Facts

[4] The respondent entered into an Agreement of Purchase and Sale on October 20, 2008 to buy the unit from A & J Barbour Holdings Ltd., conditional on the receipt of a clean Status Certificate from the Corporation.

[5] Richard Duval, the president of the Corporation, attended at the unit "for a routine inspection" on or about October 24, 2008. The common assumption during the argument was that he had inspected the unit before he signed the Status Certificate on October 22, 2008 on behalf of the Corporation, but nothing turns on the discrepancy in the dates since the Corporation had time to correct it. Relying on the Status Certificate, the respondent closed the transaction and took possession of the unit on October 31, 2008.

[6] Mr. Duval noticed that the doorway in the wall had been widened to 10 feet. He swore an affidavit asserting that this had been done without the approval of the Corporation, in violation of section 10 of Article XV of the declaration:

> **Modification of Units**
>
> No boundary wall, roof or interior partition wall shall be added to, altered, removed in all or in part, improved or renovated without the prior written consent of the Corporation of [*sic*] the Board. The Corporation or the Board may impose such conditions as it deems necessary in consideration for granting such consent.

[7] Mr. Duval swore that he tried to bring the problem to the attention of a representative of the owner of the unit at the time of his inspection. He also attended at the unit on October 30, 2008, the day on which he thought that the respondent was taking possession, and spoke to a person on the site who was not, as it turns out, a representative of the respondent. Mr. Duval gave no names.

[8] A little more than two weeks after closing the transaction and taking possession, the respondent received a letter from counsel for the Corporation stating that there had been an unauthorized alteration to the wall. This was the respondent's first notice of a problem with the wall since the Status Certificate did not refer to it and the problem did not otherwise come to the respondent's attention.

[9] Paul Goostrey, president of the respondent, deposed that real estate counsel for the respondent, Randall Longfield, forwarded this letter of complaint from counsel for the Corporation to David McKay, counsel for the seller of the unit. In his response dated December 4, 2008, Mr. McKay stated:

> [The principal and officers of the company] can produce evidence that the wall was in its present configuration [when] they bought the unit in 1984. No condition or reference relating to the wall was made in the Estoppel Certificate obtained in the purchase. We have spoken and received instructions from the officers/directors of the vendor in British Columbia who state that they were

neither aware of a potential violation of the Declaration nor directed any person to assume responsibility as stated in your letter. We presume you also obtained a Status Certificate which set out no condition or reference to the alteration.

[10] In April and May 2010, the respondent retained a structural engineer, Kevin Hu, P. Eng., of Magnate Genivar, who assessed the situation, designed the necessary reinforcement work for the wall, and supervised its execution. The drawings were forwarded to the Corporation's counsel. Mr. Hu later confirmed: "The overall construction work was complete and found to be in general conformance with the structural drawings. The lintel reinforcing column was installed as per structural drawings and is structurally adequate to support the masonry wall above the door opening" (emphasis in original).

[11] Mr. Chornobay initially argued: "D.C.C. 63 does not have confirmation that the wall has been restored to its original condition, or any indication that it is structurally adequate to support the roof trusses." Permitting a structurally inadequate wall to exist would constitute a breach of section 117 of the Act; but it seemed inconceivable to me that a professional engineer would stamp a drawing and execute work if the result were unsafe, as it would be if the reinforced lintel were not capable of carrying both the wall and the roof trusses. I directed counsel to contact Mr. Hu during a recess, who confirmed that the reinforced lintel was capable of carrying both the wall and the load associated with the roof trusses. Mr. Chornobay conceded that this disposed of the safety argument under section 117 of the Act.

[12] The Corporation complains that the respondent's work did not return the unit to its original condition by removing the 10-foot doorway and restoring the 36-inch doorway.

Issues

[13] The following issues remain to be resolved:

1. Does the Status Certificate operate to estop the Corporation from compelling the respondent to restore the wall of the unit to its original condition?

2. Is the respondent obliged to restore the unit to its original condition?

3. Is the Corporation entitled to its legal costs?

[14] I now turn to consider each of these issues in turn.

1. Does the Status Certificate operate to estop the Corporation from pursuing the respondent to restore the wall of the unit to its original condition?

[15] Section 76 of the Act governs Status Certificates. It obliges a condominium corporation to give a Status Certificate with respect to a unit in the prescribed form setting out the specific information required in the section and in the Status Certificate itself. Subsection 76 (6) provides:

> (6) The status certificate binds the corporation, as of the date it is given or deemed to have been given, with respect to the information that it contains or is deemed to contain, as against a purchaser or mortgagee of a unit who relies on the certificate.

[16] Mr. Chornobay argues that even though Mr. Duval is the president, he is not the Corporation, which accordingly did not have notice of the problem with the wall in order to inform the completion of the Status Certificate.

[17] The president of the Corporation may carry out certain functions as provided in the by-laws, pursuant to section 56(1) of the Act. The D.C.C. 63 by-law provides in Article VII subsection (1)(iv):

> The president shall be the chairperson of all meetings of the Board and of the Owners or shall designate the chairperson at all such meetings, shall have only one vote at all meetings of the Board, shall coordinate the activities of the remaining members of the Board and officers, shall in the absence of a resolution of the Board specifying another officer, deal directly with the property manager and corporate solicitor in all areas of concern, and shall direct the enforcement of the Act, the declaration, the by-laws and the rules and regulations of the Corporation by all lawful means of the Board's disposal.

[18] Mr. Duval, as president, is responsible for signing Status Certificates. Actual knowledge that he obtains in his capacity as president carrying out executive functions as required by the by-laws, such as a "routine inspection" must be imputed to the Corporation. Since the president has authority to sign a Status Certificate on behalf of the Corporation, he is obliged to take into account personal knowledge he acquires in his capacity as president. I therefore reject the argument that this information technically was not within the knowledge of the Corporation itself.

[19] Mr. Duval's unsuccessful efforts to bring the specific problem with the wall to the respondent's attention effectively admit that his status as president authorized him to do so following his inspection. It would have been more effective for him to have amended the Status Certificate, to have sent a revised Certificate, or to have sent a supplementary letter to the requester or to the seller of the unit on a timely basis than it was for him to pay a random visit or two to the unit.

[20] Is the Corporation estopped by the Status Certificate signed by Mr. Duval?

[21] In her book *Condominium Law and Administration*, 2d ed., looseleaf (Toronto: Carswell, 1998-Updated), Audrey M. Loeb comments on the purpose of the Status Certificate required by

section 76 at p. 9-2: "This document is intended to ensure that prospective purchasers and mortgagees of units are immediately given sufficient information regarding the property to make an informed buying or lending decision."

[22] From a purposive perspective, the problem posed by the alteration of the wall could be expected to have had an impact on the respondent's decision to purchase the unit. Timely notice of the problem with the wall would have permitted the respondent to negotiate with the seller of the unit over the costs of remediation.

[23] Mr. Chornobay argues that the problem with the wall that Mr. Duval discovered on his inspection does not fall within any of the clauses in subsection 76(1) of the Act or in the prescribed Status Certificate. Accordingly, he argues, Mr. Duval was not obliged to disclose the problem in the Status Certificate since there is no place on the prescribed form for him to do so.

[24] Paragraph 12 of the Status Certificate requires a condominium corporation to disclose certain information: "The Corporation has no knowledge of a circumstance that may result in an increase in the common expenses for the unit(s)." If the Corporation does have such knowledge "of a circumstance", then the Status Certificate must be altered by the addition of the word "except..." with a list of the items anticipated. Ms. Loeb, in the annotated Status Certificate in her book at p. 9-7, states:

> This statement requires the corporation to give particulars of any potential increase that it knows or, in the author's view, ought to know about, including the potential for expenses that are forthcoming, for example, as a result of engineering studies currently being conducted, even if no increase in common expenses or a special assessment has been approved by the board.

[25] Ms. Loeb takes the position that necessary financial information that a buyer would reasonably take into account in the purchase decision ought not to fall between the cracks because of timing fortuities, as in this case, but should be referred to in the Status Certificate. I agree. See *Fisher v. Metropolitan Toronto Condominium Corp. No. 596*, [2004] O.J. No. 5758, 31 R.P.R. (4th) 273 (S.C.J. – Div. Ct.) at para. 10. I that find that the language used in paragraph 12, particularly the broad term "a circumstance" coupled with the word "may," which in context connotes "might," is intended to push a condominium corporation to disclose more, not less, information that could be financially material to the requester's purchase decision. The problem with the wall was just such a circumstance, and in failing to disclose it in responding to paragraph 12 of the Status Certificate or by a timely correction, the Corporation failed to comply with its duty under the Act.

[26] The path to a determination that such a "potential for expenses" existed in this case is not hard to trace. As Ms. Loeb notes at p. 9-5: "There are numerous sections of the *Condominium Act, 1998* which authorize the condominium corporation to add costs, which are deemed to be common expenses, to the unit." She mentions, among others, section 92(3) of the Act which permits the "[c]osts of repairs to units and common elements where an owner has an obligation to maintain and repair and/or the owner does not do it and the corporation does", and section

134(5), being "[a]n order as to damages or costs against an owner or occupier of a unit, together with the excess amount that the corporation actually spent in obtaining the court order." Ms. Loeb notes that these additional expenses are meant to be addressed in the Status Certificate under paragraph 8.

[27] Had Mr. Duvall conducted an inspection in the years before the unit was sold to the respondent, then the Corporation would predictably have sent to the owner at the time virtually the same letter requiring restoration of the wall that it sent to the respondent. If the previous owner had not complied, then the information about the associated charges and costs would have been disclosed under paragraph 8 of the Status Certificate, which provides: "There are no amounts that the *Condominium Act, 1998* requires to be added to the common expenses payable for the unit(s), [except...]."

[28] I find that the Corporation was aware of the problem with the wall and the potential financial issue it raised on a timely basis, that the respondent reasonably relied upon the silence of the Status Certificate on the issue, that the Certificate is binding on the Corporation, and that the Corporation is estopped from pursuing the respondent for the restoration of the wall.

2. Is the respondent obliged to restore the unit to its original condition?

[29] Section 10 of the Corporation's declaration provides: "No boundary wall, roof or interior partition wall shall be added to, altered, removed in all or in part, improved or renovated without the prior written consent of the Corporation of [*sic*] the Board. The Corporation or the Board may impose such conditions as it deems necessary in consideration for granting such consent." Section 11 of the declaration goes on to oblige each unit owner to comply with the Act, the declaration, the by-laws and so on. Any default allows the corporation to take legal action to compel compliance.

[30] The court's jurisdiction to deal with such applications is found in section 134 of the Act:

> 134. (1) Subject to subsection (2), an owner, an occupier of a proposed unit, a corporation, a declarant, a lessor of a leasehold condominium corporation or a mortgagee of a unit may make an application to the Superior Court of Justice for an order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules or an agreement between two or more corporations for the mutual use, provision or maintenance or the cost-sharing of facilities or services of any of the parties to the agreement. ...
>
> (3) On an application, the court may, subject to subsection (4),
>
> (a) grant the order applied for;
>
> (b) require the persons named in the order to pay,

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

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

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

...

[31] As interpreted by the courts, section 134 is a fairly draconian tool in the hands of a corporation. Courts have required even attractive and useful features to be removed at the insistence of the board of a condominium: see, for example, *East Gate Estates Essex Condominium Corporation No. 2 v. Kimmerly*, [2003] O.J. No. 582 at paras. 7-12 (S.C.J.). As Flynn J. said in *Halton Condominium Corporation No. 315 v. Sid Gucciardi* (April 15, 2004), (S.C.J.): "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". In *Peel Standard Condominium Corp. No. 721 v. Derveni*, [2007] O.J. No. 5585 (S.C.J.), Van Rensburg J. said at para. 2: "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".

[32] There is, however, discretion in the court, as subsection 134(3) provides. It would be neither fair nor equitable for the court to order the restoration of the wall in this case. The respondent has paid to reinforce the wall even though it was not the one who altered it. No useful purpose, including deterrence, would be served by compelling the respondent to restore the wall now and, assuming without deciding that I have authority to do so, I decline to exercise it.

3. Is the Applicant entitled to its legal costs?

[33] At the argument of this motion, it rapidly became plain that the applicant's real goal in proceeding was to have the respondent pay the applicant's legal and incidental costs.

[34] In respect of costs, section 134 of the Act provides:

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

[35] The purport of subsection 134(5) of the Act was explained at length by the Ontario Court of Appeal in *Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc.* (2005), 253 D.L.R. (4th) 656 per Doherty J.A.:

> **40** My review of the terms of s. 134(5) leads me to agree with counsel for MTCC's submission that the section was intended to shift the financial burden of obtaining compliance orders from the condominium corporation and ultimately, the innocent unit owners, to the unit owners whose conduct necessitated the obtaining of the order. Furthermore, the section was enacted to provide a means whereby the condominium corporation could, if necessary, recover those costs from the unit owner through the sale of the unit.

The court held at para. 38 that "any additional actual costs" means costs that go beyond the normal award of costs.

[36] The concept, as explained by Wood J. in *Muskoka Condominium Corporation No. 39 v. Kreutzweiser*, 2010 ONSC 2463, [2010] O.J. No. 1720, at para. 16, is that:

> No part of these costs should be borne by the respondent's neighbours who are blameless in this matter. The Corporation declaration provides that any owner is bound to indemnify the corporation for any loss occasioned by his or her action. For these reasons it is appropriate that the corporation's costs be on a full recovery basis.

[37] Mr. Chornobay submits that the remedial work would never have been done if the Corporation had not made this application. But that submission assumes that it was the respondent's responsibility to restore the wall to its original condition. I have found that it was not in the circumstances of this case. The absence of an order under section 134 means that subsection 134(5) has no application and the costs are not to be added specifically to the common expenses for the respondent's unit. The fairest outcome would be for all the other unit holders to absorb an aliquot share of the costs of this proceeding.

[38] For the reasons given, the application is dismissed with costs to the respondent. If the parties cannot agree on costs, then I will accept written submissions on a seven-day turnaround, starting with the respondent.

P.D. Lauwers J.

RELEASED: December 2, 2010

TAB F

THIS IS EXHIBIT "F" TO THE AFFIDAVIT OF AUDREY LOEB SWORN BEFORE ME on February 19, 2015

Commissioner for Taking Affidavits

2004 CarswellOnt 6242, 31 R.P.R. (4th) 273

2004 CarswellOnt 6242, 31 R.P.R. (4th) 273

Fisher v. Metropolitan Toronto Condominium Corp. No. 596

Kevin W. Fisher, Plaintiff and Metropolitan Toronto Condominium Corporation No. 596 et al, Defendants

Ontario Superior Court of Justice (Divisional Court)

Ground J.

Heard: November 26, 2004
Judgment: December 20, 2004
Docket: 709/03

Proceedings: reversed in part *Fisher v. Metropolitan Toronto Condominium Corp.* ((October 14, 2003)), Doc. Toronto 7063/02 ((Ont. S.C.J.))

Counsel: Kevin W. Fisher, for himself

Marko Djurdjevac, for Defendants

Subject: Contracts; Property

Sale of land --- Condominiums — Resale — Estoppel certificate

Prior to closing of purchase transaction, plaintiff purchaser received estoppel certificate from defendant condominium corporation pursuant to s. 32(8) of Condominium Act, R.S.O. 1990 — Estoppel certificate was clear and did not indicate any problems — As of date of estoppel certificate and closing of purchase, condominium corporation was aware of potential problems with fireplaces and chimneys — Several months after closing, purchaser received notice of special assessment respecting cost of replacing chimneys — Purchaser initially refused to pay special assessment, but after condominium corporation registered lien against unit, purchaser paid under protest — Condominium corporation appealed judgment that allowed payment of damages to purchaser for negligent estoppel certificate — Appeal dismissed — There was no evidence that purchaser would have purchased unit if estoppel certificate was accu-

rate in stating potential problems with respect to fireplaces and chimneys — If provision of s. 32(8) was to have any meaning, condominium corporation was precluded from claiming, against any unit owner, payment of special assessment in respect of problem or condition negligently excluded from estoppel certificate — Condominium corporation was negligent in preparing and delivering estoppel certificate, and was bound by estoppel certificate — Purchaser was unable to protect himself, and condominium corporation was liable in damages for negligence.

Sale of land --- Condominiums — Common expenses

Lien against unit for non-payment — Prior to closing of purchase transaction, plaintiff purchaser received estoppel certificate from defendant condominium corporation pursuant to s. 32(8) of Condominium Act, R.S.O. 1990 ("Old Act") — Estoppel certificate was clear and did not indicate any problems — As of date of estoppel certificate and closing of purchase, condominium corporation was aware of potential problems with fireplaces and chimneys — Several months after closing, purchaser received notice of special assessment respecting cost of replacing chimneys — Purchaser initially refused to pay special assessment, but after condominium corporation registered lien against unit, purchaser paid under protest — Condominium corporation appealed judgment that allowed payment of damages to purchaser for legal fees associated with registration of lien against unit — Appeal allowed — Old Act was applicable to determination of effect of estoppel certificate, and Condominium Act, S.O. 1998 ("New Act") was applicable to interpretation of obligation of purchaser to pay proportion of special assessment and costs for registering lien against unit — Section 32(8) of Old Act and s. 84(3) of New Act did not detract from obligation of purchaser to pay share of common expenses, even if he was bringing claim against condominium corporation — Purpose of such provision was to ensure that condominium corporation was assured of receiving proportionate shares of common expenses from all unit owners in order to pay expenses — Condominium corporation operated as non-profit corporation and was dependent upon payment of common expenses by all unit owners in order to meet obligations — Failure of purchaser to pay his proportionate share of common expenses entitled condominium corporation to register lien as security for such expenses — Condominium corporation was entitled to be reimbursed by purchaser for amount of interest on special assessment and legal fees incurred for registration of lien.

Sale of land --- Condominiums — Condominium corporation — General

Records — Prior to closing of purchase transaction, plaintiff purchaser received estoppel certificate from defendant condominium corporation — Estoppel certificate was clear and did not indicate any problems — As of date of estoppel certificate and closing of purchase, condominium corporation was aware of potential problems with fireplaces and chimneys — Several months after closing, purchaser received notice of special assessment respecting cost of replacing chimneys — Purchaser initially refused to pay special assessment, but after condominium corporation registered lien against unit, purchaser paid under protest — Purchaser subsequently made five requests to condominium corporation to examine records, but was denied pursuant to s. 55(4) of Condominium Act, S.O. 1998 — Condominium corporation appealed judgment that allowed payment of damages to purchaser for failure to permit examination of records — Appeal allowed — Purpose of s. 55(4)(b) of Act was to maintain litigation privilege or solicitor/client privilege with respect to records of condominium corporation that may relate to litigation or pending litigation — Purchaser was making claim against condominium corporation and contemplating litigation when request for records were made, thus, exception in s. 55(4)(b) was applicable — Records would not have to be produced until they were producible in course of documentary discovery, if not subject to litigation privilege or solici-

tor/client privilege.

Cases considered by *Ground J.*:

Armstrong v. London Life Insurance Co. (1999), 27 R.P.R. (3d) 243, 1999 CarswellOnt 2998 (Ont. S.C.J.) — distinguished

Statutes considered by *Ground J.*:

Condominium Act, R.S.O. 1990, c. C.26

Generally — referred to

s. 32(8) — considered

Condominium Act, 1998, S.O. 1998, c. 19

Generally — referred to

s. 55 — referred to

s. 55(3) — considered

s. 55(4) — considered

s. 55(8) — considered

s. 84(1) — considered

s. 84(3) — considered

s. 84(3)(b) — considered

APPEAL by condominium corporation from judgment reported at *Fisher v. Metropolitan Toronto Condominium Corp.* (2003), 2003 CarswellOnt 6611 (Ont. S.C.J.), awarding purchaser damages for negligence in preparation of estoppel certificate, registration of lien, and failure to provide records of condominium corporation.

***Ground J.*:**

1 This is an appeal by the Defendants (collectively "Condo Corp") from the judgment of Deputy Judge Winer dated October 14, 2003, wherein Deputy Judge Winer gave judgment for the Plaintiff ("Fisher") in the amount of

$5,443.79 plus costs and interest.

Background

2 Fisher purchased a unit in the condominium building operated by Condo Corp. The purchase of Fisher's unit was closed on March 30, 2001. Prior to closing, Fisher received from Condo Corp on March 26, 2001 an Estoppel Certificate ("the Estoppel Certificate") pursuant to subsection 32 (8) of the *Condominium Act*, R.S.O. (1990) ch. 26 (the "Old Act"). Subsection 32 (8) of the Old Act provided as follows:

> Any person acquiring or proposing to acquire an interest in a unit from an owner may request the corporation to give a certificate in the prescribed form in respect of the common expenses of the owner and of default in payment thereof, if any, by the owner, together with such statements and information as are prescribed by the regulations, and the certificate binds the corporation as against the person requesting the certificate in respect of any default or otherwise shown in the certificate, as of the day it is given.

3 The Estoppel Certificate received by Fisher was a clear certificate and did not indicate any problems with fireplaces or chimneys in the condominium building. It is agreed that, as at the date of the Estoppel Certificate and at the date of the closing of the purchase of Fisher's unit, Condo Corp was aware of potential problems with the use of fireplaces and with chimneys and a risk of the spread of smoke and fire and corrosion of the chimneys at the roof level.

4 On June 4, 2002, Fisher received from Condo Corp a notice of assessment with respect to the cost of replacing the chimneys. The total amount assessed against Fisher's unit was $3,899.97 to be paid in five instalments commencing July 15, 2002. Fisher initially refused to pay the instalments of the special assessment but ultimately paid "under protest" after Condo Corp had registered a certificate of lien against his unit. Fisher ended up paying a total of $4,943.79 inclusive of lien costs of $1,043.82.

5 Fisher subsequently made five written requests to Condo Corp to examine certain records of Condo Corp pursuant to subsection 55 (3) of the *Condominium Act* S.O. 1998 ch. 19 (the "New Act") which came into force in May 5, 2001. Condo Corp refused to permit Fisher to examine the records on the basis of an exception contained in subsection 55(4) of the New Act with respect to records relating to actual or pending litigation. Subsections 55(3), (4) and (8) of the New Act provide as follows:

> **Examination of records — s. 55(3)**
>
> (3) Upon receiving a written request and reasonable notice, the corporation shall permit an owner, a purchaser or a mortgagee of a unit or an agent of one of them duly authorized in writing, to examine the records of the corporation, except those records described in subsection (4), at a reasonable time for all purposes reasonably related to the purposes of this Act.
>
> **Exception — s. 55(4)**

(4) The right to examine records under subsection (3) does not apply to,

(a) records relating to employees of the corporation, except for contracts of employment between any of the employees and the corporation;

(b) records relating to actual or pending litigation or insurance investigations involving the corporation; or

(c) subject to subsection (5), records relating to specific units or owners.

Penalty for non-compliance — s. 55(8)

(8) A corporation that without reasonable excuse does not permit an owner or an agent of an owner to examine records or to copy them under this section shall pay the sum of $500 to the owner on receiving a written request for payment from the owner.

6 Condo Corp also took the position that Fisher was required to pay his portion of the special assessment even though he was disputing his liability for special assessment. Condo Corp took this position based upon the provisions of subsections 84(1) and (3) of the New Act which provide as follows:

Contribution of owners

84. (1) Subject to the other provisions of this Act, the owners shall contribute to the common expenses in the proportions specified in the declaration. 1998, c. 19, s. 84 (1).

No avoidance

(3) An owner is not exempt from the obligation to contribute to the common expenses even if,

(a) the owner has waived or abandoned the right to use the common elements or part of them;

(b) the owner is making a claim against the corporation; or

(c) the declaration, by-laws or rules restrict the owner from using the common elements or part of them, 1998, c. 19, s. 84 (3).

7 I am satisfied that the Old Act is applicable to a determination of the effect of the Estoppel Certificate provided by Condo Corp to Fisher and that the New Act is applicable to the interpretation of the obligation of Fisher to pay his proportion of the special assessment and the obligation of Condo Corp to grant Fisher a right of access to examine records of the corporation.

8 In his analysis, Deputy Judge Winer found that Condo Corp was negligent in not disclosing in the Estoppel Certificate the problems with respect to the fireplaces and chimneys and that the damages incurred by Fisher as a result of Condo Corp's negligence were $4,943.79 being the total of Fisher's portion of the special assessment and the costs for registering the lien against his unit. The finding of negligence is not disputed by Condo Corp.

9 On this appeal, Condo Corp., with respect to the damages representing the amount of the special assessment, relies on the decision of Flinn, J. in *Armstrong v. London Life Insurance Co.* (1999), 27 R.P.R. (3d) 243 (Ont. S.C.J.) . In that action the plaintiff owner of a condominium unit brought the action against the vendor of the unit for rescission based on fraud and misrepresentation and against the condominium corporation for damages in the amount of a special assessment paid by her. The court found that the condominium corporation was negligent in issuing an incorrect Estoppel Certificate but concluded, on the basis of all the evidence, that in all likelihood, on the balance of probabilities, the Plaintiff would have closed the purchase of the unit even if the Estoppel Certificate had been correct. The Court also found against the Plaintiff with respect to the claims of fraud and misrepresentation and the action for rescission was dismissed against the vendor. With respect to the claim against the condominium corporation for the amount of the special assessment, Flinn, J. stated at page 261:

> On an assessment of all of the evidence, the court has concluded on the balance of probabilities the plaintiff would have closed regardless of the content of a proper estoppel certificate and therefore her claim against the condominium corporation and Parkside is also dismissed.
>
> Notwithstanding the dismissal of the Plaintiff's claim, I must assess the damages claimed by the plaintiff. The details of these expenses and damages are set forth in Ex. 5.
>
> As to item #7 she would be entitled to recover what she paid on condominium fees arising out of the first assessment of $3,240, the amount paid $2,440. The evidence indicated that she did not pay the second assessment but had she done so she would have been credited with the sum of $1,570 which was the cost of repairs paid directly by her and therefore her claim would be allowed in that amount, that is to say the sum of $1,570.

10 In the case at bar, there is no evidence on which the Court could conclude that Fisher would have closed the purchase of his unit had he received an accurate Estoppel Certificate stating the potential problems with respect to the fireplaces and chimneys. Fisher's evidence in this respect is that, had he obtained such an Estoppel Certificate, he would have tried to negotiate a reduction in the purchase price with his vendor or hold back some part of the purchase price pending resolution of the problems with the fireplaces and chimneys. I do not view the decision in *Armstrong*, *supra*, as standing for the proposition that the closing of purchase of a condominium unit after having received an inaccurate Estoppel Certificate precludes the purchaser from relying on such certificate as provided in section 32 (8) of the Old Act. I am also unable to accept the submission of Condo Corp that, even if the Estoppel Certificate was inaccurate and negligently prepared, it is still necessary to show some causation between the negligence of Condo Corp and the damages incurred by Fisher being the amount of the special assessment. In my view, if the provision of subsection 32 (8) of the Old Act that "the certificate binds the corporation as against the person requesting the certificate in respect of any default or otherwise shown in the certificate" is to have any meaning, the corporation is precluded from claiming as against a unit owner the payment of a special assessment required in re-

spect of a problem or condition negligently excluded from an estoppel certificate. Accordingly, I find that the Deputy Judge committed no error in his conclusion that Condo Corp was negligent in preparing and delivering the Estoppel Certificate, that Condo Corp was bound by the Estoppel Certificate, that Fisher was rendered unable to protect himself and that Condo Corp is liable to Fisher in damages for negligence.

11 Condo Corp submits that, even if Fisher is found not to be liable for the amount of the special assessment, it should not be obliged to refund to the Plaintiff the costs incurred, including solicitor's fees, to register the lien, such costs being in the amount of $1,043.82. Condo Corp relies upon section 84 of *the Condominium Act* (1998) S.O. (1998) Ch. 19 (the "New Act") which provides in part:

> (1) subject to the other provisions of this Act, the owner shall contribute to the common expenses in the proportion specified in the declaration;
>
> . . .
>
> (3) an owner is not exempt from the obligation to contribute to the common expenses even if
>
> . . .
>
> (b) the owner is making a claim against the corporation".

12 In his Reasons, with respect to the obligation of the Plaintiff to pay the special assessment, the Deputy Judge stated as follows:

> The Defendants allege that they should not have to refund the solicitor's fees to register the lien. They rely on section 84, and 84 one and three "B" of the *Condominium Act*. That section states as follows: "Subject to the other provisions of this act, the owner shall contribute to the common expenses in their proportions specified in the declaration" and subsection three, "An owner is not exempt from the obligation to contribute to the common expenses, even if "B" the owner is making a claim against the corporation." This section is stated to be subject to the other provisions of the act. Well, one of the other provisions of the act is section 32, which provides that the Defendants are bound by an Estoppel certificate. This section 84, cannot mean that the owner must pay a lien, even if the lien is invalid.

13 With great respect, I am unable to agree with the reasoning of the Deputy Judge in this regard. It appears to me that subsection 32 (8) of the Old Act does not, by its specific wording, detract from the obligation of the Plaintiff to pay his share of common expenses even if he is bringing a claim against the condominium corporation. Section 84 (3) of the New Act by its wording specifically provides that the Plaintiff is not exempt from that obligation even if he is bringing a claim against the condominium corporation. It appears to me that the purpose of such provision is to ensure that the condominium corporation is assured of receiving the proportionate shares of common expenses from all owners of units in order to be in a position to pay the expenses of the condominium corporation such as heating, hydro, maintenance and repairs which are paid for the benefit of all unit owners. The condominium corpo-

ration operates basically as a non-profit corporation and is dependent upon the payment of common expenses by all unit owners in order to meet the obligations of the condominium corporation. The failure of the Plaintiff to pay his proportionate share of the common expenses entitles the condominium corporation to register a lien as security for such expenses and accordingly, in my view, it is entitled to be reimbursed by the Plaintiff for the amount of $23.82 being interest on the special assessment and $1,020 being the legal fees incurred by Condo Corp to register the lien for a total of $1,043.82.

14 The Plaintiff had also claimed the sum of $2,500 pursuant to section 55 of the New Act in respect of the failure of the Defendants on five occasions to permit examination of records of the condominium corporation.

15 In his Reasons with respect to this claim the Deputy Judge stated:

> As to the penalty provision, I find that the Defendants are liable for $500 for failure to permit examination of the records, the act provides in section 55 (3) that the Plaintiff is entitled to those records, except as provided in subsection 4 (b). This subsection exempts records relating to actual or pending litigation. I believe the records requested relate to matters that occurred before actual or pending litigation was contemplated. The Plaintiff is entitled to $500 only, not to $500 for every letter sent.

16 With great respect, I am unable to accept the reasoning of the Deputy Judge with respect to his interpretation of section 55. It appears to me that the purpose of clause 55(iv)(b) is to maintain litigation privilege or solicitor/client privilege with respect to records of the condominium corporation that may relate to litigation or pending litigation between a unit owner and the corporation. It is clear from the evidence before this court that Fisher was making a claim against Condo Corp and contemplating litigation at the time that the requests for the records were made and accordingly, in my view, the exception in clause 55(iv)(b) is applicable. Such records would not have to be produced until they are producible in the course of documentary discovery if not subject to litigation privilege or solicitor/client privilege. Accordingly, I am of the view that the Deputy Judge erred in awarding the Plaintiff damages in the amount of $500 representing the penalty payable under subsection 55 (8).

17 The Defendants' notice of appeal seeks an order that the claims of the Plaintiff be dismissed with costs to the Defendants on a substantial indemnity basis. In view of my finding that the Deputy Judge did not err in awarding damages to the Plaintiff in the amount of the special assessment of $3,899.95, I am not prepared to interfere with the disposition of costs by the Deputy Judge.

18 The judgment of the Deputy Judge is set aside with respect to the award to the Plaintiff of $1,043.82 with respect to lien costs and $500 with respect to penalty resulting for judgment for the Plaintiff in the amount of $3,899.95 plus prejudgment interest from January 23, 2003 and costs in the amount of $350.

19 Counsel may make brief written submissions to me with respect to the costs of this appeal on or before January 21, 2005.

Appeal allowed in part.

TAB G

THIS IS EXHIBIT "G" TO THE AFFIDAVIT OF AUDREY LOEB SWORN BEFORE ME on February 19, 2015

Commissioner for Taking Affidavits

COURT OF APPEAL FOR ONTARIO

CITATION: Orr v. Metropolitan Toronto Condominium Corporation No. 1056, 2014 ONCA 855
DATE: 20141202
DOCKET: C54309, C54310, C54311, C54315 & C54320

Feldman, Tulloch and Lauwers JJ.

BETWEEN

C54309

Kelly-Jean Marie Orr also known as Kelly-Jean Rainville

Plaintiff (Appellant)

and

Metropolitan Toronto Condominium Corporation No. 1056, Gowling, Strathy & Henderson, Brookfield LePage Residential Management Services a division of Brookfield Management Services Ltd., Patrick Post, Pamela Cawthorn, Bruce Ward, Larry Boland, Francine Metzger, Michael Kosich and Richard Dorman

Defendants (Respondents)

and

Richard Weldon

Third Party (Respondent)

C54310

Kelly-Jean Marie Orr

Applicant (Appellant)

and

Metropolitan Toronto Condominium Corporation No. 1056

Respondent (Respondent)

C54311

Metropolitan Toronto Condominium Corporation No. 1056

Plaintiff (Respondent)

and

Kelly-Jean Marie Orr

Defendant (Appellant)

C54315

Kelly-Jean Marie Orr also known as Kelly-Jean Rainville

Plaintiff (Respondent)

and

Metropolitan Toronto Condominium Corporation No. 1056, Gowling, Strathy & Henderson, Brookfield LePage Residential Management Services a division of Brookfield Management Services Ltd., Patrick Post, Pamela Cawthorn, Bruce Ward, Larry Boland, Francine Metzger, Michael Kosich and Richard Dorman

Defendants (Appellant/Respondents)

and

Richard Weldon

Third Party (Respondent)

C54320

Kelly-Jean Marie Orr also known as Kelly-Jean Rainville

Plaintiff (Respondent)

and

Metropolitan Toronto Condominium Corporation No. 1056, Gowling, Strathy & Henderson, Brookfield LePage Residential Management Services a division of Brookfield Management Services Ltd., Patrick Post, Pamela Cawthorn, Bruce Ward, Larry Boland, Francine Metzger, Michael Kosich and Richard Dorman

Defendants (Respondent)

and

Richard Weldon

Third Party (Appellant)

Geoffrey D.E. Adair, Q.C., for Kelly-Jean Marie Orr, also known as Kelly-Jean Rainville

Barry A. Percival, Q.C. and Theodore B. Rotenberg, for Metropolitan Toronto Condominium Corporation No. 1056, Bruce Ward, Larry Boland and Richard Dorman

Robert J. Clayton, for Brookfield LePage Residential Management Services, a division of Brookfield Management Services Ltd., Patrick Post and Pamela Cawthorn

David Gadsden, J. Brian Casey and Matt Saunders, for Gowling, Strathy & Henderson

Thomas W. Arndt, for Richard Weldon

Heard: February 19 & 20, 2014

On appeal from the judgment of Justice Darla A. Wilson of the Superior Court of Justice, dated August 18, 2011, with reasons reported at 2011 ONSC 4876.

Lauwers J.A.:

[1] Kelly-Jean Rainville (formerly Kelly-Jean Marie Orr) bought what she believed was a three-storey condominium townhouse unit from Richard Weldon in the Grand Harbour development in Etobicoke, Ontario. The condominium documentation, however, revealed that the unit was only two storeys. The third floor was illegally built into the common element attic space. This is a set of grouped appeals about where liability falls for the difference in the number of permitted storeys.

[2] Ms. Rainville's unit, townhouse 113, is located in a building governed by Metropolitan Toronto Condominium Corporation No. 1056 ("MTCC 1056"). Ms. Rainville and her real estate lawyer at Gowlings did not know that the third floor of the townhouse was illegally constructed when she purchased the unit. When Ms. Rainville found out, she brought claims against MTCC 1056, Gowlings, Brookfield LePage Residential Management Services ("Brookfield"), which was the property manager for MTCC 1056, and several individual defendants. The defendant MTCC 1056 added Mr. Weldon as a third party.

[3] The trial judge dismissed Ms. Rainville's claims against Brookfield and the individual defendants, but found Gowlings, MTCC 1056, and Mr. Weldon liable

and ordered damages against them. She ordered Ms. Rainville to close up the third floor and to pay MTCC 1056 occupation rent for the third floor.

A. FACTUAL OVERVIEW

[4] The factual overview is largely taken from paras. 15-109 of the trial judge's reasons.

(1) The Condominium Development

[5] In the late 1980s, Mr. Weldon and Larry Boland, principals of Rylar Development Ltd., built the Grand Harbour condominium development. The development was composed of two high-rise tower buildings and an arrangement of townhouses. The three portions of the development were governed by three separate condominium corporations. The real estate market deteriorated in the early 1990s and many unit purchasers refused to close their deals. Mr. Weldon and Mr. Boland each agreed to buy one unit in the development. Mr. Weldon took townhouse 113.

[6] Mr. Weldon decided to expand the size of townhouse 113, which was originally 3000 square feet over two storeys, by building a third floor into the common element attic above his unit. Mr. Boland, with whom Mr. Weldon discussed the idea, told him that the additional third floor area might cause the development to exceed its permitted square footage, and advised him to seek approval from the Committee of Adjustment. Mr. Boland and Lou Andre, the

construction manager for the development, both urged Mr. Weldon to obtain a building permit. Mr. Weldon did not follow their advice.

[7] Construction of the third floor began in the spring of 1993, and was largely complete when Mr. Weldon and his family took possession of the townhouse on July 17, 1993. The third floor held a large family room with two skylights, a fourth bedroom, an ensuite bathroom, a storage area and a small furnace room. Mr. Weldon took title to the unit on April 7, 1994, and paid approximately $400,000 for it.

[8] MTCC 1056 became a condominium corporation on July 5, 1993 with registration of its Declaration.

[9] Mr. Weldon was president of MTCC 1056 from 1994 to 1997, but he did not take steps to have the Declaration amended to add the third floor to the unit's title. As a result, the description of townhouse 113 that formed part of the Declaration continued to show that it was a two-floor unit with common element attic space on the third floor. The description referenced the survey sheets that had been deposited in the Land Registry Office when the condominium was registered, which also showed that townhouse 113 was two storeys.

(2) Ms. Rainville's Purchase of Unit 113

[10] Mr. Weldon listed townhouse 113 for sale in late 1996 or early 1997, with an asking price of $1,075,000. In September 1997 Ms. Rainville and her then

husband Michael Orr were looking to buy a home in Toronto. She and her real estate agent, Joy Garrick, visited a number of units in the development. She was attracted to townhouse 113 in particular due to its large size, as a result of the third floor. Mr. Weldon's listing agent, Ed Wery, was present. Ms. Rainville was given a copy of the listing agreement, which described the townhouse as a three-storey unit. The unit appealed to Ms. Rainville, and after viewing it a second time and discussing potential renovations with her husband, on September 29 she offered to buy it for $975,000, with a closing date of December 19, 1997. Mr. Weldon accepted the offer.

[11] All three condominium corporations associated with the Grand Harbour development were initially managed by CBS Property Management. Brookfield took over as property manager for MTCC 1056 on October 1, 1997. According to Brookfield, the records CBS kept were unsatisfactory and were transferred to Brookfield "in dribs and drabs".

[12] Brookfield had a contractual obligation under its management agreement with MTCC 1056 to complete estoppel certificates for prospective purchasers on behalf of the corporation. In late October 1997, Ms. Rainville received an estoppel certificate prepared by Karin Stevens, a Brookfield employee. The certificate stated that there were restrictions on pets, that the reserve fund was less than Ms. Rainville had initially been told, and that there were continuing

violations of the Declaration. Patrick Post, who was the regional manager for Brookfield and also assistant secretary to MTCC 1056, signed the estoppel certificate on behalf of MTCC 1056. However, it soon came to light that the estoppel certificate was incorrect, because it referred to another condominium corporation within the Grand Harbour development.

[13] As a result, Brookfield completed a second estoppel certificate for townhouse 113, which Pamela Cawthorn of Brookfield sent to Gowlings on December 12, 1997. This certificate stated that there were "no continuing violations of the declaration, by-laws, and/or rules of the Corporation". After reviewing the unit file for townhouse 113 Mr. Post signed the certificate.

[14] Ms. Rainville testified that she was "comforted" by the second estoppel certificate. However, because she owned several cats, she continued to worry about the certificate's restriction on pets. Ms. Rainville claimed that she would not have closed the purchase transaction for the townhouse if the estoppel certificate had identified an issue about ownership of the third floor.

[15] Ms. Rainville and her husband sought to rescind the deal based on their concerns about the pet restriction and certain other possible misrepresentations made by Mr. Weldon, but ultimately decided to move forward with the purchase, at a reduced price, after Mr. Weldon threatened to sue. The parties extended the closing date to January 16, 1998. That day, Ms. Rainville went to the Gowlings

office to sign the closing documents. She thought she was meeting with Katherine Latimer, the lawyer who was to handle the transaction, but she actually met Cathy Ridout, a law clerk.

[16] Ms. Rainville testified that Ms. Ridout advised her that the boundaries of townhouse 113 extended from the "upper most surface of the drywall to the concrete level in the basement", which Ms. Rainville understood to mean from the ceiling of the third floor to the basement floor. Ms. Ridout did not show Ms. Rainville any plans of survey depicting the unit boundaries. At trial, Ms. Rainville alleged that Gowlings had a copy of the listing agreement, which incorrectly indicated that townhouse 113 was three storeys, in its file when she attended at its office. Ms. Latimer had no recollection of seeing the agreement until after the illegality of the third floor was discovered. The trial judge concluded on the balance of probabilities that the listing agreement was in Gowlings' file at the time of closing.

(3) The Renovations Reveal Defects

[17] Before moving into the townhouse, Ms. Rainville began renovations, which soon revealed defects in the unit's construction, including mould, water damage, and leakage problems with the roof. Her litigation lawyer, Martin Doane of Gowlings, sent letters to both MTCC 1056 and Brookfield to advise them of the various problems. MTCC 1056's lawyers responded by letter dated February 19,

1998, telling Ms. Rainville to "stop all further work in the unit until further notice." Ms. Rainville wanted to move in by the end of April and did not want a delay, so she did not tell her contractor, Mark Penman, to stop work. Mr. Penman advised her that she could pursue compensation from the Ontario New Home Warranty Program ("ONHWP").

[18] MTCC 1056 retained an engineering firm, Halsall Associates Limited, to provide an opinion on the work that was necessary to fix the unit's leaky roof. The Halsall engineer visited townhouse 113 in February 1998. The engineer noticed the third floor and wondered if it encroached on common element space. Halsall reviewed the Declaration and survey sheets and advised Mr. Post that townhouse 113 was supposed to have two storeys, and that the third floor was built in common element space. MTCC 1056's lawyers sent a letter to Ms. Rainville dated April 1, 1998, advising her that the third floor was common element space. This was Ms. Rainville's first indication that she might not have title to the third floor.

[19] Except for a brief period during the first week of April 1998, Ms. Rainville continued with the renovations, including the third floor, even though she knew its legality was in question. She described Brookfield as being "supportive" during this period and expected MTCC 1056 to pay for repairs she had made to the common elements to remedy water penetration.

[20] The ongoing construction prevented Ms. Rainville and Mr. Orr from moving in at the end of April as they had intended. They leased a house in the interim, ultimately moving into the Grand Harbour townhouse on December 19, 1998.

(4) Litigation Starts

[21] Litigation began once it became clear that the third floor was built in the condominium's common elements. MTCC 1056 issued an application, returnable April 16, 1998, for an injunction and compliance. That application was eventually converted into one of the actions that was consolidated for trial.

[22] In the spring of 1998, MTCC 1056's lawyers made an offer of settlement to Ms. Rainville under which it would repair the roof and grant her a lease for the third floor. Ms. Rainville refused to sign the release, on the advice of her counsel, and continued with the renovations.

[23] On September 3, 1998, Ms. Rainville started an action against Mr. Weldon, the City of Toronto and the real estate agents involved in the purchase and sale of the townhouse. She claimed damages for negligence and misrepresentation. The parties exchanged pleadings, but this action proceeded no further.

[24] In November 1998, MTCC 1056's lawyers withdrew the offer to settle and demanded strict compliance with all terms and provisions of the Declaration, by-laws, and rules. MTCC 1056 also demanded that Ms. Rainville cease "using,

altering, repairing, occupying or entering" the third floor of the townhouse. Ms. Rainville testified that MTCC 1056's change in position shocked her.

[25] On March 5, 2001, Ms. Rainville started the action against Gowlings, MTCC 1056, Brookfield and a number of individual defendants. MTCC 1056 cross-claimed against Ms. Rainville and sought an order directing her to stop all work on her unit and to close up the third floor at her own expense. MTCC 1056 issued a third party claim against Mr. Weldon, alleging that he had breached the fiduciary duty he owed to MTCC 1056 as a member of the Board of Directors. MTCC 1056 also claimed contribution and indemnity from Mr. Weldon for any damages the corporation owed to Ms. Rainville.

B. THE DECISIONS BELOW

[26] A number of proceedings were consolidated and heard together by the trial judge.

(1) Ms. Rainville's Claims

[27] To recapitulate, Ms. Rainville sued Gowlings, MTCC 1056 and several individuals who were at different times members of MTCC 1056's Board or unit owners. She also sued Brookfield, together with Brookfield employees Mr. Post and Ms. Cawthorn.

[28] The trial judge granted Ms. Rainville judgment against Gowlings for solicitor's negligence, and awarded damages of over $400,000 inclusive of prejudgment interest. She ordered Gowlings to pay to MTCC 1056, on behalf of Ms. Rainville, the cost of restoring the third floor to common element attic space, with such cost to be determined on a reference before a construction lien master. She also ordered Gowlings to reimburse Ms. Rainville for certain decorating and renovation costs associated with the third floor, with the sum to be determined on a reference to a construction lien master.

[29] The trial judge allowed Ms. Rainville's actions against MTCC 1056 and Brookfield in part. She ordered MTCC 1056 to reimburse Ms. Rainville in the amount of about $20,000 for her repairs to common elements defects.

[30] The trial judge refused, however, to make an order under s. 109(2) of the *Condominium Act*, 1998, S.O. 1998, c. 19 ("the former Act"), amending the Declaration to regularize the third floor. MTCC 1056's Cross-Claim Against Ms. Rainville

[31] The trial judge allowed MTCC 1056's action against Ms. Rainville, and ordered that she pay MTCC 1056 about $56,000 plus per diem interest for her use of the common elements in the third floor of the townhouse and that she close up the third floor, returning it to attic space. The trial judge directed a

reference before the construction lien master for directions on the implementation and costs of the remedial close-up work.

(2) MTCC 1056's Third-Party Action against Mr. Weldon

[32] The trial judge granted MTCC 1056 judgment in its third party action against Mr. Weldon for breach of fiduciary duty. She ordered him to pay occupation rent for the third floor of more than $18,000 plus interest. She also ordered him to indemnify MTCC 1056 for the sum of about $20,000 plus interest, which MTCC 1056 was to pay Ms. Rainville for her repairs to the common element defects. The trial judge also ordered Mr. Weldon to pay punitive damages of $50,000 to MTCC 1056.

(3) Costs

[33] The costs of the proceedings, which included a three-month trial, were considerable. The trial judge ordered Gowlings to pay costs to Ms. Rainville in the sum of $300,000 inclusive of fees, disbursements and applicable taxes. She ordered costs in the total amount of $200,000 inclusive of fees, disbursements and taxes to be paid to the Brookfield defendants, in the proportion of $150,000 by Ms. Rainville and $50,000 by Gowlings. The trial judge ordered Gowlings to pay $500,000 inclusive of fees, disbursements and taxes to MTCC 1056, divided equally between the insured and uninsured claims. She ordered Mr. Weldon to pay MTCC 1056 costs in the amount of $25,000.

C. THE APPEALS

[34] Ms. Rainville asks this court to allow her appeal against Brookfield and MTCC 1056. She argues: first, that the trial judge erred in dismissing her case against Brookfield and MTCC 1056 in view of the "strong evidence of negligence on their part in issuing the estoppel certificate"; second, that the trial judge made a palpable and overriding error in finding that Ms. Rainville did not rely on the estoppel certificate; and third, that the damage award was too low to restore her to the position she would have been in but for the negligence of Gowlings, Brookfield and MTCC 1056.

[35] Gowlings appeals against the finding of liability on the basis that: first, it provided legal services to Ms. Rainville at the standard of care expected of a real estate solicitor in the late 1990s; and second, that as a matter of law, Ms. Rainville did obtain title to the third floor of the townhouse when she purchased it. Gowlings also asks that its appeal from the dismissal of its cross-claim for contribution, indemnity and relief from MTCC 1056 be allowed. This cross-claim is relevant only if Ms. Rainville's appeal against MTCC 1056 is successful.

[36] MTCC 1056 cross-appeals against the trial judge's decision to award Ms. Rainville one-half of the value of the common element repairs that she made before she was ordered to stop work by MTCC 1056.

[37] Mr. Weldon appeals on the basis that the trial judge made an error in principle in awarding punitive damages against him.

D. ANALYSIS

[38] For convenience, I will break the issues down by each appeal.

(1) Ms. Rainville's Appeal Against Brookfield and MTCC 1056

[39] In this appeal, Ms. Rainville argues that Brookfield and MTCC 1056 were negligent in completing the estoppel certificate. The trial judge concluded Brookfield was not liable for negligence on the basis that its employees did not fall below the applicable standard of care and that Ms. Rainville did not rely on the estoppel certificate in deciding to purchase the townhouse. In my view, with respect, the trial judge's reasoning on this issue reveals reversible errors. These are detailed below.

[40] The basis for Ms. Rainville's claim is some important text in the second estoppel certificate, which provided:

> There are no continuing violations of the declaration, by-laws and/or rules of the Corporation, apart from any involving assessment obligations for which the current unit owner is responsible and the status of which is disclosed in paragraph 1 of this certificate.

[41] The Declaration described townhouse 113 as a two-storey unit, and indicated that the third storey was common element space. The survey sheets

referenced in the Declaration were consistent with this description. As a result, the existence of the built-out third floor was a violation of the Declaration and the statement in the estoppel certificate to the contrary was incorrect.

[42] Ms. Rainville's claim against Brookfield and MTCC 1056 sounds in negligent misstatement or misrepresentation. The elements of that cause of action are set out in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87:

> (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted. (Para. 33, p. 110)

[43] I address each element in turn.

(a) **MTCC 1056 Owed Ms. Rainville a Duty of Care**

[44] The first element of negligent misstatement is somewhat complicated by the nature of the relationship between MTCC 1056 and Brookfield. Nonetheless, in my view, there is no need at this stage of the analysis to distinguish between these two parties with respect to the completion of the estoppel certificate. The actions of Brookfield's employees in completing the certificate are, in law, MTCC 1056's actions. This flows from MTCC 1056's statutory obligations, even though

Brookfield was contracted by MTCC 1056 to complete the estoppel certificates. As a result, Brookfield was MTCC 1056's agent for the purpose of the estoppel certificates.

[45] The version of the management agreement in evidence was not signed, but MTCC 1056 and Brookfield agreed that its terms were accurate. Brookfield agreed to:

> Prepare for execution by the Corporation ... Certificates of lien in the form prescribed by Regulation pursuant to the Act and to issue and provide Estoppel Certificates together with the statements and information required pursuant to the Act to any person or person acquiring or proposing to acquire an interest in any unit ... The Manager shall be responsible for inspecting the common elements appurtenant to the unit and when the Manager has reason to believe that the unit has been unoccupied or may have been altered without permission by the Owner or occupant and upon the direction of the Board, the Manager shall inspect the unit to determine whether or not the corporation has any claim for damages against an owner as contemplated by section 41(6) and (7) of The Act or whether any violation exists prior to issuing the Estoppel Certificate. The Manager is responsible for the accuracy and completeness of all information contained in the Estoppel Certificate, however, the Manager shall not be liable for any information within the knowledge of the board but not communicated to the manager and which should be included in the estoppel certificate. [Emphasis added]

Mr. Post was appointed as assistant secretary to MTCC 1056, which enabled him to sign the certificates for MTCC 1056. In reviewing and signing the completed certificates, Mr. Post was acting on behalf of MTCC 1056 as its agent.

[46] The trial judge erred in her analysis by focusing on Brookfield's duty and ignoring that of MTCC 1056. A condominium corporation, such as MTCC 1056, is obliged by s. 32(8) of the former Act and s. 76 of the current *Condominium Act*, S.O. 1998, c.19 ("the current Act"), to provide estoppel certificates (called status certificates under the current Act) if requested by prospective purchasers. Section 32(8) of the former Act, which was in force at the time the estoppel certificate for Ms. Rainville's townhouse was issued, provided:

> Any person acquiring or proposing to acquire an interest in a unit from an owner may request the corporation to give a certificate in the prescribed form in respect of the common expenses of the owner and of default in payment thereof, if any, by the owner, together with such statements and information as are prescribed by the regulations, and the certificate binds the corporation as against the person requesting the certificate in respect of any default or otherwise shown in the certificate, as of the day it is given.

[47] As the condominium corporation for the unit Ms. Rainville was purchasing, MTCC 1056 owed Ms. Rainville a duty of care in the preparation of the estoppel certificate (*Fisher v. Metropolitan Toronto Condominium Corporation No. 596* (2004), 31 R.P.R. (4th) 273 (Ont. Div. Ct.), at para. 8). The two-stage test for establishing a duty of care set out by the Supreme Court at paras. 30-31 of

Cooper v. Hobart, 2001 SCC 79, is satisfied. First, the relationship between MTCC 1056 and Ms. Rainville is sufficiently proximate that it was reasonably foreseeable that carelessness by MTCC 1056 in executing the estoppel certificate could cause harm to Ms. Rainville.

[48] As for the second stage of the *Cooper* test, there are no policy considerations that should negative recognizing a duty of care in the circumstances. To the contrary, the purpose of estoppel certificates supports recognizing a duty of care. One of the main goals of the *Condominium Act* is consumer protection (*Lexington on the Green Inc. v. Toronto Standard Condominium Corp. No. 1930*, 2010 ONCA 751, 102 O.R. (3d) 737, at para. 49). Estoppel certificates must be interpreted in light of this objective; they are the vehicle through which condominium corporations provide important information to prospective purchasers. MTCC 1056 could not escape this special relationship and its duty of care by contracting out or delegating the completion of estoppel certificates to Brookfield.

[49] Brookfield employees may have done much of the work necessary to complete the certificates as agents for MTCC 1056. MTCC 1056 was still ultimately responsible for the contents of the certificates. This is evidenced by the requirement that Mr. Post sign each certificate in his role as an MTCC 1056 secretary.

[50] The trial judge found that, under the former Act, the limited role of an estoppel certificate was to "provide financial information about a condominium that would not otherwise be available to a potential purchaser" (para. 217), not to report "whether the unit was in violation of the declaration" (para. 219). However, in this case Brookfield had inserted into its form of the estoppel certificate, which it executed on behalf of MTCC 1056, an assertion that there were "no continuing violations of the declaration, by-laws, and/or rules of the Corporation".

[51] The fact that this provision went beyond the minimum statutory requirements does not mean that MTCC 1056 had no duty to make an effort to verify its accuracy.

(b) **The Second Estoppel Certificate was Incorrect**

[52] The trial judge found, at para. 235: "It is beyond dispute that the estoppel certificate was incorrect." This conclusion was based on the statement in the estoppel certificate that there were no violations of the Declaration. The existence of the third floor was a violation of the Declaration, since the Declaration described townhouse 113 as a two-storey unit. As a result, the trial judge's conclusion on this point is unassailable.

(c) MTCC 1056 Fell Below the Standard of Care in Completing the Estoppel Certificate

[53] The trial judge found that neither Ms. Cawthorn nor Mr. Post of Brookfield was negligent in the preparation of the second estoppel certificate (para. 229). In my view, for the reasons set out below, her reasoning regarding the applicable standard of care reveals errors.

[54] The standard of care applicable to negligent misstatement is that of an ordinary, reasonable and prudent person in the position of the representor, in the circumstances (*Queen v. Cognos Inc.*, at p. 121, para. 56; *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, at para. 28). In other words, the representor must exercise such reasonable care as the circumstances require to ensure that the representation is accurate and not misleading (*Queen v. Cognos*, at p. 121, para. 56). What is reasonable must be determined on an objective basis with consideration for the context of the particular case, such as the likelihood of a foreseeable harm, the gravity of the harm, and the cost of avoiding the harm (*Ryan*, at para. 28). The court may consider "external indicators" of what is reasonable, such as custom, trade practice, and statutory or regulatory standards (*Ryan*, at para. 28).

[55] The purpose of the estoppel certificate was to ensure Ms. Rainville was given sufficient information regarding the property to make an informed purchase

decision (*Durham Condominium Corp. No. 63 v. On-Cite Solutions Ltd.*, 2010 ONSC 6342, 99 R.P.R. (4th) 68 (S.C.), at para. 21). It follows that there was an obligation on MTCC 1056 to take reasonable steps to ensure the information in the estoppel certificate was correct, even if the information was not statutorily mandated. This obligation flows from the common law and not from the statute.

[56] There was no expert evidence at trial on the standard of care applicable to a condominium corporation or its delegate, such as a property manager like Brookfield. The trial judge appears to have considered the standard of care applicable to Brookfield and MTCC 1056 to be, in fact, Brookfield's actual practice. She described this practice as follows:

> Post testified that it was not the practice at the time to conduct a physical inspection inside the unit unless there was something in the documentation that raised a flag. To enter a unit required permission from the owner. In his practice, each unit had its own file that contained correspondence with the owners and prior estoppel certificates. In the usual course of business, Post did not go beyond the unit file and other records from the corporation. He did not, for example, review the as-built drawings to determine if there was a breach of the Declaration or By-Laws.
>
> ...
>
> The evidence was clear from Post about the procedure followed prior to completing estoppels certificates and there was nothing to suggest that the appropriate procedure was not followed in this case. (Paras. 223, 232)

[57] As a matter of principle, however, the actual practice of Brookfield and MTCC 1056 in and of itself is not capable of setting the standard, and it was an error for the trial judge to conduct her negligence analysis on this basis.

[58] In no way can Brookfield's work be seen as "reasonable and prudent", to borrow words from *Cognos*. The transition between property managers was chaotic. The trial judge found that the records kept by the previous property manager were unsatisfactory and were transferred to Brookfield "in dribs and drabs". With respect, this should reasonably have heightened Brookfield and MTCC 1056's vigilance and diligence; it cannot justify their poor performance.

[59] Inexperienced Brookfield employees prepared both estoppel certificates. Mr. Post then reviewed and signed them. This exercise can only be described as woefully sloppy. For the first certificate, the employees relied on materials in their files, which they knew were incomplete. Mr. Post conceded that the first certificate, which is not at issue in this appeal, was wrong "in its entirety". He testified that he "missed" the fact that the first estoppel certificate was incorrect in stating that there were continuing violations of the Declaration.

[60] Brookfield's performance did not improve with the second estoppel certificate – which is at issue in this appeal. The trial judge made a specific finding that Brookfield did not have "possession of, or certainly access to, all relevant documents which would have disclosed the building of the third floor".

(Para. 229) While this statement is technically correct, since the knowledge of the third floor's illegality did not surface until Halsall's involvement in 1998, it is unduly exculpatory.

[61] On the evidence, it is clear that Brookfield had the Declaration, which described townhouse 113 as two storeys, in its possession at the time it prepared the second estoppel certificate. In completing the estoppel certificate Brookfield employees confined their inquiries to the condominium documentation and the information in the townhouse's unit file. Although the management agreement stated that Brookfield should inspect the "common elements appurtenant to the unit", which would include the third storey of Ms. Rainville's townhouse, before completing the estoppel certificate, it failed to do so. Although Mr. Post did not conduct a formal inspection, he admitted that in October 1997 he noticed a window on the third floor of townhouse 113, which led him "to believe that there was in fact a third floor built up there". Even though Mr. Post would have known that the vast majority of the townhouses were two floor units, he did not make any further inquiries when the time came to sign the estoppel certificate.

[62] In the absence of evidence and expert testimony as to appropriate industry practice, this court is not equipped to set out a detailed list of steps a condominium corporation or a property manager must take to comply with the standard of care in completing an estoppel or status certificate. I conclude simply

that Brookfield's failure to make virtually *any* inquiries into the veracity of the representation that townhouse 113 complied with the Declaration was not reasonable or prudent in the circumstances, and could not meet any reasonable standard of care. The management agreement expressed the common expectation of Brookfield and MTCC 1056 that the estoppel certificates would be accurate and complete. As the standard of care set out in *Queen v. Cognos* suggests, MTCC 1056 was obliged to take steps to ensure that the estoppel certificate was correct. The failure to do so amounted to a breach of any reasonable standard of care.

[63] MTCC 1056 should not be surprised at being held to their representation that there were no violations of the Declaration. I agree with Professor Bruce Feldthusen that there is "much to be said for approaching this area as a modification to traditional contract law ... The law should be such that a reasonable defendant would not be surprised when legal consequences flow from her negligent information or advice" (Bruce Feldthusen, *Economic Negligence*, 6th ed. (Toronto: Carswell, 2012), at p. 27).

(d) **Ms. Rainville Detrimentally Relied on the Estoppel Certificate**

[64] If the estoppel certificate had been completed correctly, it would have stated that there were ongoing violations of the Declaration, since the third floor of the townhouse was illegally built into the common elements, contrary to the

description and survey sheets. The trial judge's recitation of the facts makes it clear that the existence of the third floor was significant to Ms. Rainville. The trial judge found that "[i]t is clear that had Rainville been advised that the third floor did not form part of the unit she was purchasing, she would not have gone ahead with the transaction." (Para. 278)

[65] As noted in the trial judge's reasons, the agreement of purchase and sale was signed on September 30, 1997. Ms. Rainville did not receive the first estoppel certificate until sometime around October 31, 1997. The second estoppel certificate was delivered even later, with a letter dated December 12, 1997.

[66] The trial judge's self-instruction that Ms. Rainville must prove that she relied on the information contained in the estoppel certificate to establish a negligent misstatement claim was correct in law.

[67] Ms. Rainville testified that she relied on the estoppel certificate. She was not cross examined on this testimony. Even so, the trial judge concluded that Ms. Rainville did not rely on the certificate:

> While the Plaintiff said that she felt "comforted" by the estoppel certificate, in my view that falls far short of demonstrating that she relied on it to ensure she was getting proper title to the townhouse or that it gave her any assurance about the number of floors the unit had. (Para. 235)

[68] Ms. Rainville could not prove reliance, according to the trial judge, because she had "signed the agreement of purchase and sale without reviewing an estoppel certificate or indeed without reviewing the agreement with her lawyer." (Para. 233)

[69] This statement shows that the trial judge misapprehended the role of an estoppel certificate in the purchase of a condominium unit. Estoppel or status certificates are virtually never provided by the condominium corporation to the purchaser before the agreement of purchase and sale is signed. Instead, the request for a certificate or permission to request a certificate is typically contained *within* the agreement of purchase and sale, as it was in this case (see Ontario Real Estate Association Standard Form Agreement of Purchase and Sale – Condominium Resale (Form 101, 2014), at para. 13). The contents of the estoppel certificate become relevant after the agreement of purchase and sale is signed but prior to closing. If the certificate identifies a serious breach of the Declaration, for example, then the purchaser may be able to rescind the agreement. It is now common for a purchaser to make his or her offer expressly conditional on receipt and review of the status certificate (Audrey Loeb, *Condominium Law and Administration*, loose-leaf (Toronto: Carswell, 1995), at p. 9-4).

[70] The usual practice is precisely what occurred in this case. The agreement of purchase and sale contained a provision stating that "[t]he Vendor consents to a request by the Purchaser or his authorized representative for an Estoppel Certificate from the Condominium Corporation."

[71] When the question of reliance is focused on the date Ms. Rainville closed on the condominium unit rather than the date when she signed the agreement of purchase and sale, the trial judge's other findings show conclusively that Ms. Rainville relied on the estoppel certificate. As the trial judge's recitation of the facts demonstrates, in addition to restrictions on pet ownership, the size of the townhouse was of primary importance to Ms. Rainville's decision to purchase the unit. She expressed concerns about possible violations of the Declaration after receiving the first estoppel certificate, and even sought to rescind the agreement. However, the second estoppel certificate provided comfort to her. Ms. Rainville reasonably relied on the statement that there was no violation of the Declaration in making the final decision to purchase the unit.

[72] As a result of her reliance, Ms. Rainville suffered harm. She purchased a condominium that was one floor smaller than she anticipated and wanted. This impacted her use of the unit as an inhabitant and also decreased the unit's resale value. Detrimental reliance – the final element of negligent misstatement – is therefore established.

(e) Conclusion on MTCC 1056's Liability for Negligent Misstatement

[73] In my view, effect should be given to this ground of appeal against MTCC 1056. Ms. Rainville successfully made out the elements of liability for negligent misstatement on the part of MTCC 1056 in respect of the second estoppel certificate, and is entitled to damages against MTCC 1056.

[74] I would dismiss Ms. Rainville's appeal against Brookfield. While the trial judge's ultimate holding that Brookfield is not liable was correct, I would reach that conclusion on the basis that Brookfield was MTCC 1056's agent and did not owe Ms. Rainville an independent duty of care. Nor is there evidence that Ms. Rainville relied specifically on Brookfield, as opposed to MTCC 1056.

[75] It follows from this conclusion and the incorrect statement in the estoppel certificate that MTCC 1056 is estopped from demanding that Ms. Rainville close up the third floor and restore the unit to its two storey configuration at her own expense and that she pay occupancy rent for the third floor. Those elements of the judgment below must be set aside.

[76] It also follows that MTCC 1056's cross-appeal against Ms. Rainville for one-half of the value of the common element repairs that she made before she was ordered to stop work must be dismissed.

(2) The Gowlings Liability Appeal

[77] Gowlings contests the finding of liability on two bases: first, that the trial judge erred in finding that the law firm did not provide legal services to Ms. Rainville at the standard of care expected of a real estate solicitor in the late 1990s; and, second, that, as a matter of law, Ms. Rainville obtained title to the third floor of the unit. Gowlings also asks that its cross-claim for contribution, indemnity and relief against MTCC 1056 be allowed.

(f) Did the Legal Services Gowlings Provided Fall Below the Applicable Standard of Care?

[78] The trial judge considered the expert evidence on this issue at paras. 259-278. Ms. Rainville called Robert Aaron and Gowlings called Donald Thomson. The trial judge preferred the evidence of Mr. Aaron, and concluded that "Latimer fell below the standard of care of a real estate lawyer practising in Toronto in 1998." (Para. 270)

[79] The trial judge considered that the lawyer's primary responsibility in a condominium transaction is to ensure that the client "is getting title to what they believe they have transacted for." (Para. 271) She went on to explain that in order to confirm this, "the client must be shown the plans to ensure that their unit is the one identified, in the correct location, the size, whether it has a terrace

which might be an exclusive use common element, whether it is a single storey unit or multi-level."

[80] The trial judge noted, at para. 275, that the "main point of contention between the two experts was whether the standard of practice required the vertical plan to be shown to the client." While Mr. Aaron testified that it did, Mr. Thomson testified that "only the horizontal plan had to be shown to the client."

[81] The trial judge rejected Gowlings' submission that even if the horizontal plan had been reviewed with Ms. Rainville, "it would not have revealed that there was an illegal third floor." (Para. 272) She stated:

> The horizontal plan shows the Plaintiff's unit, first floor, and there is a staircase that is shown to another level. I agree with Mr. Aaron's statement that this should have led the lawyer to look for the next floor of the unit, which would require a review of the plan showing the cross sections illustrating unit boundaries. That document clearly shows unit 7 level 1 as having a rather small basement, a first floor, a second floor above which appears to be open space going to a peaked roof. It is clear that the area above the second floor is not part of the unit. Had Rainville been shown this plan, as she ought to have been, it would have been obvious that the unit being purchased was not a 3 storey unit, but rather a 2 storey unit with a basement. (Para. 272)

[82] In argument before this court, Gowlings took the position that the horizontal plan did not show the staircase, so the trial judge must have been mistaken. This was shown in reply to be an error on counsel's part. The relevant plan was attached to Mr. Aaron's report.

[83] The trial judge stated more than once that she preferred Mr. Aaron's evidence, and her assessment of the expert evidence is entitled to deference. Gowlings has not identified any palpable and overriding error. There is no basis for disturbing the trial judge's finding that Gowlings was negligent.

(g) Did Ms. Rainville Obtain Title to the Third Floor of the Townhouse Unit?

[84] Gowlings argues that, as a matter of law, title to the third floor was conveyed to Ms. Rainville and was never a condominium common element.

[85] Gowlings does not dispute that the Declaration and the survey sheets describe or show the third storey as part of the common elements, not part of townhouse 113. Nonetheless, Gowlings argues that the "controlling document with respect to title" is not the survey sheet or sheets, but the actual physical features of the unit. This argument is based on s. 4 of the Declaration, which provides:

> Boundaries of Units
>
> The monuments controlling the extent of the units are the physical surfaces mentioned in the boundary of the units contained in Schedule "C" attached hereto.

Schedule "C" then sets out the legal boundaries for this unit as follows:

> BOUNDARIES OF RESIDENTIAL UNITS
>
> Horizontally (see cross-sections on Part 1, Sheet 3 of the Descriptions)
>
> ...
>
> b) The upper surface and plane of the concrete floor slabs in the basements of Units ... 4, 5, 6 and 7 on Level 1.
>
> ...
>
> g) The upper surface and plane of the drywall ceiling in the uppermost story of ... Units 2 to 9 inclusive on Level 1.

The ceiling of the third floor in townhouse 113 would fit within this description in these provisions.

[86] Gowlings argues that there is an error on the survey sheets since they show only two storeys and not three. Gowlings asserts that this error occurred because the survey sheets for the unit were prepared by the surveyor when the framing was in place for the two storey unit. Gowlings argues that the surveyor ought to have been called back after the construction was finished to complete the survey for the unit, which would then have included the third storey. The survey sheets ought to be corrected, but they do not control title. According to Gowlings, albeit quite by accident perhaps, by operation of law Ms. Rainville got what she bargained for as a result of the law firm's work, being title to all three floors of the unit.

[87] I do not agree with this argument for two reasons. First, the argument that the physical features of the unit trump the Declaration and the survey sheets was never put to the trial judge. The evidence necessary to explore that issue properly was not led by the parties. The experts were not examined on the practice that is followed in situations where a unit's physical features diverge from the Declaration and the survey sheets. The argument, in short, smacks of novelty and implausibility. It cannot be resolved on the evidence presented at trial or before this court (*767269 Ontario Ltd. v. Ontario Energy Savings L.P.*, 2008 ONCA 350, at para. 3; *Pirani v. Esmali*, 2014 ONCA 145, 94 E.T.R. (3d) 1, at para. 74). The court's normal practice of refusing to entertain entirely new issues on appeal should apply (*Pirani*, at para. 74; *Kaiman v. Graham*, 2009 ONCA 77, 75 R.P.R. (4th) 157, at para. 18).

[88] Second, it is not clear to me that accepting the validity of this argument would eliminate Gowlings' liability. Instead of delivering Ms. Rainville a unit with clear title, Gowlings would have delivered her into a lawsuit with MTCC 1056 about the enforceability of the Declaration. This is not what a domestic real estate client reasonably expects from her lawyer. Gowlings' failure to discover the basic problem with the size of the unit was negligent, as the trial judge concluded.

(h) Gowlings' Cross-Claim Against MTCC 1056

[89] Gowlings asks that its cross-claim for contribution, indemnity and relief against the negligent MTCC 1056 be allowed. In my view, there is no merit in the cross-claim, for the reasons expressed by the trial judge. She rejected the submission that Ms. Latimer was entitled to rely on the estoppel certificate for title purposes:

> While Latimer testified under cross-examination that she relied "in part" on an estoppel certificate that stated compliance with the Declaration, I found this evidence self-serving. Latimer had only the vaguest recollection of the documents she reviewed in the file prior to closing. Certainly, she did not rely on the certificate in terms of guiding her actions concerning what steps she needed to take to ensure her client received proper title to her townhouse. The estoppel certificate was never intended to provide evidence of proper title to a property. (Para. 276)

[90] I see no error in this conclusion.

(3) Ms. Rainville's Damages Appeals Against Gowlings and MTCC 1056

[91] The trial judge devoted more than 100 paragraphs of her decision to assessing damages. Her lament throughout, with which I agree, was the absence of credible evidence to substantiate many of Ms. Rainville's damage claims. Mr. Adair, who was not trial counsel for Ms. Rainville, stated in his factum, with his customary candour:

> On the matter of the repair, renovation and decorating costs, it is acknowledged that for whatever reason the evidence was poorly presented in a disorganized way that made the assessment of damages very difficult for the trial judge.

[92] The damages awarded by the trial judge against Gowlings and MTCC 1056 are set out in the following table:

Damage item and amount claimed	Disposition	Reasoning
1. Fees paid to contractor Penman [$205,000]	Not awarded	There was no explanation of what the amount claimed represented. [Para. 284]
2. Renovations to all floors of the unit [$106,475.89]	Not awarded	Damages not proven. [Para.287]
3. Redecoration and renovations to third floor [$89,966.59]	Awarded against Gowlings	Decorating costs were owed, but it was impossible to determine which invoices related to work on the third floor versus other portions of the unit. Master appointed to conduct a reference and determine amounts spent by Ms. Rainville on third floor decorating and renovations. [Para. 372]
4. Gowlings Account [$44,521.97]	Gowlings obliged to repay $18,542.19	Ms. Rainville was entitled only to reimbursement of amounts paid to Gowlings to complete real estate deal and related to the third floor dispute. [Paras. 311-314]
5. Cost of delay in moving into unit in 1998 [$94,442.53]	Not awarded	The costs for alternative housing in 1998 were not reasonable and not caused by the defendants' actions. [Para.321]
6. Loss of value of third floor [$225,000]	Awarded against Gowlings	"This loss flows directly from the negligence of Gowlings." [Para. 307]
7. Cost of removing	Awarded	Gowlings to pay provisional amount of

third floor [$179,126.26]	against Gowlings	$84,000 into court, with remaining balance to be determined on reference to a master. [Paras. 337, 343]
8. Costs associated with conversion of third floor [$53,095.91]	Awarded against Gowlings	Ms. Rainville was entitled to cost of converting third floor back into attic space. [Para. 323]
9. Registration costs [$43,183.76]	Not awarded	Not analyzed by trial judge. Not clear from record what these are.

[93] Ms. Rainville's focus at trial was on the legalization of the third floor. She sought damages in two measures: the first was on the premise that the trial judge would legalize the third floor, and the second was on the premise that the third floor would not be legalized. Since the trial judge rejected Ms. Rainville's request for legalization of the third floor, she was left to deal with the damages claim on that basis. Before this court Ms. Rainville is pursuing damages as the primary remedy, and legalization of the third floor only in the alternative.

[94] On appeal, Ms. Rainville altered her damages claim to include recovery for the repair, renovation and decorating costs related to the entire unit. She claims she is entitled to damages payable by Gowlings, Brookfield and MTCC 1056 "in an amount equal to that incurred for the entire repair, renovation and decorating costs in respect of Townhouse 113 during the period from January 16, 1998-December 1, 1998 together with prejudgment interest thereon."

[95] This was not how the case was argued at trial. Appeal counsel proposes a new approach given the lamentable state of the evidence:

> It appears necessary in order to do justice between the parties that the issue of the total assessment of repair, renovation and decorating costs incurred at the time of purchase and in the months thereafter ought to be the subject of a reference to a Construction Lien Master at Toronto. This will not cause any undue delay or inconvenience to the parties given that a reference has already been ordered on other necessary aspects of the damages.

[96] Since Ms. Rainville did not advance this approach to damages at trial, I would decline to grant the requested relief. This court generally will not allow an appellant a second opportunity to prove damages that should have been shown at trial as an essential element of the cause of action (*Lombardo v. Caiazzo* (2006), 52 C.L.R. (3d) 187 (Ont. C.A.), at para. 19). There are some exceptions to this rule, such as where the nature of the damages render proof and quantification inherently complex (*Eastern Power Ltd. v. Ontario Electricity Financial Corp.*, 2010 ONCA 467, 101 O.R. (3d) 81), or where the significance of the loss merits more than nominal damages despite evidentiary deficiencies (*Martin v. Goldfarb* (1998), 41 O.R. (3d) 161 (C.A.); *Rosenhek v. Windsor Regional Hospital*, 2010 ONCA 13). Neither of the exceptions apply to this case.

[97] This court's role is to consider whether the relief the trial judge granted was appropriate. The standard of review that applies to a trial judge's assessment of damages is highly deferential. To interfere, an appellate court must find that the

trial judge made an error in principle or a palpable and overriding error: *de Montigny v. Brossard*, 2010 SCC 51, [2010] 3 S.C.R. 64, at para. 27.

[98] The trial judge made some such errors with respect to damages. First, the trial judge erred by refusing to award Ms. Rainville the entire proven cost of her repairs to the common elements. Second, in requiring Gowlings to reimburse Ms. Rainville for only a portion of her legal fees, the trial judge failed to apply the appropriate test for damages in negligence. Finally, the trial judge erred in the manner of setting damages to account for the fact that Ms. Rainville did not get the three-storey townhouse she paid for. I address each of these issues in turn.

(a) **Repairs to Common Elements**

[99] At trial Ms. Rainville sought to recover what she paid to remedy common element defects in 1998, and claimed $201,880.51. The trial judge noted that "[b]oth the Act and the declaration of MTCC No. 1056 make it clear that it is the corporation who has the responsibility to repair and maintain the common elements." (Para. 351) Despite difficulties with quantification, the trial judge accepted the calculation of MTCC 1056's expert quantity surveyor for the cost of the repairs to the common elements at $41,681. Nonetheless, she awarded Ms. Rainville only half of that amount, at $20,840.50 against MTCC 1056. (Para. 369)

[100] The trial judge appears to have based this reduced recovery on the letter from MTCC 1056 to Ms. Rainville dated February 19, 1998. She explained that while it was permissible for Ms. Rainville to proceed with repairs when she took possession of the townhouse because the situation "was dire", she should have ceased repairs when she got the stop work letter from MTCC 1056. Having "attended to the urgent work", after receiving the letter "she proceeded at her own peril." (Para. 368)

[101] With respect, there is no legal basis for apportioning the damages in this manner. Pursuant to both the former and current versions of the *Condominium Act*, MTCC 1056 had a statutory obligation to repair the common elements (see s. 41 of the former Act and ss. 89-90 of the current Act). MTCC 1056's Declaration contained a similar requirement. The stop work letter did not shift this responsibility from MTCC 1056 to Ms. Rainville. The trial judge made a factual finding that Ms. Rainville incurred reasonable expenses of $41,681 to make necessary repairs to the common elements (although Ms. Rainville claimed to have spent far more). Under both the relevant legislation and MTCC 1056's Declaration, MTCC 1056 must reimburse Ms. Rainville for this full amount, not simply one-half as the trial judge concluded.

[102] In its cross-appeal, MTCC 1056 takes the position that Ms. Rainville should have applied to ONHWP for reimbursement for her repairs to the common

elements. MTCC 1056 argues that given this alternative possibility for reimbursement, Ms. Rainville's damages were avoidable and are not recoverable from MTCC 1056.

[103] I disagree. This argument ignores MTCC 1056's statutory responsibility to repair the common elements. Further, MTCC 1056 itself submitted an application to ONHWP and recovered more than $180,000 for major structural defects.

[104] Not only was Ms. Rainville not required to avoid her loss by applying to ONHWP, it would also have been impossible for her to do so. She submitted a claim to ONHWP in 1999. Although by then the applicable ONHWP warranty period had expired, ONHWP noted in its response that Ms. Rainville was not entitled to reimbursement since many of the claimed damages related to common elements, which were the responsibility of MTCC 1056. As a result, MTCC 1056 is not entitled to any diminution in the damage award as a result of a potential ONHWP claim.

(b) **Recovery of Legal Fees Paid by Ms. Rainville to Gowlings**

[105] As discussed above, the trial judge properly concluded that Gowlings was negligent in its provision of legal services to Ms. Rainville. While this finding of liability was correct, the trial judge erred in her assessment of the associated damages. The trial judge concluded that Ms. Rainville was entitled to

reimbursement for her legal fees related to both the purchase of the townhouse and the dispute regarding the third floor. However, the trial judge denied Ms. Rainville any recovery for legal fees stemming from the dispute regarding the common element repairs. This distinction was justified on the basis that "the work related to the common element problems was not reasonably foreseeable as a result of the negligence of Latimer". (Para. 311)

[106] This conclusion ignores the guiding principle for assessing damages in negligence: as Ms. Rainville argues, the appropriate remedy is to return the plaintiff to the position she would have been in had the negligence at issue not occurred (*Athey v. Leonati*, [1996] 3 S.C.R. 458, at para. 32). The trial judge did not advert to or apply this principle in her reasons.

[107] On this basis Ms. Rainville is entitled to reimbursement for all fees paid to Gowlings. But for Gowlings' negligence, Ms. Rainville would not have purchased the townhouse. Had she not done so, she would not have incurred any expenses related to the common element repairs and associated legal disputes. In order to return Ms. Rainville to her prior position, she must be reimbursed for these legal fees, plus pre-judgment interest based on the interest calculation method set out by the trial judge at para. 307.

(c) **Damages for Negligence**

[108] Ms. Rainville is entitled to damages for loss of the value of the third floor as a result of the trial judge's undisturbed finding that Gowlings was negligent and based on my finding that MTCC 1056 is liable for negligent misstatement in the estoppel certificate. Both Gowlings and MTCC 1056 caused Ms. Rainville's injury. As a result, *under* s. 1 of the *Negligence Act*, R.S.O. 1990, c. N.1, their liability is joint and several.

[109] The remedy for negligent misstatement is ordinarily to award damages to return the plaintiff to the position he or she would have been in had the misrepresentation not occurred (*BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12, at p. 37, para.46). The trial judge measured Ms. Rainville's damages as the loss of the extra value of the third floor. She relied on the evidence of an appraiser called by Ms. Rainville, who set the value of the third floor when the unit was purchased in 1998 at $225,000. I note that the appraiser fixed the relative value in 2009 at $400,000.

[110] The circumstances of this case render valuation on the date of purchase inappropriate. As noted above, had Ms. Rainville been aware that the third floor was a violation of the Declaration, she would not have closed the purchase transaction for the unit. Nonetheless, she ultimately relied on the misstatement in

the estoppel certificate and completed the transaction, which cannot now be undone.

[111] This is not to say that Ms. Rainville should be denied any remedy. There is no doubt that she has suffered significant damages as a result of the negligence of Gowlings and MTCC 1056. In my view, Professor Feldthusen's suggestion that the principles of contract law may be relevant to negligent misstatement is helpful here. While this court must be cautious not to collapse the distinction between contract damages and tort damages, the unique circumstances of this case necessitate an adaptation of the normal *principles* governing remedies for negligent misstatement. As the Supreme Court has held, while there is "a conceptual difference between damages in contract and in tort ... in many instances the same quantum will be arrived at, albeit by somewhat different routes." (*V.K. Mason Construction Ltd. v. Bank of Nova Scotia*, [1985] 1 S.C.R. 271, at p. 285, para. 28)

[112] Ms. Rainville reasonably believed that she was buying a three-storey townhouse, and reasonably expected that eventually she would sell it as a three-storey townhouse. She invested heavily to improve the property. The negligence of Gowlings and MTCC 1056 has deprived her of the opportunity to sell townhouse 113 as a renovated three-storey unit.

[113] In my view, justice in this case can only be done if Ms. Rainville's damages are measured by the loss she will suffer from losing the opportunity to sell her property as if it had been a renovated three-storey townhouse. She lost this opportunity because she relied on MTCC 1056's representations in the estoppel certificate.

[114] In my view, the Supreme Court's approach to damages for negligent misstatement adopted in *V.K. Mason Construction Ltd.* is appropriate for this appeal. The Court adopted a measure of damages for negligent misrepresentation which recognized that a plaintiff can recover the value of its lost opportunity. In that case, a contractor claimed against a bank for negligent misrepresentation stemming from the bank's advice that a property developer was adequately financed. The Court concluded that but for the bank's misrepresentation, the contractor would have undertaken a different project on which it would have earned a profit. In other words, the bank's misrepresentation caused the contractor to lose an opportunity to profit. The measure of damages was fixed as the anticipated profit the contractor lost as a result of the misrepresentation – in other words, its expectation damages.

[115] Applying the principles of *V.K. Mason* to this appeal, the existence of the third floor was crucial to Ms. Rainville's decision to purchase townhouse 113. The trial judge found that, had Ms. Rainville known the unit was not three floors, she

would not have completed the purchase. It is also fair to say that Ms. Rainville would not have spent what she did on renovating the townhouse. The negligence of Gowlings and MTCC 1056 cost Ms. Rainville the opportunity to sell her townhouse as a renovated three-storey unit. Her inability to crystallize her real loss up to this point is attributable in part to the ongoing uncertainty about legal title to the third storey resulting from the trial and appeal process.

[116] In the unique circumstances, I would find that Gowlings and MTCC 1056 are liable to Ms. Rainville for the difference between the value of townhouse 113 as a renovated three-storey unit and as a two-storey unit. Since the value of the condominium is likely to rise and fall over time due to the vagaries of the real estate market, in order to provide the parties with certainty and finality, I would set the valuation date as the date this decision is released.

(d) Legalizing the Third Floor

[117] At trial, Ms. Rainville requested that the trial judge use her discretionary power under s. 109(3) of the current Act to order MTCC 1056 to amend the Declaration and legalize the third floor. MTCC 1056 resisted legalization of the third floor and insisted that it be returned to common element attic space. The trial judge agreed with MTCC 1056's position. However, MTCC 1056 anticipated that the reconstruction would be at someone else's cost. That has changed. Ms.

Rainville has no obligation to close up the third floor, and is not liable to MTCC 1056 for occupation rent. Any reconstruction would be at MTCC 1056's own cost.

[118] The trial judge refused to make an order under s. 109(2) of the former Act amending the Declaration to regularize the third floor. This was based on her finding that the failure to include the third floor as part of the description of townhouse 113 in the Declaration was not an error or an inconsistency (paras. 127, 130). She was also persuaded that this remedy would be undesirable since it would be unfair to the other townhouse owners, and MTCC 1056 would thereafter be unable to refuse applications from other owners who had similar third floor potential. It would also result in a dispute with the two other condominium corporations within the Grand Harbour development about proportional expenses under a shared facilities agreement. The other two corporations had the view that MTCC 1056 was already unfairly advantaged as a result of the larger size of the townhouses. Increasing the size of the units within MTCC 1056 even more raised the prospect of the other corporations demanding re-negotiation of these proportional expenses, which could have resulted in higher common expenses for the townhouse unit owners (paras. 137-150).

[119] Ms. Rainville has not demonstrated any error in the trial judge's analysis on this issue.

[120] That said, the interests of the parties now array somewhat differently. Perhaps the way for the parties to sort out their respective liabilities at the least cost would be for the third floor to be legalized. MTCC 1056 may now wish to consider whether the appropriate course of action is to legalize the third floor of townhouse 113.

(4) Claims Between MTCC 1056 and Brookfield

[121] At trial Ms. Rainville argued that both MTCC 1056 and Brookfield breached the duties they owed to her by issuing an incorrect estoppel certificate. MTCC 1056 and Brookfield cross-claimed against each other for contribution, indemnity and relief over for any amount each party was required to pay to Ms. Rainville.

[122] Brookfield argued that although its management agreement with MTCC 1056, excerpted above, provided that Brookfield was responsible to MTCC 1056 for the accuracy and completeness of the information in the estoppel certificates, the exception within that provision was engaged. The exception provided that Brookfield was not responsible to MTCC 1056 "for any information within the knowledge of the Board but not communicated to the manager and which should be included in the estoppel certificate." Brookfield argued that knowledge of the third floor on the part of both Mr. Weldon and Mr. Boland was to be attributed to MTCC 1056, and that as a result, Brookfield had no obligation to indemnify MTCC 1056.

[123] MTCC 1056 argued in response that the undisclosed knowledge of one or two condominium corporation directors should not be attributed to the corporation. If the estoppel certificate contained errors or omissions, it was the fault of Brookfield. MTCC 1056 claimed contribution and indemnity from Brookfield in the event it was found liable in relation to the estoppel certificate.

[124] Given the trial judge's conclusion that neither Brookfield nor MTCC 1056 was liable for negligent misstatement arising from the estoppel certificate, she did not go on to address whether the knowledge of the third floor on the part of Mr. Weldon and Mr. Boland should be attributed to MTCC 1056. However, she did consider this issue in the context of Gowlings' argument that MTCC 1056 should be deemed to have the same knowledge as Mr. Boland.

[125] Although the trial judge acknowledged that in some circumstances it may be appropriate to impute the knowledge of one director to the board as a whole, she concluded this would not be appropriate in the case of Mr. Boland. At paras. 206-208 she distinguished the situation before her from *On-Cite Solutions*, where the knowledge of a board member was attributed to the condominium corporation, on the basis that Mr. Boland was not the president of the Board, he did not learn of the illegality of the third floor through his position on the Board, and unlike in *On-Cite Solutions*, where the president signed the certificate, Mr. Boland played no role in the execution of the estoppel certificate.

[126] I see no error in this reasoning, and I would extend it to Mr. Weldon. I am reluctant to impute the knowledge of a condominium director to its board as a general matter. Doing so would have the potential to vastly increase the liability of condominium corporations and would certainly make risk management on their part all but impossible.

[127] In the result, Brookfield cannot rely on the exception in the management agreement to avoid liability to MTCC 1056 for its error in completing the second estoppel certificate. Brookfield must indemnify MTCC 1056 for the damages it owes Ms. Rainville as a result of the negligent estoppel certificate.

(5) Mr. Weldon's Appeal and MTCC 1056's Cross-Appeal on Punitive Damages

[128] Mr. Weldon argues that the trial judge erred in requiring him to pay punitive damages of $50,000 to MTCC 1056. MTCC 1056 argues in its cross-appeal that this court should increase the punitive damage award to $140,000.

[129] The trial judge addressed this issue at paras. 401- 420. She found that Mr. Weldon's failure to advise Ms. Rainville and the Board of the illegal status of the third floor was intentional, and that his culpability was enhanced by the fact that this failure breached his fiduciary duties as a director. At para. 417, she put the blame for the various lawsuits squarely on Mr. Weldon:

> It is the intentional conduct of Weldon, his fraudulent misrepresentation, that is responsible for the years of litigation that have ensued since 1998 and the associated costs. The objective of punitive damages is to punish, not compensate. They are to be imposed "*only* if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour." *Whiten*, [*Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595] at paragraph 94.

[130] In setting the award at $50,000, the trial judge expressly took account of the Supreme Court's direction in *Whiten*, at paras. 112-126, that an award must be proportional, taking into account the blameworthiness of Mr. Weldon's conduct, which she found to be "reprehensible", the vulnerability of the other parties and the potential harm to them, the need for deterrence, the other penalties likely to be inflicted on him for the same misconduct and the advantage wrongfully gained from the misconduct.

[131] It is also noteworthy that the standard of appellate review of a punitive damage award is quite high. It is whether a "reasonable jury, properly instructed, could have concluded that an award in that amount, and no less, was rationally required to punish the defendant's misconduct." (*Whiten*, at para. 107)

[132] Mr. Weldon asserts that his conduct was not "sufficiently egregious or outrageous to warrant punitive damages", that the quantum is too high, and that the trial judge failed to notice that awarding punitive damages would result in double recovery. He argues that the punitive damages were "excessive and thus

irrational", and that a lesser award would have fully satisfied the objective of deterrence. Further, Mr. Weldon argues that the trial judge "failed to articulate the basis of that quantum or to indicate whether it was the lowest amount that would achieve the objectives of the law".

[133] Mr. Weldon's argument regarding double recovery is rooted in the fact that he was ordered to pay occupancy costs for the third floor of townhouse 113 in the amount of almost $19,000 and to indemnify MTCC 1056 for the amount that it owed Ms. Rainville for her share of the common element repair costs, which was approximately $20,000,

[134] It is noteworthy that the trial judge made the following observation in the costs award:

> [Mr. Weldon's] conduct was the subject of my comments in my Reasons and I ordered that he pay punitive damages as a result of his deceitful behaviour. In these circumstances, it would not be fair to order that he pay the costs of Mr. Rotenberg in defending the action on behalf of the condominium and I decline to do so. (Para. 69 of the costs award, 2012 ONSC 4919)

[135] In my view, there is no merit to Mr. Weldon's appeal. The trial judge was fully aware of the legal principles at play and applied them appropriately. The award is not outside the applicable range (see *Pate Estate v. Galway-Cavendish (Township)*, 2013 ONCA 669, 117 O.R. (3d) 481, at para. 140 and following). I would, accordingly, dismiss Mr. Weldon's appeal.

[136] MTCC 1056 argues in its cross-appeal, on the other hand, that the punitive damages award should be increased from $50,000 to $140,000 on the basis that Mr. Weldon has been left with a $90,000 benefit from the sale of the third floor of townhouse 113, and that a significant part of that benefit – $40,000 – remains with him. MTCC 1056 asserts that based on the criteria in *Whiten*, the trial judge made a palpable and overriding error in failing to award a sum for punitive damages that was proportionate to Mr. Weldon's conduct. MTCC 1056 argues that Mr. Weldon's conduct was deceitful, that it had a devastating impact on the people involved and that he failed to show remorse or acknowledge responsibility for his actions. As a result, MTCC 1056 argues that, as a matter of principle, no element of financial benefit for the third floor should be left in his pocket.

[137] I am unable to conclude that the trial judge made a palpable and overriding error in her award of punitive damages against Mr. Weldon. She was applied the correct principles and considered appropriate facts. Her conclusion is entitled to deference. I would dismiss MTCC 1056's cross-appeal on the punitive damages issue.

E. DISPOSITION

[138] Based on the foregoing analysis, I would dispose of the claims of the various parties as follows.

[139] I would allow Ms. Rainville's appeal and find that MTCC 1056 is liable for negligent misstatement in relation to the estoppel certificate.

[140] I would set damages for negligence and negligent misstatement, for which Gowlings and MTCC 1056 are jointly and severally liable, as the difference between the value of townhouse 113 as a two-storey unit and a three-storey unit with the valuation date set as the date this decision is released.

[141] I would dismiss Ms. Rainville's appeal against Brookfield.

[142] I would allow Ms. Rainville's appeal against MTCC 1056 regarding reimbursement for common element repairs and substitute judgment for $41,681. It follows that I would dismiss MTCC 1056's related cross-appeal against Ms. Rainville.

[143] I would also allow Ms. Rainville's appeal against Gowlings regarding legal fees and substitute an award of $28,379.02.

[144] I would dismiss Gowlings' appeal, and its cross-appeal against MTCC 1056 for indemnity.

[145] I would allow MTCC 1056's claim over against Brookfield under the management agreement for indemnity for the damages MTCC 1056 owes Ms. Rainville as a result of negligent misrepresentation.

[146] Finally, I would dismiss Mr. Weldon's appeal and MTCC 1056's related cross-appeal.

[147] The trial judge's damage awards that are not consistent with these reasons would be set aside.

[148] Interest would be payable on the awards to be calculated in the manner set by the trial judge.

F. COSTS

[149] This is a case in which the perils of disproportionality are on full display. It exemplifies how "undue process and protracted trials, with unnecessary expense and delay, can *prevent* the fair and just resolution of disputes", in the words of the Supreme Court in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 24.

[150] The trial took 43 hearing days over three months, including the argument over costs. The legal costs of such a lengthy, multi-party and multi-counsel trial were considerable. The trial judge gave extensive reasons for her awards of costs, and the consequences are set out in paras. 70- 73 of the costs decision:

> The Defendant Gowlings shall pay to the Plaintiff her costs fixed at $300,000 inclusive of fees, disbursements and taxes.
>
> The Plaintiff shall pay to Brookfield 75% of its costs fixed at $200,000 inclusive of fees, disbursements and

taxes and the Defendant Gowlings shall pay the remaining 25%.

A Sanderson order shall issue requiring the Defendant Gowlings to pay the costs of the Defendant MTCC 1056 fixed at $500,000 inclusive of fees, disbursements and taxes, payable in the sum of $250,000 for the insured claims and $250,000 for the uninsured claims.

The Third Party Weldon shall pay to the Defendant MTCC 1056 the sum of $25,000 in costs for the claim for his occupancy of the illegal third floor.

[151] Gowlings seeks leave to appeal costs, and argues that saddling the firm with almost $900,000 in costs would be "outlandish" given its limited trial involvement, especially since the "acrimonious relationship" between MTCC 1056 and Ms. Rainville caused unnecessary delay and complexity. MTCC 1056 also seeks leave to appeal costs and pursues approximately $87,000 in additional costs against Ms. Rainville on a substantial indemnity basis.

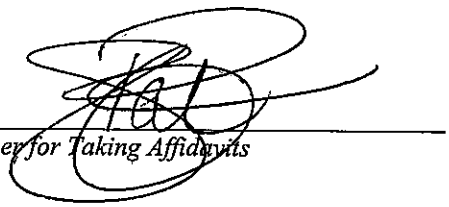
[152] The outcome of this appeal will no doubt affect the submissions of the parties on costs. In the circumstances, I would direct the parties to file supplementary arguments on costs of not more than five pages each within 45 days, if they are unable to agree on the appropriate quantum and allocation of costs following their review of these reasons.

Released: December 2, 2014 "K.F."

"Peter Lauwers J.A."
"I agree K. Feldman J.A."
"I agree Michael Tulloch J.A."

TAB H

THIS IS EXHIBIT "H" TO THE AFFIDAVIT OF AUDREY LOEB SWORN BEFORE ME on February 19, 2015



Commissioner for Taking Affidavits

1994 CarswellOnt 730, 41 R.P.R. (2d) 7

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Stafford v. Frontenac Condominium Corp. No. 11

TERRY STAFFORD and SUSAN STAFFORD v. FRONTENAC CONDOMINIUM CORPORATION NO. 11 and BOARD OF DIRECTORS OF FRONTENAC CONDOMINIUM CORPORATION NO. 11

Ontario Court of Justice (General Division)

McWilliam J.

Judgment: September 21, 1994
Docket: Doc. 7000/93

Counsel: *Kurt R. Pearson* , for applicants.

James Davidson , for respondents.

Subject: Property; Contracts

Sale of Land --- Condominiums — Common elements

Sale of Land --- Condominiums

Condominium Act, R.S.O. 1990, c. C.26, s. 32(8).

Condominium Act, R.S.O. 1990, c. C.26, s. 38(1).

The applicants proposed to purchase a resale condominium unit in the respondent condominium corporation. The purchasers requested, and were issued, an estoppel certificate which indicated that the condominium corporation had no knowledge of circumstances which might increase the common expenses, except for results arising from engineering tests, and that the corporation was not considering any substantial additions, alterations, improvements or

renovations or any substantial changes in the corporation's assets, subject to the results of the engineering tests.

Almost eight months after the purchasers closed their deal, the corporation issued a notice of special assessment for certain works which indicated that the purchasers' share of the total cost amounted to $91,932. The purchasers refused to pay their portion of the special assessment, contending that the board of directors knew, prior to issuing the estoppel certificate for their unit, that the corporation faced major expenses that would not be covered by the corporation's operating or reserve budget. The purchasers claimed that the work proposed constituted a substantial alteration of the condominium's assets which required concurrence of 80 per cent of the owners of the unit, and which was not obtained. The purchasers also contended that the estoppel certificate's failure to disclose the potential increase in common expenses violated the provisions of s. 32(8) of the *Condominium Act* (Ont.). The purchasers brought an application seeking a declaration that the estoppel certificate was invalid, and that the special assessment was not binding against them.

Held:

The application was dismissed.

An 80 per cent approval by condominium owners was not required in this case. The works in question were undertaken to correct a problem in the building's walls. The works did not constitute a "substantial" alteration necessitating an 80 per cent vote in favour of it.

The purchasers had the onus of establishing that the special assessment was not binding upon them. They failed to discharge this onus. The condominium corporation could not have realistically envisaged that the works would have resulted in costs or expenses that would not be covered by its operating or reserve budgets. The estoppel certificate had not violated the disclosure provisions contained in s. 32(8) of the Act.

Annotation

There has been very little judicial consideration in Ontario given to estoppel certificates. However, in *Stafford v. Frontenac Condominium Corp. No. 11* , the Ontario Court (General Division) decision sets out some principles which clarify the disclosure obligation of condominium corporations in issuing estoppel certificates to prospective purchasers.

The estoppel certificate is the disclosure mechanism that provides a resale condominium purchaser with pertinent information concerning a condominium corporation. The purchaser of a resale condominium unit in Ontario does not enjoy the same protection as the purchaser of a new condominium unit in that the resale purchaser does not have a 10-day cooling off period in which he or she can back out of an executed agreement of purchase and sale. Apart from the typical considerations inherent in residential purchases, it is extremely important that the resale purchaser have an indication of the financial condition of the condominium corporation in which he or she is proposing to purchase a unit. Therefore, one of the most important protections a purchaser can have when buying a resale condominium unit is to make his or her offer to purchase conditional upon receiving and approving of an estoppel certificate.

An estoppel certificate is prescribed by s. 32(8) of the *Condominium Act* , R.S.O. 1990, c. C.26, which provides:

Any person acquiring or proposing to acquire an interest in a unit from an owner may request the corporation to give a certificate in the prescribed form in respect of the common expenses of the owner and of default in payment thereof, if any, by the owner, together with such statements and information as are prescribed by the regulations ....

Apart from the matter of common expenses, other items required to be contained as part of an estoppel certificate include the current budget for the condominium corporation; the dollar amounts contained in the condominium's reserve funds; particulars of potential increases in the common expenses for the subject unit; legal actions in which the corporation is involved; whether any substantial additions, alterations, improvements or renovations are planned; insurance particulars; the name of the building's property manager, and the names of the corporation's directors and officers.

To a purchaser, the most significant feature of an estoppel certificate is that it serves to "bind the corporation as against the person requesting the certificate in respect of any default or otherwise shown in the certificate, as of the day it is given." A purchaser who requests and is provided an estoppel certificate by a condominium corporation can rely upon such information provided therein. Failure to provide an estoppel certificate within seven days of a request deems the corporation as having stated that there is no default.

In *Stafford* , Mr. Justice McWilliam considers whether the respondent condominium corporation breached its statutory obligation to disclose a special assessment. The purchasers brought an application seeking a declaration that the estoppel certificate issued by the condominium corporation was invalid.

The purchasers urged the court to adopt strict disclosure standards in scrutinizing estoppel certificates. McWilliam J. reviews the purchasers' estoppel certificate in light of the Ontario Court of Appeal's authoritative decision regarding disclosure statements in *Abdool v. Somerset Place Developments of Georgetown Ltd.* **(1992), 27 R.P.R. (2d) 157** . In considering s. 52 of the *Condominium Act* , R.S.O. 1980, c. 84, the Court of Appeal established [at p. 180] an exacting test for the impeachment of a disclosure statement. To satisfy the test,

the purchaser is obliged to establish objectively that had the information that was not disclosed, or that was inaccurately or insufficiently disclosed, been properly disclosed in the disclosure statement at the time it was delivered to the purchaser, a reasonable purchaser would have regarded the information as sufficiently important to the decision to purchase that he or she would not likely have gone ahead with the transaction, but would instead have rescinded the agreement before the expiration of the 10-day cooling-off period.

The Court of Appeal established an objective materiality test which created a very demanding threshold to be met by purchasers seeking the benefit of the rescission remedy. Mr. Justice Robins, who wrote the Court of Appeal judgment, was of the opinion that a broad and flexible approach in interpreting s. 52 would properly balance the consumer protection philosophy underlying the *Condominium Act* with the commercial realities of the condominium industry. It was the court's ruling [at p. 177] that "not every defect in a disclosure statement will warrant a declaration that an agreement is not binding."

In *Stafford* , McWilliam J. applies the reasoning of the Court of Appeal in *Abdool* in considering the commercial realities of the condominium industry. In imposing a similar test, he finds that the applicant purchasers in *Stafford* had failed to discharge the onus of demonstrating that the special assessment was not binding on them. The learned justice holds that the purchasers had an obligation to make inquiries given their knowledge that a special assessment was at least a possibility. McWilliam J. states [at pp. 15-16, post]:

Since the onus is on the purchaser to show that a disclosure statement fails to satisfy the Act to the degree that it must be declared non-binding, it seems to me to be analogously fair that the purchasers here are under the same onus to show that the special assessment is not binding on them. I find that the onus here has not been discharged. The purchasers failed to make any inquiries, even though the potential liability ignored was unknown as to quantum. How can the purchasers' case survive the "commercial" branch of the test adopted by Robins J.A.? In my view, it cannot.

The decision in *Stafford* represents an eminently fair and workable result, and is, therefore, in this writer's opinion, good law. The decision provides a degree of certainty and comfort for apprehensive condominium directors who must issue estoppel certificates disclosing sufficient information. *Stafford* strikes a reasonable balance between a purchaser's need for disclosure of relevant information and a condominium corporation's duty to report financial conditions of the condominium.

The ruling also contains an interesting discussion about what constitutes a "substantial" change to a condominium corporation's common elements for the purposes of disclosure. It appears from the decision that "substantial," in the context of s. 38(1) of the *Condominium Act* , means only a "dramatic or major" change, and, therefore, it becomes a question of ascertaining the degree of the proposed alteration, modification, or revision. Although the test is not absolutely clear, it provides a certain amount of flexibility to the workings of a condominium corporation which, prior to this decision, was lacking.

John Mascarin

Cases considered:

Abdool v. Somerset Place Develoments of Georgetown Ltd. **(1992), 27_R.P.R. (2d) 157, 10_O.R. (3d) 120, 96_D.L.R. (4th) 449, 58_O.A.C. 176** (C.A.) — *followed*

Statutes considered:

Condominium Act, R.S.O. 1980, c. 84 [R.S.O. 1990, c. C.26] —

s. 52 [R.S.O. 1990, c. C.26, s. 52]

Condominium Act, R.S.O. 1990, c. C.26 —

s. 32

s. 32(8)

s. 38

s. 38(1)

s. 38(4)

Regulations considered:

Condominium Act, R.S.O. 1980, c. 84 [R.S.O. 1990, c. C.26] —

General Regulation,

R.R.O. 1980, Reg. 121 [R.R.O. 1990, Reg. 96]

Forms considered:

Condominium Act, R.S.O. 1980, c. 84 [R.S.O. 1990, c. C.26] —

General Regulation,

R.R.O. 1980, Reg. 121 [R.R.O. 1990, Reg. 96]

Form 18 [R.R.O. 1990, Reg. 96, Form 18]

Application for declaration that estoppel certificate issued by respondents being invalid and that special assessment not binding on applicants.

McWilliam J. :

1 The applicants ("purchasers" hereinafter) bought the ground floor, retail/commercial space of the respondents' condominium (the "condo" hereinafter) on November 26, 1992. It is a 95-unit building on the Kingston waterfront called the Landmark Residences (94 are residences) at 165 Ontario Street. The transaction closed on February 4, 1993. On January 28, 1993, the condo gave an estoppel certificate to the purchaser pursuant to s. 32(8) of the *Condominium Act* , R.S.O. 1990, c. C.26 (hereinafter the "Act").

2 It provides:

> Any person acquiring or proposing to acquire an interest in a unit from an owner may request the corporation to give a certificate in the prescribed form in respect of the common expenses of the owner and of default in payment thereof, if any, by the owner, together with such statements and information as are prescribed by the regulations, and the certificate binds the corporation as against the person requesting the certificate in respect of any default or otherwise shown in the certificate, as of the day it is given.

3 The certificate was completed to comply with Form 18 of Regulation 121 under the Act. It certified that an attached current budget was accurate (paragraph 4); the condo had no knowledge of circumstances which might increase common expenses, except for inflation, taxation, and "the results of present engineering tests on the balconies by J.L. Richards & Associates" (paragraph 6); and the condo "is not presently considering any substantial additions, alteration or improvement to or renovation of common elements or any substantial changes in the assets of the Corporation other than those normally financed by the reserve fund subject to the results of present engineering tests on the balconies by J.L. Richards & Associates" (hereinafter "Richards").

4 Almost eight months after the February closing on August 31, 1993, the condo issued a notice of special assessment which indicated that the purchasers' share would be $91,932, or 15.226 per cent of the total funds required of $603,784 (Tab 23, documents brief). Balcony work (a neutral term for the moment) constituted $597,408 of the total proposed work of $882,927, or 66.66 per cent. Nine different items composed the remaining one third of the work.

5 The purchasers first learned of these projected costs on June 15, 1993, at the spring meeting of the condo owners, and of their share of the costs. Those owners present voted 44 to 36 to carry out the renovations. The purchasers have not paid their special assessment to the condo, but they have been paid into their solicitors' trust account.

6 In their application record, the purchasers say:

> The Board of Directors of the Condominium Corporation knew in 1992 that the Condominium was faced with the potential for major expenses in 1993, but did not disclose this information to the Applicants. Instead, the Corporation induced the applicants, by way of the estoppel certificate, to complete the purchase of the property to the Applicants' detriment.

7 The purchasers also state that the work proposed constituted a substantial alteration of the condo's assets, and as such would require the concurrence of 80 per cent of the owners of the units, and no such support was obtained. In addition, the purchasers said that contrary to the undertaking given in the estoppel certificate, the condo did have knowledge of circumstances that might have resulted in an increase of common expenses that it failed to disclose. Such failures to disclose violated section 32(8) of the Act, and the statements made in the estoppelcertificate were so inadequate as to amount to non-disclosure in the circumstances.

Substantial Undertaking

8 When the vote was taken at the spring meeting, the majority (44-36) also approved that glass would be used to replace the brick wing walls on the cantilevered balconies. The material discloses that in cost terms, there does not appear to be any major difference betweenthe cost of glass and brick (Respondents' Record, Tab 1(b)). It seems the consulting engineer, Peter R.F. Morrin, preferred glass for its lower, long-term maintenance costs.

9 The Board of Directors was advised by its solicitors in March 1993 (Respondent's Record, Tab J) that such a vote would comply with section 38 of the Act, and that an 80 per cent approval by condo owners was not required.

10 Section 38(1) provides:

> The corporation may by a vote of owners who own 80 per cent of the units make any substantial addition, alteration or improvement to or renovation of the common elements or may make any substantial change in the assets of the corporation, and the corporation may by a vote of the owners make any other addition, alteration or improvement to or renovation of the common elements or may make any other change in the assets of the corporation.

11 In my view, the section envisages two kinds of additions: *substantial* additions, etc., and simply *any other* additions, etc. Substantial changes require a weighted vote of 80 per cent approval. Other changes simply require a vote, and I would courageously read in majoritarian and affirmative as necessary conditions of that other vote.

12 Essentially, the work was undertaken to correct a problem with the brick wing walls, which were in a dangerous condition due to spalling and cracking, and the concrete work on the cantilevered balconies was more obviously in the nature of replacement than the glass ends of the wing walls were. This is true, notwithstanding that the original design had an aluminum and glass railing across the front of the balconies (Respondents' Record, Tab G). Yet the glass essentially performs the same structural and safety purpose as the brick wing walls. Still, it does change the appearance of the building. Nevertheless, in my view, such an apparent change does not represent a substantial addition, etc., as set out in s. 38. Courts must consider carefully in what circumstances they will declare an addition substantial. The remedy of immediate buyout available to a potential *minimum* of 20.1 per cent of owners who dissent under s. 38(4) requires sober, second thought before being unleashed. I note that the condo's declaration (Article IV 4(a)) gives the Board of Directors the right to decide the substantial issue, but essentially the Board chose the "the other addition" option, and had the vote. Consequently, I am not called upon to decide the efficacy of that article of the declaration. The steps the Board took complied with the requirements of section 38.

Disclosure

13 The purchasers raised the general argument that the disclosure obligation implicit in section 32 of the Act was not complied with by the condo. The disclosure made in the estoppel certificate amounts, in effect, to non-disclosure, they claimed. Counsel sought to impress the condo with knowledge of budget, structural defects, and other deficiencies prior to January 28, 1993, such that its statements in the estoppel certificate about budget (paragraph 4) and common expenses (paragraph 6) and substantial additions (paragraph 8) were improper inducements for the purchasers to close the purchase of February 4, 1993.

Short History of Projections

14 In a Technical Audit by Richards dated November 1990, cantilevered balconies were listed as a deficiency item costing $300,000 to repair, and it was to be paid off at $75,000 a year from 1991 to 1994. The audit noted that the deterioration was not of "structural significance at the present time." It also recommended that $40,000 a year be set aside for the following five years to repair tower masonry cladding caused by the same phenomena which affected the brick end walls, the freeze-thaw cycle (Tab 25). The operating rule (1991) of the Reserve Fund Committee was that "only *major* expenditures for common property items will be included as Reserve Fund expenditures" (emphasis in text).

15 In May of 1992, the chairman of the board told the spring meeting of the owners that he did not anticipate any special assessment made on account of the Reserve Fund in 1992. A Reserve Fund Committee report dated August 25, 1992, made refurbishing and repairing all masonry and flashing a first priority, at an estimated cost of $340,000. On October 2, 1992, owners were notified that "urgent preventative measures and tests relating to balconies ... must be un dertaken in the *immediate future* ." Balcony deterioration was considered in the 1992 Reserve Fund, and was put forward, in the light of other priorities, to be "undertaken" in 1993. On December 15, 1992, the owners had their annual meeting (Tab 36). The chairman's report, which was appended to the minutes, reported on activities related to the Reserve Fund. It noted that during concrete work on the balconies carried over from 1991, serious deterioration was observed, and test core samplings were ordered, plus chain dragging. The report concluded:

> Until these tests have been completed and analyzed, early in January 1993, a valid estimate of balcony repair costs cannot be made. However, we know that the costs will be significant. (Tab 36, p. 4.)

16 Later, the chairman specifically addressed the Reserve Fund budget. The Reserve Fund makes contributions to the regular monthly condominium fees. He noted as well:

> During the fiscal year 1992, events have taken place which were unforeseen and unpredictable i.e. unbudgeted emergency measures as reported above. Consequently, the Board believes that due to the uncertainty as to the magnitude of cost for ensuing major projects in 1993, in particular cantilevered balconies, any attempt to prepare a 1993 Reserve Fund Project List and a Reserve Fund Budget at this time would be fruitless. When estimates have been received early in 1993 following the balcony tests by J.L. Richards & Associates, we will be able to calculate the amount of money required to perform the necessary Reserve Fund work in 1993 and bring the contingency level up $250,000. It should be noted that in order to keep our Condominium Fees at a reasonable level, it is proposed that a special assessment can be anticipated.

17 Counsel for the purchasers referred the court to the Minutes of the Owners' meeting of July 20, 1993 (Tab 22). There, he said, the Board received four options to replace the brick end walls in January. It should be pointed out that immediately after the options were discussed,the minutes record:

> Since the initial presentation of alternatives on the 19th day of March, 1993 another material considered was of

a concrete type appearance.

18 Essentially, the possibility of these options was disclosed by the repair work mentioned in the exception in clause 8 of the Estoppel Certificate, i.e., that the condo was not considering any common element renovations other than those normally financed by the Reserve Fund, subject to the results of present engineering tests on the balconiesby J.L. Richards & Associates.

19 As far as other expenses are concerned, the president, Leigh Cruess, swore on December 9, 1993:

> However, as of the end of 1992, we had no information that these expenses, or any other expenses not related to the balconies, might result in a special assessment. We thought that any special assessment would be the result of the required repairs to the balconies and that our reserve fund policy would otherwise meet our needs.

20 A breakdown of the figures in the notice of the special assessment justify Mr. Cruess' observations, and Mr. Davidson's submission, that this special assessment was balcony-driven.

Jurisprudence

21 Counsel agree, in general, that there is a paucity of precedent concerning section 32(8) of the *Condominium Act* . The applicant, however, maintains that analogy suggests the court ought to adopt tough disclosure standards in scrutinizing estoppel certificates. He cited with approval Mr. Davidson's article in 1991 on Estoppel Certificates. He wrote if circumstances could realistically result in costs or expenses that would not be covered by the corporation's short-term (operating) budget or long-term (reserve) budgeting, they must be disclosed.

22 Mr. Davidson also nodded toward commercial realism, and noted that "unnecessary alarm" should be avoided by statements in estoppelcertificates.

23 In *Abdool v. Somerset Place Developments of Georgetown Ltd.* **(1992), 10 O.R. (3d) 120** , Robins J.A. opted for a broad interpretation of s. 52 of the *Condominium Act* [R.S.O. 1980, c. 84] regarding condominiumdeclarations, and the need for developers to comply with the "consumer protection objectives" of the Act. His Lordship said, at p. 136:

> The purchaser is clearly entitled to the information called for by the Act in order to make an informed decision about his or her condominium purchase. At the same time, however, once the ten-day period has expired, the vendor is entitled to assume that it has a binding agreement of purchase and sale and to rely on the certainty of that agreement in developing the project and conducting its business affairs.

24 A disclosure statement, he said, must be "defective in a material respect." Once a purchaser goes through the cooling-off period of ten days provided in the Act, Mr. Justice Robins said the onus is on the purchaser who seeks to resile from his agreement. Here, the purchasers knew that a special assessment was at least possible after the engineering studies were completed. They made no inquiries. Since the onus is on the purchaser to show that a disclo-

sure statement fails to satisfy the Act to the degree that it must be declared non-binding, it seems to me to be analogously fair that the purchasers here are under the same onus to show that the special assessment is not binding on them. I find that the onus here has not been discharged. The purchasers failed to make any inquiries, even though the potential liability ignored was unknown as to quantum. How can the purchasers' case survive the "commercial" branch of the test adopted by Robins J.A.? In my view, it cannot.

25 Costs are reserved at the request of counsel. If they are not agreed upon, then counsel can make concise submissions in writing on a timetable to be arranged between themselves with the respondent condo commencing the exchange and replying. If counsel think oral submissions are necessary, then the court co-ordinator at Ottawa can be spoken to for a date suitable to everyone. If counsel want a date in Kingston, I will be there doing criminal work beginning on Monday, November 14, 1994, for the week. Perhaps we could do it from 9:15 to 10 a.m. some morning. November 16 is not available, as I have a sentencing at that time.

Application dismissed.

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TREZ CAPITAL LIMITED PARTNERSHIP *et al* Applicants	and	WYNFORD PROFESSIONAL CENTRE LTD. *et al* Respondents	Court File No: CV-14-10493-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at TORONTO

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Applicants		*Respondents*	Court File No. CV-14-10493-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF Section 101 of the *Courts of Justice Act* and Section 243 of the *Bankruptcy and Insolvency Act*

PROCEEDING COMMENCED AT
TORONTO

SUPPLEMENTARY RESPONDING MOTION RECORD OF THE APPLICANTS, TREZ CAPITAL LIMITED PARTNERSHIP AND COMPUTERSHARE TRUST COMPANY OF CANADA

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