CITATION: The Courthouse Block Inc. v. Middlesex Condominium, 2011 ONSC 3893
COURT FILE NO.: 2280/2010
DATE: 2011/07/05

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
THE COURTHOUSE BLOCK INC. Applicant	Brian Daly and Sean Flaherty for the Applicant
– and –	
MIDDLESEX CONDOMINIUM CORPORATION NO. 173 Respondent	Jonathan H. Fine for the Respondent
	HEARD: May 30, 31 & June 1, 2011

RADY J.:

REASONS FOR JUDGMENT

Introduction

[1] The applicant owns 35 of 38 commercial units in the respondent's mixed use condominium complex located at 379-389 Dundas Street and 380-390 King Street in London, Ontario ("the property"). It alleges that the respondent has acted oppressively toward it entitling it to relief pursuant to s.135 of the *Condominium Act*, 1998, S.O. 1998, c.19. It seeks an order compelling the respondent to purchase its units at a fair value to be determined.

The Facts

[2] The property consists of two residential towers containing 255 residential units. The east residential tower is accessed from Dundas Street and the west tower from King Street. The towers flank a two-storey commercial complex with entrances from both Dundas and King Streets.

[3] The property is just over 35 years old, having been constructed in or about 1975 as an apartment building. In June 1990, the property was converted into a condominium and the respondent was created. It is common ground that when the building was converted into a condominium, no significant replacements of major building components occurred.

[4] In 1994, a mortgagee in possession, Royal & Sun Alliance Co., took control of the condominium corporation. During the time it was in possession, there were a number of unsold residential units, the building required repairs, some of which were undertaken by Royal, and most of the commercial units were vacant and had been for many years.

[5] On November 9, 2001, the applicant purchased 37 of the 38[1] commercial units from Royal. It bears noting that the applicant's principal is Shmuel Farhi, a well known London businessman who, through the applicant and related interests, owns in excess of 80 rental buildings in the city. There is no question that Mr. Farhi is a seasoned and astute investor.

[6] At the time Royal issued its notice of sale, the mortgage was $4,771,294.64. The applicant paid $650,000 for its 37 units. The seller's agent was Rick Gleed of DTZ Barnicke, which was also a tenant in one of the commercial units. Prior to closing, representatives of the applicant conducted a walk-through visual inspection of the units but did not inspect the mechanical systems. The applicant says that it was not able to

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[1] One of the units is an equipment unit owned by the respondent to house equipment for Bell Cellular.

inspect the mechanical equipment or systems although there is no evidence that it was prevented by the vendor from doing so. The property was purchased on an "as is/where is" basis. The applicant concedes that other than what is included in the agreement of purchase and sale, there were no discussions, representations, disclosures, warranties or limitations of liability. Mr. Gleed was aware of at least one instance of water entry into the Barnicke unit prior to the execution of the agreement of purchase and sale but did not disclose it to the applicant, considering this was a sale under power and the due diligence obligations of the purchaser.

[7] At the time of purchase, there were five other tenants.[2] In 2009, the applicant sold two units to the London Convenience Store. As a result of its holdings, the applicant is responsible for 15% of the common expenses. The London Convenience Store and the residential owners fund the balance. Since the purchase, the applicant has successfully attracted tenants and at the time that this application was commenced, all but four units have been leased. Since its purchase, the applicant has made numerous requests to the respondent for repairs to be made to address continuing problems with water penetration of the commercial units. The respondent's alleged failure to deal with the water leakage issues promptly or at all is at the heart of this application. There are various other complaints but it is fair to say that the water problems have been the most pressing and persistent.

The Parties' Positions

[8] The applicant says that when it purchased the units, it believed that maintenance of the common elements would be conducted on a proactive and preventative basis. Instead, the respondent has neglected its obligations and has favoured the residential interests over the commercial. Since its purchase, the applicant has reported at least 153 incidents of water penetration into the commercial units, some of which have been minor

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[2] London Goodwill Industries, London Convenience, JJ Barnicke, The London Press Club, Sexual Assault Centre and HALO Inc.

but some have been floods, causing damage and disruption to the business of the affected tenants. Many of the problems stem from aged and failing heat pumps, for which no preventative maintenance or replacement program exists. Further, the exterior areas are said to be in a poor state of repair, particularly the decorative church tower located outside. The applicant says that its tenants are leaving because of these problems and that its reputation as a landlord is adversely affected. And finally, although the respondent says it has a plan for replacement of the heat pumps and for repairs, the applicant does not have confidence that the respondent will follow through given its track record.

[9] The applicant submits that the respondent has treated it unfairly by refusing to address these issues and its conduct is oppressive within the meaning of s. 135 of the *Condominium Act*.

[10] The respondent acknowledges that there have been instances of water penetration into the commercial units but says that the court should not consider any evidence of complaints prior to September 2008 (i.e. two years prior to the application being issued) because they are statute barred. It concedes that the evidence is admissible, however, on the issue of reasonable expectations, which is relevant to an oppression remedy. Second, it says that substantially all of the applicant's complaints are moot because steps have been taken to affect repairs or to carry out repairs in future in accordance with a professionally prepared remediation plan. It denies that the applicant is losing tenants and if tenants are leaving, it is for reasons unrelated to water problems.

[11] Further, there is an issue respecting abuse of process because the applicant has already sued the respondent for damages relating to water entry. A statement of claim was issued on April 5, 2007, which has been defended but has not yet been adjudicated. The claim and this application share some legal and factual issues and there is a danger of inconsistent decisions.

[12] Finally, the respondent submits that the board of directors has always acted reasonably in accordance with sound business judgment and in accordance with its

obligations under the bylaw. The bylaw also protects the corporation by virtue of a limitation of liability clause.

The Statutory Provisions

[13] It is helpful to first set out the statutory framework and the relevant language of the bylaws.

> **Standard of Care**
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> s. 37 (1) Every director and every officer of a corporation in exercising the powers and discharging the duties of office shall,
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> (a) act honestly and in good faith; and
>
> (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. 1998, c. 19, s. 37 (1).
>
> **Liability of directors**
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> (3) A director shall not be found liable for a breach of a duty mentioned in subsection (1) if the breach arises as a result of the director's relying in good faith upon,
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> (a) financial statements of the corporation that the auditor in a written report, an officer of the corporation or a manager under an agreement for the management of the property represents to the director as presenting fairly the financial position of the corporation in accordance with generally accepted accounting principles; or
>
> (b) a report or opinion of a lawyer, public accountant, engineer, appraiser or other person whose profession lends credibility to the report or opinion. 1998, c. 19, s. 37(3); 2004, c. 8, s. 47(1).
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> **Repair of damage**
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> 89. (1) Subject to sections 91 and 123, the corporation shall repair the units and common elements after damage. 1998, c. 19, s. 89 (1)…
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> **Maintenance**
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> 90. (1) Subject to section 91, the corporation shall maintain the common elements and each owner shall maintain the owner's unit. 1998, c. 19, s. 90 (1).
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> **Reserve fund**
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> 93. (1) The corporation shall establish and maintain one or more reserve funds. 1998, c. 19, s. 93 (1).

Purpose of fund

(2) A reserve fund shall be used solely for the purpose of major repair and replacement of the common elements and assets of the corporation. 1998, c. 19, s. 93 (2).

Reserve fund study

94. (1) The corporation shall conduct periodic studies to determine whether the amount of money in the reserve fund and the amount of contributions collected by the corporation are adequate to provide for the expected costs of major repair and replacement of the common elements and assets of the corporation. 1998, c. 19, s. 94 (1).

Compliance order

134. (1) Subject to subsection (2), an owner, an occupier of a proposed unit, a corporation, a declarant, a lessor of a leasehold condominium corporation or a mortgagee of a unit may make an application to the Superior Court of Justice for an order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules or an agreement between two or more corporations for the mutual use, provision or maintenance or the cost-sharing of facilities or services of any of the parties to the agreement. 1998, c. 19, s. 134 (1); 2000, c. 26, Sched. B, s. 7 (7).

Oppression remedy

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. 1998, c. 19, s. 135 (1); 2000, c. 26, Sched. B, s. 7 (7).

Grounds for order

(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. 1998, c. 19, s. 135 (2).

Contents of order

(3) On an application, the judge may make an order the judges deems proper including,

(a) an order prohibiting the conduct referred to in the application; and

(b) an order requiring the payment of compensation. 1998, c. 19, s. 135 (3).

[14] Article 4.1(c) of the respondent's Bylaw No.1 provides as follows:

> The duties of the Corporation shall include but shall not be limited to the following:
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> …
>
> (c) arranging for the supply of heat, electricity and water to the property except where prevented from carrying out such duty by reason of any event beyond the

> reasonable control of the Corporation. If any apparatus or equipment used in effecting the supply of heat, electricity and water at any time becomes incapable of fulfilling its function or is damaged or destroyed, the Corporation shall have a reasonable time within which to repair or replace such apparatus or equipment and shall not be liable for indirect or consequential damages for personal discomfort or illness caused by reason of the failure to perform such duty.

Steps Taken by the Respondent

[15] In order to assess the respondent's conduct, it is necessary to review what steps, if any, it has taken to date to address or rectify the applicant's ongoing and justifiable concerns.

[16] The respondent carried out reserve fund studies in 2002, 2005, 2009 and a current reserve fund study has recently been completed by Brown & Beattie Engineers for 2011. It appears that some of the recommendations in the 2002 and 2005 studies were not implemented. The applicant says it has not received the 2009 study. The 2011 study provides for raising $5 million by way of loan and $1.172 million by special assessment over the next four years. These amounts are in addition to the regular, annual contributions to the reserve fund made by unit owners. The special assessment was levied recently and averages $4,000 per unit, so action is clearly being taken to implement the recommendations, which include the replacement of all heat pumps in the commercial space that are original to the building; replacement of the inverted roof in the towers and commercial spaces; replacement of the heating/cooling distribution system; and a number of other replacements. It further recommends that an investigation be undertaken to assess the condition of the other roofing of the towers and commercial spaces and the condition of the church tower, among other things.

[17] Brown & Beattie retained Ed Porasz, a professional engineer, to consult regarding the heat pumps in response to a report prepared by Peter Goring who was retained by the applicant to inspect eight of the commercial area heat pumps. Mr. Goring was critical of the poor state of repair and the installation of the heat pumps. Mr. Porasz does not agree

with the dire conclusions drawn by Mr. Goring but he does say that the units are past their life expectancy.

[18] The respondent retained Orzech Heating & Cooling by resolution dated July 27, 2010 to service all of the commercial area's 80 heat pumps. The work was finished in the fall of 2010 and Mr. Orzech reported to the respondent that the work was fully completed. There is some evidence that Mr. Orzech may not have serviced all of the pumps for reasons not apparent, although his instructions from the respondent were clear and not apparently countermanded or circumscribed. Unfortunately, there have been further leaks following the completion of Mr. Orzech's work.

[19] In any event, the board of directors has also approved a staged and prioritized plan for repairs and replacements and an accelerated timeline for some items has been prepared to address concerns with more immediacy. This is called a remediation action plan, which prioritizes work to be done at a cost of $3.3 million over the next five years. It says that it will be pursuing this plan with the assistance of its professional advisors. It identifies the heat pumps in the commercial units and common areas as a priority with their replacement beginning in March 2011 and ending in June 2011. However, it would appear that the work has not yet been undertaken. Undoubtedly, this litigation intervened.

[20] The respondent has expended some funds over time that have directly or indirectly benefitted the applicant. For example, in 2006-2007, roof work for the commercial area was completed. Improvements to the common elements of the commercial mall have been undertaken. Elevator repairs and refurbishment was done. The swimming pool, which is located over the commercial space, has received attention in order to stop leakage. Repairs to leaking skylights have also been undertaken.

[21] It appears as well that the respondent has responded reasonably quickly to the applicant's complaints when there have been water problems, usually within one to two business days. The respondent has arranged for contractors to clean and sanitize the

premises and to repair the underlying problem, which, as noted, rests largely with the heat pumps. However, the regime for their wholesale replacement was not established until recently.

[22] The respondent has used some stop gap measures, for example, by hanging pails in the ceiling space to catch water. This is clearly suboptimal if used as anything but a short term solution but the evidence about the duration of their use is conflicting.

[23] There is evidence that some steps are being taken to identify problems with the decorative church tower through the implementation of a three stage plan. There is protective fencing around the tower in the meantime until the work is undertaken.

[24] I do not think it would be inaccurate to say that the respondent did not make remediation of the commercial area a priority until after the applicant commenced the first lawsuit and then threatened this proceeding. It is apparent that the respondent, while somewhat dilatory in the past, has now taken steps that seriously address the applicant's concerns.

The Case Law

[25] The issue is whether its conduct has been oppressive. Some guidance on the issue may be derived from the case law.

[26] In *McKinstry v. York Condominium Corp. No. 472* (2003), 68 O.R. (3d) 557 (S.C.J.) the court commented as follows:

> …Stakeholders may apply to protect their legitimate expectations from conduct that is unlawful or without authority, and even from conduct that may be technically authorized and ostensibly legal. The only prerequisite to the court's jurisdiction to fashion a remedy is that the conduct must be or threaten to be oppressive or unfairly prejudicial to the applicant, or unfairly disregard the interests of the applicant. Once that prerequisite is established, the court may "make any order the judge deems proper" including prohibiting the conduct and requiring the payment of compensation. This broad powerful remedy and the

> potential protection it offers are appropriately described as "awesome". 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.

[27] In *Metropolitan Toronto Condominium Corp. No. 1272 v. Beach Development (Phase II) Corp*., Justice Penny discussed the concept of reasonable expectations in the following way:

> 13 In *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, the Supreme Court held that the best approach to analyzing the oppression remedy is a two-pronged test. At the first stage, the applicants must establish a breach of reasonable expectations. If successful, the court must go on to consider whether the conduct complained of amounts to oppression, unfair prejudice or unfair disregard.
>
> …
>
> 19 The concept of reasonable expectations is objective and contextual, taking into account the facts of the specific case, the relationships at issue and the entire context. The actual expectation of a particular stakeholder is not conclusive. The applicant must identify the expectations that were allegedly violated and establish that those expectations were reasonable held, based on factors that may include general commercial practice, the nature of the corporation, the relationship between the parties, steps that the claimant could have taken to protect itself, the fair resolution of stakeholders' conflicting interests and, importantly, representations and agreements. I address each of these factors below.
>
> …
>
> 21 One of the leading decisions of the Ontario Court of Appeal on the issue of oppression in the condominium context is *York Region Vacant Land Condominium Corp. No. 968 v. Schickedanz Bros. Ltd.* (2006), 215 O.A.C. 158. This case involved a bifurcated common element allocation formula which, the Court of Appeal found, clearly favoured the interests of the developer at the expense of the unit holders. There was no allegation that the bifurcated common expense formula had been misrepresented in the developer's declaration or that there was

> any disclosure impropriety prior to the owner's purchases. Indeed, the Court of Appeal found that the bifurcated expense formula outlined in the declaration was disclosed to all prospective purchasers of units. The Court of Appeal also found that there had been no improper intent behind the bifurcated common expense formula. In fact, the formula was an attempt to reflect the commercial realities inherent in that particular site and the staged nature of the development. Last, the Court of Appeal concluded that so long as the bifurcated formula was precisely drafted, properly disclosed to prospective purchasers and infringed no prohibition in the Act, then the allocation formula could not be said to defeat owners' reasonable expectations or to give rise to oppressive conduct. If, the Court of Appeal held, declarants could not rely upon the terms of a declaration which fully complied with the Act and was fully disclosed to purchasers, there would be "shocking implications" for the industry.
>
> 22. The *Schickedanz* case is, therefore, premised on the understanding that the framework of the Act is predicated on the registration of the declaration, which then becomes, along with the Act, the core document upon which owners and prospective owners can rely.

[28] Justice Ground in *Sexsmith v. Intek Inc.*, [1993] O.J. No. 711 reviewed the meaning of "unfairly prejudicial" and "unfairly disregards the interests":

> [para. 30] With respect to whether the conduct complained of was unfairly prejudicial to the applicant, the Ontario Court of Appeal in (In Re *Mason and Inter-City Properties Ltd.* (1987), 59 O.R. (2d) 631, held that unfair prejudice to, or unfair disregard of the interests of, minority shareholders were <u>less rigorous tests</u> than oppression, per Blair J.A. at p. 65. The phrase "unfairly prejudicial" was considered in *Diligenti v. RWMD Operations Kelowna Ltd*. (1976), 1 B.C.L.R. 36 (S.C.), wherein Fulton J. stated at pp. 45-46:
>
> > There has been no interpretation, in this context, of the words "unfairly prejudicial". Turning to the dictionaries for assistance, I find the following definitions in the Shorter Oxford English Dictionary, 3rd ed.:
> >
> > "prejudice…I. Injury, detriment, or damage, caused to a person by judgment or action in which his rights are disregarded; hence, injury to a person or thing likely to be the consequence of some action…

> "Prejudicial…I. Causing prejudice; detrimental, damaging (to rights, interests, etc.)…
>
> "Unfair…Not fair or equitable; unjust…Hence, unfairly."
>
> It is significant that the dictionary definitions support the instinctive reactions that what is unjust and inequitable is obviously also unfairly prejudicial.
>
> In considering the whole effect which should be given to the expression "unfairly prejudicial" in the light of these definitions, and of the rule summarized above, I agree that it must be borne in mind that the consequences in question must flow to the applicant as a member, and not as a director or employee. Prejudicial, according to the dictionary, means detrimental or damaging to his rights, interests, etc. The question then is: does the applicant have some rights or interests as a shareholder in respect of which he has been unfairly prejudiced?...
>
> [para. 32] The term "unfairly disregards the interests of" would appear to be the least rigorous ground of the three set out in s. 248 of the OBCA. In *Stech v. Davies*, [1987] 5 W.W.R. 563 (Alta. Q.B.), Egbert J. referring to Diligenti, supra, stated at p. 569:
>
> The learned justice did not discuss the meaning of "unfair disregard", as those words were not included in the section of the Act with which he was dealing. In my view, they mean to unjustly or without cause, in the context of s. 234(2), pay no attention to, ignore or treat as of no importance the interests of security holders, creditors, directors or officers of a corporation.

[29] In considering whether the respondent has acted oppressively, the court must be mindful of two imperatives: the need to defer to reasonable business decisions undertaken by the board of directors and to recognize its obligation to balance private and communal interests. See, for example, *York Condominium Corp. No. 382 v. Dvorchik* (1997), 12 R.P.R. (3d) 148 (Ont. C.A.) and *McKinstry, supra.* This is particularly important in buildings such as these where residential and commercial uses co-exist.

Analysis

[30] In coming to a conclusion, it is necessary to first consider the applicant's reasonable expectations and whether they were breached. The applicant is an experienced commercial land owner and landlord. The units were contained in a 25 year old building and they were purchased under power of sale on an "as is" basis, without more than a walk-through visual inspection. The purchase price was an attractive one. There is no evidence that the applicant was aware of water entry issues before its purchase but the applicant should have been aware that the building systems were aging, and that the building had been maintained for a considerable period of time by a mortgagee in possession, which would want to protect its investment but undoubtedly wished to minimize its losses.

[31] The applicant was aware of the respondent's repair and maintenance obligations pursuant to the *Condominium Act* but also knew that by virtue of Bylaw No. 1, the corporation had a reasonable time in which to effect repairs and replacement. It is not unreasonable that the applicant would expect that there would be a plan in place for the maintenance of common elements and that mechanical equipment would be upkept. It is noteworthy, however, that no warranties respecting the mechanical systems were sought on closing and none were given.

[32] There is a dispute about the extent of preventative maintenance on the heat pumps. Mr. Goring suggests there was little, if any. Mr. Poracz concludes otherwise. I prefer Mr. Poracz's evidence because he had an opportunity to inspect more units than Mr. Goring and his conclusion accords with common sense: since many of the units are working well past their life expectancy, they must have been the subject of a maintenance program of some kind.

[33] I am persuaded that the respondent has not, until recently, given priority to the replacement of the heat pumps in the commercial space. However, I am not prepared to second guess the board of directors on this issue. It is a volunteer board, reliant on the

advice of its professional advisors. The building is dated and presents a number of challenges requiring a sensitive balancing of various competing interests. It is important to remember that there are also 255 residential units in the complex and those unit owners have a set of their own reasonable expectations that must be addressed. The evidence supports the conclusion that funds were expended to address various problems related to the residential units as well but it cannot be said that the residential interests were unfairly preferred to the commercial. Fortunately, the respondent is in good financial health and is now in a position to take serious steps to remedy the problems.

[34] In sum, I am simply unable to conclude on the evidence and in the circumstances that the applicant's reasonable expectations have been breached. The respondent has undoubtedly not acted with the dispatch the applicant would have liked and one can certainly understand its frustration and annoyance. Nevertheless, assessed contextually and objectively, one cannot say there has been a breach.

[35] Even if I were to have concluded otherwise, it cannot be said that the applicant has been oppressed in the sense of having been unfairly prejudiced, unfairly disregarded, unjustly and without cause. The respondent responded to the complaints of water leaks in a reasonably prompt and professional way. It did not, however, replace the heat pumps. I am unable to conclude that this was unjust and without cause given the board's responsibility to the residential and commercial interests and the need to balance them in a fiscally sound and judicious way.

[36] Finally, even if the applicant had been successful in establishing oppression, I would not order a forced purchase of its units. To my mind, that would be a disproportionate response to the matter, particularly when the respondent has now taken concrete steps to rectify and remediate the applicant's concerns. If the respondent fails to follow through as the applicant fears, it has a remedy pursuant to s. 134 of the Act.

[37] In view of these reasons, it is not necessary to deal with the limitations or abuse of process issues.

[38] I will receive written submissions respecting costs within 30 days.

"Justice H. A. Rady"

Justice H. A. Rady

Released: July 5, 2011

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