CITATION: Toronto Common Element Condominium Corporation No. 1508 v. William Stasyna, , 2012 ONSC 1504
COURT FILE NO.: CV-11-00421537-0000
DATE: 2012-03-06

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
TORONTO COMMON ELEMENT CONDOMINIUM CORPORATION NO. 1508 Applicant	*Michael A. Spears*, for the Applicant
– and –	
WILLIAM STASYNA, WANDA BANKS-STASYNA, MARIA DIPIETRO, ROBERT PHIPPS and SHAWN ROCHE Respondents	*Andrea C. Krywonis*, for the Respondents
	HEARD: November 10, 2011

REASONS FOR JUDGMENT

MICHAEL G. QUIGLEY, J.

Introduction

[1] The dispute in this case relates to alterations that were made by the respondents to the walkway area that is behind their homes in this residential development. In the eight years since it was built, a number of owners have added personal landscaping close to the fences at the back of their properties. However, that area of land does not belong to them. It comprises part of the common element lands that includes a common walkway belonging to Toronto Common Elements Condominium Corporation No. 1508 ("TCECC No. 1508" or the "Corporation"). Now, the Corporation wants those landscaping alterations removed. It wants the common elements lands restored to their original state.

[2] To achieve that return to uniformity, TCECC No. 1508 applies under rule 14.05 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 and s. 134 of the *Condominium Act, 1998*, S.O.

1998, c. 19 for a declaration that the respondent owners are in breach of s. 98 of the Act. It seeks orders that each of them be required to remove unauthorized alterations that they have made to the common elements owned by TCECC No. 1508 adjacent to each of their properties.

[3] The common elements are attached to 32 separate "Parcels of Tied Land" or "POTLs," that collectively comprise this housing development. Each of the respondents owns one of those parcels, and each of them has an interest in the common elements, because they are attached to each of the 32 separate parcels. They are located around the perimeter of the housing development and they also go in between some of the separate parcels or properties. Visually, however, the common elements walkways appear to be an indistinguishable part of each owner's separate parcel of tied land.

[4] TCECC No. 1508 says that the *Condominium Act* and its Declaration prohibit any alterations to the common elements without the approval of the board of directors. Nevertheless, the respondents have allegedly (i) installed alterations on the common elements walkways without consent or approval of the board and contrary to the Act and Declaration of the Corporation, and (ii) failed or refused to remove the alterations despite numerous requests from TCECC No. 1508 over a period of several years.

[5] The respondent owners argue that the Corporation's application ought to be stayed or dismissed on three grounds:

(i) that TCECC No. 1508 is statute-barred from bringing the application by the provisions of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B.;

(ii) that the applicants were required to submit to mediation and arbitration as a mandatory precondition before bringing their application under ss. 132 and 134(2) of the *Condominium Act*; and

(iii) that other equitable defenses available to them should cause the court to exercise its discretion in their favour.

[6] In any event, the respondents claim that the Corporation has not been reasonable in how it has pursued enforcement. They say that less onerous options were available to it. They say those options should have been attempted prior to bringing this application. Indeed, the respondents have actually submitted this dispute to mediation, but they only took that step on March 11, 2011 after TCECC No. 1508 commenced this application. Since the Corporation has failed, in their view, to comply with the *Condominium Act* by submitting to mediation, the respondents claim that this court has no jurisdiction to grant the relief sought by the applicant in the Notice of Application. They ask the court to stay TCECC No. 1508's application.

[7] In spite of the courageous resistance of the respondents, I am satisfied that TCECC No. 1508 is entitled to succeed for the reasons that are set out below. I find that it is entitled to require that the respondents remove the unauthorized items from the common elements property adjacent to each of the respondent's individual parcels. I am not satisfied, however, that it

would be appropriate in the circumstances of this case to require that the associated costs be entirely at the expense of the respondents. Having regard to the history of the proceedings and the dealings between these respondents and this and prior boards of the Corporation, I have concluded that the respondents should not be expected to pay all of the applicant's legal costs. For this reason, the parties will effectively share the costs involved in this application.

Summary of Background Facts

[8] The respondents are the registered owners of three of the parcels of tied land. The Stasynas own POTL 16, the Roches own POTL 19 and the Phipps-DiPietros own POTL 19. They have been owners respectively since October 21, 2003, October 28, 2003 and April 19, 2007.

[9] The unauthorized additions that TCECC No. 1508 seeks to remove consist of the landscaping alterations undertaken by these three owners on the common elements land adjacent to their respective parcels.

[10] The Roches landscaped the area behind their residence in May of 2004. They planted shrubs and trees and installed a flagstone patio in their backyard that extended to the back fence. However, the area just inside the fence is part of the common elements walkway. It is not their private property. At that time, several of the other parcels also had various visible forms of landscaping, such as trees, shrubs, patios and stones, in some cases also located on the common elements walkway.

[11] The Stasynas landscaped their property in 2004 and 2005. They planted trees and shrubs, laid decorative patio and other stones and installed a metal gate. In 2006, they put red decorative stone between their parcel and the adjacent parcel, POTL 15. Finally, the Phipps-DiPietro family landscaped the backyard of their parcel in 2007 by planting small trees and laying mulch. None of the respondents have conducted any further landscaping of their parcels since that time, but the landscaping each of them put in place at those times remains to this day. It is admitted that some of that landscaping encroaches on the unmarked common access walkway area at the back of their properties.

[12] Each of the respondents received a letter from the Corporation requiring them to remove the landscaping alterations they made to the common elements walkway area at the rear of their parcels. Those letters allege that the changes that they made were affecting access to the common elements walkway.

[13] Both the Roches and the Stasynas received their correspondence from the Corporation on July 18, 2005, advising them that they needed to obtain permission prior to making the changes that they had undertaken. It required that their changes be removed by August 30, 2005.

[14] The Stasyna's also received a notice in April of 2006 requiring the removal of the red stone they had placed in between their parcel and the adjacent property.

[15] The Phipps-DiPietro family received a letter from the corporation on May 25, 2007, requiring that they also remove the changes that they made to the common elements area at the rear of their property by June 15, 2007. As with the Roches and the Stasynas, the notice received by the Phipps-DiPietros alleged that the changes were affecting access to the common elements.

[16] A period of time passed during which none of the three owners heard anything further from the board with respect to the common elements. The respondents swear that each of them thought that the issue was resolved since they received no further enforcement threats or notices. Regardless, they all also acknowledge that none of them took any steps to resolve the issue or remove the landscaping prior to the deadline given to them by the Corporation.

[17] During this same period in 2007, there were other owners who received similar notices to remove landscaping at their homes that impinged on the common elements walkways. However, those owners complied with the notice. They removed the landscaping. The motion record also contains evidence of other owners removing trees that encroached on the open walkway area of the common elements after receiving threats from the board.

[18] Three and a half years after the initial removal requests were made, the board called a Special Meeting to hold a vote on proposed changes to the common elements in January of 2009. As it was empowered to, the board stipulated that the proposed changes were to be treated as a substantial change requiring a 66.6% favorable vote. The board chose to treat the matter that way under s. 97(6)(b) of the Act because the proposed changes to the common elements had become contentious among the owners.

[19] Twenty-six of the thirty-two owners attended and voted at the meeting. Fifteen voted in favor of the proposed changes to the common elements and eleven owners voted against them. The remaining six owners did not attend the meeting or vote. This vote represented less than half of the units and clearly less than the two thirds threshold that had to be passed if the change was to be effective.

[20] Following this meeting, the Corporation held its annual general meeting on September 21, 2009. The owners decided that all of the common elements had to be returned to their original form by August of 2010. This decision meant that all alterations, landscaping or other impediments that had been erected and changes that had been made to the common elements were required to be removed.

[21] On August 29, 2009, the Corporation sent a written demand to offending unit owners, including the respondents. That notice gave each of the owners a generous one-year grace period within which to comply. It required the removal of additions and alterations from the common elements area on or before August 1, 2010.

[22] It is not surprising that the decision of the board had become a divisive issue that generated a certain amount of vitriol among the owners, who had largely been at peace with each other before this dispute arose.

[23] Thus, notwithstanding the one year grace period, these three owners did not comply and remove their alterations from the common elements area by August 1, 2010. Having failed to comply with those demands, each of them received a letter from the corporation's lawyers in September of 2010, advising that their landscaping was in violation of the *Condominium Act* and notifying them that an application for compliance would be brought pursuant to s. 134 of the Act if the common elements were not restored by October 31, 2010.

[24] The solicitor's demand letter also enclosed an account to each of the three respondents for $1,688.32 representing their proportionate shares of the $5,000 of legal expense allegedly incurred by the Corporation in enforcing its rules relative to each of them. The respondents obviously felt this was heavy handed. When they realized that each of them had received nearly identical letters and significant legal accounts, they sought legal counsel as a group. That ultimately led to this litigation.

[25] Some half-hearted efforts appear to have been made between the parties' solicitors to negotiate a resolution in the fall of 2010, but they bore little fruit. Two or three letters were exchanged between the debating legal questions. These letters discussed (i) the changes made by the three owners to the common elements walkways, (ii) whether the *Limitation Act* applied, and (iii) whether TCECC No. 1508 was obliged to engage in compulsory mediation prior to bringing an application before the court. However, evidently both sides were entrenched in their positions. Consequently, TCECC No. 1508's solicitors proceeded to commence this application in March of 2011.

[26] It is import to note that the Corporation claims to have no obligation to engage in mediation and arbitration prior to commencing this application. Equally, they claim that it is irrelevant that the matter was submitted to mediation on March 11, 2011 after the applicants commenced this application, regardless whether they acknowledged that step in their application materials. They refuse to mediate the case. The respondents claim to remain willing to do so.

[27] This hearing was held on November 10. I allowed the parties a further period of four weeks to see if they could resolve their dispute consensually but they have been unable to do so. Each of them seems intent to avoid conciliation and persevere in their entrenched positions.

Issues

[28] There are four issues requiring resolution on this application:

(i) Is the Corporation prevented from bringing this compliance motion owing to knowledge of the common element changes and the expiry of an applicable limitation period?

(ii) Are mediation and arbitration under ss. 132 and 134 of the *Condominium Act* mandatory before this court has jurisdiction over the subject matter of this application?

(iii) Is the Corporation precluded from requiring the compliance of the respondents with the demand to restore the common elements by equitable or other defences?

(iv) What is an appropriate disposition in this case respecting the costs of remediation of the common elements and the legal costs of this proceeding?

Each of these issues is addressed in the paragraphs that follow.

Relevant Statutory and Governance Provisions

[29] In Ontario, the *Condominium Act* imposes statutory duties on condominium corporations and on members of the condominium to comply with the Act and with the Declaration, by-laws and rules established by the condominium corporation at its inception.

[30] Subsection 17(2) of the Act provides that a condominium corporation has a statutory duty to control, manage and administer the common elements and subsection 3 of that section imposes a statutory obligation on the condominium corporation to take all reasonable steps to ensure that the members of the condominium comply with the Act, and with its Declaration, by-laws and rules. A mirror obligation is imposed upon the members. Section 119 of the Act makes clear that all of the parties to this litigation are statutorily obliged to comply with the Act, the Declaration, and the by-laws of the condominium corporation and with its rules of operation.

[31] Changes made by owners to common elements are addressed in s. 98. Under that provision, as it relates to this application, there are only two permitted grounds upon which an owner may make additions, alterations or improvements to the common elements of the condominium corporation. Provided that the addition, alteration or improvement proposed to be made to the common elements is not contrary to the *Condominium Act* itself or to the Declaration of the condominium corporation, the common element change is authorized only where one of two alternative methodologies is adopted:

(i) The board must approve of the proposed addition, alteration or improvement by resolution.

(ii) Alternatively, the owner and the corporation must have entered into an agreement (a) that allocates the cost of the proposed addition, e (b) sets out the respective duties and responsibilities including the responsibilities for the cost of repair after damage, maintenance and insurance of the Corporation and the owner with respect to the proposed addition, alteration or improvement, and (c) sets out or addresses the other matters that the regulations made under the *Condominium Act* require, but which are not relevant here.

[32] Section 97 of the Act governs changes that are made by the corporation to the common elements. Subparagraph 97(6)(b) provides that the board may deem any change to the common elements to be substantial. If it does so, then that change must receive the favorable vote of 66.6% of the units of the corporation before it may be implemented.

[33] Enforcement mechanisms are set out in section 134 of the Act. The condominium corporation may apply to the court for a compliance order under subsection 134(1) where that owner is in breach of the Act. The first three subsections of section 134 are relevant to this application:

> (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 bylaws, rules or an agreement between two or more corporations for the mutual use, provision, or maintenance of the cost-sharing of facilities or services of any of the parties to the agreement.
>
> (2) If the mediation and arbitration processes described in s. 132 are available, a person is not entitled to apply for an order under subsection (1) until the person has failed to obtain compliance through using those processes.
>
> (3) On an application, the court may, subject to subsection (4),
>
> (a) grant the order applied for;
>
> (b) require the persons named in the order to pay,
>
> (i) the damages incurred by the applicant as a result of the acts of noncompliance, and
>
> (ii) the costs incurred by the applicant in obtaining the order; or
>
> (c) grant such other relief as is fair and equitable in the circumstances.

[34] Subsection 134(5) is also relevant to this application. It stipulates that if the condominium corporation obtains an award of damages or costs in an order made against an owner or occupier of a unit, the damages or costs, together with any additional actual costs to the corporation in obtaining the order, shall be added to the common expenses for the unit and the Corporation may specify a time for payment by the owner of the unit.

[35] Finally, section 132 of the *Condominium Act* provides that every declaration shall be deemed to contain a provision that the Corporation and the owners agree to submit a disagreement between them with respect to the declaration, bylaws or rules to mediation and arbitration. This is the mediation provision that the respondents seek to invoke.

[36] The governance documentation of this Corporation also contains provisions that are relevant. Article III(A) of the Declaration stipulates that no changes are to be made to the common elements without the prior written approval of the directors and in accordance with section 98 of the Act.

[37] Article 7.2 of that Declaration also stipulates that failure of the board to take action to enforce compliance with those rules does not constitute waiver. Moreover, article 12 of Bylaw No. 1 stipulates that the Corporation has two options or alternative courses of action it may pursue where there is a violation of the Act by an owner relative to the common elements. The first is a self-help remedy in which the Corporation can take steps to bring the offending property into compliance with the declarations and bylaws itself by removing the offending landscaping or alterations, restoring that property to its permitted or required appearance, and then charging the cost of that work by way of a lien on the title of the owner's property. The alternative procedure is what has been followed in this case. That procedure permits the Corporation to commence proceedings by way of an application seeking an order for compliance against the offending owners.

[38] One final source of confusion here arises from the difference between the old common element rules and new rules passed in 2005. Although the board passed a new rule in 2005, there is no evidence that the owners were ever given notice of the new rule. Thus, that the original rules continue to govern for all relevant times in the course of this proceeding. It is interesting to note, however that Mrs. Stasyna was on the board of the Corporation at the time that rule was proposed and passed and participated in that decision.

Analysis

Is the Corporation statute barred from requiring reversal of the common element changes made by these owners?

[39] The respondents claim that the Corporation has had knowledge of the landscaping that was done by them for a very long time, at least since 2007, and even farther back than that. The Corporation acknowledges that its correspondence demanding the removal of the landscaping on the common elements was sent to the respondents in 2005, 2006, and 2007. The respondents claim that it has done nothing to enforce its demand. They claim that the corporation knew of the non-compliant common elements, and thus had "discovered" the existence of its claim more than two years before it commenced this application. They say it is statute barred from bringing this claim because it has allowed its limitation period to expire.

[40] The proposition that questions of enforcement and compliance under the *Condominium Act* may be subject to the application of a limitation period is well recognized in the case law: see *Toronto Standard Condominium Corporation No. 1633 v. Baghai Developments Limited and Rabba Fine Foods, Inc.* (unreported); *The Chaudiere Machine and Foundry Company v. The Canada Atlantic Railway Company*, [1902] 33 S.C.R. 11; *Metropolitan Toronto Condominium Corporation No. 949 v. Staib* (2005), 205 O.A.C. 15 (C.A.), affg. [2005] O.J. No. 5265 (S.C.J.).

The respondent claimed that these case show that the limitation period must prevent the Corporation from enforcing compliance relative to the condominium common elements. However, in the particular circumstances of this case, I find that proposition cannot succeed for four reasons.

[41] First, none of the case law referred to by the respondent relates to actions to enforce compliance with the statute itself. The cases referred to by the respondents are all cases that were concerned with the failure of a condominium corporation to seek compliance with its internal governance documents – rather than the statute – for an extensive period of years.

[42] One of these case was *Metropolitan Toronto Condominium Corporation No. 601 v. Hadbavny*, [2001] O.J. No. 4176 (S.C.J.), upon which Sachs J. relied in the *Staib* case, In that case, the condominium corporation failed to object to the presence of pets in condominiums, which was not contrary to the *Condominium Act* itself but rather to the Declaration, or bylaws of the condominium corporation, clearly a lesser matter.

[43] *Staib* is also a case of very different facts from those present here. In that case, there was a delay of 10 years in the enforcement of the condominium's no pets rule.

[44] There are other unique features to this case. There were many claims of non-compliance against other owners of parcels as well as these owners. Discoverability is not the issue here. The non-compliant state of the common elements lands had been known for a long time. The owners of the affected parcels had been on notice for a long time and the Corporation never abandoned its position that these owners were non-compliant – instead it initially sought to use less forceful means to achieve compliance. It arranged a vote to see whether a majority of owners might vote for a change to the required state of the common elements. Then, in 2009, after the owners as a whole again voted for enforcement of the common elements, the Corporation granted a full year's additional grace to owners to comply. However, the correspondence in the application record evidences that certain owners, such as Roches, reacted to that extension of temporary accommodation by holding out until the last moment and then complaining of delay on the part of the Corporation.

[45] Secondly, as Durno J. observed at paragraphs 9 and 10 in *Yuen v. Peel Condominium Corporation No. 492*, [2000] O.J. No. 3501 (S.C.J.), even if the Corporation's board lacked diligence in enforcing the common appearance of the common elements as stipulated in the Declaration, the waiver provision in section 31 of the Act is a complete answer to the claim that the respondents ought to be completely or partially relieved from their obligation. The respondents were aware of the Declaration terms with respect to the appearance of the common elements before they entered into their agreements of purchase. There is no evidence here, any more than there was in the *Yuen* case that could give rise to a conclusion that the directors of the condominium corporation failed to exercise their powers or discharge their duties honestly or in good faith, even if they did delay acting for quite a long time.

[46] Thirdly, even if the Corporation failed to exercise the proper standard of care required under section 24 of the Act, section 31 provides a complete answer. Section 31 stipulates that the failure to take action to enforce any provision of the Act, declaration, bylaws or rules, irrespective of the number of violations or breaches which may occur, shall not constitute a waiver of the right to do so thereafter, nor can it be deemed to abrogate or waive any such provision. As held in some of the cases advanced by the respondents, the board may be precluded from enforcing its Declaration or bylaws but is entitled at any time to enforce compliance with the Act itself, even if it failed to do so for some period of time.

[47] However, the fourth reason is that the condo corporation did not fail to seek compliance with the Act, contrary to the submissions of the respondents. In this case, notice was sent by the board to the offending owners in at least 2007 requiring them to bring the common elements annexed or adjacent to their property into compliance with the Declaration and the Act. The respondent owners failed to do so. They chose not to bring their properties back into compliance, notwithstanding that other owners did comply with the board's request. At its root, the source of this dispute is a disagreement between owners about their properties and about the freedom individual owners should have to individualize their own parcels where they impinge on the strips of land that comprise the common elements.

Are mediation and arbitration under ss. 132 and 134 of the *Condominium Act* preconditions to this court having jurisdiction?

[48] The second question that arises is whether the Corporation is required under sections 132 and 134 of the *Condominium Act* to pursue mediation and/or arbitration with the respondents before this court can acquire jurisdiction over the subject matter of the application and before the Corporation may seek an order requiring compliance.

[49] The answer in a word is no. The simple reason is that the alterations and variations that have been made in this case to TCECC No. 1508's common element areas have *never* been in compliance with section 98 of the Act. It is only under section 98 that permissible variations can be made. The language of sections 132 and 134 of the Act show that the mediation and arbitration provisions are not "available" when what is at issue is *initial compliance* with section 98 of the Act itself.

[50] Here, as in *McKinstry v. York Condominium Corporation* (2003), 68 O.R. (3d) 557 (S.C.J.), the respondents say the court lacks any jurisdiction to entertain the applicants' claim because they did not first resort to mediation and arbitration as required by s. 132(4) of the Act which provides:

> Every declaration shall be deemed to contain a provision that the corporation and the owners agree to submit a disagreement between the parties with respect to the declaration, by-laws or rules to mediation and arbitration in accordance with clauses (1)(a) and (b) respectively.

[51] However, Jurianz J. observed at paragraph 19 that the Legislature's objective in enacting s. 132 was to enable the resolution of disputes arising within a condominium community through the more informal procedures of mediation and arbitration, but only "with respect to the declaration, by-laws or rules" of the condominium corporation. While a generous interpretation ought to be given to the statutory language in trying to resolve disagreements between owners and the condominium corporation further to that legislative goal, he specifically noted that s. 132(4) does *not* require owners and condominium corporations to submit disagreements *with respect to the Act* to mediation and arbitration.

[52] The language permitting court applications to be commenced for compliance with the Act is broader than that imposing a duty to mediate. The duty to mediate only applies to “lesser disputes” or disagreements arising out of the interpretation, application, or non-application of the declaration, by-laws and rules of the condominium corporation itself, or disputes as to their validity: see *Metropolitan Toronto Condominium Corporation No. 747 v. Korolekh,* 2010 ONSC 4448 at para. 49.

[53] The application here seeks a declaration from this court that the respondents are in violation of section 98 of the Act, just as was sought in *Peel Condominium Corp. No. 283 v. Genik*, [2007] O.J. No. 2544. In that case, what was at issue was a dispute concerning the installation of satellite dishes on a number of units of the condominium corporation. After repeating the language of section 98, Dawson J. observed that the evidence that was before him clearly established that the satellite dish in question there had been installed in violation of the Act.

[54] This is no different from the situation of alterations and changes made here by these respondent owners to the common elements that are appurtenant to their parcels. Quite simply, they are not in accord with the Act, because no change to the common elements has ever been authorized here by the owners in accordance with the Act. In *Genik*, however, there was the further complication that the satellite dishes there were in contravention of the declaration and rules of the corporation as well as s. 98 of the Act.

[55] At paras. 7-9 Justice Dawson emphasized that there was nothing that could be done at any meeting of the condominium corporation that could change that fact that the satellite dishes were non-compliant. He concluded at para. 9 that:

> This is not a situation in which mediation or arbitration is required. These are circumstances in which the evidence establishes a clear violation of the Act, the declaration and the rules. Those who choose to become owners or residents of condominium units are required by law to comply with the Act, declaration and rules, in the common interest of all residents of the development.

[56] Finally on this issue, I would refer to Justice Low's decision in *Metropolitan Toronto Condominium Corp. No. 985 v. Vanduzer*, 2010 ONSC 900. In that case, the respondent had constructed a gazebo on her property. The court found that the gazebo was an addition and a

structure which fell under s. 98 of the Act and thus required approval by the Board and an agreement registered on title. No such approval had been given nor had any agreement been registered on title. In that case, as in this case, the respondents tried to argue that the condominium corporation had the onus to show that the structure was unsafe or posed some risk to demonstrate that respondents were in breach of s. 98 of the Act. Low J. rejected that position outright there, as I reject it here. I can do no better than to adopt the conclusion that she reached on this point in that case at paras. 25-26:

> I do not accept that submission. Under the predecessor legislation, there was no right given to unit owners to make alterations, additions or improvements to common elements. The Act loosened the prohibition by allowing them on the conditions set forth in s. 98 of the Act. Under the Act there is still no right vested in an owner of a unit to make alterations, additions or improvements to common elements. There is merely a statutory mechanism whereby an owner may acquire permission to do so from the condominium corporation through compliance with the requirements in s. 98 and at the discretion of the condominium corporation.
>
> There are no statutory criteria limiting the scope of the discretion reposed in condominium boards in assessing a request and either giving or denying approval of proposed alterations, additions or improvements. The basis of a denial could be for reasons of safety concerns, as I find it was here, but they could equally be for aesthetic reasons, or reasons relating to the market value of the property among others.

[57] It seems to me that this conclusion must follow here as well, as Low J. emphasizes, because to decide otherwise would undermine the rights of the other compliant owners who are entitled to demand that the Corporation insist upon compliance from recalcitrant owners. The respondents say this case is not about compliance with section 98 of the Act, but rather about enforcement in the face of significant delay by the Corporation, an issue I address and dismiss below. They say this case requires a balancing act and reasonableness and ought not to be decided just on the basis of section 98.

[58] In the face of those submissions, I conclude by referring to *Orr v. Metropolitan Toronto Condominium Corp. No. 1056*, [2011] O.J. No. 3898 (S.C.J.), where Darla Wilson J. observed at para. 177 that:

> 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.

[59] It is plain in this case that the alterations made by these respondents are not authorized under section 98 of the Act. The board held a vote to consider changes and these owners voted on the proposed changes to the common elements. Even though approved by more than 50 % of the owners present, there were insufficient votes to carry the 66.6% vote required to implement the changes.

[60] This is not a case where there was legally a need to take this dispute to mediation or arbitration before coming to the court. As I will comment further below, that approach might well have been desirable and preferable to the strict compliance approach now being adopted by the Corporation. Nevertheless, as a matter of legal technicality, the condominium is entitled to take a strict compliance approach where it is compliance with the Act that is in issue, rather than compliance with its declaration, bylaws or the like.

Is the Corporation precluded by equitable or other defences from requiring the restoration of the common elements?

[61] In a word – no. The respondents argue that the applicants are estopped by the doctrine of laches and acquiescence from pursuing the removal orders. They argue that by not enforcing the Act, Declaration or rules for years, the condominium corporation has slept on its rights.

[62] The respondent Roche submits that the condominium corporation acquiesced to the landscaping on his property. He says that despite the removal notice received in 2005, the condominium corporation authorized irrigation work on his parcel and adjacent common elements at its own cost in October 2006.

[63] The applicant counters that the mere passage of time does not constitute laches. There needs to be some acquiescence, which there was not.

[64] In *M.(K.) v. M.(H.)*., [1992] 3 S.C.R. 6, La Forest J. held that the doctrine of laches applies where a delay effectively constitutes acquiescence or renders the prosecution of an action unreasonable:

> What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches under either of its two branches. Rather, the doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine.

[65] In support of its laches argument, the respondent points to *Metropolitan Toronto Condominium Corporation No. 601 v. Hadbavny*, [2001] O.J. No. 4176 (S.C.J.). In that case, Mesbur J. allowed the owner to keep his pet contrary to a bylaw, because the condominium corporation had failed to enforce the bylaw in the past. Mesbur J. held at para. 20 that by

sleeping on its rights, the condominium corporation created a reasonable expectation that they would continue not to be enforced.

[66] This is not the case here. The Corporation did not sleep on its rights. In fact, the Corporation pursued its right by sending correspondence to the owners, including Roche, demanding the removal of the landscaping in 2005, 2006, and 2007.

[67] There is no delay that constitutes acquiescence or that renders this application unreasonable. Accordingly, the doctrine of laches does not apply.

[68] The respondent has also argued that the landscaping at issue is *de minimis non curat lex*, or in other words, so insignificant that courts ought not to deal with it: see *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General),* [2004] 1 S.C.R. 76 at paras. 200-206.

[69] In support of the *de minimus* argument, the respondent points to *York Condominium Corp. No. 35 v. Mosseau*, [1995] O.J. No. 3291 (Gen. Div.). In that case, the condominium corporation applied for an order that the respondents breached the Declaration by altering their exterior windows for safety and aesthetic reasons and for order to remove the changes. In that case, there was clear evidence of acquiescence and laches applied. Brockenshire J. also held at paras. 22-23 that *de minimus* applied to bar the condominium corporation's application, because the changes to the window were so insignificant:

> The argument is that this would be for the general welfare. I can appreciate that as a view taken by the Condominium Corporation and I can appreciate these particular unit holders having a different view. And when I look at the photographs showing how circumscribed is the view in another sense of these back windows due to the fencing I feel the onus is on the Condominium Corporation to show that this proposal is for the general welfare, and I do not feel that onus has been met.
>
> The de minimis argument is to my mind completely obvious. On first reading the factums, my first question to counsel was, is this a matter of principal. It appears that it is. It appears there has been stand-off. It appears that the parties rather than resolving it physically in the backyards have come to the court seeking an interpretation, for which they are to be commended. The cost of bringing three separate applications with all of the paper and documentation entailed therein in my view horrendously outweighs anything that either side could hope to gain.

[70] This case can be distinguished on a few bases. Firstly, in *Mosseau*, the owners breached the Declaration – whereas, here they have breached the Act. Secondly, in *Mosseau*, the alterations were minor and merely decorative. Here, in contrast, the respondents have landscaped, installed fences – in other words, made larger changes that affect access to the common elements walkway.

[71] The respondents also argued that their case was similar to *McMahon v. Wentworth Condominium Corporation*, 2009 ONCA 870. In that case, the respondent owner claimed his hot tub was not an addition, alteration or improvement within the meaning of s. 98. The hot tub rested on the common elements backyard. MacPherson J.A. for the Ontario Court of Appeal agreed with the motions judge that the hot tub could not be considered to be an addition, alteration, or improvement based on dictionary definitions.

[72] Here, in contrast, it is in the essence of landscaping alterations that they are actually incorporated into the land. To my mind, this different factual context causes *McMahon* to be inapplicable.

[73] Accordingly, the respondents cannot use the *de minimus* defence to bar the application.

[74] Finally, I note that equitable defences are discretionary. To merit these defences, the respondent needs to demonstrate clean hands. As Binnie J. held in *Wewaykum Indian Band v. Canada*, [2004] 4 S.C.R. 245 at para. 107:

> One of the features of equitable remedies is that they not only operate "on the conscience" of the wrongdoer, but require equitable conduct on the part of the claimant. They are not available as of right. Equitable remedies are always subject to the discretion of the court: *Frame v. Smith, supra*, at p. 144; *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, at p. 589; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 S.C.R. 678, 2002 SCC 19, at para. 66.

[75] As I discussed above, after receiving multiple notices from the Corporation, the respondents made a choice not to remove their landscaping. They cannot simply ignore a good faith notice and then come to court, asking for an equitable remedy.

> **What is an appropriate disposition in this case respecting the costs of remediation of the common elements and the legal costs of this proceeding?**

[76] The inevitable result in the circumstances of this case is that the recalcitrant owners must restore the common elements appurtenant to their properties to their original unaltered state. That leaves only the issue of costs relative to that restoration and the costs of this proceeding.

[77] It seems obvious that these respondents ought to pay for the costs of remediation of their own properties, or perhaps better stated, the costs associated with restoring the common elements walkway lands owned by TCECC 1508 to its original un-landscaped state. This is a question of fundamental fairness. While these three unit-owners resisted the actions of the condominium board, a number of other fellow owners whose properties were also non-compliant nevertheless chose to comply with the continuing request of the board to restore the common elements walkways area to its original state. They paid for those restorations themselves. There is no reason that these owners ought not to do the same just because they held out longer.

[78] More importantly, given my findings that these respondent unit-owners never obtained the authorization of TCECC No. 1508 to make the impugned changes in the first place and their conduct at that time and in the years since has violated both the *Condominium Act* and the TCECC No. 1508 declaration, there is no cogent reason that they ought not to be required to remediate or repair and restore the alterations they made.

[79] However, the costs associated with remediation and those associated with this proceeding are entirely different matters in my view. Having succeeded technically in its application, for the particular reasons set out above, the applicant has smugly asked for its costs on a substantial indemnity basis. It submits that it is entitled to such costs by virtue of Article V of the TCECC No. 1508 Declaration, which states:

> Each owner shall indemnify and save harmless the Corporation from and against any loss, costs, damage, injury or liability whatsoever which the Corporation may suffer or incur resulting from or caused by an act or omission of such Owner, his family, guests, visitors or tenants to or with respect to the Common Elements, except for any loss, costs, damages, injury or liability caused by an insured (as defined in any policy or policies of insurance) and insured against by the Corporation. All payments to be made by an Owner pursuant to this Article shall be deemed to be additional contributions toward common expenses payable by such Owner and shall be recoverable as such.I would first note that contrary to the ebullient claims of the Applicant, Article V of the Declaration does not explicitly entitle the condominium corporation to costs on a substantial indemnity basis. Rather, it provides for a general indemnity for "costs" caused by "an act or omission" of the condominium owners. It provides no guidance of how an act or omission of TCECC No. 1508 which gives rise to legal costs ought to be dealt with where, in a case like this one, the owners are not solely responsible for the costs.

[80] Typically, the court awards partial indemnity costs to a successful party: Mark M. Orkin, *The Law of Costs*, 2nd ed., looseleaf (Aurora: Canada Law Book Inc., 2010) at 2-11. Substantial indemnity costs are only merited in cases where the party who is required to bear the costs has engaged in "reprehensible, scandalous or outrageous conduct": *Young v. Young*, [1993] 4 S.C.R. 3 at 134, per McLachlin J. (as she was then). See also *Davies v. The Corporation of the Municipality of Clarington et al.*, 2009 ONCA 722 at para. 40; *Schwark Estate v. Cutting*, 2010 ONCA 299 at para. 10.

[81] The respondents' behaviour in this case has not been any more reprehensible, scandalous, or outrageous than that of TCECC No. 1508. On one hand, the respondents have prolonged this dispute by failing to comply with TCECC No. 1508's multiple notices. However, on the other hand, even if unwittingly, TCECC No. 1508 has wasted considerable time and expense in my view by insisting on this litigation when mediation was available to the parties. It could have achieved a more conciliatory resolution long before now.

[82] Moreover, whatever rights the Corporation thinks it may have reserved for itself in the Declaration relative to costs, the fundamental fact is that Article V of TCECC No. 1508's Declaration does *not* displace this court's discretion to award costs. Our Court of Appeal clearly determined in *Bossé v. Mastercraft Group Inc.* (1996), 123 D.L.R. (4th) 161 (C.A.), leave to appeal to the S.C.C. refused, [1995] S.C.C.A. No. 205, that a contractual right to recover legal fees is subject to judicial discretion. The Court observed at para. 65:

> The costs of and incidental to a proceeding or a step in a proceeding are, subject to the provisions of a statute or the rules of court, in the discretion of the court and the court may determine by whom and to what extent the costs shall be paid: Courts of Justice Act, R.S.O. 1990 c. C-43, s. 131(1); rule 57.01 of the Rules of Civil Procedure. As a general proposition, where there is a contractual right to costs the court will exercise its discretion so as to reflect that right. However, the agreement of the parties cannot exclude the court's discretion; it is open to the court to exercise its discretion contrary to the agreement. The court may refuse to enforce the contractual right where there is good reason for so doing - where, for instance, the successful mortgagee has engaged in inequitable conduct or where the case presents special circumstances which render the imposition of solicitor and client costs unfair or unduly onerous in the particular circumstances. See, generally, Orkin on Costs, 2nd ed. 1993, p.2-111; *Collins v. Forest Hill Investment Corporation*, [1967] 2 O.R. 351 (Cty. Ct.), *Ontario Potato Distributing Inc. v. Confederation Life Insurance Co.* (1991), 25 A.C.W.S. (3d) 809 (Ont. Ct. Gen. Div.), *Cabot Trust v. D'Agostino* (1992) 11 O.R. (3d) 144 (Gen. Div.), *C.D.I.C. v. Canadian Commercial Bank* (1989), 68 Alta. L.R. (2d) 194 (C.A.), p. 203-4. [Emphasis Added]

[83] The court's discretion to award costs is grounded in s. 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c-C 43:

> 131(1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

[84] Moreover, this court's discretion relative to costs must be principled. In *Davies v. Clarington (Municipality)* (2009), 312 D.L.R. (4th) 278 at para. 40, Epstein J.A. writing for the Court of Appeal stated:

> In summary while fixing costs is a discretionary exercise, attracting a high level of deference, it must be on a principled basis. The judicial discretion under rules 49.13 and 57.01 is not so broad as to permit a fundamental change to the law that governs the award of an elevated level of costs. Apart from the operation of rule 49.10, elevated costs should only be awarded on a clear finding of reprehensible conduct on the part of the party against which the cost award is being made. As

> Austin J.A. established in Scapillati, Strasser should be interpreted to fit within this framework - as a case where the trial judge implicitly found such egregious behaviour, deserving of sanction.

[85] It is guided by factors set out in Rule 57.01(1). Of relevance to the case at hand are the following factors:

> (c) the complexity of the proceeding;
>
> (d) the importance of the issues;
>
> (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
>
> (f) whether any step in the proceeding was,
>
> (i) improper, vexatious or unnecessary, or
>
> (ii) taken through negligence, mistake or excessive caution.

[86] The applicant argues that there is a jurisprudence awarding substantial indemnity costs to a condominium corporation. In particular, it points to *Peel Condominium Corp. No. 338 v. Young*, [1996] O.J. No. 1478. In that case, Justice Webber granted substantial indemnity costs on the basis that the issue to be decided was "clear and straightforward" and the respondents "refused to deal with the problem" by ignoring a resolution letter sent by the applicant after the litigation commenced.

[87] I agree with the comments made by Justice Aitken in *Carleton Condominium Corp. v. Lagacé*, [2004] O.J. No. 1480 at para. 28 that cases awarding substantial indemnity costs have done so on the basis that the losing party has not taken the opportunity to avoid litigation:

> In this respect, I differentiate this case from those such as *Peel Condominium Corp. No. 338* v. *Young*, [1996] O.J. No. 1478 (Gen.Div.); *Peel Condominium Corporation No. 449* v. *Amy Elizabeth Frances Hogg*, a decision of Carnwath J. dated March 13, 1997; *Frontenac Condominium Corporation No. 7* v. *Jim Gallant and Connie Armstrong*, a decision of Ratushny J. dated September 27, 2001; and *Carleton Condominium Corporation No. 66* v. *Helena Brown*, a decision of Polowin J. dated September 7, 2001. In all of those cases, costs were awarded on a solicitor-client or substantial indemnity scale. It is to be noted, however, that in each case, the judge stated that the person against whom the costs order was being made had been given specific notice of the problem that eventually necessitated the court application and had been given the opportunity of addressing the problem before the litigation was started.

[88] As I mentioned above, in this case, mediation, though not mandatory, could have resolved this conflict in a more cost-effective manner. The applicant has unnecessarily wasted time and expense by insisting on bringing these proceedings.

[89] In *Wallace v. Allen* (2007), 86 O.R. (3d) 489 (S.C.J.), Eberhard J. found at para. 8 that the defendant's conduct, though "not dishonest or criminal", was "foolish, unnecessary, and wasteful" in provoking litigation. As a result, she exercised her discretion to reduce the partial indemnity costs owing to the defendant by 20 percent.

[90] There is no suggestion here that the bringing of this application by the board was anything even close to dishonest, but it does seem to have been unnecessary and wasteful when there was the mediation option open and available. Here too, I find that it is appropriate to exercise my discretion to reduce the partial indemnity costs owing to the applicant by 20 percent for its unnecessary and wasteful – though perfectly legal – conduct to pursue this litigation when openings were made available to permit this dispute to be resolved between all unit-owners on a more conciliatory and consensual basis. There is no question that the TCECC No. 1508 board had the technical right to act as it did. Yet, against the background of history here and the period of apparent inaction by prior boards, this board ought to have behaved in a more conciliatory manner in my view. This is especially so since the records of its meetings with unit-owners suggest that it may have been coddling to the seemingly overbearing views of one or two vocal and compliance-oriented unit-owners.

[91] As these reasons show, I find myself having to agree that the Corporation had and has the legal authority to behave as they did. It had the right to litigate rather than trying to first work out a long term solution that would again bring peace to this small community. The board was offered a number of conciliatory opportunities but chose not to pursue them. I cannot accept that it ought to be rewarded for that conduct when it was offered and could have pursued a conciliatory approach, at least initially and before incurring the costs of this application. Should it be rewarded in costs for that approach? In my view the answer is no.

[92] I am aware that in making this order, I am forcing the unit-owners as a whole, including these recalcitrant unit-owners, to shoulder these costs, together since it is inevitable that TCECC No. 1508 will seek to pass those costs on to unit-owners. The respondents must certainly pay for costs associated with this action and this application, but as well, all unit-owners, including these respondents, ought to bear the costs associated with their board's decision here to first litigate and only talk later. It was a decision that may have been legally correct, but that showed poor judgment in my view. I choose not to reward that conduct by a more fulsome award of costs, in the hope the message will avoid the recurrence of future similar situations.

Conclusion

[93] In summary, I find that the respondents have breached s. 98 of the Act by making alterations to the common elements without board approval or an agreement with the Corporation. I do not agree with the respondents that the applicant is barred by a limitation period or equitable defences. I also do not agree that applicant was required to comply with mediation and arbitration under ss. 132 and 134 of the Act before commencing this litigation. However, the applicant's decision to insist on litigation when alternative dispute mechanisms were available to it informs my decision to reduce the costs owing to the applications.

[94] As a result, I am granting TCECC No. 1508's application for a declaration that the respondent owners are in breach of s. 98 of the Act and for an order requiring the respondents to remove unauthorized alterations from the common elements adjacent to each of their properties. I order that costs be paid by the respondent to the applicant on a partial indemnity basis, reduced by twenty percent.

Michael G. Quigley, J.

Released: March 6, 2012

CITATION: Toronto Common Element Condominium Corporation No. 1508 v. William Stasyna, 2012 ONSC 1504

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

TORONTO COMMON ELEMENT CONDOMINIUM CORPORATION NO. 1508

Applicant

– and –

WILLIAM STASYNA, WANDA BANKS-STASYNA, MARIA DIPIETRO, ROBERT PHIPPS and SHAWN ROCHE

Respondents

REASONS FOR JUDGMENT

Michael G. Quigley J.

Released: March 6, 2012