**Citation: Orr v. Metropolitan Toronto Condominium Corporation No. 1056, ONSC 2011 4876**
**COURT FILE NO.:** 01-CV-206672 CM
**DATE:** 2011 08 18

**ONTARIO SUPERIOR COURT OF JUSTICE**



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| **B E T W E E N:** | ) | |
| Kelly-Jean Marie Orr also known as Kelly-Jean Rainville | ) | |
| Plaintiff | ) | *Jack B. Berkow and Ranjan Das*, Counsel for the Plaintiff |
| **- 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 | ) | *Barry A. Percival Q.C., David Young & Theodore B. Rotenberg* for the Defendant MTCC No. 1056, Ward, Boland, Kosich, Metzger & Dorman; *Timothy Bates & Robin Squires* for the Defendant Gowling; *Robert Clayton* & *Brett Rideout* for the Defendants Brookfield, Post and Cawthorn |
| Defendants | ) | |
| - and - | ) | |
| Richard Weldon Third Party | ) | Self-represented |
| | ) | **HEARD:** October 26, 27, 28, 29, November 2, 3, 4, 5, 6, 9, 10, 12, 18, 19, 20, 23, 24, 25, 26, 30, December 4, 7, 8, 9, 10, 14, 16, 17, 2009 and January 11,12,13,14, 15, 18, 19, 20, 21, 25, 26, 27, 28 and February 1, 2010. Written submissions subsequently received. |

**Madam Justice Darla A. Wilson**

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## REASONS FOR JUDGMENT

[1] On September 30, 1997 Kelly Jean Orr ("Rainville") executed an agreement of purchase and sale with the Defendant Richard Weldon ("Weldon") to buy his condominium located in the Grand Harbour complex. That act spawned, over the next 12 years, numerous pieces of litigation which culminated in the trial of this action and other related actions before me over the course of three months. The trial was a complex proceeding with evidence from numerous expert witnesses and the filing of 385 exhibits.

### *CLAIMS BEFORE THE COURT*

[2] The Plaintiff, Rainville, brings her action against the following Defendants:

- Metropolitan Toronto Condominium Corporation No. 1056 ("MTCC No. 1056"), and several individuals who were, at different times, members of the Board of Directors or unit owners;
- Gowling Strathy & Henderson ("Gowlings"), the law firm she retained to handle the purchase of the condominium; and
- Brookfield Lepage Residential Management Services ("Brookfield"), the property managers of the condominium and Patrick Post ("Post") and Pamela Cawthorn ("Cawthorn") who held positions within Brookfield.

[3] Richard Weldon, from whom Rainville purchased the unit, is not a named Defendant.

[4] The Plaintiff requests several grounds of relief from this Court in action number 01-CV-206672 ("the main action"), including:

- an order amending the Declaration of MTCC No. 1056 to correct the error inconsistency in the Declaration and to correctly describe her unit as a 3 storey unit;
- damages for the monies that she spent on repairs and renovations to her unit; or
- alternatively, damages of $4.5 million dollars which is said to be the amount paid for purchasing the unit, repairing the common elements, renovations, renting other premises and the cost of converting the third storey to attic space.
- An order that she not be required to pay a proportionate share of any amount that MTCC 1056 is ordered to pay

[5] In the further alternative, the Plaintiff seeks:

- an order requiring MTCC No. 1056 to grant her a 99 year lease for the third storey; or
- an order requiring MTCC No. 1056 to approve all of the work done to the third storey; or
- a Declaration that the conduct of MTCC 1056 was oppressive towards the Plaintiff.

[6] Punitive damages are sought against all of the Defendants, except Gowlings, and a declaration is requested that the conduct of MTCC No. 1056 has been oppressive to the Plaintiff.

[7] All of the Plaintiff's allegations are denied by the various Defendants. The action against Latimer was discontinued and the action against Boland was dismissed prior to this trial.

[8] In the amended Statement of Claim, the Plaintiff pleads that she retained the Defendant Gowlings to "ensure that the Plaintiff received title to the property for which she had negotiated." It is further pleaded that Gowlings failed to review the registered Declaration of MTCC No. 1056 in Schedule "C" and failed to determine that her unit was registered as a 2 storey townhouse unit instead of as a 3 storey unit. It is stated that had the Plaintiff known this information, she would not have agreed to close the purchase transaction of the unit. Gowlings denies these allegations and pleads that its title opinion was accurate and it had no knowledge that the unit the Plaintiff had purchased was a 3 storey unit and not a 2 storey.

[9] The Plaintiff launched an application (Court file No. CV-09-378415) shortly before this trial, in July 2009, seeking a declaration that MTCC No. 1056 breached its duty by failing to replace/repair/maintain the roof above the Plaintiff's townhouse and requesting an order that MTCC No. 1056 replace and/or repair it immediately. By an order dated July 22, 2009, Justice Code directed the Application to be consolidated with the main action.

[10] MTCC No. 1056 brings its own action against Rainville (Court file No. 98-CV-145778 CM) in which it seeks:

- an order directing Rainville to cease any work on her unit without first obtaining consent of the Board of Directors; and

- a mandatory order directing her to essentially close up the third floor and restore it to its original state (an unusable attic space) and to do so at her own cost plus payment for the use of the common element space on the third floor from the date she purchased the unit onwards.



[11] The Defendant MTCC No. 1056 brings a Third Party Claim (Court File No. 01-CV-206672A CM) against Weldon for contribution and indemnity for any amounts for which it is found to be responsible to the Plaintiff. The Defendant also seeks damages from Weldon as well as a declaration that Weldon breached his fiduciary duty to MTCC No. 1056 as a director. MTCC No. 1056 alleges that Weldon converted the third floor attic into living space and by doing so contravened the Declaration. This is denied by Weldon.

[12] Another action was brought by Rainville in 1998 against Weldon, the city of Toronto and the real estate agents involved in the purchase and sale of the condominium. That action was settled and dismissed in 2001 and reference will be made to that claim later in these reasons.

[13] An order for a consolidated trial of these actions and others was made in 2005. The trial of these actions was adjourned by Justice Blenus Wright on October 27, 2008 at the Plaintiff's request and it was set for trial October 26, 2009 with a scheduled time of four weeks. The Plaintiff changed counsel in September 2009 and her new counsel brought a motion at the opening of trial for an adjournment. For oral reasons given at the motion, I refused the request for an adjournment and the trial proceeded.

[14] Because of the protracted nature of the proceedings, I will set out a brief history of the events giving rise to the various actions.

***THE DEVELOPMENT OF GRAND HARBOUR***

[15] The Third Party, Weldon and the Defendant Larry Boland ("Boland") were the principals of a company called Rylar Development Limited ("Rylar"), which was formed in 1987. Rylar had developed a couple of projects in Montreal. Weldon and Boland decided to build a condominium development near the waterfront that would be different from any other development in Toronto. They found the land, put a deposit on it and obtained financing through Central Capital. The money for the construction was obtained from National Bank. It was an ambitious project with an approximate cost of $120 million.

[16] The condominium complex was to be built in 3 phases: phase 1 was MTCC No. 965 ("965"), which was a tower with 276 units; phase 2, MTCC No.1031 ("1031"), also a tower with 119 units, which was connected to 965 by means of a bridge; and phase 3, MTCC No. 1056 ("1056"), which consisted of townhouse units. The townhouses were located closer than the two towers to the lake. Some of the townhouses were constructed with bricks while others were built with wooden frames.

[17] Phase 1 was offered for sale in 1988 when the condominium market was strong and the units sold quickly. Construction commenced in late 1988 or early 1989 with the firm of Bradsil who was the

general contractor for the project. Lou Andre ("Andre") was the construction manager and was basically in charge of Bradsil.

[18] The sale of the units in phase 2 (the other tower, 1031) also went well.

[19] In 1990, phase three, the townhouses with large-sized units, were offered for sale at very high prices. By this time, the real estate market in Toronto had crashed and sales were slow. It was determined that the design of the townhouses with large-sized units needed to be re-done to attract purchasers. From the initial plan of 32 townhouses, the design was changed to 39 smaller townhouses. This required an increase to the gross floor area of the project. The necessary approval was obtained from the Committee of Adjustment on June 9, 1989 [exhibit 225].

[20] By 1992, the real estate market for condominiums in Toronto had collapsed. The project was in deep financial trouble, as were Weldon and Boland who had personally guaranteed $40,000,000.00 of the financing. National Bank, the largest investor, was concerned and in late 1992 or early 1993, it appointed Pelican Management Ltd. ("Pelican") as a monitor.

[21] Initially, Pelican was just overseeing the project but was not controlling the finances. However, this changed on December 7, 1993 when Pelican became the court-appointed official receiver [exhibit 104]. At this point, Pelican was the entity actually running the project and Weldon and Boland became employees. Weldon and Boland were able to negotiate a reduction in their personal exposure to $500,000.00 each.

[22] Because of the deterioration in the real estate market, many purchasers who had bought units refused to close the deals and litigation ensued. Weldon and Boland worked to sell as many of the remaining units as possible. This was a chaotic time and the bank wanted the units sold and the condominium registered as quickly as possible. Both Weldon and Boland had an agreement with the lending institution National Bank to purchase one of the units in the development. In the fall of 1992, Weldon chose townhouse unit 113 and Boland selected townhouse unit 117. It was agreed that they could use management fees and commissions from sales against the purchase price of the units.

[23] Boland did some minor upgrades to his unit, which were accounted for in the final sale price. These modifications were done by Lou Andre and Boland moved in to his unit in July 1993.

[24] Weldon's unit, number 113, was 3000 square feet. However, Weldon wanted a unit that was larger than 3000 square feet. The as-built drawings of the architect [exhibit 246] show unit 113 as a two storey unit with attic space above plus a basement. Unit 113 was finished by April of 1992 as a 2 storey unit. The surveyor, Roger Avis ("Avis"), had to perform an inspection to ensure the construction of the townhouse units was in accordance with the as-built drawings. This inspection was done in September of 1992 and at that time, unit 113 was a 2 storey.

[25] In order to get the additional space he desired, Weldon decided to build a third floor in the attic space and to account for this cost on closing. Weldon discussed the addition of the third floor with Boland, who indicated that it might exceed the permissible square footage of the development. Boland told him he needed Committee of Adjustment approval in order to make it legal. Weldon did not feel this was an issue, given that the project was 57,000 square metres. Boland also told him to get a building permit, as did Lou Andre. Weldon admitted he never obtained a building permit, because he

did not feel it was his responsibility as the purchaser. He recalled that Boland told him he was "nuts" to go ahead without these documents.

[26] According to Boland, Weldon indicated that he would take the necessary steps to ensure the build-out was legal. Helyar, the bank's quantity surveyors, was to establish a price for the third floor. Construction to unit 113 commenced in the spring of 1993. It included:

- the installation of three skylights, additional windows, and stairs going from the second to the third floor;
- the creation of a bathroom, sitting area, and bedroom; and
- the installation of a heat pump.

[27] The new space on the third floor comprised of 862.2 square feet. New drawings were done by Sigma Engineering Group Ltd. [exhibit 212]. Weldon testified that no attempt was made to conceal the third floor construction. Pelican was aware of it, as was the bank.

[28] MTCC No. 1056 became a condominium corporation on July 5, 1993 when the Declaration [exhibit 104] was registered. Schedule C of the Declaration describes the boundaries of the units and refers to the survey sheets that have to be deposited in the Land Registry Office when the condominium is registered. These sheets [exhibit 246] show that the upper boundary of unit 113 did not include any space above the second floor ceiling.

[29] Weldon took no steps to amend the Declaration prior to registration or indeed at any time, despite the fact that he was president of the condominium from 1994-1997. He did not want to encounter any problems with the project and he did not want to lose his third floor. Further, he testified that he believed that obtaining these documents was not his responsibility. Of paramount concern to Weldon at that time was getting the condominium registered so that the funds from the purchasers would be obtained. The lenders did not want any delays in the registration.

[30] Weldon and his family took possession of unit 113 on July 17, 1993 and most of the construction was complete. The deal closed on April 7, 1994. There was an agreement of purchase and sale done in June 1993 [exhibit 208] but it was never signed. This document makes no reference to the unit being 3 storeys. The purchase price was $402,366.09. After allowance for his commissions and management fees, the amount Weldon owed on closing was $280,124.51 [exhibit 210].The cost of finishing the third floor was $103,948.58. Weldon testified that the unit was finished to a high standard and there were no problems with leaking or mould while he lived in it.

[31] Weldon listed the unit for sale in late 1996 or early 1997. His real estate agent did a market analysis and the asking price was $1,075.000.00. In the listing agreement [exhibit 3], it was described as a 3 storey unit. Weldon testified that he believed the third storey was his to sell. The illegality of the third floor of unit 113 was not brought to the attention of the Board during the time that Weldon and Boland were on the Board.

***THE PLAINTIFF'S PURCHASE OF UNIT 113 AND SUBSEQUENT EVENTS***

[32] The Plaintiff and her husband, Michael Orr ("Michael" or "Michael Orr"), moved to Toronto from Thunder Bay in 1995. They purchased an extremely large home at 37 Edgehill Road for the sum of $2.7 million dollars. In the summer of 1997, Michael was offered a job in Texas, which he accepted. The Orrs decided to sell the house on Edgehill and purchase one in Texas along with a smaller place in Toronto where they would live during the summers. They hired a real estate agent, Joy Garrick ("Garrick"), to find a suitable residence in Toronto, preferably a condominium, which would permit them to keep their numerous cats. Rainville had not owned a condominium before but she liked the idea of the security it offered, given that she and her husband would be away for long stretches of time. They sold the Edgehill Road house on August 11, 1997 for $3.57 million with a closing date of April 29, 1998.

[33] In September of 1997, Garrick took Rainville to see the Grand Harbour condominium complex on Lakeshore Blvd. West, which was close to Lake Ontario. Rainville was struck by the development which she testified was unlike any she had seen previously. She was especially drawn to the townhouse complex due to its view of the lake and park-like setting. Garrick took Rainville to see townhouse unit 116, which was approximately 2500 square feet. It had a floor at ground level, a second floor and a pull-down ladder from a trap door in the ceiling, which led to a third floor that was unfinished.

[34] As Rainville left unit 116, the owner of the unit next door, number 115, told her that there were other units for sale, namely units 113 and 114. Appointments were made to view these two units. Rainville and Garrick attended at unit 114 first. According to Rainville's evidence, it was a very pretty unit. It had 2 floors and a narrow spiral staircase led to a third floor which contained 2 additional bedrooms and a bathroom. Rainville was concerned that her furniture would not fit and felt that it was not sufficiently private.

[35] Rainville and her real estate agent then went to view unit 113, which was owned by Weldon. Weldon's listing agent, Ed Wery ("Wery"), was present during Rainville's initial visit to unit 113. Rainville was given a copy of the listing agreement dated July 1997 [exhibit 3] which described it as a 3 storey unit with a listing price of $1,075,000.00. Rainville was shown a first floor, which contained a living room, dining room, kitchen, office and a bathroom. On the second floor, there were 3 bedrooms, 2 bathrooms and a family room. From the master bedroom, there was a beautiful view of the lake and marina. From the second floor, Rainville ascended a staircase which was approximately three and a half feet wide. There was a second landing with a Juliet balcony and a few more stairs that led to the landing on the third floor. There was a skylight at the top of the stairs and French doors which opened into a large family room that had 2 skylights. The third floor also contained a fourth bedroom that had an ensuite bathroom, a storage area and a small furnace room with a heat pump for the third floor. Unit 113 had a view across the lake, to the lighthouse.

[36] Rainville testified that unit 113 had all of the features that she desired and that other units she had seen lacked. She would still need to do renovations. She asked a few questions of Wery and learned that multiple pets were permitted in the condominium and that this unit was one of only 2 units that contained a third floor. Further, she was told that the reserve fund for MTCC No. 1056 stood at one million dollars.

[37] Rainville made arrangements for her husband to view the unit. Rainville and her husband, Michael, went through the unit together and discussed the renovations that would be necessary.

Michael was concerned about the cost of the renovations. Rainville went through unit 113 again, with her friends Barb and Joe Goebbels who owned a design company and had done the renovations on her other house. On September 29, 1997, Rainville made an offer to purchase the unit for the sum of $975,000.00 with a closing date of December 19, 2007. She did not have an inspection of the unit done before signing an offer nor did she did not ask her lawyer to review the offer before it was made. Weldon accepted the offer on September 30, 1997 [exhibit 5].



[38] On October 20, 1997, Rainville attended at the townhouse along with her real estate agent, Garrick; her friends, the Goebbels; and her renovator, Mark Penman ("Penman"). They walked through the unit and Rainville indicated what she wanted changed. In particular, she did not like the dark wood floors and she planned on putting in an entirely new kitchen. Penman quoted a price for the work of $130,000.00. Rainville was not certain if that price included the kitchen installation.

[39] That day, for the first time, she met Weldon, who was there with his agent, Wery. Weldon told her that he was president of the condominium corporation and that he thought the renovations she planned would be fine. Garrick did not have with her the estoppel certificate, which she indicated to Rainville was an important document.

[40] Sometime around Halloween, Garrick brought over the estoppel certificate dated October 20, 1997 [exhibit 7]. It had been completed by a representative of Brookfield, the property management company. It indicated:

- Weldon was in arrears on the common expenses;
- there were restrictions on pets;
- there were continuing violations of the Declaration;
- an incorrect listing of the members of the Board of Directors;
- the reserve fund was less than the amount that was indicated to the Plaintiff; and
- there was an outstanding lawsuit against MTCC No. 1056.

[41] This was different than the information Rainville had been provided with when she decided to purchase the unit and she felt that Weldon had misrepresented things to her.

[42] Subsequently, she learned that this estoppel certificate that had been provided was not the correct one; it referred to another condominium corporation in the complex, number 965. Rainville and her husband, Michael Orr, retained Martin Doane ("Doane"), a litigation lawyer at the Gowlings firm to handle the condominium deal. Doane had done work for Michael Orr concerning various business deals. The purchase and sale agreement was sent to Gowlings on October 21, 1997. Doane asked one of his partners, Katherine Latimer ("Latimer"), who practised in the area of real estate transactions, to handle the purchase on behalf of the Orrs because he was not a real estate practitioner.

[43] By letter dated December 12, 1997, Cawthorn from Brookfield sent Gowlings the correct estoppel certificate [exhibit 9] along with the Declaration and By-laws for MTCC No. 1056. The second estoppel certificate indicated that Weldon was in arrears in the sum of $1,050.14 for common

expenses, that there was a lawsuit against the corporation, and there was a limitation on the permissible number of pets. It correctly listed the Directors of the Corporation. It stated:

> **There are no[t] 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.** [Emphasis mine].

[44] Rainville felt "comforted" by this information but was worried about the pets issue because she had several cats. Around this time, Rainville was undergoing medical testing. She and her husband, Michael had just returned from Texas where they had put in an offer on a house. Michael Orr was concerned about the various misrepresentations that had been made by Weldon. He was also concerned about the fact that they had bought a house in Texas and the additional expenses associated with the Toronto condominium. According to Rainville, after learning of these problems, she and her husband wanted to "pull the plug on the deal."

[45] Doane sent a letter to Weldon's lawyer, Eric Feige ("Feige") rescinding the agreement of purchase and sale and requesting a return of the deposit due to what he alleged were material misrepresentations. Letters went back and forth between the lawyers and the closing date was extended. Weldon was unwilling to rescind the deal and threatened to sue. Rainville and her husband decided to go ahead with the purchase. Eventually, it was agreed between the parties that the deal would close, with a date of January 16, 1998 and an abatement in the price of $20,000.00. This sum was paid by the real estate agents.

[46] On January 16, 1998, Rainville went to Gowlings to sign the documents for the condominium deal. She had not met with anyone at the firm with respect to the purchase prior to this time. She met with a woman, Cathy Ridout ("Ridout"), who she thought was Katherine Latimer, the lawyer who was to handle the transaction. Ridout was a law clerk who worked in the real estate department. It is not disputed that Rainville never met with solicitor Latimer prior to the closing of the transaction.

[47] Rainville signed the closing documents that she was asked to sign by Ridout. Rainville testified that Ridout explained to her what she owned and what were common elements. She was not shown any plans. Rainville's understanding was that she owned from the drywall on the top ceiling of the third floor to the concrete floor in the basement. Rainville testified that she advised Ridout that she intended on doing renovations to the townhouse. The meeting lasted less than an hour and she was given the keys to the townhouse.

[48] On the same day, January 16, 1998, the Plaintiff prepared a letter to be sent to the president of MTCC No. 1056 and to Brookfield setting out the renovations that she was planning to undertake on the unit [exhibit 21]. She had her sister fax the letter as she was anxious to commence the work. She wanted to re-do the bathrooms and the floors, add a new fireplace, and totally renovate the kitchen. Rainville denied the renovations included any structural changes and testified that the work was all cosmetic.

[49] The contractor, Penman, started demolition work January 19, 1998. He was working on all 3 floors, as time was short. He started demolition of the bathrooms, removing drywall, and ripping out

the kitchen. Rainville anticipated that the work would take approximately six weeks. She did not get a building permit as she had been advised it was not necessary because all of the work was interior.

[50] Construction floor plans were prepared, likely by Penman, in October 1997 [exhibit 177]. They indicate the changes to the second floor included eliminating one of the bedrooms to make a larger master bedroom and the utilization of steel beams, which the Defendant MTCC No. 1056 argues clearly constitute structural changes as opposed to cosmetic renovations. Under the terms of the Declaration, any structural changes require the written approval of the Board. The Plaintiff received a letter from Cawthorn advising that the renovations were fine as long as they did not impact on exterior walls. Her request for a new fireplace was denied as it constituted an exterior design change.

[51] On January 22, 1998 Penman started to sand the hardwood floors and Rainville was asked to attend at the unit. Penman showed Rainville that the floors were rotten. Mark Penman's brother, Jeff ("Jeff"), was in business with him and was the project manager. He came on site January 31, 1998 and smelled mould. He lifted up the floor boards and saw that the floor joists were rotting due to leaking through the walls. He pulled off the baseboards and saw moisture damage at the base of the walls. There was mould in the insulation in the walls. Jeff showed Rainville that there was water damage to the drywall and mould. The electrical wiring was deficient and there was evidence of charring. There was missing insulation in the kitchen and the plumbing was sub-standard. In short, there were many deficiencies in the construction. According to the Plaintiff, Jeff told her "You have a lemon; patch it up, paint it and sell it."

[52] Jeff Penman testified that he told Rainville that she could pursue Ontario New Home Warranty Program ("ONHWP") for some of the damages. She could not recall if she discussed this issue with Doane. The Plaintiff testified she did not call ONHWP because Patrick Post from Brookfield did not want the information about the mould getting out to other unit owners. She gave evidence that she "trusted" Post to advise her as to what was covered by ONHWP because he was most familiar with the process.

[53] Rainville was very concerned about the state of the unit she had just purchased. She knew that the condominium had the obligation to repair the common elements and any consequential damage caused by a defect located in the common elements. Her lawyer, Doane, advised her to take photographs and videotapes to document the problems.

[54] Two videos taken February 5, 1998 and February 17, 1998 were filed as exhibit 130 at the trial, showing the water penetration into unit 113. A series of photographs taken in this time frame documenting many deficiencies and water damage were filed as exhibit 26.

[55] The Plaintiff called Cawthorn and took her through the townhouse to show her the problems. On February 10, 1998 there was a meeting at the townhouse with the Plaintiff, her husband Michael, Penman, and Post, who was the regional manager for Brookfield. The condition of the unit was "horrific" according to the Plaintiff: there was mould throughout the unit and water damage along with sub-standard workmanship. They asked Post what could be done about the situation. Michael Orr indicated that he wanted a meeting with the Board of Directors.

[56] Because of the state of the renovations, it was clear that it would be difficult to determine what damages were related to the common elements and what related to other work that had been done prior to Rainville taking possession.

[57] On February 17, 1998, there was a meeting with Rainville's husband and Penman which was attended by their lawyer, Doane. The Plaintiff and her husband hired a number of experts to provide opinions on what remedial work needed to be done. Dan Boone ("Boone"), a consulting engineer, viewed the unit in early February and prepared a letter [exhibit 27] that set out the deficiencies in the unit and stated that it ought not to have passed inspection. Boone noted the third floor was a later addition and not part of the original unit. Brentwood Roofing [exhibit 28] provided comments on what needed to be done to correct the deficiencies in the roof. An electrician attended to advise of the deficiencies in the wiring.

[58] The Plaintiff and her husband instructed Doane to send letters to the MTCC No. 1056 and to Brookfield. MTCC No. 1056 retained lawyers, the firm of Fine & Deo, who responded by letter dated February 19, 1998 that the condominium would repair the common elements and/or consequential damage caused to a unit by a defect in the common elements [exhibit 32]. Rainville acknowledged being advised that the condominium corporation would **not** pay for any repairs that it did not authorize in writing. According to the evidence of Rainville, by the beginning of March she had paid approximately $90,000.00 to Penman for the construction work.

[59] The letter from Fine and Deo dated February 19, 1998 advised that she could not have her own contractors perform work on the common elements and further, that MTCC No. 1056 had a right to be advised of the repairs necessary and an opportunity to review the problem and to have its own contractors repair the problem. The letter stated that the condominium would not pay for any repairs that it did not authorize.

[60] While the letter advised the Plaintiff to "stop all further work in the unit until further notice," Rainville testified that both Post and Cawthorn were aware of the type of renovations being done. She did not instruct Penman to cease working on her unit. During this period of time, no one from the condominium corporation told her that her third storey was illegal. At the end of March, Cawthorn asked for a copy of the building permit which was only applied for March 6, 1998 [exhibit 176].

[61] MTCC No. 1056 retained an engineering firm, Halsall Associates Limited ("Halsall"), to provide an opinion on the work that was necessary to fix the roof. The engineer, Templeton, attended townhouse unit 113 on February 23 and 26, 1998 and took photographs [exhibits 265 and 292]. While examining the roof and interior of the third story for water penetration, Templeton wondered whether the third story encroached on common element space. He discussed the issue with other engineers at Halsall. By an e-mail dated March 13, 1998 [exhibit 35], Sally Thompson from Halsall advised Post that their review of the Declaration and survey drawings indicated that the unit was meant to have only 2 storeys and that the third storey was constructed in common element space.

[62] This information was communicated to MTCC No. 1056, who in turn sent it on to their lawyers to review the issue from a legal perspective. Rainville and her husband received from Doane a copy of a letter from MTCC No. 1056's lawyers dated April 1, 1998 [exhibit 347]. The letter stated, "The Corporation's engineer, in his investigations, requested information as to whether the attic space which your client is occupying, is common element or unit space. Our search of the condominium description

indicates that this is indeed common element space." This was the first notification that the Plaintiff had that there was an issue with the legality of the third floor.

[63] Shortly thereafter, by a letter dated April 9, 1998 [exhibit 39], the Plaintiff received the reporting letter from Katherine Latimer on the real estate transaction confirming she had "a good and marketable title in fee simple to the unit…". The Plaintiff testified that she would not have purchased townhouse unit 113 if she had known the third floor was illegal as she needed that space. According to Rainville, the estoppel certificate gave her much comfort as it indicated that there were no violations of the Declaration or By-laws and she relied on it.

[64] Following the discovery that the third floor was built into the common elements, the litigation commenced. An application for an injunction and compliance [exhibit 178] returnable April 16, 1998 was issued by MTCC No. 1056. The parties, through their solicitors, attempted to resolve the issue of the third floor and Rainville's claim for the costs of repairs to her unit and the common elements. Rainville was adamant the roof be replaced, not repaired. Eventually, that application was converted into one of the actions that proceeded to trial before me.

[65] Because of the ongoing construction, Rainville and her husband were unable to move into the unit at the end of April as planned and their house deal in Toronto closed April 29, 1998, leaving them with no place to live because Rainville and her husband failed to close the Texas house purchase and forfeited their $75,000.00 deposit. They leased a house at 50 Viewmount for a price of $5,500.00/month and moved in at the beginning of May.

[66] The Plaintiff continued with the renovations although she was forced to stop the work briefly on her unit during the first week of April 1998 when the City issued a stop work order until the proper building permits were issued. Apart from this, however, the work was on-going in the unit, including the third floor which by this point the Plaintiff knew was illegal. She testified that she did not receive anything in writing to tell her to stop. On the contrary, she described Brookfield as being "supportive".

[67] Rainville thought MTCC No. 1056 was going to pay her for the repairs that she had done to her townhouse as a result of water penetration and they would fix the other problems themselves. Rainville and her husband were discussing with Doane the possibility of bringing an action to legalize the third floor. MTCC No. 1056 had requested that Brodak, a contractor, assess the roof and determine if it needed to be repaired and/or replaced.

[68] During this time period, the lawyers continued to exchange letters concerning the roof issue and further assessments were obtained. On April 22, 1998, Fine & Deo sent a letter to Doane enclosing a copy of the report of the engineers, Halsall. By letter dated May 26, 1998 [exhibit 51] MTCC No. 1056's lawyers advised that the roof would be repaired, not replaced.

[69] MTCC No. 1056's lawyers and Doane were attempting to come to an agreement on the outstanding issues to avoid the court attendance for the application, which had been adjourned to July 1998. Fine & Deo made an offer of settlement [exhibit 58], which included the following terms:

- MTCC No. 1056 would repair the roof according to a quotation from Avenue Road Roofing;
- MTCC No. 1056 would repair the dormer;

- the patio doors would either be repaired or replaced;
- the cedar decking would be replaced on the balcony;
- a determination would be made as to whether there was sufficient gross-floor area to allow the third floor to be permitted;
- if a minor variance was required, the Plaintiff would undertake the application to effect the variance and MTCC No. 1056 would support it;
- if the third floor existed at the time the condominium was registered, the Board would grant a lease to the Plaintiff and she would pay the additional share of common expense costs related to the square footage of the third floor;
- alternatively, the Plaintiff would bring an application to obtain legalization of the third floor, which would be supported by MTCC No. 1056.

[70] Although Rainville was anxious to resolve everything, she refused to sign the release on the advice of her counsel that it was too broad.

[71] At this time, in the summer of 1998, the Plaintiff continued on with the work on her unit. By this point, she testified she had spent perhaps $700,000.00 on the renovations, including a payment of $270,000.00 to Penman. The contract with Penman, invoices and receipts from Penman were not produced at trial.

[72] By this point, Rainville and her husband were no longer moving to Texas. She wanted the roof repaired immediately. There were on-going negotiations through the lawyers. Rainville testified that she continued on with the renovation work, because no one told her to stop.

[73] On September 3, 1998, the Plaintiff issued a Statement of Claim against Weldon, the City of Toronto and the real estate agents involved in the purchase and sale claiming damages for negligence and misrepresentation. Pleadings were exchanged but the action proceeded no further.

[74] Rainville was anxious to have the third floor legalized. By a letter dated November 13, 1998 [exhibit 61] from its counsel, MTCC No. 1056 withdrew its previous offer to settle the dispute with the Plaintiff and advised: “You are hereby put on notice that the Corporation is demanding strict compliance with **all** the terms and provisions of the declaration, by-laws and rules of Metropolitan Toronto Condominium Corporation No. 1056 and specifically demands that your client cease and desist from using, altering, repairing, occupying or entering any portion of the common element attic, effective immediately…”

[75] Rainville testified that she was shocked by this letter as it represented a completely different position than had been taken previously. She instructed Doane to send a letter in response [exhibit 62] with a proposal for settlement which included an application to amend the Declaration to indicate the boundaries of her unit included the third floor.

[76] There was an annual general meeting of MTCC No. 1056 December 17, 1998 which the Plaintiff attended. The issue of her third floor was discussed at the meeting.

[77] On December 19, 1998, the Plaintiff and her husband moved into the townhouse.

[78] In January of 1999, David Mitchell ("Mitchell") became the president of the Board of MTCC No. 1056. On April 1, 1999, Doane drafted a letter to ONHWP for Rainville to sign to advise of the structural defects which had been discovered in her unit. She believed that this constituted notice of her claim. She did not send any receipts or photographs. She was aware that MTCC No. 1056 was dealing with ONHWP in an effort to obtain compensation under the warranty.

[79] Shortly thereafter, she received a letter from Post advising that she was not permitted to do any repairs to the attic area or roof as they were common elements [exhibit 68]. By a letter dated June 9, 1999 [exhibit 70], Brookfield requested copies of invoices for work that had been done to common elements. Rainville testified that she could not get the invoices from Penman and consequently, she did not send any. She did not, however, advise Brookfield of this at the time.

[80] ONHWP sent an engineer to inspect the unit June 1, 1999. On July 30, 1999 ONHWP sent a letter [exhibit 73] denying the Plaintiff's claim. It advised that the claim was outside the limitation period and further, many of the items she had identified as deficient were common elements and therefore, she could not make a claim. The Plaintiff did not appeal this decision.

[81] MTCC No. 1056 submitted a claim to ONHWP in the sum of $343,335.36 for major structural defects in September 1999 [exhibit 356]. MTCC No. 1056 relied on the report of its engineers, Halsall. After some negotiation, in April of 2000, the claim was settled for the sum of $181,401.00 for the defects.

[82] During this time period, the roof continued to leak. Rainville was still hoping to legalize the third floor and her lawyer continued to correspond with MTCC No. 1056's counsel in this regard. At the end of September 1999, the Plaintiff received the Halsall report dated June 1, 1999 [exhibit 69] which indicated that the roof repairs had to be completed before winter.

[83] On October 15, 1999 Rainville received a letter and package from Grand Harbour advising that the Annual General Meeting would be held on October 27, 1999 and one of the items on the agenda was the **"Exception Policy."** She did not know what that referred to. She received a letter dated October 27, 1999 [exhibit 79] from Grand Harbour addressed to all unit owners which stated:

> …the entire attic space above all of the townhouses in this Condominium Corporation is common element space and belongs to all of the owners of all of the units. Notwithstanding that definition, townhouses #113 and #114 have developed this attic space above the units and has *[sic]* become part of the living space of the townhouse. These alterations were done without the approval of the Board of Directors. The alterations to townhouse #113 were completed by a previous owner who was one of the original developers of this project as well as a previous Board member…Your Board of Directors is opposed in principle to the expansion of units into the common elements for a variety of reasons and has determined that the most satisfactory solution to the existing problem with townhouses #113 and #114 is to grant temporary approval for the completion of the common element attic space until such time as these units are no longer occupied by the current owners…

[84] Before the AGM, members of the Board met with Rainville and her husband, Michael Orr, to explain the Exception Policy. Michael Orr rejected the policy as being completely unacceptable.

[85] Rainville attended the October 27, 1999 meeting and a lawyer for the condominium corporation, Audrey Loeb, was present and the Exception Policy was discussed. It provided that Rainville and the owner of unit 114 Michael Kosich ("Kosich") be permitted to continue to use their third floors as long as they paid the additional costs for the extra space and upon sale of the units, converted the third floor back into attic space at their expense. One of the Board members, Wayne Carson ("Carson"), presented overheads [exhibit 364] setting out the positive and negative features of the proposed policy.

[86] The president of MTCC No. 10566, Mitchell, testified that he thought it was fair to all owners and permitted Rainville and Kosich to continue to use their third floors while prohibiting the other owners who had potential to create a third floor from doing so. None of the other owners of MTCC No. 1056 opposed its adoption and the Plaintiff abstained from the vote. Instead, she asked a question about the roof repairs. When questioned at trial about her silence on the exception policy at the AGM in 1999, Rainville testified that she had been assured by the Board, specifically Mitchell and another member Arnold Hoffmann, that her third storey would be legalized. This was vociferously denied by both Mitchell and Hoffmann.

[87] Subsequently, counsel for MTCC No. 1056 wrote to the Plaintiff for her agreement with the policy [exhibit 81]. A letter to Doane followed [exhibit 82]. Doane responded by correspondence dated December 30, 1999 [exhibit 84] rejecting the exception policy and instead, suggesting that MTCC No. 1056 commence an application under the *Condominium Act* to correct the Declaration to indicate the boundary of unit 113 included the third floor. Alternatively, it was proposed that the third floor be conveyed to Rainville or as a last resort, that Rainville be granted a fully transferable 99 year lease to the third floor. At this time, Kosich had an application outstanding to legalize his third floor and Rainville was waiting to see the outcome of that application.

[88] At the end of 2000, Doane ceased representing the Plaintiff and she retained new counsel, John Hahn ("Hahn"). On March 5, 2001, the main action against MTCC No. 1056, Brookfield and Gowlings was commenced (Court File No. 01-CV-206672CM). MTCC No. 1056 issued a Third Party Claim against Weldon.

[89] The Plaintiff continued to experience problems with water leaking into her unit.

[90] She attended the AGM in November 2000 and told the Board that the third floor was already constructed when she bought the unit. She attended the AGM in October 2001 and was not certain if she raised the issue of her third floor at that meeting.

[91] In 2002, Rainville and her husband, Michael Orr, separated. Rainville attended all of the meetings except the Special Meeting that took place in 2002, at which time her lawsuit against the condominium was discussed.

[92] Rainville testified that she was treated shabbily by the property management company and by the Board. When she submitted requests for work to be done in her unit, they were ignored. She did not receive copies of mailings that the other unit owners received.

[93] The Board decided to reconsider the Exception Policy at a Special Meeting to be held on December 7, 2005. Rainville stated that she did not receive the memorandum about this meeting from the Board. She eventually got a copy of it from Kosich. She understood there was going to be a special meeting during which the Exception Policy would be discussed and that in advance of the meeting, there would be materials given to the owners. Further, during the meeting, the lawyer for the condominium, the lawyer for Kosich and the lawyer for Rainville would each give presentations. MTCC No. 1056 prepared a summary [exhibit 197] and the Plaintiff's lawyer prepared a summary [exhibit 132]. These were distributed to the owners at the meeting.

[94] Rainville attended the meeting along with her lawyer. The Board advocated the retention of the Exception Policy, which it felt was fair to all. One of the reasons for the Board's position was the fact that if the third floors of units 113 and 114 were approved, the Board would have no basis for refusing requests from other owners who had the ability to build into their attic space and create a third floor. There were 18 units that had the ability to do this.

[95] At the meeting, a motion was brought to defer the vote. The Board indicated that it would step down if the Exception Policy was not accepted. That would be an indication that the ownership did not have confidence in the actions of the Board. The owners voted against deferral and voted to confirm the Exception Policy [exhibit 133].

[96] In 2003, Rainville listed unit 113 for sale in order to try and recover the money she had put into it. She listed it at $2,790,000.00 and received an offer of $2,350,000.00 [exhibit 182]. She accepted the offer but could not close the deal because of the litigation. In 2009, she listed it at a price of $2,600,000.00 [exhibit 183]. In August of 2009, unit 113 was the subject of an article in the *National Post*. Rainville was not interviewed for it. The article described the unit as having been "gutted to the concrete" with structural supports added and rooms enlarged [exhibit 184]. The Plaintiff continues to occupy the unit.

***THE INVOLVEMENT OF BROOKFIELD***

[97] Initially, all three condominium corporations, MTCC No. 1056, MTCC No. 965, and MTCC No. 1031, were managed by CBS Property Management. Brookfield became the property manager for MTCC No. 1056 and MTCC No. 965 effective October 1, 1997. The records from CBS were less than satisfactory, according to Post, who was the regional manager for Brookfield at the time. Brookfield received only partial documents, incomplete accounting records and had to constantly badger CBS for the necessary materials relating to the corporations. After requests were made by Brookfield, some of the information would come in, often in "dribs and drabs."

[98] The on-site property manager, Cawthorn, was new to the job and was assisted by Karin Stevens ("Stevens"). Post attended at the premises once a week and, in addition, attended Board meetings and the AGM.

[99] One of the duties of the property manager at that time was to complete estoppel certificates, which are mandatory under the *Condominium Act*. This was done by reviewing the files for the unit in question as well as other records of the corporation in order to determine whether payments of expenses were up to date, the status of the reserve fund, and particulars of the corporation and the composition of its board of directors.

[100] In this case, the initial estoppel certificate was prepared by Stevens. This certificate dated October 20, 1997 that was given to Rainville [exhibit 7] contained errors, specifically with respect to the Board of Directors of MTCC No. 1056. The information provided related not to MTCC No. 1056, but rather, to MTCC No. 965. The certificate indicated that there were "continuing violations of the Declarations, By-laws and/or Rules of the corporation…" A draft Declaration for MTCC No. 1056 was enclosed with the estoppel certificate.

[101] Post reviewed the unit file for townhouse 113 and signed the second estoppel certificate dated December 12, 1997. There was nothing in the records of the corporation that indicated an illegal third floor had been built in unit 113.The second estoppel certificate [exhibit 9] corrected the errors in the first certificate. The estoppel certificate made no reference to the number of floors in unit 113 but did indicate that there were "no continuing violations of the declaration, by-laws and/or rules of the corporation…" The existence of the third floor was clearly a violation of the Declaration. The Plaintiff asserts that she relied upon the estoppel certificate when purchasing the unit. Brookfield submits that she relied on her solicitor with respect to the title to her property.

[102] Rainville also alleges that Brookfield, in particular Post and Cawthorn, were aware of the renovations that she was undertaking to her unit and gave her permission to proceed. This is denied by Brookfield.

***THE CLAIM AGAINST GOWLINGS***

[103] Gowlings was retained on or about October 21, 1997 to act on the purchase of the townhouse at Grand Harbour. Doane requested that his partner, Latimer, who practised in the real estate area, handle the transaction on behalf of Ms. Rainville.

[104] What documents that were sent to Gowlings is a matter of dispute: Rainville was adamant Gowlings had a copy of the listing agreement in its file when she attended at their office to sign the final documents. Latimer had no recollection of seeing the listing agreement until after the illegality of the third storey had been discovered.

[105] Upon receiving the agreement of purchase and sale, Ms. Latimer ordered a title search and requested that one of her real estate clerks, Ridout, obtain the estoppel certificate. Latimer recalled reviewing the estoppel certificate at some point and that there was an issue about the number of cats permitted. This problem was dealt with by Doane and resulted in an extension of the closing date and a price adjustment.

[106] Latimer asked Ridout to obtain the horizontal plans. Latimer did not have a specific recollection of looking at the horizontal plans for the condominium, but believed that she reviewed them to determine where Rainville's unit was located and where the parking spots were. She did not obtain prior to the closing the cross-section plans referenced in Schedule C of the Declaration which illustrated the unit boundaries [exhibit 246].

[107] On January 16, 1998, the day the deal was to close, Latimer was involved in another transaction so she asked Ridout to meet with the Plaintiff. Rainville signed the documents that she was asked to sign. Ridout did not review the horizontal plan with Rainville [exhibit 282]. She reviewed the estoppel

certificate and described what comprised the common elements and what Rainville owned and told her that the terrace was an exclusive use common element.

***THE THIRD PARTY CLAIM AGAINST WELDON***

[108] The claim asserted by MTCC No. 1056 against Weldon is for indemnity for any damages awarded in the main action. It is based on fraudulent misrepresentations by means of Weldon's concealment of the illegality of the third floor to Rainville. Weldon was a director of MTCC No. 1056 from 1993 to 1997 and had the obligation to exercise the powers and discharge the duties of his office in good faith. It is the position of MTCC No. 1056 that Weldon actively hid the fact that he did not have legal title to the third floor when the purchase and sale agreement was entered into. This constitutes a breach of the statutory duty that he owed MTCC No. 1056 and a breach of his fiduciary duty.

[109] Liability is denied by Weldon. He pleads that he contracted with Pelican for the purchase of a three storey unit and this was approved by National Bank. Weldon states that he was unaware that the third floor of the unit was built into the common area. He pleads that amending the Declaration was not his responsibility.

***ISSUES FOR DETERMINATION***

[110] I note that at the time the purchase and sale agreement was entered into in 1997, the governing legislation was the *Condominium Act,* R.S.O. 1990, c.C.26, which will be referred to as the "Old Act". In 1998, the *Condominium Act*, S.O. 1998, c. 19 was enacted and will be referred to as the "New Act" for ease of reference.

1. Does this action constitute an abuse of process since the Plaintiff issued a prior claim arising from the same facts and later dismissed it?

2. (a) Is the Plaintiff entitled to a remedy for the third floor of unit 113 and if so, is it:

- an amendment to the Declaration pursuant to section 109(2) of the New Act;
- an amendment to the Declaration pursuant to the oppression remedy under section 135 of the New Act; or
- an order legalizing the third floor pursuant to section 32(8) of the Old Act/section 98(1) of the New Act?

(b) If the Plaintiff is not entitled to a remedy, should there be an order requiring her to close up the third floor under section 134 of the New Act or should she be granted a lease or a license to the third floor?

(c) If the Plaintiff is ordered to close up the third floor, who should compensate her for her damages and the cost of closing up the third floor? Which Defendants, if any, are liable for payment of damages to the Plaintiff? Did the Plaintiff fail to mitigate her damages?

3. Was Brookfield negligent and did its actions constitute a breach of its duties pursuant to the *Condominium Act* and/or a breach of its fiduciary duty? What is the legal effect of the estoppel certificate?

4. Was the Defendant Gowlings negligent in the handling of the real estate transaction? If so, did the negligence cause any damages and if so, what are the damages flowing from the negligence?

5. If any of the Defendants are found to be liable to the Plaintiff, what are damages owing to her?

6. Should the Plaintiff be reimbursed monies she contributed to legal expenses of MTCC No. 1056?

7. Should there be a court order requiring MTCC No. 1056 to repair or replace the roof over unit 113?

8. Is this an appropriate case for an award of punitive and/or aggravated damages against the Defendants (with the exception of Gowlings) and/or the Third Party?

9. Should the Plaintiff and Weldon be required to pay for the use of the third floor during their ownership and if so, in what amount?

10. Is the Defendant MTCC No. 1056 entitled to compensation from Weldon in the Third Party action?

***ANALYSIS***

**1. Is the present action an abuse of process?**

[111] Counsel for MTCC No. 1056 argues that Rainville is precluded from any remedy in this action, because she started another claim against Weldon and others and later abandoned it. I do not agree that this constitutes an abuse of process. Although the claim before me arises out of the same factual situation, the allegations against the present Defendants are different than those made against Weldon. Further, if the condominium corporation felt strongly that this action was an abuse of process, certainly a motion could have been brought years ago for a ruling on that issue, instead of at the conclusion of a lengthy trial.

[112] I pause at this point to comment on the Plaintiff's dismissal of the action she commenced against Weldon for compensation. She instituted an action against Weldon and the agents in 1998, after learning of the illegality of the third floor. She dismissed it on a without costs basis in 2001 [exhibit 366] and signed a release [exhibit 66]. All of these actions were done while Rainville was represented by counsel. She was questioned about these events during the trial. She was unable to offer any cogent reason for releasing Weldon although she testified that her lawyer at the time, Hahn, recommended that she do so.

[113] She said that she agreed with this course of conduct, because she believed he had no money and was judgment proof. However, no evidence to support this assertion was called at trial. She also

alleged that the Board had told her that they would pursue Weldon, but again, she called no evidence to support this assertion. It was vociferously denied by the directors at the time who attended trial and gave evidence, Hoffman and Mitchell. Her lawyer, Hahn, was not called as a witness at the trial to shed further light on this issue.

[114] While Counsel for the Plaintiff, Mr. Das, describes the submission of the Defendants concerning the release of Weldon by the Plaintiff as "nothing but a desperate attempt to avoid liability," I do not agree. Whether or not a party has exigible assets is a consideration after Judgment has been obtained; it is not a persuasive reason to abandon a claim against a party who is clearly liable, particularly in light of the amounts at stake in this litigation.

[115] It is the Plaintiff's contention that neither she nor her lawyer Doane knew all of the facts at the time that she released Weldon. It is also submitted by Plaintiff's counsel that Rainville could not have ascertained the facts surrounding the construction of the third floor at the time that she agreed to dismiss the action against Weldon and the agents.

[116] This position cannot be sustained on a review of the evidence. Rainville clearly knew that Weldon was the one who had built out the third floor; she knew it did not conform to the Declaration and was illegal; and she knew that Weldon had misrepresented the unit to her as a three storey unit instead of a two storey unit. By her own evidence, she would not have purchased the unit if she knew that it was only two storeys. She knew all of these things in mid-1998 and that is what prompted her to issue the Statement of Claim against him for damages. What remains a mystery are the reasons behind her agreement to dismiss the action against him and pursue others for her damages.

[117] In my view, Rainville did not provide a reasonable explanation for her abandonment of the claim against Weldon without payment of any compensation. She was represented by counsel at the time and the evidence was clear that she had a strong chance of success in her action against Weldon.

**2. a) Is the Plaintiff entitled to a remedy for the third floor and if so, what is it?**

[118] The Plaintiff argues that the proper remedy is for the Court to amend the Declaration pursuant to section 109(2) of the New Act, because she is an innocent victim. She purchased the unit, believing it was a three storey dwelling as it stated on the listing agreement. The third storey had been constructed prior to the registration of the Declaration and the corporation was aware of the construction and furthermore, two of the Board members knew that steps had not been taken to legalize the third floor. It is submitted by counsel for the Plaintiff that the description in the Declaration showing the third floor as common element attic space is inconsistent and wrong, as it was built at the time of registration and the intent and purpose of the Declaration and description is to accurately reflect unit boundaries.

[119] The applicable section of the New Act is section 109(2) which states:

> The court **may** make an order to amend the declaration or description if satisfied the amendment is **necessary** or **desirable** to correct an **error** or **inconsistency** that appears in the declaration or description or that arises out of the carrying out of the intent and purpose of the declaration or description. [Emphasis mine].

This section mirrors its predecessor, section 3(8) of the Old Act.

[120] The Court has the discretion to make an order amending the Declaration in certain circumstances:

- if there has been an error made in the Declaration;
- if there is an inconsistency in the Declaration; or
- if there is an inconsistency that becomes apparent in carrying out the intent and purpose of the Declaration.

  In all these situations, the Court must be satisfied that it is necessary or desirable to amend the Declaration.



[121] While the solicitor for the Plaintiff submits that the amendment is necessary due to an *error* in the Declaration and that it was always intended that the third floor of Weldon's unit would be legalized, I do not accept this argument. Nor do I agree that because the third floor of unit 113 was constructed prior to the registration of the Declaration, it was an oversight which ought to be remedied by the Court.

[122] The onus is on the Plaintiff to persuade the Court that there is an error in the Declaration that requires an amendment and the Plaintiff has failed to discharge this burden. The solicitor for the Plaintiff submits "The Receiver stick-handled the third floor construction, which clearly evidences the "intent" that the third floor was intended." However, there was no evidence from the Receiver, Pelican, called at the trial. Similarly, there was no evidence from National Bank, the lending institution in charge of the development, to confirm that townhouse 113 was intended to have a third floor and the Declaration was registered without the change being made.

[123] Since there was no evidence at trial from Pelican or National Bank, the Plaintiff must rely on the evidence of Weldon to support her argument under section 109(2) of the *Act*. Rainville called Weldon as a witness as part of her case. To say that he was unimpressive is an understatement. He is clearly an intelligent man. Yet, he was unwilling to admit his own role in the debacle involving unit 113. Instead, he blamed others and gave testimony which was, at times, patently false and self-serving. When confronted with prior sworn testimony that contradicted his evidence at trial, he refused to admit that he had not told the truth on an earlier occasion and instead, characterized his falsehood as "an incomplete answer." It is difficult to know what parts of Weldon's testimony were truthful; where his evidence conflicts with that of other witnesses, I prefer the evidence of the others.

[124] What is abundantly clear is that Weldon knew in 1993 that the building of the third floor in unit 113 did not conform to the Declaration as registered and that steps needed to be taken to legitimize it. The evidence of his partner Boland, which Weldon confirmed in his own testimony, is that Boland told him during the construction that he needed to obtain a building permit and to go ahead without it and without ensuring the third floor was legalized was "nuts." As one of the developers of the project, he knew that the necessary action to legalize his third storey would require Committee of Adjustment approval. This might have been problematic, given that the development was at the maximum gross floor area ["GFA"] that was permitted. Weldon knew this because of a previous Committee of Adjustment approval that had been obtained.

[125] Of greater concern, however, was the fact that to do anything would have resulted in a delay in the registration of the condominium, which would have been a huge problem in light of the financial difficulties the project was in at that time and the pressure being brought to bear by the lending institutions. Any type of delay in the registration would not have been without disastrous consequences. Weldon had personal exposure to the bank and he did not want to invite further problems. As a result, he did nothing to legalize the unit and he moved in and occupied the third floor from July 1993 until he sold it to the Plaintiff four years later.

[126] Weldon's actions are particularly offensive given that he sat as a member of the Board and as president from 1994 until 1997. During that time, he said nothing to any other Board member about the problem, nor did he take any steps to regularize the third floor. Then, he put the unit up for sale, misrepresenting it as a three storey unit in the listing agreement and failing to disclose its illegality to the Plaintiff.

[127] There is no evidence whatsoever that this issue was brought before the turnover Board or the first Board. Nor is there evidence there was an agreement that the third floor would be legalized or even a recognition by the Board that the Declaration did not reflect the intention of the Corporation. In my view, on the evidence as a whole, it cannot be said that the failure to include the third floor of unit 113 in the Declaration was a mistake or an error. Consequently, I do not find that the Court ought to exercise its discretion pursuant to section 109(2) to amend the Declaration to correct an error.

[128] I turn now to the consideration of whether it can be said that there was an *inconsistency* in the Declaration or one that became apparent in the carrying out of the intent and purpose of the Declaration. This question must be answered in the negative. The evidence not only does not support this contention, it argues against its validity. The evidence was that, initially, the design contemplated a number of the townhouses would have a third storey. However, given the large size of the units and the downturn in the real estate market in 1989, a decision was made by the developers to change the design to make the townhouses smaller and hopefully, more desirable to potential purchasers. Thus, the third floors were deleted from the plans.

[129] The fact that Rainville's unit was not intended to have a useable third floor is made clear from the evidence of Rainville's own contractor, Penman, who testified that the joists on the top of the second floor were not intended to bear the load that a useable third floor would impose on them. That is the reason those joists had to be changed during the Plaintiff's renovations.

[130] Counsel for the Plaintiff submits repeatedly that Rainville had no notice of the illegality of the third floor when she purchased the unit and having in hand a clean estoppel certificate puts her in a unique position. Thus, it is argued it is necessary and/or desirable to correct the error and/or omission in the declaration by permitting Rainville to have legal title to the third floor. In my view, there is no merit to this argument. As I have indicated, the only suggestion that MTCC No. 1056 knew of the third floor encroaching into common element space in unit 113 came from Weldon, who had every reason to make that statement in an attempt to divert responsibility from himself. The fact that the Plaintiff thought that she was purchasing a 3 storey unit does not mean that was the intent and purpose of the Declaration and this is an important distinction.

[131] Furthermore, the Declaration specifies that the owners of the townhouse units contribute to the common expenses in accordance with the proportion of the size of the unit. If it were intended that

certain units could build into the common element space to create third floors and additional square footage, surely the Declaration would have addressed that potentiality and it does not.

[132] Counsel for the Plaintiff relies on the case *Camrost York Development Corporation v. MTCC No. 989*, seemingly an unreported decision of Justice Lane dated February 21, 1996. In that case, the uncontradicted evidence was that there was a clerical error on the common expense allocations of 12 units when the numbers were transposed. It is important to note that there was an acknowledged error in that case, which is vastly different than the facts of the case before me. I do not find this case to be of assistance to the Plaintiff's argument.

[133] Even if I were of the view that the Declaration contains an error or inconsistency (which I am not), I must still be satisfied that it is desirable or necessary to make an amendment. After considering all of the evidence, I have arrived at the conclusion that it is not for several reasons.

[134] The law is clear that even if an owner believed he or she had purchased something as part of the transaction, if it is illegal or contrary to the Declaration, the court will not exercise its discretion to amend the Declaration on the basis of an error or inconsistency*: Re Carleton Condominium 279 Rochon et al*, 59 O.R. 545; *Taggart v. Bachtold* (March 16, 1992), Doc. Ottawa 30109/89 (Ont. Gen. Div.).

[135] While the Plaintiff argues for an amendment, because she was, in essence, an innocent purchaser, that is not the only consideration for the court. In determining desirability, the Court must consider the effects of the proposed amendment on other unit owners and on the corporation as a whole. Mitchell, the president of MTCC No. 1056, testified at the trial and in my opinion, he was a credible witness. He was knowledgeable about the history of MTCC No. 1056, having been acclaimed as president at the December 1998 AGM. He was articulate during his testimony. While he clearly has strong opinions about the issues in this litigation, he was, in my view, straight-forward and honest. He clearly has the best interests of MTCC No. 1056 at heart.

[136] Mitchell testified that there are approximately 18 units with the potential to build into the third floor and enlarge their units and arguably, their value. Mitchell gave evidence that the Board struggled with the issue of how to deal with the illegal third floors in Rainville and Kosich's units. Mitchell sought a legal opinion on the ramifications of legalizing them.

[137] Mitchell was advised by the counsel for MTCC No. 1056 at that time that if the Plaintiff were entitled to keep her third floor, the Board would have no legitimate basis for refusing the request of other unit owners who wished to construct a third floor and had the ability to do so. According to Mitchell, this would lead to chaos for MTCC No. 1056.

[138] A condominium corporation must consider the rights of *all* of its unit owners and not prefer the position of one over another.

[139] Another serious concern for MTCC No. 1056 was the impact that the enlargement of a number of the townhouse units would have on the Shared Facilities Agreement ("S.F.A."). The S.F.A [exhibit 286] is an agreement signed in 1991 by the 3 condominium corporations in Grand Harbour and it deals with common utilities between the 3 condominium corporations such as grounds-keeping, security, heat, lights, the recreation centre, and pool. The unit owners pay common expenses which are determined according to the number of units, as opposed to the size of the units. Under the current

agreement, because the number of townhouses is relatively small compared to the number of units in the towers, MTCC No. 1056 pays only 9 per cent of the overall expenses while MTCC No. 965 pays 63 percent and MTCC No. 1031 pays the balance.

[140] The S.F.A. was signed on the basis of the units being as they were at the time of the registration of the Declaration, not with modifications. It is generally accepted that the S.F.A. is an advantageous agreement for MTCC No. 1056 according to the evidence at trial from Michael Carson, Sam Hasan, and Mitchell. They all concurred that there is a certain level of resentment towards the townhouse unit owners from the other corporations, MTCC No. 965 and MTCC No. 1031, because of the perception that they are not contributing their fair share of the common expenses.

[141] A letter from the presidents of the other corporations, MTCC No. 965 and MTCC No. 1031, dated October 23, 2007 [exhibit 287] made reference to the fact of the illegal expansions into the attic at MTCC No. 1056. This letter stated:

> Should this situation be allowed to continue, it is our opinion that the proportional expenses accorded to the town homes through the Shared Facilities Agreement would have to be revisited. We trust that your corporation will be diligent in pursuing this matter to ensure that these spaces are closed and that no further "attic expansions" are permitted.

[142] The tension between the tower condominium corporations, MTCC No. 965 and MTCC No. 1031, and the townhouse corporation, MTCC No. 1056, has been evident in other situations. Mitchell testified that there was, for example, a dispute in 1999 involving the restoration of a cupola located on the grounds of MTCC No. 1056. The unit owners of the tower corporations were disgruntled about the monies being spent on restoration of the cupola.

[143] Mitchell recalled that the president of MTCC No. 965 stated that he wanted to arrange a meeting to discuss re-allocation of the expenses of the 3 corporations. MTCC No. 1056 views the SFA as quite advantageous to them and wish to preserve the *status quo.*

[144] The evidence of Sam Hasan ("Hasan") on this issue was of assistance. In my view, he was a credible witness who gave his evidence in an honest fashion. Hasan was articulate, had a good recall of the events in the past, and was fair-minded in his responses to questions put to him on cross-examination.

[145] Hasan moved into the Grand Harbour complex in 1994 and subsequently was involved as a member of the Board of Directors from 2001 to 2008 and of the Shared Facilities Committee commencing in 2002. He described the feeling of the tower corporations, MTCC No. 965 and MTCC No. 1031, towards MTCC No. 1056 on the issue of the S.F.A. as "hostile," because they believe MTCC No. 1056 is not paying its fair share of the common expenses. He testified that if more attics are converted into liveable space, he believes that the tower corporations will renegotiate the S.F.A.

[146] Further, he testified that his unit has a very large attic space and if the Plaintiff's third floor is legalized, he would insist in building into the third floor of his unit as well. Other unit owners would be entitled to do the same.

[147] The solicitor for the Plaintiff argues that on the base of fairness, the Plaintiff's third floor must be legalized. I do not agree with this submission. It is not simply the issue of what is fair or unfair to the Plaintiff that I must consider; I must consider what is fair or unfair to all of the unit owners. In my view, legalizing the Plaintiff's third floor at this time would have consequences that would be unfair to other unit owners in MTCC No. 1056. This includes the ability of 18 other owners in MTCC No. 1056 with large attic spaces to build into their attic area to create more space and render their units more valuable. The 18 unit owners with third floor potential did not buy their units with the intention of building another storey. They bought a two storey unit and paid the price of a two storey unit. If a third storey were built, the sale price would obviously be higher than the unit as a two storey.

[148] The other unit owners in MTCC No. 1056 who do not have the potential to build an additional storey are in a less advantageous position. In my opinion, allowing the 18 unit owners with third floor potential to build would be unfair to the unit owners as a group because those owners without that capacity are at a disadvantage. This outcome certainly cannot be said to accord with the intent and purpose of the Declaration.

[149] In addition, it is most probable that should other owners in MTCC No. 1056 build a third floor, the tower corporations, MTCC No. 965 and MTCC No. 1031, would revisit the terms of the S.F.A. The tower corporations would insist that MTCC No. 1056 pay a higher percentage towards the common expenses. This would be unfair to those owners who are not able to enlarge their units yet must pay higher fees nonetheless.

[150] Rainville had remedies available to her against Weldon prior to the hearing of this trial. Rainville chose, for whatever reasons, not to pursue her options. When considering the interests of Rainville, together with the interests of the other unit owners, and the interests of the condominium corporation, I am not persuaded that the Declaration must be amended in order to provide fairness to the Plaintiff.

**Is the Plaintiff entitled to an amendment to the Declaration pursuant to the statutory oppression remedy-- section 135?**

[151] The New Act provides an oppression remedy pursuant to s. 135:

> (1) An owner, a corporation, a declarant or a mortgagee of a unit may make an application to the Superior Court of Justice for an order under this section.
>
> (2) On an application, if the court determines that the conduct of an owner, a corporation, a declarant or a mortgagee of a unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant, it may make an order to rectify the matter.
>
> (3) On an application, the judge may make any order the judge deems proper including,
>
> > (a) an order prohibiting the conduct referred to in the application; and
> >
> > (b) an order requiring the payment of compensation.

[152] Counsel for the Plaintiff argues that MTCC No. 1056's conduct was oppressive in several respects:

- failure to repair the common element deficiencies;
- allowing the Plaintiff to renovate the third floor;
- issuing the estoppel certificate;
- leading the Plaintiff into a belief that the third floor would be legalized;
- issuing the demand letter in November 1998 requiring the Plaintiff to close up the third floor;
- implementing exception policy in October 1998 which was targeted at the Plaintiff;
- conducting the special meeting of 2005 and the AGM of 2008 unfairly; and
- failing to repair Rainville's leaking roof.

The aim of section 135, it is argued, is to protect unit owners from unfair treatment.

[153] Counsel for MTCC No. 1056 argues, firstly, that the oppression remedy contained in the New Act did not exist in its predecessor and cannot be applied retrospectively. Alternatively, counsel submits that the conduct of MTCC No. 1056 was at no time oppressive towards the Plaintiff.

[154] Counsel for the Plaintiff argues that the decision of Master Abrams in *MTCC No. 1250 v. Mastercraft Gro*up, [2006] O.J. No. 3600 stands for the proposition that section 135 can be applied retrospectively. However, I do not read that case as supporting that argument. It involved a motion brought to amend the statement of claim, including a claim for oppression. The Master noted, "It is well-settled law that there is a strong presumption against the retroactive application of legislation."

[155] In allowing the proposed amendments, the Master made no finding on the issue of whether section 135 ought to be applied retrospectively. Rather her decision to allow the oppression amendments was based on her finding: "At this stage, it is not clear to me that the oppression amendments are untenable at law."

[156] I am not persuaded that section 135 was intended to be applied retroactively, but even if it were, I do not find that the conduct of MTCC No. 1056 was oppressive towards the Plaintiff within the meaning of the legislation.

[157] Oppression is defined as conduct that is coercive or abusive. In *Niedermeier v. York Condominium Corp.*, No. 50, 2006 CarswellOnt 3935 (O.S.C.), Justice Shaw stated, "Oppression has also been described as conduct that is burdensome, harsh and wrongful, or an abuse of power which results in an impairment of confidence in the probity with which […] affairs are being conducted […]"

[158] It must be recognized that the Board is charged with the responsibility of balancing the private and communal interests of the unit owners and their behaviour must be measured against that duty. The court does not look at the interaction between the Board and the Plaintiff in isolation. Justice

Juriansz (as he then was) articulated some limits to the oppression remedy's power and the balance of interest that must be borne in mind in *McKinstry v. York Condominium Corp. No. 472*, 2003 CarswellOnt 4948 (S.C.J.):

> It must be remembered that the section protects legitimate expectations and not individual wish lists, and that the court must balance the objectively reasonable expectations of the owner with the condominium board's ability to exercise judgment and secure the safety, security and welfare of all owners and the condominium's property and assets…

[159] MTCC No. 1056's conduct must also be viewed in light of the behaviour of the Plaintiff. The solicitor for the Plaintiff denies any contributory negligence on behalf of Rainville on the basis that she had advised them of her planned renovations in her letter of January 16, 1998 and that some of her proposed work would clearly involve breaking into the common elements. Further, it is submitted that Rainville could not have known what the term "common elements" included. Rainville admitted that from her discussion with Ridout at the time of closing the house deal, she knew that she was purchasing certain parts of her unit while other parts were owned by the corporation—specifically with respect to townhouse 113, she had a terrace which was an exclusive use common element, which she could not change at will.

[160] This argument must fail, however, because in my opinion, the Plaintiff was not candid with MTCC No. 1056 and Brookfield about the nature and extent of her planned renovations. The onus is not on the condominium corporation to determine whether a unit owner's renovations involve work to the common elements. Rather, the onus is on the unit owner to inform the corporation of the extent of the work that is desired to be done and to inquire as to whether it will involve the common elements.

[161] It is clear that the Plaintiff's plan from the outset was to do extensive renovations of unit 113. To describe her intended changes as cosmetic or decorative is inaccurate. She intended on changing the floor plan of the townhouse to remove an existing bedroom and enlarge the master. This necessitated structural changes, which required the approval of the Board.

[162] The Plaintiff's letter of January 16, 1998 to the corporation and Brookfield describing the work she planned to do at townhouse 113 was misleading and minimized the extent of the work she planned to undertake. I do not accept the submission of Counsel for the Plaintiff that she complied with the governance procedures of MTCC No. 1056 by advising the Board of Directors and Cawthorn of the renovations she intended to do. Nor do I agree that MTCC No. 1056 and Brookfield tacitly agreed with her continuing with her modifications.

[163] The Plaintiff was aware very soon after taking possession of the unit of the serious nature of the deficiencies and she was advised by her own lawyer to keep track of the monies she was expending, yet she did not do so and was unable at trial to provide any documentation concerning the expenses she incurred in remedying the problems in her unit. No satisfactory explanation was provided for this, and she attempted to put the blame on her contractor, Penman, with whom she had a falling out.

[164] After discovering the rotten floorboards and the existence of mould in the unit, MTCC No. 1056 told the Plaintiff to stop work and that it had the responsibility of doing the work and would not pay the Plaintiff's contractors to do it. Notwithstanding this advice and the letter of February 19, 1998,

the Plaintiff continued on with the work. She had her own agenda and was not going to be dissuaded from it. It was only when the city served a stop work order on the Plaintiff in early April 1998 for failure to have a building permit that the work stopped for a very brief period of time.

[165] A review of the history of the actions of the corporation indicates that there has been an evolution of its view of the illegal third floor of unit 113. In mid-1998, MTCC No. 1056 was prepared to support Rainville's application to obtain legalization of the third floor. This did not occur, however, because the Plaintiff refused to sign a release in favour of the condominium corporation. No satisfactory explanation was provided by Rainville for her refusal to do so; she simply stated it was on the advice of her solicitor, Doane.

[166] In 1999, the Board created the "exception policy" to deal with the illegal third floors in units 113 and 114. Through this policy, Rainville could have received approval to use her third floor as long as she paid her share for using the extra space and upon sale of the unit, the third floor would have to be converted back into attic space at her expense. The Plaintiff and her husband refused to accept the exception policy and instead, Doane wrote to the condominium's lawyer indicating that the corporation ought to commence an application to correct the Declaration to include the third floor.

[167] The exception policy may not have been a perfect solution but it was, in my view, a *bona fide* attempt by the Board to deal with a problem in a manner that was fair to the owners of the units with the illegal third floors as well as to the other unit owners. The Board was entitled and indeed mandated to develop a policy which it viewed as reasonable and to put it to a vote. Section 17(3) of the New Act requires the corporation to take all reasonable steps to ensure compliance by owners and in so doing, the Board must make decisions, make recommendations to the owners, and ensure the Declaration, By-Laws and Rules are being followed.

[168] It may be the case that there are several ways of proceeding on any particular issue. The Board is entitled to make a determination that in its view, balances the interests of some owners with those of the other owners. That does not mean that it is unfair towards the unit owners who are unhappy with the decision. I reject the suggestion of the Plaintiff that the exception policy was oppressive and was developed to treat her unfairly.

[169] While the Plaintiff contends that the special meeting of 2005 and the AGM of 2008 were conducted unfairly, her view was not supported by credible evidence. There was nothing improper in the Board soliciting proxies from the owners in advance of the meeting. Similarly, at the 2005 meeting the president, Mitchell, threatened to resign, along with some other members of the Board if the vote was deferred. While the Plaintiff alleges this was improper behaviour, I disagree. Mitchell was president of the corporation and had invested a significant amount of time and energy in dealing with the problem of the illegal third floors. He supported the exception policy and made his views clear to the membership. There was nothing objectionable in doing so. Emotions may have run high at the meeting. However, if the membership did not support the actions or views of the Board, there was nothing improper in the members of the Board indicating they would step aside under those circumstances.

[170] I am not to be taken as stating that the actions of the condominium have always been reasonable. At times, the corporation was slow to respond and it is clear that over the years, a certain level of animosity has developed towards Rainville. She has become an on-going difficulty for the

corporation. Her conduct, in the view of the Board, has resulted in the incurring of very substantial legal fees, which has resulted in the owners having to pay special assessments.

[171] I am mindful of the comments of Justice Juriansz in *McKinstry v. York, supra*, with which I concur, that the condominium Board is charged with the duty to exercise proper judgment on behalf of all unit owners for their welfare and the proper management of the assets. The Court in exercising its discretion must balance the reasonable expectations of an owner with the duties of the Board to the ownership at large.

[172] Looking at the conduct of the Board from 1998 to date, I do not find that it was oppressive towards Rainville.

**Should the court order the third floor legalized pursuant to pursuant to section 32(8) of the Old Act/section 98(1) of the New Act?**

[173] The solicitor for the Plaintiff argues that due to both section 98 of the New Act, and the Estoppel Certificate the Plaintiff received, the Court ought to legalize the third floor.

[174] Section 98 (1) states:

> An owner may make an addition, alteration, or improvement to the common elements that is not contrary to this Act or the declaration if,
>
> (a) the board, by resolution, has approved the proposed addition, alteration or improvement;
>
> (b) the owner and the corporation have entered into an agreement that
>
> i. allocates the cost of the proposed addition, alteration or improvement between the corporation and the owner;
>
> ii. sets out the respective duties and responsibilities for the cost to prepare after damage, maintenance and insurance of the corporation and the owner with respect to the proposed addition, alteration or improvement; and
>
> iii. Sets out the other matters that the Regulations made under this Act […]

[175] The Plaintiff argues that because she received a clean estoppel certificate, the corporation is deemed to have acknowledged that the third floor was not contrary to the Declaration. It is argued that the third floor is clearly an addition within the meaning of the *Act*. It is submitted that the court ought to make the order and the parties could then enter into an agreement to satisfy the statutory conditions set out in paragraph (b). The case *Fisher v. MTCC Corp. No. 596* (2004), CarswellOnt 6242 (Ont. Div. Crt) is cited as support for this proposition.

[176] In my opinion, the facts of *Fisher* are quite different than the facts of the case I am required to decide. In that case, the contents of the estoppel certificate relating to the fitness of the chimney were wrong and the defendant corporation was aware of this information. Notwithstanding this knowledge,

the corporation assessed *Fisher* for the cost of the chimney repair and then put a lien on his property. As counsel for MTCC No. 1056 correctly points out, Fisher did not involve a unit owner trying to acquire title to a portion of the common elements through representations made in the estoppel certificate. As such, I find it of little value to my analysis.

[177] Furthermore, section 98 is a method by which unit owners can approve a change or improvement to the common elements or the granting of a lease to the common elements. There must be a vote of two thirds of the unit owners. In my view, the purpose of section 98 is not to enable the court to make an order approving an alteration to the common elements. It does not confer on the court the ability to usurp the function of the unit owners and the Board in certain circumstances. The remedy being sought by the Plaintiff pursuant to section 98 is not in accordance with the intention of the legislation and does not confer on the court the power to legalize the Plaintiff's third floor.



**2. (b) Should the Plaintiff be ordered to comply with the Declaration and close up the third floor pursuant to the Court's discretion under section 134 of the New Act or should the Plaintiff be granted a lease or a license to the third floor?**

[178] Section 134 of the new Act (section 49 of the old Act) empowers the Court to make an order enforcing compliance with any provision of the Act or the Declaration and it is discretionary. As a general rule, the Court will favour enforcement to preserve the integrity of the Declaration: *Re: Carlton Condominium Corporation No. 279 and Rochon et al.* (1987), 59 O.R. (2d) 545 (C.A.). In that case, the unit owners had installed a satellite dish in common element space with the consent of the declarant board and a subsequent Board sought an order for its removal. It is of note that in overturning the lower court's decision in this case, the Court of Appeal commented that the unit owners had acted in good faith and had bargained properly in entering into the arrangement. Nonetheless, the Court noted that the interests of the other unit owners must be taken into account and the Act provides that a Declaration may be amended only with the consent of the unit owners.

[179] When determining whether to exercise its discretion to enforce compliance with the Declaration, the Court must consider the facts of the particular case, together with the conduct of the parties. The discretion must be exercised judicially. It is not simply a matter of determining who acted appropriately in the circumstances. By way of example, in *Simcoe Condominium Corp. No. 67 v. McDermott*, [1998] O.J. No. 1758, Justice Harvey Spiegel considered an application brought by the condominium corporation for an order requiring the unit owner to remove a window she had installed in the attic of her unit, which was in breach of the Declaration. The unit owner had written to the Board for permission to install a window and acknowledged that she did not obtain written consent prior to undertaking the work. Justice Spiegel, noted the conduct of the Board was unfair and unreasonable in some respects. He still "reluctantly concluded that in view of the clear breach of the declaration by the respondent before any of the impugned conduct of the respondent's Board of Directors..," the unit owner must comply with the Declaration and remove the window and to restore the attic space to its original condition at her own expense.

[180] In *Peel Condominium Corp. No. 449 v. Hogg*, [1997] O.J. No. 623 (G.D.), Justice Carnwath considered the case of a unit owner who kept a dog in a condominium where the Declaration had a no pets rule. The unit owner resisted an application by the Condominium Corporation to enforce the no

pets rule on the basis that the condominium had not enforced the rule and there were other unit owners who had pets.

[181] In granting the application, Justice Carnwath found that the balance of equities favoured the condominium because the need for a general enforcement of the condominium's rules overrode the unit owner's enjoyment of her pet. In doing so, Carnwath J. noted the importance of a Declaration and the need for the corporation to be seen to be enforcing its rules and by-laws. He stated:

> Under the *Condominium Act* **the condominium corporation and each unit owner has a right to the compliance by all owners with the Act, the declaration and the by-laws and rules of the corporation.** Indeed, the condominium corporation has a duty to require compliance; where compliance is not forthcoming the condominium corporation has a right to apply to the Ontario Court for an order directing the performance of the duty and the court may exercise its discretion, order direct performance of the duty and include in the order any provisions that the court considers appropriate in the circumstances…" [Emphasis mine].

[182] The Court of Appeal commented on the importance of the Declaration in *Carlton Condominium and Rochon et al, supra,* when it noted,

> The declaration, description and by-laws, including the rules, are therefore vital to the integrity of the title acquired by the unit owner. He is not only bound by their terms and provisions, but he is entitled to insist that the other unit owners are similarly bound…"

[183] In the case before me, it is beyond dispute that the third floor of townhouse 113 is in violation of the terms of the Declaration. While that is not the fault of the Plaintiff, it does not follow that as a result, the Court must relieve her from her non-compliance. The particular facts of each case must be considered by the court when determining if an order ought to be made requiring compliance.

[184] There are many other unit holders whose interests cannot be ignored. Further, this situation has been on-going for a lengthy period of time and has caused upset, feelings of hostility among unit owners, and difficulty for the Board to manage the corporation. The Plaintiff has occupied and enjoyed the use of common element space since 1998 without paying for it. The issue of the Plaintiff's occupation of the common element space has become a significant problem for the Board.

[185] While the solicitor for the Plaintiff dismissed the suggestion that other unit owners with the capacity to build into the attic space would be entitled to do so if the Plaintiff is permitted to continue to use her third floor (the "floodgates argument"), I do not agree. The evidence was to the contrary.

[186] Hasan testified with the benefit of having been a member of the Board of Directors for 8 years and a member of the Shared Facilities Committee for 6 years. His unit had the ability to build into the attic space and he testified that he would demand a third floor for his unit if the Rainville third floor were legalized. There were other units with the ability to create additional space by building into the attic. The attraction is not difficult to comprehend: it would increase the size of the townhouse and its sale price on the market.

[187] In addition, Hasan testified that he believes that if other townhouse owners made applications to add a third floor to their units thereby enlarging the square footage, this would in all likelihood lead the other condominium corporations to revisit the SFA. According to Mr. Hasan's testimony, this would result in negative consequences for the townhouse owners as their contributions would undoubtedly increase.



[188] Guidance can be found in the reasoning of Herold J. in *Metropolitan Toronto Condominium Corp. No. 776 v. Gifford*, [1989] 6 R.P.R. (2d) 217. In that case, the condominium corporation brought an application to compel the unit owners to remove their dog, although the developer's agent had informed them that dogs were permitted on the premises. Justice Herold noted that the Declaration made it clear that pets were prohibited on the property. The Court had to balance the interests of the corporation with those of the unit owners, who had been misled at the time they purchased their condominium unit. In determining whether or not to exercise his discretion, Justice Herold considered a number of factors including:

- the nature of the total development;
- the reasonable expectations of the other occupants of the development;
- the existence of previous complaints about the dog by other unit owners;
- the perception of the seriousness of the particular issue by other occupants; and
- the advantages of requiring compliance compared to the advantages of permitting non-compliance.

[189] Justice Herold found that there had been no complaints about the dog and the dog did not appear to have actually interfered with any other owners. Nonetheless, he concluded that his discretion must be exercised in favour of enforcing the declaration. He noted,

> The major advantage of requiring compliance, on the other hand, appears to me to be that a message will be sent out by the board to the unit owners that the declaration and by-laws are in place for a good reason and they will be enforced, and a message will also be sent by the Court that where the board acts reasonably in carrying out its duty to enforce the by-laws and declaration the board will be supported by the Court. To permit non-compliance in this case would clearly open the door to numerous, possibly very legitimate, requests by other unit owners to exempt them from certain other requirements in the declaration and by-laws on the basis that each case should be decided on its own merits. While I do not disagree that each case must be decided on its own merits, at least by the Court if not by the board who appears to have no discretion, the general message surely must be that enforcement will be expected and exceptions will be rare and will require a court application in any event…"

[190] I agree with the comments expressed by Herold J. concerning the need for consistency and certainty in how the declaration will be enforced.

[191] In my view, on the facts of the case before me, my discretion must be exercised in favour of ordering compliance with the Declaration of MTCC No. 1056. I say this after considering the potential

adverse consequences of permitting non-compliance by Rainville with respect to her illegal third floor. Given the long history of this matter, the Court must send a strong message that the Declaration will be enforced. Further litigation by other unit owners is to be discouraged; they must understand that the provisions of the Declaration and the by-laws must be adhered to. I therefore order the Plaintiff must comply with the Declaration of MTCC No. 1056; she must close up the third floor of her unit and return it to attic/common element space.



[192] In addition, I find the comments of Herold J. concerning the potential unfairness of his decision to the unit owners applicable to the case before me. He noted,

> …This is not to say that the Giffords do not have a cause of action arising out of the misrepresentation but rather that their cause of action is against the real estate agent and perhaps her principal or principals but not against MTCC No. 776 with whom she had no connection whatsoever….

Similarly, in the case before me, Rainville's cause of action is or was against other parties, and not against MTCC No. 1056.

[193] An alternative argument put forth by the solicitor for the Plaintiff is that she ought to be granted a lease or a license to the third floor. It is unclear why she would be seeking an order from this court granting her a lease to the third floor. During the course of her evidence at trial, she indicated that a lease was not a resolution that held any attraction. Rather, in her words, it was "a disaster, the worst case scenario" for her. The Exception Policy was, in reality, a lease offered to the Plaintiff to occupy the common element attic space until such time as she sold the unit. Rainville made it clear at the time the policy was presented to her that she would not accept such a compromise. Had she wished to avail herself of the Exception Policy, she would have done so years ago when it was offered and the litigation would have settled without the necessity of a trial. That did not occur and in my view, granting the Plaintiff a lease to the third floor is no longer a reasonable or desirable outcome and I reject it. Based on the evidence, I am not persuaded that fairness dictates that the Plaintiff be granted a lease to the space that she is currently using as a third floor and has been since 1998.

**2. c) If the Plaintiff is ordered to close up the third floor, who should compensate her for her damages and the cost of closing up the third floor? Which Defendants, if any, are liable for payment of damages to the Plaintiff? Did the Plaintiff fail to mitigate her damages?**

**Vicarious Liability Argument**

[194] The Plaintiff argues that MTCC No. 1056 must be found vicariously liable for the actions and conduct of Boland. It is submitted that he had the knowledge that the third floor of Weldon's unit was illegal and he failed to act on it or to notify the Board. Alternatively, it is submitted by the Plaintiff that MTCC No. 1056 is deemed to have had the knowledge of Boland. No authority or case law was submitted in support of this argument and I note that the allegation of vicarious liability was not pleaded in the Amended Statement of Claim.

[195] In its reply submissions, counsel for the Defendant Gowlings, Mr. Bates, argues that through the actions of Boland and Weldon, it must be deemed that MTCC No. 1056 knew at the time of the Registration of the condominium corporation that the third floor was illegal. Counsel cites several cases in which the court found that knowledge of the directing mind of the corporation was attributed

back to the corporation: *R. v. Canadian Dredge & Dock Co.*, [1985] 1 S.C.R. 662. It is further submitted by Mr. Bates that in their roles as Directors of the corporation, Boland and Weldon were clearly acting within the scope of their duties when they failed to bring the illegal third floor issue to the attention of the other members of the Board. I do not accept this submission as a correct statement of the law nor does it accord with the evidence in this case.

[196] The Defendant Boland testified at trial. In stark contrast to Weldon, I found Boland to be candid and straight-forward in his testimony, and he did not attempt to mislead the court or blame others for his own actions. Boland had a good recollection of the events going back to the inception of Grand Harbour. He acknowledged that after telling Weldon in the spring of 1993 that he had to ensure the third floor was legalized, he did not follow up with him. The construction of the third floor commenced in the spring of 1993 and was completed by July 1993. In the spring of 1994, the partnership between Boland and Weldon was severed and Boland went on to develop other areas and the two have had no further business involvement since that time.

[197] Boland was on the declarant Board in 1993 when the condominium development was registered. He was in Weldon's unit a couple of times and on the third floor once. There were no further discussions with Boland about the illegality of the third floor. Boland became a member of the Board in September of 1997 when he was asked to do so to deal with the use of the courtyard. He resigned in December 1998 [exhibit 386] because another Board member suggested he was in a conflict of interest. During this period of time, the topic of the illegal third floor in unit 113 never came up and he never raised it. He became aware that Weldon had sold his unit when he saw a dumpster outside of townhouse 113. Boland went to some meetings after he resigned from the Board. In 2005, he moved to Aurora and has not been at Grand Harbour since that time.

[198] Boland was asked in cross-examination why he did not apprise the Board of the illegality of the third floor of unit 113 while he was on the Board of the Corporation. He responded that at the time, there were many things going on at the development. The situation was extremely stressful with the spectre of bankruptcy a constant presence. He noted that to legalize the third floor would have required an amendment to the Declaration which would have delayed the registration of the condominium and this would have resulted in a delay in the transferring of the monies that had been deposited for the units. This delay would not have been acceptable given the precarious financial situation the development was in.

[199] He acknowledged that, in hindsight, he could have raised the issue of the illegal third floor with the Board but he did not. He thought that Weldon would eventually have to deal with the issue, certainly before he was able to sell his unit because the lawyers would discover the illegality of the third floor. Given the huge financial stresses associated with the project, Boland did not view the third floor as a "big deal" at the time or as a major liability for MTCC No. 1056. I accept his assertion thatalthough he knew of the illegal third floor in 1993, over the years he forgot about it. This is hardly surprising, given the magnitude of the difficulties he encountered with the Grand Harbour project.

[200] Vicarious liability originated in the law of master and servant. It involves holding a corporation responsible for the actions of an individual, usually an employee. The concept of vicarious liability makes an individual's superiors liable for a tortious act done in the course of one's employment or closely connected to one's employment. Reflecting the doctrine of *respondeat superior*, vicarious

liability involves imputing to a corporation the intentions and conduct of its servants or agents: *Bazely v Curry*, [1999] 2 S.C.R. 534.

[201] Vicarious Liability has two requirements as set out in *Bazely, supra*: (1) There must be an employment relationship between the individual and the corporation, or it must be shown that the relationship between the tortfeasor and the person against whom liability is sought is sufficiently close as to make a claim for vicarious liability appropriate; (2) and the Plaintiff must demonstrate that the tort is sufficiently connected to the tortfeasor's assigned tasks such that the tort can be regarded as a materialization of the risks created by the enterprise. (See also J. Anthony VanDuzer, *The Law of Partnerships and Corporations*, 3rd[rd] ed. (Toronto: Irwin Law, 2009) at p. 206).

[202] The obvious difficulty with the Plaintiff's argument is that Boland was not an employee of MTCC No. 1056 at any time. Rather, he was a volunteer on a Board of Directors. Secondly, it cannot be said that the inaction of Boland could, in any respect, be perceived as him acting in the course of his duties as a member of the Board of Directors. Finally, the failure of Boland and/or Weldon to advise the Board as a whole of the illegality of the third floor of unit 113 was not connected in any way to their duties as Board members such that it can be argued that the wrong was related to the risks created by their positions. I note that no submissions were made by Plaintiff's counsel as to how the Boland-MTCC No. 1056 relationship ought to be the subject of vicarious liability.

[203] Alternatively, it is submitted, MTCC No. 1056 is deemed to have had the knowledge of Boland and this can form the basis for a finding of vicarious liability. I do not accept this argument. Direct liability involves the act of an individual being attributed to a corporation as though it were the corporation that actually performed the act. Direct liability is rooted in the idea of directors being merged with the corporation for the purposes of giving the corporation a directing mind. This is often referred to as "identification theory" and the concept was effectively explained by Lord Reid in *Tesco Supermarkets Ltd. V. Nattrass* (1971), [1972] A.C. 153 (H.C.) in a passage that was quoted by the Ontario Court of appeal in *Montreal Trust Co. of Canada v. Scotia McLeod Inc.* 1995 CarswellOnt 1203:

> Applicant living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability.

[204] Where an individual may be considered to be the directing mind of a company, liability attributed to him or her may equally be attributed to the company. For this to be the case, however, that individual must be conceptualized as being at the core of the company's operations: "In order to

trigger its operation…the actoremployee [*sic*] ..must be the "ego", the "centre" of the corporate personality, the "vital organ" of the body corporate, the "alter ego" of the employer corporation or its "directing mind." *Dredge v. R, supra.*

[205] In my view, neither Boland nor Weldon can be conceived of as the directing mind of MTCC No. 1056 and accordingly, liability cannot flow from them as directors to the corporation. As was noted in *Rushton v. Condominium Plan No. 8820668* (1997), 202 A.R. 299 (Q.B.):

> The board is not something independent of the condominium corporation. The condominium corporation's power and duties are exercised and performed by the board…The board's acts are not the acts of its members. The board's acts are the acts of the condominium corporation…"

[206] In the case before me, Boland was one of five directors of the Board and it is not suggested that he acted in a particular fashion that makes it appropriate to impute his knowledge to MTCC No. 1056 as a whole. He did not share his knowledge about the illegality of the third floor of unit 113 with his fellow Board members because he forgot about it. I agree with the submission of counsel for MTCC No. 1056 that there was no specific person who could be deemed the directing mind of the corporation. When Weldon was president and Boland was a director of the condominium corporation, there was no evidence that either of them ever "directed the affairs" of MTCC No. 1056. It is quite a different fact situation from a company, for example, operated by two brothers who owned all of the shares between them and made all of the decisions regarding the corporation. In that case, if one of the brothers failed to disclose something illegal to the other brother, a court might well find that this information ought to be imputed to the corporation.

[207] I am not to be taken to say that the knowledge of a director cannot ever be imputed to the Board of Directors as a whole. This is obviously a fact specific determination. Such an inference might be appropriate for example where a certain director is be considered the company's directing mind and that individual possesses knowledge where the circumstances suggest that the knowledge be attributed back to the corporation. In *Durham Condominium Corp. No. 63 v. On-Site Solutions Ltd.* 2010 CarswellOnt 9267, the court attributed knowledge of the president of a condominium corporation to the corporation as a whole. However, the facts of that case are very different from those before me. In *Durham, supra*, the president of a condominium corporation knew that a unit had been modified in a manner that violated the declaration. With this knowledge, he signed an estoppel certificate that stated there were no violations. The court noted that he acquired the knowledge of the violation in his capacity as president carrying out the executive functions required by the by-laws. He was obligated to sign the estoppel certificate on behalf of the corporation as part of his duties as a president. The court found that it was reasonable in those circumstances to transfer the knowledge of the president to the corporation. In the case before me, Boland was not the president and did not acquire the knowledge of the illegality of the third floor through his position on the Board. Further, Boland played no part in the execution of the incorrect estoppel certificate.

[208] In my view, there is no basis in law for a finding that Boland's or Weldon's failure to advise the condominium board of the illegality of the third floor of townhouse 113 gives rise to a finding of vicarious liability against the Corporation. Similarly, on the facts of this case, I do not find that the knowledge of an individual member ought to be attributed in law to the corporate entity.

**Failure of Plaintiff to call Michael Orr as witness**

[209] During the course of her testimony, Rainville made many references to her ex-husband, Michael Orr, and his involvement in the ordeal. He was present during many of the meetings and discussions with members of the Board, employees of Brookfield, and the lawyer, Doane. It is Michael Orr's voice that can be heard on the videos taken in February 1998 and marked as exhibits 130 and 265. He was actively involved in the events following the discovery of the mould and other water damage. Rainville confirmed during her evidence that she was in communication with him during the trial so clearly, he was available to attend court and give evidence.

[210] When asked about the location of Penman, Rainville testified that she was unaware of his current whereabouts. His brother, Jeff Penman, who did attend the trial, indicated that he had no idea where he was and they were estranged. Rainville and Penman parted on bad terms and she did not pay the balance of the contract price so I do not find it unusual that she did not call Mark Penman as a witness.

[211] Counsel for the Defendant MTCC No. 1056 asks that an adverse inference be drawn against the Plaintiff for her failure to call Michael Orr as well as other individuals, her contractor, Mark Penman and her friends, the Goebbels, who were involved in the re-design of her townhouse. Counsel relies on *Levesque et al. v. Comeau et al.* (1970), 16 D.L.R. (3d) 425 (S.C.C.) and *Vieczorek et al. v. Peirsma et al.* 58 O.R. (2d) 583 (C.A.) as support for the drawing of an adverse inference.

[212] Those cases, together with *Lambert v. Quinn,* 1994 CanLII 978 (Ont. C.A.) discuss the law of adverse inference and when it is appropriate that such an inference be drawn. In *Lambert v. Quinn, supra*, the Court stated "such an inference may be drawn against a party for failure to call a witness who may give material evidence when that party alone could bring the witness before the court."

[213] While it might have been helpful to hear evidence from the Goebbels, I do not find that the Plaintiff's failure to call them justifies an adverse inference being drawn. A party is not obliged to call every witness who might have some evidence to offer to trial.

[214] I find it quite surprising that Rainville did not call Michael Orr as a witness on her behalf since some of her evidence was hotly contested by other witnesses. Given the breakdown in the marital relationship, it may be that the potential value of his evidence was outweighed by other factors unrelated to the issues in this trial. His evidence may have duplicated that of other witnesses. It is not my function to second guess counsel's decision concerning evidence. Suffice it to say that I am not prepared to draw an adverse inference from Rainville's failure to call Michael Orr as a witness on her behalf.

**3. Was Brookfield negligent and did its actions constitute a breach of its duties pursuant to the *Condominium Act* and/or a breach of its fiduciary duty? What is the legal effect of the estoppel certificate? Pursuant to section 32(8) of the Old *Act,***

- 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 ow*ner* 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.

[215] This is consistent with the nature and purpose of an estoppel certificate under the Old Act. The Old Act never actually refers to an "estoppel certificate". The prescribed form, Form 18, "became widely known as an estoppel certificate, as the condominium corporation was stopped or prevented from changing the information therein.": See Mark Freedman, "The Status Certificate" in Richard Wong and Denise Thompson, eds., *Condominiums for Law Clerks: Buying, Selling and Financing under the New Legislation* (Toronto: Law Society of Upper Canada, Continuing Legal Education, 2002). Under section 76(1), the New Act, the term estoppel certificate is no longer used and the document is referred to as a status certificate.

[216] The information required to be disclosed and certified in Form 18 included the following: status of common expenses of a particular unit owner; amount of prepaid common expenses standing to the credit of said owner; amount of payment and next due date on account of common expenses; status of the budget; status of the reserve fund; disclosure of circumstances that may result in an increase in the common expenses for a particular unit; disclosure of any legal action to which the corporation is a party; consideration of any substantial addition, alteration, improvement or renovation to common elements or change to the assets of the corporation; status of insurance as mandated by the Old Act; contact of the property manager; and contact of the corporation's directors and officers.

[217] The purpose of an estoppel certificate under the Old Act was to provide financial information about a condominium that would not otherwise be available to a potential purchaser which could be relied upon. It thereby insulates the purchaser from hidden costs upon taking ownership. The items enumerated in Form 18 relate to foreseeable costs that might be passed on to a prospective purchaser upon taking ownership. Absent an estoppel certificate, it is unclear that a prospective purchaser would have means to acquire information about hidden costs such as a pending special assessment or outstanding debts of the previous owner. This information might well be integral to a decision of whether or not to purchase a unit.

[218] The Westlaw annotation to the case *Stafford v. Frontenac Condominium Corp. No. 11* 1994 CarswellOnt 730 (Ont.C.J.(Gen.Div.)) states:

> 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…

[219] Under the Old Act, Form 18 did not require information as to whether the unit was in violation of the declaration.

[220] In the case before me, there were two estoppel certificates prepared: October 20, 1997 [exhibit 7] and December 12, 1997 [exhibit 9]. Both were prepared by employees of Brookfield. The first certificate was incorrect as it referred to the Board members from one of the other condominium corporations. The second estoppel certificate was prepared by Pamela Cawthorn as part of her duties as an employee of Brookfield. It was signed by the Regional Manager, Patrick Post, in the course of his employment with Brookfield and in his capacity as assistant secretary to the corporation. It contained information that was different than the information imparted to Rainville when she was considering buying unit 113:

- the amount of the reserve fund was much less;
- the policy with respect to owning more than one pet was not as she had been advised; and
- there was an outstanding lawsuit against MTCC No. 1056.

[221] Evidence was called at trial concerning the practice in place at the time for preparation of the estoppel certificates. Effective October 1, 1997, the property manager for MTCC No. 1056, MTCC No. 965 and the Shared Facilities changed from CBS to Brookfield. Although a signed copy of the management agreement between MTCC No. 1056 and Brookfield was not produced at trial, all of the evidence indicated that the terms of the unsigned agreement [exhibit 350] were those that governed the relationship. Pursuant to the agreement, one of the responsibilities of Brookfield was 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.

[222] The evidence from Patrick Post was that Brookfield had difficulty obtaining the files from CBS through Georgetta Semlyen and the documentation that was provided was not complete. The certificates were prepared using information contained in the unit file along with records from the condominium corporation. Any irregularities in the unit along with information concerning the status of payments for common expenses was included in the certificate, along with particulars about the corporation, the composition of the Board of Directors, and the amount of the maintenance fee for the particular unit. Other documentation was to be enclosed with the certificate such as the Declaration and the By-laws, the insurance certificate, the budget and the financial statements for the corporation.

[223] 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.



[224] In the case of the Plaintiff's purchase from Weldon, there was nothing in the records of the corporation that referred to the construction of the third floor or its illegality. There was no evidence that the Plaintiff ever spoke to anyone at Brookfield about the third floor of her unit prior to the closing of the deal.

[225] The Plaintiff testified that she was not familiar with estoppel certificates as she had never purchased a condominium before. Her agent, Garrick, advised her that the estoppel certificate would substantiate the information that Rainville got from the vendor and his agent, Wery.

[226] When the second estoppel certificate was prepared, it was sent to Gowlings and enclosed the Declaration and By-Laws, the proposed management agreement with Brookfield, the financial statements for the period ending April 30, 1996, and the 1997/98 budget. It indicated Weldon was in arrears $1,050.14 for the payment of common expenses.

[227] It was due to the fact that the information supplied to Rainville was not supported by the estoppel certificate that she and her husband tried to get out of the deal, with the assistance of their lawyer, Doane. Of paramount concern was the restriction on the number of pets that were allowed in a unit. The estoppel certificate made no reference to the number of floors in unit 113, as this was not part of the information to be included in it.

[228] Counsel for the Plaintiff argues that liability flows from the incorrect information contained in the certificate. It is submitted that Post ought to have discerned that the third floor was constructed in breach of the Declaration of the corporation, had he conducted himself as a prudent property manager. It is not suggested, however, what exactly Post ought to have done to have come to this conclusion. Brookfield became involved with Grand Harbour at the time of the Plaintiff's purchase of Weldon's unit. It had to rely on the information provided to it by the prior property manager, CBS, along with information emanating from the corporation and its Board. In October of 1997, Weldon had not imparted the information about the illegality of the third floor to the Board and Boland testified that that time he assumed Weldon had taken care of the issue. So the Minutes of the meetingswould not have shed any light on the illegality of the build out. Because Weldon had not disclosed these facts, the unit file pertaining to unit 113 obviously would not have contained any information that would have made it clear the third floor contravened the Declaration.

[229] While counsel for the Plaintiff argues that Brookfield had "possession of, or certainly access to, all relevant documents which would have disclosed the building of the third floor," the evidence does not support this argument, as I have discussed already. I do not find that there was negligence on the part of Cawthorn or Post in the completion of the December 1997 estoppel certificate.

[230] The Plaintiff testified that the listing agreement described the townhouse as a 3 storey unit. Obviously, the real estate agents composed the listing agreement, presumably based on information

provided to them from Mr. Weldon. One wonders what enquiries agents Wery and Garrick made before drafting the listing agreement. Obviously, as experienced real estate agents, they would have known that potential purchasers would rely on the information contained in the listing agreement. Since the vast majority of the townhouse units in MTCC No. 1056 did not have three floors, one would expect that the agents would realize the configuration of townhouse 113 was different than the others and would make further enquiries before committing the information to a formal document. However, quite apart from dismissing the lawsuit against them, the Plaintiff did not call either agent to testify at trial so it was not possible to ascertain the source of the information concerning the third floor.



[231] Counsel for the Plaintiff submits that there was a duty on Post and Cawthorn on behalf of Brookfield to search for various documents to discern the history of the unit and the illegal construction of the third floor. There was nothing in the evidence and nothing in the case law to suggest that such a far-ranging duty was imposed on Brookfield and I reject this argument. It is not the obligation of a property manager to conduct an investigation to determine if there has been duplicitous conduct on the part of a unit owner which might somehow compromise the title to a unit, prior to issuing a certificate.

[232] 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. Based on the documentation that was available, it is not reasonable to suggest that somehow, Brookfield ought to have determined that Weldon had built an illegal third floor in unit 113.

[233] It is further submitted by the solicitor for the Plaintiff that Brookfield "knew that the estoppel certificate was the crucial document of Kelly's purchase of the unit" and that the estoppel certificate "formed the foundation of Kelly's purchase of the unit." This latter argument is not supported in any way by the evidence. Rainville signed the agreement of purchase and sale without reviewing an estoppel certificate or indeed without reviewing the agreement with her lawyer. How can it be said that she relied on a document she had never seen as the "foundation" of her purchase?

[234] Rainville testified that the number of pets that were permitted was critical to her and she was concerned about other issues as well. Thus, when she received the second estoppel certificate and it indicated the reserve fund was not as she had been told, limitations on the number of pets as well as the existence of lawsuits, she made inquiries to satisfy herself on these points. In fact, the pets issue was so important that Rainville got Doane involved and the deal was in limbo for a period of time, because the estoppel certificate did not support what Rainville had been led to believe about the pets.

[235] It is beyond dispute that the estoppels certificate was incorrect. But, in order to be successful in its claim against Brookfield, the Plaintiff must be able to demonstrate that she relied on the information contained in the estoppel 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.

[236] It is of significance, in my view, that upon receiving the initial estoppel certificate in October of 1997( with erroneous information) which indicated there were continuing violations of the Declaration and/or By-Laws, the Plaintiff did not make any inquiries to determine what they were. She did, however, contact the lawyer who had an action against the condominium corporation to obtain further details and she had her husband contact Doane.

[237] The suggestion that the estoppel certificate was the "critical document in the purchase of the unit" is not supported by the evidence, nor by the actions of the Plaintiff.

[238] The Plaintiff's suggestion that Brookfield had an obligation to take steps to force the MTCC No. 1056 to legalize the third floor is, in my view, without merit.

[239] Further, there is no basis for the argument that Brookfield ought to be imputed with the knowledge that the Plaintiff would not have purchased unit 113 if it were only a 2 storey unit. Certainly, Rainville did not testify about any discussion she had with either Cawthorn or Post concerning the third floor prior to the deal closing.

[240] The enforcement of an estoppel certificate is most commonly sought where there has been non-disclosure of the potential for a major expense that subsequently results in a purchaser being charged a special assessment shortly after taking ownership. *Fisher v. Metropolitan Toronto Condominium Corp. No. 596*, [2004] O.J. No. 5758 (Ont. S.C.), relied on by the Plaintiff, is an appeal of the judgment of a Deputy Small Claims Court Judge. In that case, after closing, the Plaintiff received a notice of assessment for the cost of replacing chimneys. The estoppel certificate the Plaintiff in that case received indicated there were no problems with the chimneys, but the evidence at trial was that the Corporation was aware of problems with the fireplaces and chimneys and did not disclose this. Justice Ground noted in these circumstances, "the corporation is precluded from claiming as against a unit owner the payment of a special assessment required in respect of a problem or condition negligently excluded from an estoppels certificate." That is a different fact situation than the one at hand in two significant respects: in *Fisher, supra*, the issue was of a financial nature, which is the intended purpose of an estoppel certificate; and secondly, the Plaintiff in that case was not attempting to compel the corporation to act positively as is the case before me. To put it another way, the estoppel certificate was being used as a shield in *Fisher*, not as a sword, as Rainville seeks to do.

[241] In my view, *Fisher, supra,* does not stand for the proposition that a corporation will be bound by an estoppel certificate regardless of the nature of the document's inaccuracy.

[242] In *Marafioti v. Metropolitan Toronto Condominium Corporation No. 75,* [1994] 47 A.C.W.S. (3d) 1331, O.J. No. 1110, the Court considered the case of a wooden deck and fence that were built adjacent to the Plaintiff's townhouse unit. These additions had been built into the common elements, with the agreement of the developer before the condominium was registered. The applicants wished an order preventing the respondent from removing the deck and fence. The corporation sought an order compelling the applicants to remove the deck. Justice Greer noted,

> If the owners are tenants in common of the common elements of the townhouse, including the exterior walls, any change such as the adding of a deck, the extension of a fence which is attached to the exterior wall, affects all unit owners….

[243] Despite the fact that the unit owners had been granted permission to effect the changes that they did, the court dismissed their application for an injunction and the homeowners were ordered to remove the deck and fence from their townhouse. The case before me is analogous to *Marafioti, supra*. There was no agreement for Weldon to build out the third floor. This addition involved building into the common elements which clearly affects all unit owners. Even accepting Weldon's evidence that he

had the agreement of Pelican prior to registration, on the reasoning in Marafioti, the third floor must be returned to attic space.

[244] As I discussed above, while the case involving Rainville is different factually from *Carleton Condominium Corp. No. 279 v. Rochon, supra*, the analysis by the Court of Appeal is most helpful. In finding that the unit owners were not in compliance with the declaration even though they had the consent of the board at the time they installed the dish, the court ordered the satellite dish be dismantled.



[245] Based on the reasoning in *Rochon, supra*, even if Weldon had secured the consent of the declarant Board to the build out in to the third floor, in the absence of an amendment to the Declaration, this construction would be subject to close up and restoration to the original attic space.

[246] There was no evidence to support a claim against either Cawthorn or Post in their individual capacity. As employees of Brookfield, both of these individuals had their duties and responsibilities set out in the Management Services Contract. To paraphrase their obligation, it was to act in the best interests of MTCC No. 1056 and therefore, in the interests of all of the unit owners. There is no duty to Rainville owed by Cawthorn or Post and this must have been obvious prior to trial.. It is unclear to me why they continued to be Defendants in their personal capacity at the trial. The action against them must be dismissed.

**4. Was the Defendant Gowlings negligent in the handling of the real estate transaction? If so, did the negligence cause any damages and if so, what are the damages flowing from the negligence?**

[247] The Plaintiff asserts Gowlings was negligent in their handling of the purchase of the condo, because they failed to meet the standard of care of a reasonably competent lawyer practising in the area of real estate law in Toronto in 1998 and in so doing, they failed to ascertain that the third floor was not properly part of the townhouse unit.

[248] Justice Doherty described what constitutes the actions of a reasonable lawyer in *Folland v. Reardon*, [2005] O.J. No.216 (Ont. C.A.),

> In accepting the reasonably competent lawyer standard, I do not detract from the often repeated caution against characterizing error in judgment as negligence…the reasonable lawyer standard does not call for an assessment of the sagacity of the decision made by the lawyer. The standard demands that the lawyer bring to the exercise of his or her judgment the effort, knowledge and insight of the reasonably competent lawyer. If the lawyer has met that standard, his or her duty to the client is discharged, even if the decision proves to be disastrous…

[249] Solicitor Latimer candidly admitted that she had very little actual recollection of the Plaintiff's transaction. The clerk, Ridout, who met with the Plaintiff January 16, had a very vague recollection of the meeting or what was discussed.

[250] Rainville testified that she was certain the listing agreement was in the Gowlings file in the boardroom during the meeting with Ridout on January 16, 1998. This was disputed by Latimer who stated that she saw the listing agreement in April 1998 only after the issue of the third floor arose. The letter of retainer to Gowlings [exhibit 8] enclosed only the agreement of purchase and sale. Ridout has

no recollection of the meeting with the Plaintiff on the closing date and Latimer was not present, so the only evidence before the court on this point is that of Rainville, who was adamant the listing agreement was there. However, Rainville could not advise the Court how the listing agreement made it into the Gowlings file prior to her attendance at their office. It clearly was not sent with the agreement of purchase and sale, nor was their correspondence from the agents sending the listing agreement to Gowlings.



[251] If the listing agreement was available and reviewed, it would have been patently obvious that the townhouse was described as a three storey unit, which does not accord with the description in the vertical cross section and the illegality of the third floor would have been discovered prior to closing.

[252] Rainville recalled that Ridout reviewed the estoppel certificate with her and explained what constituted common elements and exclusive use common elements. According to Rainville, Ridout told her that she owned "the upper most surface of the drywall to the concrete level in the basement." Rainville understood this to mean that she owned from the basement floor to the ceiling on the third floor. Rainville did not describe the townhouse to Ridout nor was she asked to do so.

[253] Ridout had no independent recollection of the meeting with Rainville on January 16, 1998, or of what documents she reviewed with her, although she had some memory of the Plaintiff who she described as "flamboyant and well-dressed". It was her usual practice to review the Statement of Adjustments with the client but not the plans or drawings for the unit. She did not recall having a discussion with Rainville concerning what exactly it was she was purchasing or going over the common elements of the condominium. She did not recall advising Rainville of the boundaries of her unit.

[254] If there had been asked a question concerning the boundaries, she would have referred to the registered Declaration, Schedule C. She assumed any issues regarding the transaction would have been dealt with by the lawyer handling the deal, in this case by Latimer.

[255] Rainville testified that she was not shown the location of her unit on any of the survey plans. The Horizontal Plans [exhibit 282] had been obtained by Gowlings as part of its standard searches on residential real estate transactions. Ridout did not review the horizontal plan with Rainville nor did she ask her whether she wanted to take a look at it. Counsel for Gowlings argues that even if the horizontal plan were reviewed with the Plaintiff, the illegal third floor build out would not have been discovered. Gowlings does not dispute that Latimer did not obtain and review with Rainville the vertical plans, the cross-section of the registered survey sheet [exhibit 246].

[256] Latimer acknowledged that she knew it was a multi-level townhouse but the number of levels was not significant to her. She agreed that in the usual course she met with the purchaser and went over the plans with the client to ascertain the boundaries of the unit and to ensure the client is getting what they thought they had purchased. Latimer conceded it was the lawyer's obligation to meet with the client and confirm the boundaries of the unit. She further acknowledged that Rainville was not given the opportunity to review the boundaries of the unit she was purchasing and no-one reviewed Schedule C showing the vertical boundaries with her. Latimer never discussed the boundary issue with Ridout prior to the closing. However, Latimer did not believe it would have altered the outcome. Even if she had been present at the meeting on the day of closing, she would have shown Rainville the plan

with the location of her unit and this would have revealed nothing about the number of levels in the unit.

[257] It is unclear from the evidence whether Gowlings received a copy of the registered Declaration prior to the closing of the transaction. Latimer testified that in her usual practice, she would have received and reviewed the registered Declaration along with Schedule C, She had no specific recollection of doing so in this case.

[258] The solicitor for Gowlings argued that there was nothing in the file that would have or should have alerted Latimer to the fact that the unit being purchased had an illegal build out into common element space and that furthermore, Latimer relied on the clean estoppel certificate in issuing her opinion on title.

[259] Expert opinion was called by the Plaintiff and the Defendant Gowlings on the standard of care and it was of great assistance to the court.

[260] Counsel for the Plaintiff called solicitor Robert Aaron ("Aaron") to provide an opinion on the standard of care of a reasonably competent solicitor acting in similar circumstances in 1998. Aaron was qualified by the court as an expert in the conveyancing of real estate and in particular in the area of condominiums. I found Aaron to be a credible, knowledgeable witness who answered questions fairly. His evidence was of great benefit to the court and I did not find him to be an advocate as submitted by counsel for Gowlings.

[261] He testified that it is the obligation of the solicitor handling the condominium purchase to determine what his or her client was buying and in order to do so, the solicitor needed to review the plans and the declaration with the purchaser client prior to closing. Buying a condominium unit is very different than purchasing a detached home. Aaron outlined the steps that a lawyer needed to undertake: review of the agreement of purchase and sale; and do a title search which includes the abstract of title as well as reviewing the plans on file at the registry office. Aaron testified that the lawyer must compare the actual unit with the plans on file to ensure that the unit to which title is to be taken is indeed the unit that the client intends to purchase. He stated, "the most important part of the transaction from the point of view of a lawyer is to make sure that what the client is expecting to get in terms of where the unit is, the size, shape, configuration in relation to the other units is in fact what the client is getting title to. And if the lawyer doesn't compare those two things with the client's understanding, then the lawyer is not doing any service to the client. The lawyer must make sure that what the client thinks he is getting or she is getting, is in fact what title will be transferred to."(transcript p. 177 line 21) While Aaron did not state that reviewing the vertical plans for a condominium in every case was the standard in 1998, he was quite clear that a prudent lawyer would have reviewed **all** of the horizontal plans.

[262] In essence, Aaron testified that it is the responsibility of the solicitor handling the transaction to ensure that the client is getting what he or she believes they purchased. In his words,

> …it's my job to make sure that the client understands what they have, and what they don't have, and whether what they have is what they thought they had before we went over the plans. It's crucial to make sure that the understanding and the plans match. (Transcript p. 179, lines 17-22)

[263] In the case of a multi-level condominium unit, according to Aaron, the lawyer should ask where the staircases are located and how many levels there are. Aaron stated that at the very least, Latimer should have pulled the plans for level one where the Plaintiff's unit was located and reviewed these plans with her to ensure the unit she was getting was the proper one and correctly identified on the plans. Aaron testified there were a number of "red flags" which ought to have led to further inquiries by the lawyer: the indication of a first floor on level one; the indication on the cross-section of the second floor on level one; and the absence of an indication of a third floor for unit seven on level one. These red flags were ignored, according to Aaron, and this constituted a breach of the minimum standard of practice. In his opinion, the failure of Latimer or her designate to review with Rainville the number of floors in the unit and the failure to note the absence of the third floor on level one, plan G, fell below the appropriate standard.

[264] The expert in the practice area of real estate and conveyancing called by Gowlings was Donald Thomson ("Thomson"). Thomson was knowledgeable and fair in his evidence and in my view, was a credible, impartial expert. His opinion differs from that of Aaron in terms of what the obligation was for a solicitor acting on a condominium deal in 1998. In Thomson's opinion, there were two things that a prudent solicitor would do when acting for a buyer of a resale condominium in 1998: (1) review Schedule C of the Declaration which sets out the boundaries of the unit; and (2) pull the horizontal plans and point out to the purchaser-client where the unit was in relation to other units and to show the exclusive use elements as well as the parking spots and lockers.

[265] Thomson testified that in his opinion, it was not the standard of care for the lawyer to pull both the horizontal and vertical plans, unless there was some issue about the boundaries. In this case, the estoppel certificate indicated there were no violations of the Declaration, so there would be no reason for the lawyer to be suspicious.

[266] In his practice, Thomson has never seen a case where there was a build-out into the common elements; such an occurrence would be extremely rare, as he described it "one in a million." Thomson is of the view that Aaron's expert opinion is not the standard of care, but rather the standard of perfection.

[267] In cross-examination, Thomson agreed that the client ought to be shown the horizontal plan and the boundaries of the unit identified, which was clearly not done with Rainville. He agreed this failure was a breach of the standard of care.

[268] Both experts agree that the client must be shown the boundaries of the unit they are purchasing. Even if the lawyer did not review the vertical plans with the client, the boundaries of the unit had to be described from Schedule C of the Declaration to ensure that the purchaser is getting what they believe they bought. In this case, this was not done. It is not disputed that Rainville was not offered the opportunity to review the plans.

[269] The file from Gowlings was disorganized and incomplete. In fact, during the course of the trial further productions were made. It was unclear whether a copy of the registered Declaration was contained in the Gowlings file at the time of the closing. Given the lack of certainty about the contents of the Gowlings file, the lack of recollection of Latimer and Ridout together with the evidence from Rainville, I find on a balance of probabilities the listing agreement was available for review on the day of the closing. Latimer must not have reviewed the document, which indicated the townhouse was a

three storey unit. Had she done so, after reviewing the plans it would have been obvious that the third story was not properly a part of the unit.

[270] However, even accepting that Gowlings did not have the listing agreement and was not told that the Plaintiff had purchased a three storey unit, I am of the opinion that Latimer fell below the standard of care of a real estate lawyer practising in Toronto in 1998.

[271] Purchasing a condominium unit is far different than purchasing other types of real estate such as a detached house or a recreational property. I agree with the opinion expressed by Aaron that it is the lawyer's responsibility when acting for a purchaser of a condominium unit to ensure that the client is getting title to what they believe they have transacted for. 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.

[272] In the case of the Plaintiff's unit, the lawyer or designate ought to have reviewed the plans for MTCC No. 1056 showing Level 1 Units 1 through 16. Rainville's condominium, townhouse 113 was located on the plans at Level 1, Unit 7. Counsel for the Defendant Gowlings argued that even if the horizontal plan had been reviewed with the Plaintiff, it would not have revealed that there was an illegal third floor. I do not accept this submission. 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.

[273] The fact that Gowlings had no reason to suspect there was an illegal build- out into the common elements is of no significance. It does not obviate the lawyer's duty to his or her client to protect her interests and ensure that what she was in fact purchasing was what she understood it to be. This they failed to do. I do not agree that the standard as endorsed by Mr. Aaron is one of perfection or is one that is made with the benefit of hindsight. Rather, in my opinion, it is what a reasonably prudent real estate lawyer in these particular circumstances should have done

[274] Latimer and Ridout knew very little about Rainville, even the most basic of facts—for example, her level of sophistication as a purchaser of real estate or her familiarity with condominiums. They had an obligation to meet with her, discuss the purchase with her and ensure that she was buying what she had contracted to buy. This they failed to do.

[275] I reject the submission that "while it would have been preferable for Gowlings to review the Horizontal Plans with Ms. Orr, their failure to do so made no material difference." 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. Aaron testified that he believed it did; Thomson testified that only the horizontal plan had to be shown to the client, the boundaries of the unit described with reference to Schedule C of the Declaration, which sets out the horizontal and vertical boundaries of the unit. Even by Gowlings' own expert's evidence on the standard of care, there was a breach by Latimer as no plans at all were

reviewed with Rainville nor was reference made to Schedule C of the Declaration. As I have previously indicated, in this case, if the horizontal plans had been shown to Rainville, it would have led to further inquiries by the solicitor, which would have alerted her to the existence of the illegal third floor.

[276] Furthermore, while counsel for Gowlings submits that Latimer was entitled to rely on the estoppel certificate with respect to the issue of title, in my view, this is an over-statement from a solicitor's perspective, of the importance of the certificate. 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.



[277] Had the plans been reviewed with the client, the illegality of the third floor would have been discovered. Had Latimer or Ridout engaged in a discussion with their client about her purchase, it is quite likely the third storey issue would have become apparent.

[278] It 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. In her evidence, she indicated that she required the space provided by the third floor; she had looked at other units not as large as town house 113 and found they were not adequate for her needs. The failure of solicitor Latimer or her designate Ridout to go over with the Plaintiff the plans showing her unit prior to closing the deal, in my opinion, was a breach of the standard required of a solicitor in similar circumstances acting on a condominium transaction in 1998.

***DAMAGES***

**5. If any of the defendants are found to be liable to the Plaintiff, what are damages owing to her?**

[279] In her written submissions, the Plaintiff's position on damages is as follows:

> The Plaintiff submits that she is entitled to damages if the third floor is legalized, and even if the third floor is not legalized. Schedule "A" sets out the damages she is entitled to with legalization, and Schedule "B" sets out the damages she is entitled to without legalization. The Plaintiff submits that the damages that any and all of the Defendants are liable for the damages sought and the Court has the necessary power to apportion those damages amongst any Defendants that are found liable.

[280] With the greatest respect to counsel, given the complex nature of the allegations against the various Defendants and the variety of relief sought as well as the evidence heard over the course of the better part of three months of trial time, the brevity of the submissions on damages is of little assistance to the Court in determining appropriate damages.

[281] Based on my findings, the Schedule B chart appended the Plaintiff's written submissions would apply ["without legalization of the 3rd floor"]. This Schedule states that the "total of all amounts

claimed is $388,502.89 (excluding expert evidence)." Upon closer examination, this is an inaccurate statement. The schedule sets out for a total sum of $388,502.89:

- amounts for renovations to all floors, including materials and various contractors [$106,475.89];
- the associated costs with the delay in moving in back in 1998 [$94,442.53];
- the Gowlings accounts [$44,521.97];
- redecoration and renovations [$89,966.59]; and
- the associated costs of converting the third floor back to an attic [$53,095.91].

[282] In addition to this amount, the following items are claimed:

- the fees paid to Penman [$205,000.00];
- the loss of value of third floor [$225,000.00];
- the cost to remove the third floor [$179,126.26];
- the cost to remedy the structural defects in 1998 [$201,880.51];
- and the registration costs [$43,183.76].

[283] There are punitive damages claimed as well, although there is no amount inserted for this. When I add up these sums, I arrive at a figure of $1,242,693.30 so it is unclear why counsel indicated the total damages being claimed are $388,502.89.

[284] In addition, when I reviewed the items listed in Schedule B, there were no details provided as to what work was done on which floor. For example, there is a claim for Mark Penman, Custom Builder in the sum of $205,000.00. The supporting documentation for this is a series of cheques from February 5, 1998 to September 30, 1998 which total $342,805.60. The amount claimed is $205,000 although there is no explanation of what that amount represents. Rainville testified that she signed a contract with Penman for $130,000, but she was unable to produce it at trial and could not recall if that sum included materials. No invoices from Penman itemizing the work were produced. Filed as exhibit 135 was an undated letter from Mark F. Penman to Rainville and her husband which estimated the cost to "restore unit 113 to an acceptable standard of workmanship" to be $239,000. This was apparently presented to the Board at a meeting on February 17, 1998, but no contract was ever signed with Penman to do the work.

[285] Similarly, there are invoices from Rowan Hardwood Floors, The Fireplace Shoppe, Glen Tech Construction, painters, light stores, and for a central vacuum system, to name a few. Again, there are few specifics provided and the court has no way of determining whether the work that was done relates exclusively to the 3rd floor or whether the sums paid were for work done for the renovations to floors 1 and 2.

[286] To make the point, Rainville testified that she paid Brenlo Inc. $4,390.78 for mouldings due to the water damage. However, the invoice indicates the amounts were for baseboards, casings, door jambs, etc. and does not state where these pieces were installed. Further, Rainville testified that she paid an additional $13,410.84 to Entablature Frieze and Pillars but had no cancelled cheques for these amounts. Again, it is unclear what these amounts relate to, given the fact that the Plaintiff intended to do significant renovations to the townhouse.



[287] The Declaration [Exhibit 104] states that the unit owner must repair damage in the unit. The exception to this would be negligence attributable to the condominium corporation which caused the damage. The obligation is on the Plaintiff to prove her damages. The Court should not be left in the unenviable position of having to guess at the amounts that were spent to repair damage through the common elements. The Plaintiff acknowledged that she failed to keep receipts for the work that was done, although no satisfactory explanation was provided for this omission. Many of the items included by the Plaintiff in her schedule of damages are not recoverable in this action, in my opinion. While the Plaintiff claims she repaired damage in her unit which she attributes to common element deficiencies, this was not proven at trial. Quite apart from the lack of specificity in the documentation, the submissions of the Plaintiff do not indicate against which Defendant(s) certain damages are sought. The allegations against the various Defendants are different. Rainville seeks these damages for work done to her unit: $106,475.89 for renovations to all floors; $89,966.59 for redecorating; and $201,880.51 for the repair to common elements, for a total of $388,502.89. It is not clear on what basis these amounts are sought. The Plaintiff has not proven negligence against the condominium, Brookfield, Post, or Cawthorn.

[288] If the townhouse was negligently constructed neither MTCC No. 1056 nor Brookfield is liable for this. MTCC No. 1056 was registered in 1993 and Weldon moved in that year and lived there until he sold it to the Plaintiff. It was in receipt of the Construction Control Technical Audit ["the Audit"] in 1994, according to the evidence. This document set out the various construction deficiencies that existed following completion of the project. There was no evidence to suggest that MTCC No. 1056 failed to attend to the matters listed in that Audit, such that a finding of negligence might be made against it. The various experts who testified at the trial did not relate the water damage to a deficiency listed in the Technical Audit. Thus, the Plaintiff has not established any basis for a finding that MTCC No. 1056 was negligent and therefore responsible for paying for the repair of damage inside her unit, so this claim must fail.

[289] Throughout these proceedings and indeed throughout the written submissions, it is argued that the Plaintiff was an innocent victim. Her solicitor submitted that she purchased townhouse 113 in good faith and through no fault of her own, she is left with a third floor to her unit on which she has spent significant sums of money in renovations, yet she does not have legal title to it. As well, she has incurred many thousands of dollars in legal fees. While I agree with this description of Rainville as an innocent purchaser, it is important to note that she has made certain decisions which have had an effect on her ability to recover damages and she must accept responsibility for these decisions. From prior to the real estate deal closing, Rainville had the benefit of counsel whose opinion and recommendations she respected. This is not a case of an uninformed Plaintiff who was unaware of her legal rights.

[290] It may be that the Plaintiff had a valid cause of action against Weldon for fraudulent misrepresentation due to his intended concealment of the illegality of the third floor. She may have had a case against Weldon based in negligent misrepresentation, depending on what he said to her at the

time she was considering purchasing the townhouse. She may well have had the basis for a claim against the agents, depending on their level of knowledge and what advice was given concerning the need for an inspection of the unit. She may have had a claim against the builder or general contractor in negligence for defective construction.

[291] It is obvious that Rainville's solicitor, Doane, who was involved in investigating the construction problems in February 1998, was alive to the issue of recovery for his client at that time. Exhibit 259 is a memo from a junior member of the Gowlings firm done March 9, 1998 at the request of Doane. In the memo, the author noted:

> You [Doane] have asked me to discuss the potential liability and grounds for liability for a number of parties in relation to Michael and Kelly Orr's purchase of a condominium townhouse at 2289 Lakeshore Blvd. West…" The author goes on to state, "My brief conclusion is that each of the parties listed [contractor and builder; vendor; agent; city of Etobicoke; and condominium corporation] is liable, either fully or in part, for the Orrs' damages, **except for the condominium corporation**…" [emphasis mine].

[292] It does not appear there was ever an attempt to claim against the builders. As I indicated earlier in my reasons, there was a claim issued against Weldon, the agents and the city but that was dismissed a number of years later with no payment from any of the Defendants. Neither Doane during his extensive testimony at the trial nor the Plaintiff provided any satisfactory explanation for their failure to pursue these parties for the damages incurred by Rainville due to the defects in construction.

[293] In addition, Rainville had the right to submit a claim to ONHWP for the defects, had she notified them of the problems immediately when she encountered them. Michel Cote ("Cote"), the vice-president of Tarion [formerly ONHWP] testified at the trial and was a very knowledgeable witness. His evidence was of great assistance to the Court. Cote's job involved the administration of warranties for alleged construction deficiencies. He stated that in the usual course, the unit owner would submit a list of items they were dissatisfied with to ONHWP and to the Builder. If an agreement could not be worked out, there was a conciliation process which was available. Cote was involved in the conciliation and he would determine if the problem was one that was under warranty—for example, a defect in the materials or workmanship. Invariably, this required Cote to do a site inspection. While he held the position of condominium technical representative until 1991, he estimated that he conducted perhaps 150 conciliations for both unit owners and condominium corporations. Eventually, he was promoted to the position of Regional Manager for the GTA and in this capacity; he had the final decision on whether or not a claim would be allowed.

[294] Cote stated that the limitation period for a claim to ONHWP for major structural defects is 5 years following the date of registration of the condominium. Thus, in Rainville's case it would have been July 5, 1998. MTCC No. 1056 sent a letter dated June 8, 1998 to ONHWP [exhibit 355] in which it advised that it was asserting a claim for major structural defects throughout the Grand Harbour project. This letter constituted notice to ONHWP of the claim.

[295] Cote testified that a unit owner can make their own claim for major structural defects. Generally, the owner will send a letter setting out the deficiency and the damages sought, often accompanied by an opinion from an architect or engineer. ONHWP usually would perform a site

inspection with the participation of the builder, and perhaps it might be necessary to have an engineer involved.

[296] After the problem is identified, ONHWP will send the work out for tender and obtain bids on it. Although the warranty may be voided if the owner has done work on their own, if there is evidence of a problem and the owner has invoices and receipts and it is reasonable, ONHWP will pay the owner for the expenses incurred in correcting the defects.

[297] Cote was involved in administering the claim asserted by MTCC No. 1056 for structural deficiencies. They provided the report of Halsall Associates Limited January 20, 2000 [exhibit 356] with the supporting receipts. Eventually, MTCC No. 1056's claim was settled in January of 2000.

[298] Cote stated that had he been notified in January or February of 1998 about the condition of townhouse unit 113, he would have perceived the situation as "dire," based on the photos provided by Rainville and would have done a site inspection within a day or two. In all likelihood, he would have had an engineer attend at the unit and determine the source of the water problem and what needed to be done to rectify it. The owner would have been advised to stop all work immediately.

[299] After that, in the usual course, a scope of work would have been done, it would have been put out to tender and a contractor hired. The entire process would have taken 8-10 weeks depending on the contractor's availability. The remedial costs would have been covered by ONHWP.

[300] In Rainville's case, her letter was sent to ONHWP on April 1, 1999 [exhibit 64], along with photos. ONHWP rejected Rainville's claim for various reasons:

- on the common elements, because they were beyond the 5 year limitation period;
- on the framing of the third floor because it violated the Declaration;
- on other items, because they were not major structural defects and also out of time.

[301] That decision was not appealed. Cote stressed that in order to pay a unit owner's claim for work they undertook on their own, there must be detailed invoices which clearly indicate what defect is being remedied. ONHWP does not simply pay invoices that are submitted.

[302] Given this evidence, it is perplexing why Rainville did not avail herself of the option of approaching ONHWP in a timely fashion for payment of the damages arising from the water leaking. Items such as installation of vapour barrier, drywall, removal of mouldy insulation, replacement of rotting joists, replacement of hardwood flooring and removal and replacement of electrical and plumbing lines would be the sorts of things that constitute safety hazards and would be covered.

[303] As I have indicated previously, Rainville had the benefit of a solicitor and an experienced contractor to advise her, so her decision to proceed with her own remedial work makes little sense under the circumstances. While she certainly was what I will describe as an innocent purchaser of the townhouse, she is an intelligent woman with financial resources and legal representation throughout.

[304] Furthermore, she cannot look to recover damages from entities that are not responsible in law to her for the situation in which she finds herself. She had avenues to pursue for recovery and if she chose not to avail herself of those routes, she must bear the consequences.

[305] As a result of my finding that Gowlings was negligent, Rainville is entitled to the damages that flow from this negligence.



**Diminution in value of the unit**

[306] Since the Plaintiff does not have title to the illegal third floor of her townhouse, she has suffered a loss and is entitled to damages from Gowlings to compensate for this loss. The only evidence on this point came from the real estate appraiser called by the Plaintiff, George Carruthers ("Carruthers"). He looked at data from 20 sales in the Grand Harbour townhouse complex between 1996 and 2009 and concluded that in September of 2009 when he viewed the premises, he estimated that the third floor's value was $400,000, based on $440 per square foot. As of 1998, he estimates that the value of the third floor was $260 per square foot for a total of $225,000. He acknowledged that the mid-point in 1998 was $255 per square foot and the value could be $205,000.

[307] I accept the evidence of Carruthers and find that the loss to Rainville for the third floor at the time of purchase was $225,000. This loss flows directly from the negligence of Gowlings in the handling of the purchase and they must pay this sum to the Plaintiff, plus pre-judgment interest from January 16, 1998, less the period October 2008 to October 2009, when the matter was adjourned at the Plaintiff's request. Given the lengthy period of time that has elapsed since the action was commenced, the rate of pre-judgment interest must be averaged.

**Reimbursement of legal fees paid to Gowlings**

[308] The Plaintiff seeks repayment of all fees paid to Gowlings, both for the purchase of the unit and for other work done principally by Doane relating to attempts to get payment for the common element repair and to resolve the illegal third floor problem. In Schedule B, the Plaintiff claims the sum of $44,521.97 for fees paid to Gowlings covering the period of February 1998 to December 1999.

[309] Gowlings argues that the Plaintiff would only be entitled to damages representing the amount she paid to Gowlings to complete the real estate deal as the other accounts relate to Doane's work, which the Plaintiff was not critical of at trial. Further, it is submitted that the fees paid to Gowlings for Doane's work on the other issues are not foreseeable.

[310] Copies of various accounts delivered by Gowlings were produced at trial (tab 62 joint document brief) as well as copies of cheques from Rainville totalling $35,218.31.

[311] In my view, the Plaintiff is not entitled to reimbursement of all of the fees that she paid to Gowlings. I agree with the submission of counsel for Gowlings that the Plaintiff was not critical of the work of Doane in her evidence, despite the fact that it was apparently on his recommendation that the claim against Weldon and the real estate agents was dismissed and the exception policy rejected out of hand years ago. Doane testified at length concerning his involvement in this matter dealing with the common element deficiencies and the third floor issue. In my opinion, the work related to the common element problems was not reasonably foreseeable as a result of the negligence of Latimer and thus, is not recoverable as a damage.

[312] However, the balance of Doane's involvement was related to his work attempting to deal with the illegality of the third floor. While the accounts from Gowlings that were produced were incomplete, it is possible to approximate the fees related to the third floor issue. In the account dated June 22, 1999, a fee of $2,492.03 relates to the problem with the third floor and the balance of $19,673.67 appears to cover work done for both the deficiencies and the third floor issue. With no more precise way to determine the proper fees related to the third floor solely, I award the full amount of $2,492.03 relating to the third floor and half of the amount of $19,673.67, or $9,836.84 relating to the third floor and other deficiencies in reimbursement to the Plaintiff.

[313] Clearly, given my finding that Gowlings was negligent in their handling of the closing the Plaintiff is entitled to reimbursement of the fees and disbursements paid to Gowlings for doing the deal. The account for that specific work was not produced at trial. However, the account dated February 16, 1998 [exhibit 134] covers the period from November 1997 (review of agreement of purchase and sale) to February 11, 1998 (including the closing) appears to deal with the closing of the purchase agreement. The evidence was that after receiving the estoppel certificates, Rainville was concerned about misrepresentations made by Weldon, principally with respect to the number of pets that an owner was permitted to have. Since Rainville had numerous cats, she testified this was a significant concern for her. Consequently, Doane became involved in negotiating with Weldon's real estate lawyer, threatening not to close the deal. Eventually, the closing date was extended and an abatement in price secured. In my view, this work, which comprised some of the February 1998 account, is related to the purchase and sale transaction and the Plaintiff is entitled to reimbursement of that account. It is in the sum of $6,213.32, inclusive of disbursements, and the Plaintiff is entitled to recover this amount with interest.

[314] The Plaintiff is therefore entitled to payment from Gowlings for legal fees she paid to the firm in the sum of $18542.19, plus pre-judgment interest from March 2001 at the average rate, not including the period October 2008-October 2009.

**The costs for alternative living accommodations 1998**

[315] The Plaintiff seeks rental accommodations in the sum of $45,084.92 for the period April through December 1998, plus $30,445.91 for the moving and storage [Taylor estimate] plus reimbursement of the maintenance fees paid at Grand Harbour for the same period plus some additional expenses for a total of $94,442.53.

[316] It appears, although it is not articulated, that the argument of Rainville is that had there not been mould and other defects in the construction, her renovations would have been completed by the end of April when her house deal on Edgehill closed. The difficulty with this argument is that there was no evidence on which a finding could be made as to when her renovations would have been finished without the problems she encountered.

[317] It is clear that time was an issue from the outset; that is why she sent the letter to Cawthorn on the day the condominium deal closed and started the work immediately thereafter. As Rainville testified, Penman started working on all three floors as they were "short of time". Contrary to the Plaintiff's description of the anticipated work as being cosmetic only, from the outset she clearly contemplated doing extensive renovations to the unit, including installing an entirely new kitchen.

While Jeff Penman testified that when he first attended the site on January 31, 1998, he thought it was a 6-8 week project, his description of the work as being comprised of changing finishes is not accurate.

[318] Rainville's own letter described installation of all hardwood floors, marble and ceramic tiles, replacement of all door frames, baseboards and doors, installation of a new fireplace, mantle and hearth, gutting the kitchen, re-doing the gas line, new wiring and plumbing, plus installation of new kitchen cabinets and all appliances, to name some of the items. This cannot be described as an "in and out job" to use the words of Penman.

[319] I am not persuaded that had all of the renovations gone smoothly, the Plaintiff could have moved in by the end of April. Further, she and her husband made an offer on a home in Texas, which was accepted in March 1998, with a closing date of April 17, 1998. As indicated previously, it was their intention to live in Texas and spend the summers at the townhouse in Toronto. On the Plaintiff's own evidence, by early March it must have been obvious that the townhouse renovations would not be completed by the end of April when their house deal closed.

[320] The Plaintiff and her husband failed to close the Texas house, lost their $75,000 deposit and instead, signed a year's lease for a house at 50 Viewmount at a cost of $5,500 per month. Curiously, no explanation was offered for the failure to close the Texas house transaction, given Rainville's evidence that her husband had accepted a job in Texas, which led to the sale of their home on Edgehill and their need for smaller accommodations in Toronto for seasonal use.

[321] In any event, it is unclear as to why Rainville was unable to move into the townhouse until December 1998. Even accepting the construction defects necessitated additional work, it is difficult to conceive what prevented the work from being completed earlier than it was. Perhaps the breakdown in the relationship between Rainville and her contractor accounted for part of the delay; perhaps the on-going dealing with the condominium corporation was another factor; perhaps some of the trades were delayed. I agree with the submission of counsel for MTCC No. 1056 that the delay in moving in was related to the discovery of the construction defects and the Plaintiff's decision to essentially gut and rebuild the townhouse. The defects which were discovered were latent and the Plaintiff has not established negligence against MTCC No. 1056 with respect to the condition of her unit. On the basis of the evidence before me, I do not find that the costs for alternative housing in 1998 are reasonable nor do I find they are due to the actions of the Defendants.

**The close up costs of the third floor, and associated moving and storage costs**

[322] Matt Czernikiewicz ("Czernikiewicz") is a moving consultant who was called by the Plaintiff to give evidence as to the costs associated with moving the contents of Rainville's home into storage while the construction restoring the third floor to attic space was going on. His written estimate dated November 16, 2009 was marked as exhibit 271 at the trial. He attended at the premises to calculate the costs. The cost of packing the contents of Rainville's unit, insuring them, moving them to a storage facility for 6 months and moving them out was quantified at $30,445.91. This did not include the removal and storage of a large crystal chandelier, which would be an additional $5,500-$6,550. Given the absence of any evidence to the contrary, I accept the evidence of Czernikiewicz. I find the associated costs to be $36,445.91.

[323] The Plaintiff will have to rent alternative accommodations for 3 months at a cost of $5,500 per month for an additional sum of $16,650. Thus, the evidence called by the Plaintiff established that the associated costs of converting the third floor back into attic space are $53,095.91. I accept this evidence as reasonable and the Plaintiff is entitled to this sum from Gowlings, as it is directly related to their negligence in failing to ascertain the Plaintiff did not have legal title to the third floor.

**Costs of restoring the third floor to attic space**

[324] The Plaintiff called David Armstrong ("Armstrong") who works at Nutrend Construction as a senior estimator. Armstrong was qualified as an expert in the area of construction costs and his CV was filed as exhibit 277 at the trial. Armstrong was retained to provide a report on the cost of closing up the third floor and returning it to attic space as well as the cost of remedying the deficiencies on all 3 levels of the townhouse. Unfortunately, Armstrong's costs estimates were not broken down between costs to repair the common elements and other costs that would be the responsibility of the unit owner.

[325] His calculation dated August 29, 2008 for the work to remove the third floor was filed as exhibit 278.

[326] Armstrong attended at the townhouse and measured the third floor. He then put the numbers into a computer programme known as "Exactimate", which, according to Armstrong, is a standard programme used in the industry to calculate estimates. He based his calculations on prices in the greater Toronto area. Mr. Armstrong used some of his own figures from his experience but most were done by Exactimate.

[327] His figures for the cost to remove the third floor finishes and restore it to common element/attic space totalled $179,126.26. This was based on an estimate of $140,988.79 for the work, a 10% profit margin of $15,508.77, another 10% for overhead for $14,098.88 plus GST of $8,529.82.

[328] Armstrong explained that Exactimate is a calculator based on the figures that are input into the programme. He admitted that there were obvious errors in his calculations. For example, he included the cost of the mechanical chase but admitted that it does not exist so it should not have been included. For some of the labour costs, he used his own data. For others, he relied on the figures from Exactimate.

[329] I found the opinion of Armstrong to be of little assistance, because as he acknowledged, there was no way to test the reliability of the Exactimate programme. Mr. Armstrong testified that while the Exactimate programme was commonly used in his business by estimators, he was unaware of whether it had been accepted in an Ontario court as a legitimate method by which to calculate construction costs. The expert called by MTCC No. 1056, Mr. Hand, had never heard of the programme.

[330] While Armstrong is clearly experienced in estimating construction costs, some of his methodology was questionable. He used the Exactimate programme in order to calculate the costs but there was no way for the Court to test the validity of the calculations. Under cross-examination, Mr. Armstrong was defensive is his responses and acknowledged that there were errors in the calculations done.

[331] Armstrong candidly acknowledged that he did not possess any expertise in computer programmes so if there was an error, he would not necessarily be aware of it.

[332] Furthermore, he was unable to provide reasons to support the manner in which the computer programme had calculated the costs. For example, when Mr. Clayton questioned him about removal of the plumbing on the third floor, Armstrong was uncertain where the plumbing was located. He did not know how the pipes ran and he was unable to answer why, in arriving at his calculations, the programme had not simply included the cost of draining the pipes and capping them, instead of removal.



[333] On cross examination, Armstrong testified that he was aware of the profession known as "quantity surveyors." He did not know what educational background was required. He acknowledged that quantity surveyors were qualified to provide estimates for construction jobs, although he felt they were no more competent than he was.

[334] Expert evidence is a well recognized exception to the opinion rule. The often cited case of *R. v. Mohan*, [1994] S.C.J. No. 36 sets out the test for the admissibility of expert evidence. Four criteria must be met: relevance; necessity in order to assist the trier of fact; the absence of any exclusionary rule; and a properly qualified expert.

[335] No objection was made to Armstrong being qualified as an expert and, indeed, his CV attests to his qualifications. Yet, during the course of his evidence, I became concerned with its value, given his explanation as to how he arrived at his calculations. The essence of an expert opinion is that the individual possesses an expertise in an area that the court does not and that the court can rely on that opinion.

[336] Just because an individual has an impressive resume does not automatically mean that the expert can necessarily assist the court in the issues it must determine. I would have been much more impressed with Armstrong's evidence if he had attended at the townhouse, examined the third floor, took measurements and then, based on his own experience in the construction industry, provided estimates as to the costs of removing the third floor and restoring it to attic space. He would then have been in a position to justify his conclusions and explain how he arrived at his figures. Instead, it appears that he relied on a computer programme, which did its own calculations and obviously made errors. The reliability of Exactimate was not subject to the usual type of scrutiny the Court subjects experts to. For these reasons, I must attach little weight to the opinion offered by Armstrong.

[337] Alan Hand ("Hand")**,** the principal of A.W. Hooker Quantity Surveyors, was called by the Defendant MTCC No. 1056 and qualified as an expert in the area of quantity surveying. He was asked to provide an opinion on the cost of repairing the common elements in the Plaintiff's unit as of 1998 and to comment on the estimate provided by the expert retained by the Plaintiff, Armstrong. He was also requested to provide an opinion on the costs of closing up the third floor. I found Hand to be knowledgeable in the area and forthright in his evidence. Hand attended at the townhouse and took measurements and photographs. He reviewed the building permit file. In Hand's opinion, restoring the third floor to attic space would cost in the range of $84,000. This would involve: removing the stairs; taking out the finishes, fixtures and fittings; removing the HVAC system and the electrical components; removing the bathroom and water supply pipes; removing the skylights and window; and framing and closing up the ceiling. His figure took into account the inclusion of some soft costs plus a 5 per cent increase to reflect the fact that his original estimate was done in 2008. His original estimate of the costs was $64,233. I accept the evidence of Hand and find that the cost of restoring the third floor to attic space in 2010 was $84,000. However, that figure may have increased since the time of

trial. I order the defendant Gowlings to pay the sum of $84,000.00 into Court, such funds to be subject to further order of this Court.

[338] In the written submissions of MTCC No. 1056, counsel note that there was no evidence at trial on the manner in which the close-up should proceed. It is submitted that given the lengthy history of these proceedings there is good reason to doubt that the Plaintiff will comply with a court order or co-operate with MTCC No. 1056 or use any damages awarded to her to close up the third floor. There is a concern that the close-up costs of Hand set at $84,000 might be inadequate if there are significant delays in undertaking the work. It is requested that the Court give directions to deal with this concern.

[339] It was patently obvious during the course of the trial that the relationship between the Plaintiff and MTCC No. 1056, including the current president, is acrimonious, to put it mildly. There has been little co-operation between the parties and, in my view, there is merit to the concern that there might be delay in effecting the close up of the third floor. It is as a result of the negligence of Gowlings that this work has to be undertaken, and they are responsible for the payment of this damage.

[340] The Plaintiff is directed to close up the third floor of her townhouse forthwith. By this, I mean as soon as is practically possible. MTCC No. 1056 is to retain an engineer on or before September 30, 2011 to prepare a scope of work for the restoration of the third floor to attic space. The scope of work is to be prepared on or before October 31, 2011 and immediately served on the Plaintiff and counsel for Gowlings for their review and input. The Plaintiff and Gowlings are to provide responses, if any, to the engineer's proposal on or before November 15, 2011. The parties are directed to attend before me prior to November 30, 2011 to discuss timing issues for the work and any other matters related to commencing the work.

[341] In her evidence, Rainville testified that if the third floor has to be returned to attic space, she will have to reconfigure the townhouse so that it remains a three bedroom house. Currently, there is one bedroom on the third floor and two others on the second. Regrettably, there was no hard evidence about the cost of doing this or the necessity. Presumably, Rainville's belief that she must have the townhouse as a three bedroom unit is from the perspective of its appeal to potential purchasers, not because Rainville personally requires a three bedroom unit.

[342] It is not clear that the estimate of Hand of $84,000 to perform the close up work is adequate at the present time. Further, in my view, there may be other issues that arise during the course of the work to close up the third floor that were not anticipated at the time of trial and on which the parties cannot agree. Because of the past history between the Plaintiff and MTCC No. 1056, I am of the opinion that referral of the matter of the close up of the third floor to a Construction Lien Master is appropriate in order to ensure the work proceeds efficiently and in a cost effective manner.

[343] Therefore, pursuant to Rule 54.02(1)(b), I am hereby directing a reference before a Construction Lien Master to determine the costs associated with restoring the third floor of townhouse 113 to common element attic space and the manner in which it will proceed. The master shall consider Rule 54.04(1) and determine the following issues, in addition to any others that are deemed necessary:

- the actual costs in returning the third floor to an attic;

- the necessity of any additional work to the second floor as a result of the loss of the third floor;

- the costs of any decorating or renovations to any floor other than the third which are lost as a result of returning the third floor to attic space; and

- any additional expenses to be incurred by the Plaintiff as a result of this work being undertaken while the work is being done.

[344] The Master shall direct payment of funds from the $84,000 paid into Court and any further sums payable by the Defendant Gowlings to pay for the costs of restoring to third floor to attic space at such times and location as specified by the Master pursuant to Rule 55.05(1).

[345] While I do not require a report back from the Master, if there is any issue that the parties or the Master wish to address me on, I may be contacted through Judges' Administration. The report of the Master is to be confirmed pursuant to Rule 58.09.

**Costs of repairing the common element defects in the Plaintiff's unit**

[346] Armstrong, the Plaintiff's expert on construction costs, provided an opinion on the cost of work done to the common elements for deficiencies on all three levels using the Exactimate programme, referred to above. He testified that in 1998 dollars, the cost of correcting the problems stemming from the water damage was $201,880.51 [exhibit 279]. In 2006 dollars, when he did his report, there was a 28% difference, so the number was $280,389.60.

[347] MTCC No. 1056 called Hand who gave his opinion as to the costs of repairing the common elements. Hand determined the boundaries of the unit in order to determine the repair costs to the common elements and what the Plaintiff could claim against MTCC No. 1056. These would include: joists between second and third floors; structural supports behind the drywall for exterior walls; insulation; pipes, wiring, venting behind exterior walls; framing of exterior windows and exterior doors not on third floor.

[348] Hand used his knowledge from the rates in construction in 1998 as well as the R.S. Means manual as of January 1999. This manual is published annually and sets out the costs of pricing in the construction industry. In Hand's opinion, the cost of the repairs to the common elements was $41,681 [exhibit 275]. This number assumes the removal of studs for the exterior walls.

[349] Hand disagreed with the estimate of Armstrong, and in his view, the Armstrong calculation was flawed in numerous respects. It included non-common element repairs, the software programme double counted studs, it did not correctly account for doors and open doorways and included the cost of a mechanical chase which does not exist, to name a few.

[350] The difficulty quantifying the cost of repairing the damage to the common elements is twofold: the Plaintiff did not obtain permission from MTCC No. 1056 to proceed with the repairs, as was the proper procedure prior to undertaking any work; and furthermore, she did not keep records of what repairs she had effected, nor the costs incurred in doing so.

[351] Both 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. The wording of the Declaration [exhibit 104] is clear that if a unit owner wishes to make an alteration to a common element or do any work or repair, the owner must secure the **written consent** of the corporation. Any structural changes or any changes to plumbing or electrical work within the unit require the written approval of the Board. Further, while the corporation has the obligation to repair the common elements, this is not so if the damage to the common elements is caused by the failure of the unit owner to maintain and/or repair their own unit.

[352] Rainville testified that Ridout told her what she owned and what were common elements when she met at the Gowlings office on the day of the closing. Before embarking on the extensive renovations that she planned, it would have been prudent to have made inquiries of the corporation to ensure that there was no infringement on the areas the condominium had the responsibility to look after and repair. This was not done, likely because Rainville was so anxious to proceed with the work she planned, as is evidenced by the letter she sent to Brookfield the same day as the deal closed. In any event, while Rainville may not have understood initially that she was not permitted to perform any work that she wished to on common elements, even if they were in need of repair, certainly when she received the letter dated February 19, 1998 [exhibit 32] from the condominium's lawyers she knew that the report of the common elements was the purview of the condominium corporation. She ought to have stopped the repairs at that point.

[353] Rainville testified that Brookfield, through Post and Cawthorn, was aware of the nature of the work that she was doing and that they had given her the go ahead to proceed with the work, even though it involved the common elements. She went so far as to suggest that Cawthorn was at the site on a regular basis and that she was knowledgeable about what work was undertaken and was "supportive." This may be Rainville's recollection of what transpired, but it does not accord with the evidence.

[354] Halsall Engineering had been asked by Brookfield on behalf of the condominium to investigate the deficiencies. Dan Templeton ("Templeton"), a civil engineer employed by Halsall, testified at the trial and I found him to be a knowledgeable witness, whose responses were fair and balanced.

[355] Templeton was assigned to the project and he attended at Grand Harbour on February 24 and 26, 1998. He went to Rainville's unit where he met with Penman, Michael Orr and Post. He reviewed the photographs taken by the Plaintiff as well as the video. Penman walked him through the unit and pointed out the various deficiencies. At this point, Templeton testified that basically the home had been "gutted" and the structural walls moved. The original structural components were missing by this time.

[356] Templeton made notes and took photographs. In the course of his mandate to investigate the deficiencies, he had to determine the unit boundaries. Consequently, he reviewed the declaration and, by doing so, he concluded that the third floor of unit 113 was actually part of the common elements. It was as a result of Templeton's observations that the illegality of the third floor came to light.

[357] I have made reference previously to Templeton's findings and involvement concerning the ONHWP claim but I refer to his evidence here to illustrate the condition of the unit in February 1998 when he attended.

[358] On the same day that the real estate deal closed, Rainville faxed a letter to the condominium Board and copied Cawthorn of Brookfield setting out the renovations that she proposed to do [exhibits 21 and 22]. She advised that she intended to: install hardwood floors, marble and ceramic tiles; replace all door frames, baseboards and doors; install plaster ceiling mouldings; replace stair railing; replace bathroom fixtures and vanities; paint and wallpaper; install new fireplace mantle and hearth; replace kitchen cabinets, appliances, re-work gas line, wiring and plumbing for new design; and replace some light fixtures.



[359] It is suggested by the solicitor for the Plaintiff that it was incumbent on the corporation through Brookfield to tell Rainville that some of her planned work might involve breaking into the common elements. I do not accept this submission as an accurate statement of the obligation of the corporation. It is clear Rainville was aware that as a unit owner in a condominium corporation, she could not simply do what she wished with her unit. She was not candid in her letter about the extent and nature of her planned renovations; rather, she chose to minimize the work being done so that it appeared to be decorative or cosmetic, as opposed to reconfiguring the space in the townhouse. The more prudent and proper course would have been for Rainville to accurately depict the work that she wished to do and inquire of the corporation whether it was permitted.

[360] While Rainville describes the intended renovations as “cosmetic”, this is clearly not accurate. In fact, she had discussed the plans with her friends, the Goebbels, who were designers as well as with her contractor Mark Penman. Plans were done in October of 1997 [exhibit 177], prior to the closing, which show an entirely new floor configuration for the second floor and a structural change in the area of the kitchen. In order to enlarge the master bedroom on the second floor, a wall had to be removed and the use of steel beams was anticipated, according to the plans. Clearly, the work contemplated involved structural changes and no explanation was offered by the Plaintiff for the failure to send these plans to the Board and to Cawthorn, given the nature of the work that she intended to do.

[361] I reject the Plaintiff’s characterization of the changes as cosmetic or decorative in nature. Similarly, I do not accept her evidence about the alleged acquiescence of the Board and Brookfield to the work that she was having done at the townhouse.

[362] Counsel for the Plaintiff submits that Cawthorn’s letter to Rainville of February 2, 1998 [exhibit 25] amounts to permission to continue with the renovations. I do not read the letter as supporting that proposition. Rather, I agree with the submissions of counsel for Brookfield but that letter must be read in light of the fact that Cawthorn was responding to a request from Rainville to add a fireplace to the unit. This would involve the installation of a chimney on the exterior wall, which was not permitted. The letter cannot be read as a blanket approval by the Board for the Plaintiff’s anticipated renovations.

[363] The Plaintiff testified that she had reviewed the Declaration because of her concern about the pet issue. Her lawyer, Doane, obviously reviewed the Declaration as he entered into negotiations with Weldon’s real estate solicitor when he was attempting to get Rainville and her husband out of the deal.

[364] While, in my view, Cawthorn’s letter could have been more instructive on the issue of whether the work required the written consent of the Board, it ought to have been clear to Rainville that she was not permitted to do whatever renovations she desired. If she had not reviewed the Declaration in sufficient detail to realize there was a limit on the type of work she could do to her townhouse without the written approval of the Board, the letter from Cawthorn ought to have alerted her to this issue.

Instead, the evidence is clear that Rainville did not consult with the Board or her lawyer concerning the propriety of the work she planned; rather, she simply continued on with the renovations, which was ill-advised.

[365] The evidence from the Plaintiff concerning the monies she spent on the repairs was wholly unsatisfactory. She has the burden of proving her claim, yet the court is left in the position, essentially, of having to guess at the proper value of the repairs she undertook to common elements.

[366] Counsel for MTCC No. 1056 submits that the Plaintiff is not entitled to be reimbursed for the repairs she undertook to the common elements in 1998, because she did not obtain permission and she did not provide invoices for the work that was done.

[367] While I agree that Rainville did not follow the proper procedure for the repairs to the common elements, the situation in which she found herself immediately after taking possession of the townhouse was dire. Having not owned a condominium previously, Rainville may not have understood what the correct procedure was in order to fix the common elements. She had contractors on the premises and it appears she attended to the urgent work that needed to be done to repair the common elements.

[368] This behaviour can be explained in the initial period of time after the purchase closed. However, by February 19, 1998, when she received the letter from the corporation advising her to stop all work, she proceeded at her own peril and in my view, is not entitled to be paid for the work she undertook after that time.

[369] I note the figure of $41,681 from Hand is the cost for all of the repairs to the common elements. In the absence of any better evidence, I find that the Plaintiff is entitled to be paid by MTCC No. 1056 half that amount or $20,840.50 for the repairs she effected to the common elements prior to February 19, 1998. There shall be pre-judgment interest on this sum from October 2006, being the date the Plaintiff first quantified the costs she was demanding for these repairs.

**Redecoration and renovation expenses to third floor**

[370] It is the Plaintiff's position that had she known that townhouse 113 did not have a third floor she would not have purchased the unit and therefore she claims the total sums that she paid for decorating and renovating the unit in the sum of $89,966.59. This is comprised of the costs of lights, carpets, marble for floors, vanity tops, kitchen countertops, fireplace surround, hardware, custom hand railings, plumbing fixtures and other miscellaneous expenses. The invoices were located in the joint document briefs.

[371] It is not clear to me if the claim being asserted refers to the redecoration costs for the entire townhouse or the third floor only. Unfortunately, the written submissions of the Plaintiff do not cast any light on this point. The invoices do not indicate which floor of the unit they apply to. In certain cases there is a total amount indicated then a section that says "amount claimed" with no explanation as to how that figure was arrived at. By way of example, I note the sum of $2,169 is claimed for Yorkville Design Centre, the company owned by the Goebbels, the friends of Rainville. When the documents are examined, it is only copies of cheques that have been produced, nothing more. Given the extensive nature of the work done on the unit, it is impossible to relate these cancelled cheques to work done on the third floor.

[372] Based on the documentation produced, it is impossible to determine what decorating costs are related to the work done on the third floor. It is not the obligation of the court to sift through the various invoices and try and determine which ones relate to work done on the third floor; this burden falls on the Plaintiff. In the absence of any reliable evidence on which to make a determination of the redecoration and renovation costs related to the third floor Rainville is entitled to as damages, I direct pursuant to Rule 54.04(1) of the *Rules of Civil Procedure* the Master to conduct a reference on the issue of the decorating and renovation costs that the Plaintiff incurred on the third floor and determine the amounts that were spent by the Plaintiff. Such amount is to be paid by the Defendant Gowlings to the Plaintiff, together with pre-judgment interest from March 2001 at an average rate, less the year of October 2008-October 2009.

[373] While counsel for MTCC No. 1056 argues that the figure must be reduced to take into account the Plaintiff continued with decorating the third floor after April 1998 when she learned that she did not have title to that space, I do not accept this submission. The work had started immediately after the deal closed when Rainville had no reason to believe she did not own the attic space. For her to have stopped in April when it was not clear what was going to happen with the third floor and when the work was partially completed would not have been reasonable. It was clear from the evidence that the townhouse was gutted, it was a construction zone in mid -1998 and the third floor could not have been left in that condition.

**The costs incurred for rental housing and other expenses to December 1998 when the townhouse was in move-in condition**

[374] The Plaintiff claims the sum of $94,442.53 comprised of the costs of renting a house after their Edgehill home closed; maintenance fees paid to Grand Harbour April-December 1998; insurance, gas, cable, Bell bills; duct cleaning and moving and storage. There is nothing contained in the Plaintiff's solicitor's written submissions with respect to these damages. Rather, it is submitted "The Plaintiff submits that the damages that any and all of the Defendants are liable for the damages sought and the Court has the necessary power to apportion those damages amongst any Defendants that are found liable." This does not set out the basis upon which the Plaintiff's claim for the costs incurred during the period when the townhouse was under construction. It may be that the Plaintiff is of the belief that the extensive renovations that she planned could have been completed by April 1, 1998 had she not encountered the mould and other problems. However, there was no evidence to support this contention and to find that the townhouse would have been in move-in condition by the time the sale of the Edgehill house was completed in April 1998 would be speculation. The renovations were extensive and it is extremely optimistic to believe that they would have been completed within 3 months. Therefore, I am not of the view that these costs should be awarded to the Plaintiff.

**6. Should the Plaintiff be reimbursed the monies she paid towards the legal expenses incurred by the MTCC No. 1056?**

[375] While this is an issue raised in the submissions of MTCC No. 1056, it is not claimed in the Schedule submitted by counsel for the Plaintiff. Further, s. 84(3)(b) of the New Act does not relieve an owner from the obligation to contribute to the common expenses of the condominium even if the owner is making a claim against the condominium corporation. This claim is not being pursued, but even if it was, I would not grant the requested relief.

**7. Should MTCC No. 1056 repair or replace the roof over townhouse 113?**

[376] The Old Act imposes on the condominium corporation the requirement to maintain the common elements and to repair after damage. The Declaration of MTCC No. 1056 states "The Corporation shall repair and maintain the common elements…" MTCC No. 1056, therefore, had a duty to repair the roof over unit 113 if it was deficient, as well as any damage to the Plaintiff's unit caused by deficiencies in the roof.

[377] The law is clear that the corporation is not required to do whatever an owner requests, even if it is supported by something in writing from someone who works in that particular field. The corporation must be cognizant of the cost of the undertaking, given the condominium's financial position at the time and upcoming expenses, to name only a couple of considerations.

[378] The duty imposed on the condominium is to act in good faith and to be even-handed, not to prefer one owner's position over that of others: *Roy v. York Condominium Corp. No 310* (August 14, 1992) No 1191/91 Keenan J (Ont. Gen. Div.). It is, however, important to note that the corporation may do a temporary repair and defer replacement if that is a reasonable course of action, given the corporation's financial situation. As Justice Keenan noted in *Roy*,

> The Board of Directors stand in a fiduciary relationship with the owners. The Board owes a duty to deal honestly and in good faith and to be even-handed. So long as the Board's decisions meet those standards, they are reasonable…The duty of the Board is to respect personal opinions of the owners, if possible, and adhere to the appropriate objective standards of quality and workmanship. What standard is appropriate may be influenced by prevailing economic conditions and the willingness or ability of the owners to provide the funds. The Board has the duty to allocate those available funds even-handedly to maintain and repair the common elements…

[379] It is not disputed that the roof over townhouse 113 is part of the common elements, although the skylights installed by Weldon are not. In this case, MTCC No. 1056 did repairs on the roof in 1998, 2003 and 2004. The evidence at trial was that there were no leaks at that time. It did not replace the roof, but it is not obligated to. While the Plaintiff was clearly not happy that the roof was not replaced, that does not mean that the corporation failed in its duty to her as a unit owner. The corporation must consider the opinions of the professionals it retains to opine on the best way to deal with a roof that is leaking; whether it is to do repairs or replace the roof in its entirety. Other considerations come into play when making the determination, perhaps most importantly the financial condition of the corporation at the time.

[380] The Plaintiff called Jonathan Peat ("Peat"), a roofing consultant, who was qualified as an expert in the area of roofing consultations. He was a credible witness who attempted to offer the Court a fair opinion. It was his view that both the flat roof and the sloping cedar roof over Rainville's townhouse needed to be replaced. He testified on the various inadequacies he noted when he examined the roof, including gaps between some shingles, flashing deficiencies, inadequate sealing and incorrect deflection of water. He acknowledged there was evidence of repairs that had been done to the roof. He was unable to say what was the source of the damage to the interior of the Plaintiff's townhouse or to comment on the role of the sky lights in the leakage.

[381] While I accept the expertise of Peat in roof consultation, he acknowledged he was unfamiliar with reserve fund studies done for condominium corporations or the need to determine what common elements need to be replaced at what time. He agreed that engineers are more qualified to provide that type of opinion.

[382] The corporation called the engineer, Mr. Panahi ("Panahi") who inspected the roof in June 2009. He was to check for water coming through the membrane. He noted water stains around the skylights on the third floor but no signs of current water penetration in the attic. Panahi did not see any signs of active penetration of water through the roof. Importantly, he did not see evidence of leaking on the drywall or any signs of mould.

[383] He went outside onto the flat roof and noted water ponding and evidence of recent repairs to the roof membrane. On the sloped roof, there were deficiencies in the cedar roof but no signs of water penetration in that area. Panahi concluded that water was not coming through the roof membrane but possibly from the skylight perimeter.

[384] He testified that by converting the attic to living space, ventilation is affected and the leaks could be coming from humidity or structural movement. He could not make a determination without the as built drawings or performing a structural evaluation. For leakage to occur through the membrane there would have to be a hole or cut or complete deterioration in the membrane and he found no evidence of any of this. It was his opinion that the flat roof and the sloped cedar roof did not require immediate replacement.

[385] The evidence from the corporation was that there was a programme in place to deal with repair and replacement of the common elements. There were reserve fund studies that were undertaken. The law is clear that the condominium corporation does not have to meet an idealized standard; rather, the test is one of reasonable diligence to maintain and repair to acceptable standards.

[386] I accept the opinion of Panahi, who as a civil engineer, was certified in the area of reserve fund studies and had knowledge of the considerations of condominium corporations when determining replacement and repair issues concerning the common elements.

[387] On the whole of the evidence, I find that the condominium met its obligation through its repair of the roof over townhouse 113 and it was not obligated to replace it.

**8. Is this an appropriate case for an award of punitive and/or aggravated damages against the Defendants (with the exception of Gowlings) and/or the Third Party?**

[388] In her statement of claim, the Plaintiff claims punitive and/or aggravated damages against all of the Defendants except Gowlings, presumably as a result of the conduct of the Defendant MTCC No. 1056. The Plaintiff's written submissions are silent on this head of damage and no case law was provided in support of the claim. I assume, therefore, that these damages are not being pursued. However, in the event that I am wrong on my assumption, I would not find that the actions of the Defendants are of the type that deserve an award of punitive or aggravated damages.

[389] The Supreme Court of Canada has made it clear that punitive damages are awarded against a Defendant in exceptional cases when the actions of a party amount to misconduct which "represents a

marked departure from ordinary standards of decent behaviour.": *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595.

[390] In my view, the actions of the Board over the years were those of a responsible, reasonable Board attempting to deal with a difficult situation and come to a solution that was mutually acceptable. Often, the attitude of the Plaintiff and her husband was not conducive to achieving a workable solution; it seems that it was "their way or the highway." The Plaintiff was insistent on doing the renovations that she wanted to do and she proceeded in the face of being told to stop. When she learned of the illegality of her third floor, she wanted and expected legal title to it regardless of the factors that militated against this remedy. She rejected the proposal by the condominium corporation back in 1998 which contained, among a number of terms, a provision that she would apply for legalization of the third floor with the support of MTCC No. 1056. She did so, according to her own evidence, because the release that was sought to be executed was too broad.

[391] In my view, the conduct of Weldon clearly is deserving of an award of punitive damages. However, this point is moot because he is not a Defendant in these proceedings, so that relief is not available to the Plaintiff.

**9. Should the Plaintiff and Weldon be required to pay for the use of the third floor during their ownership and if so, in what amount?**

[392] MTCC No. 1056's action against Rainville (Court File No. 98-CV-145778) seeks, *inter alia*, to restrain Rainville from using any part of the common elements and an order directing her, at her own cost, to remove all changes to the area above the second floor and restoring it to unimproved common elements or in the alternative, an order authorizing MTCC No. 1056 to make the changes at the expense of Rainville. In the Statement of Claim, the sum of $85,000 is sought as the estimated value of the use of the common element space from the date she purchased her unit until the date she ceases to use the third floor space.

[393] The same claim is advanced against Weldon in action 04-CM-266159 for his use of the common element space while he was in possession of the unit from July 17, 1993 being the date he occupied the townhouse until January 1998 when the sale to Rainville closed..

[394] The solicitor for MTCC No. 1056 argues that the proportionate share of the common expenses is based on a square footage calculation. It is not disputed that the third floor of townhouse 113 is 862.2 square feet, which accords with the survey measurement of the third floor [exhibit 213].

[395] Schedule D of the registered Declaration [exhibit 104] lists the percentage interest in common elements and percentage contribution to common expenses by unit and level number. The Rainville townhouse is unit 7, level 1, and the percentage contribution set out is 3.243%. The proportionate share for townhouse 113 according to mathematical calculation should be .9589 percent larger to accord with the additional space of the third floor. Pursuant to the Amended Statement of Claim dated January 28, 2010, MTCC No. 1056 alleges that the total proportionate share of Rainville's contribution is 4.2019%. It is a claim based in unjust enrichment.

[396] While counsel for Rainville submits that there is no formula in the Declaration that requires her to pay anything different than the 3.243% that is specified and to do otherwise would require an amendment to the Declaration, I do not accept this argument. The evidence at trial was clear that the

basis for the determination of the appropriate contribution towards the common expenses of the corporation was on a square footage basis. To put it another way, the owners contributed to the common expenses in proportion to the size of their units. Since Weldon never disclosed the additional square footage he obtained by adding the third floor, he never paid towards the common expenses in proportion to the size of his unit.

[397] Rainville's former counsel agreed with this at her examination for discovery and her current counsel, Mr. Berkow, confirmed this at the trial. It is not disputed that neither Weldon nor Rainville ever paid for their use of the additional space on the third floor. I note that in his written submissions, Weldon "acknowledges owing MTCC No. 1056 for condominium fees to the Corporation for the time that Defendant lived at the complex based on the calculation provided by MTCC No. 1056 of around $11,000." [Page 10 of his submissions].

[398] In my view, it is inequitable to permit Weldon and Rainville to have had the use and enjoyment of the additional space in the condominium without having to pay for it. No evidence was called by either of them to dispute the methodology of MTCC No. 1056 in arriving at the amounts owing. Michael Kalisperas ("Kalisperas") testified at the trial. He is the current property manager of MTCC No. 1056 and has held this position since 2000. I found Kalisperas to be a credible witness who was knowledgeable about the finances of the condominium corporation and the Shared Facilities Agreement. While Kalisperas has experienced considerable difficulties with Rainville in his capacity as property manager, I did not find him to be biased against her. Rather, in my view, he attempted to provide the Court with evidence that was of assistance. I accept the evidence of Kalisperas and in my opinion, based on the increased square footage, the amounts set out in Schedule B of the written submissions of MTCC No. 1056 correctly calculate the amounts owing for use of the additional common element space.

[399] The Plaintiff, owes MTCC No. 1056 the principal sum of $53,957.22 plus interest at 5% to April 30, 2010 for a further sum of $2,441.80. The Plaintiff shall pay $56,399.02 to the Defendant MTCC No. 1056, plus interest from May 1, 2010 at the per diem rate of $7.38 to the date she ceases to use the third floor.

[400] The Third Party Weldon shall pay to MTCC No. 1056 the sum of $11,984.15 together with interest at 4% as set out in Schedule B of the written submissions for a further sum of $6,755.16. Weldon shall pay interest from May 1, 2010 at the per diem rate of $1.31 to the date of my Judgment.

**10. Is the Defendant MTCC No. 1056 entitled to compensation from Weldon in the Third Party action?**

[401] The Amended Third Party claim issued by MTCC No. 1056 against Weldon claims:

- contribution and indemnity for any amounts which MTCC No. 1056 is found to be responsible to the Plaintiff;
- its costs of the main action and of the Third Party claim;
- a declaration that Weldon breached his fiduciary duty and his statutory duty to MTCC No. 1056 as a director; and

- compensatory, aggravated and punitive damages for said breach of fiduciary duty.

[402] As I have indicated, Weldon acknowledges that he ought to have paid common element fees for the additional space on the third floor for the time he resided in the unit, but he did not make the additional payments.

[403] MTCC No. 1056 pleads that Weldon converted the third floor attic into living space, thereby contravening the terms of the Declaration. It is alleged that Weldon concealed the existence of the illegal third floor at the time that he entered into the agreement of purchase and sale with the Plaintiff by "knowingly, negligently and/or recklessly misprepresenting that Unit 113 had 3 legal floors." Further, it is alleged that due to his conduct, MTCC No. 1056 through Brookfield did not have the accurate information when the estoppel certificate was completed.

[404] In his submissions, Weldon states that Pelican Management were appointed monitors of the Grand Harbour project in the spring of 1993 and that from this point onwards, Pelican had control of the project. Weldon argues it was part of his purchase agreement with the National Bank that a third floor would be built. Weldon further submits that Lou Andre, the construction manager, was not sure if Committee of Adjustment approval was needed for the third floor but Pelican was aware of the problem and encouraged him to go ahead.

[405] The cost of the third floor was determined to be $103,948.58, which amount was taken into account on the statement of adjustments on closing of the deal. In essence, Weldon alleges that he bought the dwelling as a 3 storey unit from Pelican and that is what he sold to the Plaintiff.

[406] The difficulty with the argument put forward by Weldon is that he failed to establish these propositions on the evidence. Given the serious credibility issues I have already noted with respect to Weldon's testimony, I do not find his evidence on this point persuasive. If part of the agreement with National Bank was that he would be permitted to build a third floor, I would have expected someone from National Bank to attend court to confirm this was the agreement. Alternatively, if Pelican was indeed aware of the deal Weldon made for the acquisition of a third floor and Pelican sold unit 113 to Weldon with a third floor, it is curious that no one from Pelican attended court to confirm this evidence. Given the length of this trial, the unexplained failure of Weldon to call a representative from the Bank and/or Pelican to confirm their knowledge about the third floor leads me to draw the conclusion that their evidence would not have supported the contention of Weldon that the third floor was part of his deal to buy the townhouse.

[407] In my view, Weldon in his written submissions has mischaracterized the evidence of Lou Andre ("Andre"). He confirmed that the construction of Weldon's third floor commenced in the spring of 1993 and, initially, Andre was reporting to Weldon. Andre knew that construction of the third floor would go into the common elements and he was not sure if this required a variance. Later, when Pelican assumed control, he submitted invoices for the work to Ron Mandowsky ("Mandowsky") for approval. There was no discussion with Mandowsky about changing the declaration to accord for the third floor. Andre acknowledged that the additional square footage would have to be declared to the Board because it affected the GFA and taken into account in the calculation of shared expenses.

[408] Andre confirmed that no building permit was ever secured for the work. In fact, renovations of the type undertaken by Weldon for the third floor would have required a building permit, as-built

drawings and the involvement of an architect and engineer. The surveyor would have had to complete revised drawings and Andre was never told by Weldon to involve any of these people, nor to get accurate drawings.

[409] In approximately June or July 1993, Andre took Mandowsky through unit 113, and the third floor was substantially complete. It was obvious to Andre that the expansion had involved an intrusion into the common elements. Andre thought he discussed that issue with Mandowsky, although he did not specifically recall.

[410] The evidence from Andre about the knowledge of Pelican concerning the illegality of the third floor and his belief that the illegality would be rectified is far from establishing that it was mere inadvertence that the third floor was not legitimized. I agree with the submission of counsel for MTCC No. 1056 that while Andre may be well-versed in the construction business, his opinion or understanding on the ease of remedying the illegality of the third floor is of little value to the Court. I do not say this to disparage Andre, because he was quite candid that his area of expertise was in construction, not in the proper procedure to correct problems in a Declaration.

[411] Weldon, however, was expert in real estate developments and what steps were required to comply with the legal requirements. Being the developer he was aware that there was an issue with respect to the GFA of the project, as there had already been a committee of adjustment approval. He knew that the construction of the third floor violated the Declaration and that to take steps to legalize it would require the involvement of various professionals and the creation of additional drawings and permits. All of this would have raised questions and potentially delayed the registration, which would have been a disaster under the circumstances.

[412] If Weldon's argument is that he was a bona fide purchaser from Pelican of unit 113 with a third floor and he paid for it, I reject this submission. There was no evidence from Pelican to support this theory and it flies in the face of the evidence, Rather, I see it as a convenient way for Weldon to attempt to deflect blame for the situation Rainville found herself in after January 16, 1998.

[413] I agree with the submission of counsel for MTCC No. 1056 and find that Weldon's failure to apprise Rainville and the Board of the illegal status of the third floor was not simply an oversight; rather, it was intentional. He did not want to have to take steps to amend the Declaration nor did he wish to "upset the apple cart" by causing a delay in the registration of the condominium corporation given the financial circumstances of the project. He knew from 1993 onwards that the third floor of his townhouse was illegal yet at no time did he inform the Board or take any steps to remedy the situation.

[414] As a member of the Board of Directors of the corporation from 1993 to 1997, Weldon had a statutory duty under the Old Act to "exercise the powers and discharge the duties of his office honestly and in good faith." His actions breached the duty imposed on him and the breach was fiduciary in nature. The condominium corporation would be affected by his non-disclosure when the illegal nature of the unit came to light. Weldon acted in his own self-interest in order to obtain financial gain.

[415] As a director of the Board of MTCC No. 1056 he was a fiduciary to the corporation and was under a duty not to prefer his own interests to those of the corporation, which he clearly failed to do. Not only was he on the Board of Directors, he was one of the developers of the complex so he cannot

be heard to say that he did not realize that the build-out into the common element space contravened the Declaration.

[416] Indeed, at trial he did not dispute the illegality of the third floor nor his knowledge of the illegality at the time. Instead, he attempted to deflect the responsibility away from himself and to blame others. Had he advised Rainville at the time she made her offer to purchase the unit that the third floor was not properly part of the townhouse, I have no doubt on the evidence that she would not have closed the transaction as the unit was not large enough for her needs without the third floor.



[417] 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, supra*, at paragraph 94.

[418] In my view, the actions of Weldon are reprehensible and deserving of an award of punitive damages. Clearly, Weldon profited by his deceitful conduct; he sold the townhouse in 1997 for $955,000 and he paid approximately $660,000 for it in 1993. He left Rainville in the unenviable position of purchasing a condominium that had an illegal third floor, knowing she was about to embark on extensive renovations. He had been warned of the consequences of his actions years before but he paid no heed because he was only concerned with what was in his own best interests. He attended the trial of the action representing himself and failed to demonstrate any remorse for his behaviour or to acknowledge that his responsibility for the years of legal proceedings that have ensued, the significant legal costs incurred by all of the involved parties, not to mention the impact of these lawsuits on the lives of the people involved.

[419] Such behaviour, in my view, is deserving of rebuke by the court in the form of a punitive damages award, which I assess in the sum of $50,000. In my view, given the facts of this case, this is a fair amount of what is rationally required to punish Weldon. I am mindful of the Supreme Court of Canada's direction that an award of punitive damages must be proportional, taking into account a variety of factors: the blameworthiness of the Defendant's conduct; the vulnerability of the Plaintiff; the potential harm directed specifically at the Plaintiff; the need for deterrence; the other penalties likely to be inflicted on the Defendant for the same misconduct; and the advantage wrongfully gained by the party from the misconduct: *Whiten, supra* paragraphs 111-126.

[420] The Third Party Weldon is to pay the sum of $50,000 to the Defendant MTCC No. 1056 forthwith.

**CONCLUSION**

[421] I make the following orders:

(a) The Plaintiff's application (Court File No. CV-09-378415) is dismissed.

(b) The Plaintiff's claims in Court File No. 01-CV-206672 are dismissed against the Defendants Brookfield, Post, and Cawthorn, as well as against Ward, Boland, Metzger, Kosich and Dorman. The crossclaims are dismissed.

(c) The Defendant MTCC 1056 shall pay to the Plaintiff the sum of $20,840.50 for repairs to common element defects, plus pre-judgment interest from October 2006 less the period October 2008-October 2009.

(d) The Plaintiff shall have judgment against the Defendant Gowlings in the following amounts:

- $225,000 plus pre-judgment interest from January 16, 1998 at the average rate, less the one year period October 2008-October 2009;
- $18,542.19 plus pre-judgment interest from March 2001 at the average rate, less the one year period October 2008-October 2009;
- $53,095.91 for the associated close up costs;
- the close up costs of the third floor, in a sum to be determined by the Master; and
- the decorating/renovation costs to the third floor, in a sum to be determined by the Master pursuant to Rule 54.02(1).

(e) In the action with the Court File No. 98-CV-145778, MTCC No. 1056 is granted leave to amend its claims in accordance with paragraph 479 set out in its written submissions dated March 8, 2010. Rainville is directed to close up the third floor of townhouse 113 and restore it to common element attic space, in accordance with the time lines set out in my Reasons for Judgment. MTCC No. 1056 is to retain an engineer on or before September 30, 2011 to prepare a scope of work for the restoration of the third floor to attic space. The scope of work is to be prepared on or before October 31, 2011 and immediately served on the Plaintiff and counsel for Gowlings for their review and input. The Plaintiff and Gowlings are to provide responses, if any, to the engineer's proposal on or before November 15, 2011. The parties are directed to attend before me prior to November 30, 2011 to discuss timing issues for the work and any other matters related to commencing the work. The sum of $84,000 is to be paid into Court forthwith by the defendant Gowlings towards the cost of returning the third floor to attic space. The matter is referred to the Construction Lien Master to effect the work and calculate the costs.

(f) The Plaintiff is ordered to pay to MTCC No. 1056 for the occupation of the third floor in the sum of $56,399.02 plus interest from May 1, 2010 at the per diem rate of $7.38 to the date she ceases to use the third floor.

(g) In the action with the Court File No. 04-CV-266159CM, the Third Party, Richard Weldon, is ordered to pay to MTCC No. 1056 for his occupation of the third floor in the sum of $18,739.31 plus interest at the per diem rate of $1.31 from May 1, 2010 to the date of my Judgment. I order Weldon to indemnify MTCC No. 1056 the sum of $20,840.50 plus the applicable interest for repairs to the common element defects undertaken by the Plaintiff. The Third Party Richard Weldon is to pay to MTCC No. 1056 the sum of $50,000.00 in punitive damages forthwith.

(h) If counsel and Weldon are unable to agree on costs, I will meet with counsel and Weldon to deal with a timetable for delivery of brief submissions and to schedule a time for oral argument. An appointment may be arranged through Judges' Administration.

[422] I would be remiss if I did not thank counsel for their excellent advocacy on behalf of their respective clients as well as their civility demonstrated to the Court throughout the course of this long trial. I am grateful for their patience in waiting for these reasons, necessitated by my continued involvement in other trials.

Darla A. Wilson J.

**Released:** August 18, 2011

**Citation: Orr v. Metropolitan Toronto Condominium Corporation No. 1056, ONSC 2011 4876**
**COURT FILE NO.:** 01-CV-206672A CM
**DATE:** 2011 08 18



**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

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

Plaintiff

-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

-and-

Richard Weldon

Third Party

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**REASONS FOR JUDGMENT**

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Darla A. Wilson, J.

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**Released:** August 18, 2011