CITATION: Missal v. York Condominium Corporation No. 504, 2023 ONSC 4908
COURT FILE NO.: CV-20-649256
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2023 ONSC 4908 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Perry Missal, Applicant

AND:

York Condominium Corporation No. 504 and Nicola Seppanen, Respondents

BEFORE: Justice A.P. Ramsay

COUNSEL: *John DeVellis* and *Patrick Nelson*, for the Applicant

Timothy M. Duggan, for the Respondents

HEARD: May 23, 2023

REASONS FOR DECISION

I. Overview

[1] The applicant, Perry Missal, seeks a declaration that he has been treated oppressively within the meaning of s. 135 of the *Condominium Act, 1998*, S.O. 1998, c. 19 (the "Act") by the respondent, York Condominium Corporation No. 504 (the "respondent corporation").

[2] The application was issued on October 1, 2020. The relief sought in the initial Notice of Application only related to excessive noise transfer emanating from another unit owner into the applicant's unit. The applicant sought an order directing the respondents to ensure the floor assembly in the unit above had a sound attenuation barrier to achieve an acoustical soundproof standard of a minimum Impact Isolation Class of FIIC 69, as well as damages. The applicant also sought a declaration in the original Notice of Application that the respondent corporation's failure to address the "unreasonable and excessive transmission of noise and vibration is oppressive contrary to section 135 of the Condominium Act".

[3] The applicant subsequently reached a settlement with the other unit owner and, as a term of the settlement, the application was dismissed as against her. The sole party to the application is the respondent corporation. The applicant seeks to amend the application to allege that the respondent corporation has acted oppressively towards him in failing to complete certain improvements and undertake certain security measures in relation to the common elements of the condominium.

2023 ONSC 4908 (CanLII)

I. Nature of the Application

[4] The applicant seeks the following relief:

a) An Order declaring the respondent corporation's conduct oppressive, contrary to s. 135 of the Act;

b) An Order for special damages for oppression to compensate the applicant for the costs of the SS Wilson Report and the legal fees incurred in obtaining compliance from the respondent, Nicola Seppanen ("Ms. Seppanen") and pursuing this matter;

c) General damages for oppression in the amount of $60,000;

d) An Order requiring the respondent corporation to repair and maintain the common elements appurtenant to the applicant's building, the Victorian, including:

   i. the outside lights must be made to reliably turn on and illuminate the yard and porch when people walk in the area;

   ii. the front lawn must have grass and sod installed, and suitable shrubs and trees installed along the northern fence, to achieve the same quality of appearance as the courtyard for the Main Building;

   iii. the fence surrounding the Victorian must be raised to not less than eight feet of height, the same as the Main Building, to prevent intruders from accessing the Victorian; and

   iv. the gate to the fence must have a self-closing mechanism and lock installed. The lock should be keyed to the locks on the rest of the grounds of the building; and

e) An Order for costs of this application on a substantial indemnity scale.

II. Background facts

[5] The applicant is a condominium unit owner. The applicant has owned and resided in Unit 9, on Level 1f of the Victorian since July 20, 1998. Ms. Seppanen's unit is located directly above the applicant's unit. She has lived there since 2010.

[6] The respondent corporation is a condominium corporation that was created by the registration of its declaration and description on or about January 22, 1980. It is comprised of 40 residential dwelling units and appurtenant common elements, all of which are municipally located at 17 Pembroke Street, Toronto, Ontario. The dwelling units are divided between two buildings, being a historic Victorian house located closer to Pembroke Street (the "Victorian") and a newer building located farther from Pembroke Street (the "Main Building" and, together with the

Victorian, the “Condominium”). The Victorian contains 4 out of the 40 dwelling units in the corporation.

[7] The excessive noise was said to have been caused by the installation of wood flooring by the previous owner of the unit now owned by Ms. Seppanen. The applicant contends that the work was completed without proper underlay.

[8] On December 17, 2020, the applicant and Ms. Seppanen reached a settlement. By order of Steele J. made on January 6, 2021, the action was dismissed against Ms. Seppanen (“Steele J.’s Order”). The respondent corporation was not a party to the settlement.

[9] On June 8, 2021, the applicant delivered an Amended Notice of Application.

[10] At the hearing of the application, the applicant sought to amend the application to include the orders that the respondent corporation carry out various improvements to and on the Victorian’s common elements.

III. **Positions of the parties**

[11] The positions of the parties are summarized below.

i. **The Applicant**

[12] The applicant states that the respondent corporation has acted oppressively towards him by disregarding his legitimate expectations that the corporation enforce its own rules, investigate serious security concerns, and treat all portions of the Condominium equally.

[13] The applicant contends that he has been subjected to unfair treatment for a number of years. The applicant asserts that the respondent corporation has refused to follow its own rules or its obligations under the Act and has routinely ignored his legitimate complaints regarding noise from the unit above, even after being confronted with a noise report that says the noise transmission was “clearly audible” and less than the court-ordered level of FIIC 69, which is also the noise transmission level in the Condominium’s renovation agreement.

[14] The applicant asserts that the respondent corporation failed to investigate or take any action regarding numerous security issues pointed out by him with respect to the Victorian, and says that, in contrast, the respondent corporation has provided numerous security upgrades for the Main Building. He argues that there is a higher standard of maintenance and landscaping for the Main Building, in particular the courtyard surrounding the Main Building, versus the Victorian.

ii. **The Respondent**

[15] The respondent corporation submits that the application ought to be dismissed for the following reasons, either separately or together: firstly, the applicant did not disclose the terms of the settlement with Ms. Seppanen on a timely basis; secondly, the respondent corporation did not act oppressively toward the applicant in contravention of the Act.

2023 ONSC 4908 (CanLII)

2023 ONSC 4908 (CanLII)

IV. The issues to be determined on this application

[16] The following issues are raised on this application:

i. The applicant's motion to amend the Notice of Application.

ii. Should the application be stayed as an abuse of process?

iii. Did the respondent corporation fail to respond to the applicant's noise complaints?

iv. Were the respondent corporation's actions toward the applicant regarding security and maintenance issues oppressive?

v. If the respondent corporation's actions were oppressive, what is the remedy?

V. Analysis

i. Motion to amend the Notice of Application

[17] The applicant brought a motion, at the commencement of the hearing of the application, to amend the notice of application. The applicant delivered an Amended Notice of Application in May 2021. The amendments are significant, expanding the relief sought in the original application. However, the motion is on the consent of the parties. The parties agreed that the motion to amend should be brought at the commencement of the hearing of the application. Supplementary materials and cross-examinations were completed based on the proposed Amended Notice of Application.

[18] In the result, the motion to amend the notice of application, and the form annexed as Schedule "A" to the applicant's Notice of Motion, is granted.

ii. Should the application be stayed as an abuse of process?

[19] The respondent corporation submits that the application should be stayed as an abuse of process as the applicant did not disclose the particulars of a "tentative agreement", or "second settlement", which the applicant reached with Ms. Seppanen for a period of seven months. The applicant had reached an earlier settlement in December 2020 with Ms. Seppanen, which resulted in Steele J.'s Order.

[20] I would dismiss this argument. Settlement agreements reached between some parties, but not others, must only be immediately disclosed to non-settling parties if they entirely change the litigation landscape: *Skymark Finance Corporation v. Ontario*, 2023 ONCA 234, 166 O.R. (3d) 131, at para. 46. In *Tallman Truck Centre Limited v. K.S.P. Holdings Inc.*, 2022 ONCA 66, 466 D.L.R. (4th) 324, the Ontario Court of Appeal indicated, at para. 23, that the disclosure obligation extended "to *any agreement* between or amongst parties to a lawsuit that has the effect of changing the adversarial position of the parties set out in their pleadings into a cooperative one" (italics in original; underlining added). In *CHU de Québec-Université Laval v. Tree of Knowledge*

International Corp., 2022 ONCA 467, 162 O.R. (3d) 514, at para. 55, and in *Skymark*, at paras. 46-47, the Ontario Court of Appeal identified the factors to be considered in deciding whether a party's failure to disclose a settlement agreement amounts to an abuse of process. Those factors are as follows:

a) there is a clear and unequivocal obligation of immediate disclosure of settlement agreements that change the landscape of the litigation;

b) the obligation to disclose extends to any agreement between or amongst parties that has the effect of changing the adversarial position of the parties into a cooperative one;

c) the obligation requires the settling party to immediately disclose information about the agreement, not simply notification that it exists;

d) both the existence of the settlement and the terms of the settlement that change the adversarial nature of the proceeding must be disclosed;

e) the standard is "immediate", not "eventually" or "when it is convenient";

f) the absence of prejudice to a non-settling party does not excuse a breach of the obligation of immediate disclosure; and

g) any failure to comply with the obligation of immediate disclosure must result in a stay of the claim brought by the defaulting, non-disclosing party.

[21] As the respondent corporation indicates in their own factum, this was a "tentative agreement" between the applicant and Ms. Seppanen at a mediation session on March 22, 2022. A "tentative agreement" is not a settlement. It does not conclusively resolve the dispute between the parties. Once reached, a settlement is binding on the parties and may be enforced by the court. A settlement agreement is a contract: *Olivieri v. Sherman*, 2007 ONCA 491, 86 O.R. (3d) 778; *Donaghy v. Scotia Capital Inc./Scotia Capitaux Inc.*, 2009 ONCA 40, 93 O.R. (3d) 776, at para. 12, leave to appeal refused, [2009] S.C.C.A. No. 92; and *Hodaie v. RBC Dominion Securities et al.*, 2011 ONSC 6881, 108 O.R. (3d) 140, at para. 17, aff'd 2012 ONCA 796.

[22] The applicant and Ms. Seppanen apparently entered into a formal agreement in July or early August 2022. The respondent corporation was advised of the existence of the second settlement on August 8, 2022. Particulars of the settlement were provided to the respondent corporation on October 31, 2022. I am not satisfied, however, that this was the sort of settlement that required immediate disclosure, as it did not change the litigation landscape between the parties. Whether the settlement changes the landscape of the litigation is a question of fact. First, this is not a lawsuit. This is an application. The respondent corporation has not provided any authority for the proposition that these principles should apply to parties in an application. The bases for the application commenced by the applicant, as a unit owner of a condominium, are the statutory duties and obligations that the respondent corporation has under the Act and the respondent corporation's obligations under the governing document, the Condominium's

2023 ONSC 4908 (CanLII)

Declaration. There is no *lis* between the respondent corporation and Ms. Seppanen, also a unit owner.

[23] In addition, the applicant and the respondent corporation consented to Steele J.'s Order. The consent order is a contract. A provision of the consent order was that the application was dismissed as against Ms. Seppanen. The only party to the application was the respondent corporation. The applicant and Ms. Seppanen had already entered into a settlement agreement. The respondent corporation was a stranger to that agreement. The second "tentative agreement" was to ensure that Ms. Seppanen complied with her earlier agreement. Not all settlements must be disclosed immediately: *Bennington Financial Corp. v. Medcap Real Estate Holdings Inc.*, 2023 ONSC 2742, at para. 39; *iPRO Realty Ltd. v. George Sokkar*, 2022 ONSC 6825; and *GH Asset Management Services Inc. v. Lo*, 2022 ONSC 7218, at para. 26. Again, I note that *Skymark* speaks to a "claim", as does the jurisprudence. There is no potential for contribution and indemnity between the co-respondents in this proceeding.

[24] The respondent corporation submits that the effect of the settlement was to change Ms. Seppanen from the applicant's litigation adversary into his ally. The second settlement agreement required Ms. Seppanen to cooperate with the applicant if he wished to have her examined as a witness, and further required her to provide documents to assist with his pursuit of the claim against the respondent corporation prior to any such examination. I do not find that the second agreement entirely changed the landscape of the litigation in a way that significantly altered the dynamics of the litigation. The fact that Ms. Seppanen could have provided an affidavit or evidence in support of the applicant's case is not determinative. This is not an action. The only pleadings before the court are the Notice of Application and the proposed amendments, to which the respondent corporation consented before the hearing. The application is grounded on the respondent corporation's statutory duties and duties stemming from the condominium documents. There are no claims between Ms. Seppanen and the respondent corporation, nor could there be, on this application.

[25] As Ms. Seppanen was no longer a party to the proceedings at the time of the second settlement, it was also open to the respondent corporation to obtain her evidence before the hearing by virtue of r. 39.03(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which permits a party to examine a person as a witness before a pending application.

[26] The respondent corporation has also argued that the court should draw an adverse inference from the applicant's failure to adduce evidence from Ms. Seppanen. In my view, it was equally open to the respondent corporation to have Ms. Seppanen's evidence available at the hearing.

iii. **Did the respondent corporation fail to respond to the applicant's noise complaints?**

[27] The applicant submits that the respondent corporation failed to investigate or enforce its own rules regarding noise transmission or to respond to his complaints of noise transmission. I do not find any merit in the applicant's submission that the respondent corporation failed to investigate, respond to, or enforce the rules regarding noise transmission. In my view, this aspect of the relief sought by the applicant must fail for the reasons that follow.

2023 ONSC 4908 (CanLII)

2023 ONSC 4908 (CanLII)

[28] The applicant's assertion that the previous owner removed the acoustic underlay is based on hearsay. There is nothing in the materials before me to indicate that the parties agree that this fact is not in dispute. The evidence does not support the applicant's contention that his complaints, when made to the respondent corporation, were ignored. Justice Steele order, which memorialized the first agreement between the applicant and Ms. Seppanen ordered Ms. Seppanen to ensure that a sound attenuation barrier is installed between her unit and the applicant's unit to the requested standard. Ms. Seppanen was in the process of complying with the consent order. I query whether ongoing issues related to the noise complaint should be addressed by the Condominium Authority Tribunal (CAT), whose jurisdiction expanded to address noise and nuisance following the settlement with Ms. Seppanen and the dismissal of the application against her, and there being no motion before the court to enforce the terms of Steele J.'s rder.

[29] The Notice of Application was issued on October 1, 2020. Paragraph 1(a) indicates that the applicant was seeking:

> An Order directing the respondents to ensure the floor assembly in the unit above Missal's residential unit has a sound attenuation barrier to achieve an acoustical sound proof standard of a minimum Impact Isolation Class of FIIC 69.

[30] The Condominium's Rules prohibit noise that disturbs the comfort or quiet enjoyment of others. Paragraphs 8 and 13 of the Condominium's Rules state:

> 8. [Residents or their guests] shall not create or permit the creation of or continuation of any noise or nuisance which, in the opinion of the Board or the manager, may or does disturb the comfort or quiet enjoyment of the property by other owners, their families, guests, visitors, servants, and persons having business with them.
>
> 13. No Residential Unit owner shall create any noise, caused by any instrument or other device or otherwise which in the opinion of the Board may be considered to disturb the comfort of the other owner.

[31] Pursuant to s. 17(3) of the Act, a condominium corporation must take all reasonable steps to ensure that owners comply with the Act and governing documents.

[32] The applicant says that he started to experience issues with noise in 2007 when the prior owner of Ms. Seppanen's unit renovated and installed hardwood floors, and in so doing, removed the floor underlay. The applicant claimed that until the settlement, he experienced excessive noise emanating from that unit. The applicant says that he was able to hear every noise emanating from the unit including the most intimate and private sounds and activities. He says that the "constant noise" caused his mental health to drastically decline. He deposed that he "suffered from crippling anxiety which sometimes leaves him trembling with suicidal thoughts." He says that his friend, Rodney Ramsden, stopped visiting largely because they could not have a conversation due to the constant noise level.

[33] Although the applicant says he first experienced noise issues in 2007, he did not bring this to the attention of the respondent corporation. In his original affidavit, the applicant deposed that when the noise transmission started 13 years previously, he emailed the previous owner. The applicant does not say that he complained to the respondent corporation. The applicant's friend, Mr. Ramsden, swore an affidavit in support of the application, which annexes videos of his visit to Ms. Seppanen's unit on September 27, 2022. Mr. Ramsden did not request the permission of the unit owner, Ms. Seppanen, to take videos of her unit. Mr. Ramsden deposed that he visited the applicant on several occasions, the most recent being in 2019 prior to COVID-19 lockdowns. He was able to hear sounds emanating from Ms. Seppanen's unit as the occupants went about their daily activities.

[34] In June 2010, when the previous owner put the property up for sale, the applicant wrote to him and his real estate agent to raise the noise issue again, asking that the issue be fixed before the unit was sold. It was only in July 2010 that the respondent corporation was alerted to the issue, when the applicant, by his own admission, included the property manager on an exchange of emails with the previous owner. On the evidence before me, this was not a complaint to the respondent corporation, though admittedly, the exchange made the respondent corporation aware of the applicant's complaint. The applicant, the property manager, and a member of the condominium's Board of Directors exchanged emails.

[35] Ms. Seppanen purchased the unit in 2011. In April 2011, she carried out some renovations to the unit. In his affidavit, the applicant concedes that when he raised the issue of the removal of the sound barrier with the then-property manager, the property manager offered to permit him to inspect the new work, that is the renovation of the kitchen, but he says that he did not care about the kitchen and his concern was always the flooring. On the other hand, the respondent corporation says that the property manager offered to permit the applicant to inspect the flooring, which offer was not accepted by the applicant. The next complaint is nine years later in 2020.

[36] I do not agree with the applicant's characterization of the evidence of Adam Kalpin, the current property manager who was cross-examined on his affidavit in response to the application. The applicant says that Mr. Kalpin acknowledged that the respondent corporation did nothing to investigate the applicant's noise complaints. I note that Mr. Kalpin's answer was interrupted by counsel. He testified that he could not recall, based on the information before. This is not surprising as he had no personal involvement in the events or the applicant's complaints, a number of years had elapsed, and the respondent corporation changed property managers several times. The applicant says that the noise transmission started in 2007. His next complaint occurred three years later in 2010, and later, in 2020.

[37] There is no evidence that the applicant asked the respondent corporation to do anything about the noise. After 2011, the applicant made no complaint until 2020. In January 2020, he requested a copy of the renovation policy. It was only after the applicant received the renovation policy that he says he pointed out certain passages to the property manager at the time, Gail McKee. He deposed that: "I informed Gail that Thom had installed hardwood directly on the subfloor, and he had admitted as much in an email to me." By the applicant's own admission, Ms. McKee did investigate his complaint. He further deposed:

2023 ONSC 4908 (CanLII)

> On February 3, 2020, Gail wrote that she had spoken to Niki, the owner of Suite 15A, and that the respondent Seppanen claimed to be surprised that the noise was suddenly an issue, even though we had texted for years about this. Gail wrote that I was not to retaliate and bang on the ceiling and make threats. I have hit the ceiling only a few times in the past 13 years, only when trying to get someone's attention not to stomp around, and have never made threats. Gail wrote that the matter was "escalating to an issue that is not within managements control and management will recommend this become a civil matter." In other words, I was on my own.

2023 ONSC 4908 (CanLII)

[38] In response, the applicant retained counsel.

[39] There is no evidence of continual noise complaints to the respondent corporation over the years that were ignored. The applicant's first complaint to the respondent corporation was in fact not made until 2020, although the applicant brought the issue to the respondent corporation's attention in 2010. When Ms. Seppanen purchased the unit, the then-property manager offered the applicant the opportunity to inspect the flooring. He did not take the manager up on that offer. There is a dispute between the parties as to whether the respondent corporation asked Ms. Seppanen to place more area rugs in her unit. The applicant challenges the credibility of this assertion in the absence of any supporting corroborating evidence. This is an application. In my view, it is not appropriate on an application to decide factual disputes, especially where credibility comes into play. This may however be a non-issue. The next complaint of noise emanating from Ms. Seppanen's unit did not occur until months later, in May 2020. I infer that there is some evidence that the respondent corporation took steps to address the issue by asking the applicant's neighbour to place a rug on the floor.

[40] The applicant also asserts that the then-property manager, Ms. McKee, summarily dismissed his complaints. The applicant's lawyers sent a letter to the respondent corporation dated May 6, 2020, demanding that steps be taken to address the excessive noise within seven days. On May 13, 2020, Ms. McKee responded that "we are treating this with the utmost importance and would like to have a resolution to this matter as eagerly as your client does".

[41] I take judicial notice that the demand letter was sent in the midst of the pandemic and the shutdown. The applicant's affidavit in support of the application was sworn on October 23, 2020. By December 2020, Ms. Seppanen had entered into a renovation agreement with the respondent corporation to address the acoustic issues (the "Renovation Agreement").

[42] On December 17, 2020, the applicant and Ms. Seppanen settled the matter regarding the noise complaints. The terms of the settlement were incorporated into Steele J.'s Order. Ms. Seppanen consented to:

a) by February 28, 2021 and at her cost, *"ensure that a sound attenuation barrier is installed between the Applicant's unit (Unit 9, Level 1) and her unit (Unit 11, Level*

2) that will achieve an acoustical soundproof standard of a minimum Impact Isolation Class rating of FIIC 69"; and

b) apply the sound attenuation barrier *"to the entirety of the lower horizontal boundary"* of her unit, including the stairs separating the two units and the floor of Ms. Seppanen's upper level.

2023 ONSC 4908 (CanLII)

[43] The applicant deposed in his supplementary affidavit that Ms. Seppanen installed new floors but failed to complete the work by the deadline imposed in Steele J.'s Order or comply with the requirements of the Renovation Agreement. The Order of Justice Steele required Ms. Seppanen to:

[44] ...by February 28, 2021...and at her cost, ensure that a sound attenuation barrier is installed between the Applicant's unit …and her unit … that will achieve an acoustical soundproof standard of a minimum Impact Isolation rating of FIIC 69

[45] The Renovation Agreement, which the applicant submits is mandatory, states:

> Where a hard surface floor finish such as… hardwood… is to be installed in a suite…an owner shall ensure that a sound attenuation barrier is installed that will achieve an acoustical sound proof standard of a minimum Impact Isolation Class rating of FIIC 69.… [A]n owner must provide the Corporation with appropriate test documentation from the manufacturer. The test must be based on the absence of a suspended ceiling below the flooring. Failure to install this type of material may result in a requirement to remove the flooring.… An owner must arrange for a corporation staff member to inspect the installation.… A sample is required for inspection.

[46] The applicant retained SS Wilson Engineering Consultants Ltd. to investigate the new floors in Ms. Seppanen's unit and determine whether the new floors complied with Steele J.'s Order and the Renovation Agreement. Its report is appended to an affidavit provided by Neil McCann (the "SS Wilson Report"). Mr. McCann concluded that none of the tested areas achieved the FIIC 69 as specified to comply with the requirements of Steele J.'s Order. He noted that the "[t]he ECF underlayment material that was installed is generally considered to be a good underlayment product; however, due to the age and materials of construction of this structure, the ECF underlayment alone is inadequate to produce the specified FIIC 69." He further noted that the "FIIC 69 is extremely unlikely to be achieved in practice due to the age of the structure and its materials of construction." He noted that the simplest and most effective means to increasing the FIIC of the floor/ceiling was by supplementing the hardwood/vinyl floor finish in Unit 11 with dense, high-pile carpet or floor runners.

[47] On the materials before the court, I do not accept that the respondent corporation did not respond to or investigate the noise complaints. There is no evidence of continuous complaints. The 2007 incident between the applicant and his neighbour was not brought to the attention of the respondent corporation. The first actual complaint to the respondent corporation was in early 2020.

The applicant and Ms. Seppanen settled their issues in December 2020. This is less than a year after the applicant requested the Renovation Agreement and complained to the respondent corporation's property manager. The respondent corporation contends that Ms. Seppanen had completed the installation of new flooring in her unit in or about May 2021, as contemplated by the settlement with the applicant. Based on the applicant's own expert, achieving the FIIC 69 rating would be unlikely as it "would involve undertaking significant renovations within Unit 9 to separate the gypsum ceiling from the wood joists with the use of specialized vibration-isolation products."

[48] The respondent corporation did what they were obliged to do under the Act and the condominium documents. They entered into the Renovation Agreement with Ms. Seppanen so she could correct the issue. Prior to doing so, the respondent corporation confirmed the information from the manufacturer of the acoustic underlay that Ms. Seppanen planned to install in her unit. That information indicated that the acoustic underlay was rated to exceed the standard of FIIC 69, which was the standard provided for in the Renovation Agreement (as well as in the Consent Order). The respondent corporation approved the installation of the flooring and acoustic underlay in Ms. Seppanen's unit based on this information. Ms. Seppanen had retained professionals to install the flooring and underlay in her unit to do so properly and in accordance with the manufacturer's specifications.

[49] While the applicant asserts that the flooring did not comply with the terms of the settlement with Ms. Seppanen, on the materials before me, Ms. Seppanen was attempting to remedy the situation. The respondent corporation was involved in that endeavor. The applicant concedes that the problem was remedied in September 2022. The applicant's friend, Mr. Ramsden indicates that he has since visited the applicant after Ms. Seppanen remedied the situation and deposes that the "(t)he noise disturbances were non-existent. There were no longer any noises emanating from Seppanen's unit."

[50] I find that the respondent corporation acted reasonably in its responses to the applicant's noise complaint. After it received the applicant's complaint in or about January 2020, it asked Ms. Seppanen to place additional area rugs on the floors in her unit. In May 2020, the respondent corporation directed Ms. Seppanen to ensure that proper acoustic underlay was installed under the floors in her unit after the applicant complained about noise transmission. The respondent corporation reviewed the manufacturer's specifications for the underlay that Ms. Seppanen proposed to install, and confirmed with her that she would have the underlay and new flooring professionally installed. The applicant, who secured a co-operation agreement from Ms. Seppanen, including the obligation to provide documents, has not proffered any evidence from her which indicates that the respondent corporation's version of events as to its dealings with Ms. Seppanen is not accurate. In this instance, I accept the respondent corporation's evidence, and given the co-operation agreement between the applicant and Ms. Seppanen, I would draw an adverse inference from the lack of any evidence proffered by the applicant from Ms. Seppanen to challenge the respondent corporation's version of events in which she was directly involved and had personal knowledge.

2023 ONSC 4908 (CanLII)

2023 ONSC 4908 (CanLII)

[51] In my view, the respondent corporation has not acted oppressively with respect to the applicant's complaints regarding noise emanating from Ms. Seppanen's unit. I am satisfied that the corporation only received its first complaint about noise from Ms. Seppanen's unit in early 2020. There is no complaint since 2011. The respondent did take positive steps to address the applicant's complaint. It was open to the applicant to obtain evidence from Ms. Seppanen, whom he had secured a cooperation agreement from as a term of his settlement, to provide evidence to the contrary. There is none before the court.

[52] It was some months later, in May 2020, in the midst of the pandemic, that the applicant again complaint of noise emanating from Ms. Seppanen's unit. The respondent's lawyers directed Ms. Seppanen to place the appropriate underlay. The respondent to contends that she took steps to do so. She had her unit measured for the flooring and the underlay and entered into a renovation agreement with the Corporation for the work to be carried out. Ms. Seppanen completed the renovation to the floors in May of 2021, following her agreement reached in December 2020 with the applicant. After being advised in June 2021 by the applicant's lawyers that the installation by Ms. Seppanen was insufficient, the applicant retained the SS Wilson engineering firm. Ms. Seppanen co-operated by permitting access to her unit. Again, there is no evidence called by the applicant to contradict the respondent corporation's version of events.

[53] The applicant commenced the application while the respondent corporation and Ms. Seppanen were attempting to address his noise complaint raised in 2020. The respondent corporation asserts that prior to its receipt of the SS Wilson Report, it was not aware that the age and wood construction of the building would make an FIIC 69 rating unachievable in practice. The second settlement agreement required Ms. Seppanen to install carpeting, which was called for by the SS Wilson Report. Ms. Seppanen complied with the requirements of the report, and the second settlement agreement with the applicant.

[54] For the sake of completeness, although this factor does not affect the outcome, I note that the parties have not addressed whether any ongoing issue of noise complaints should be addressed by the CAT, which was launched in 2017, and whose jurisdiction was expanded in October 2020 to include disputes relating to pets, vehicles, parking and storage, and again in the fall of 2021 (effective January 2022), to include disputes relating to noise and other nuisances. I note there was no motion before this court, at any time, to enforce the Order of Steele J.

iv. **Were the respondent corporation's actions toward the applicant oppressive?**

[55] The applicant submits that since at least July 2019, he has been asking the respondent corporation to investigate numerous security concerns related to thefts and trespassing on his porch and has provided numerous videos to support this. He argues that the respondent corporation has failed to take any steps or investigate his concerns but has taken numerous steps to enhance the security of the Main Building. The applicant says that he has suggested increasing the height of the fence in front of the Victorian, installing a working gate, and installing a lock on the gate. The applicant says that the respondent corporation has not put a lock on the gate or addressed any of the other security issues raised by him. The applicant's material includes email exchanges with the then-property manager regarding theft and securing his personal items since he faces the street.

The applicant complains that the respondent corporation never canvassed the idea of raising the fence with any of the other residents in the Victorian.

[56] The applicant points to further disrepair. He states the front lawn no longer has flowers or shrubs, which were destroyed from repairs to bury a downspout. The applicant says that the sprinklers for the Victorian's yard did not turn on the entire summer of 2022, leaving the lawn dead, and flowers were never planted in the planters.

[57] The applicant further says that respondent corporation has not repaired or replaced the Victorian's windows for several years, whereas in the Main Building have already been replaced.

[58] The applicant argues that there has been preferential treatment for directors and points to a change in policy for short-term rentals which occurred shortly after a unit owner, whom he alleges lists two of her units on Airbnb, was appointed onto the Board of Directors.

[59] On the materials before me, I do not find that the respondent corporation's conduct towards the applicant has been oppressive.

[60] Pursuant to s. 89 of the Act, a corporation is required to repair the units and common elements after damage, with certain exceptions:

> 89 (1) Subject to sections 91 and 123, the corporation shall repair the units and common elements after damage.
>
> (2) The obligation to repair after damage includes the obligation to repair and replace after damage or failure but, subject to subsection (5), does not include the obligation to repair after damage improvements made to a unit.
>
> (3) For the purpose of this section, the question of what constitutes an improvement to a unit shall be determined by reference to a standard unit for the class of unit to which the unit belongs.

[61] Pursuant to s. 90(1) of the Act, the respondent corporation has a duty to maintain the common elements and a unit owner is required to maintain their own unit. The relevant sections read:

> 90 (1) Subject to section 91, the corporation shall maintain the common elements and each owner shall maintain the owner's unit.
>
> (2) The obligation to maintain includes the obligation to repair after normal wear and tear but does not include the obligation to repair after damage.
>
> 91 The declaration may alter the obligation to maintain or to repair after damage as set out in this Act by providing that,
>
> > (a) subject to section 123, each owner shall repair the owner's unit after damage;

2023 ONSC 4908 (CanLII)

(b) the owners shall maintain the common elements or any part of them;

(c) each owner shall maintain and repair after damage those parts of the common elements of which the owner has the exclusive use; and

(d) the corporation shall maintain the units or any part of them.

[62] Section 119 of the Act identifies the individuals, including the corporation, officers, and owners, among others, who must comply with the Act, the declaration, and the by-laws and rules of the condominium corporation. The provision reads:

> 119 (1) A corporation, the directors, officers and employees of a corporation, a declarant, the lessor of a leasehold condominium corporation, an owner, an occupier of a unit and a person having an encumbrance against a unit and its appurtenant common interest shall comply with this Act, the declaration, the by-laws and the rules.

[63] The courts apply a test of reasonableness to determine if a condominium corporation has breached its statutory duties to repair and maintain the common elements: *York Condominium Corp. No. 59 v. York Condominium Corp. No. 87* (1983), 42 O.R. (2d) 337 (C.A.) ("*YCC 59*"); *Roy v. York Condominium Corp. No. 310*, [1992] O.J. No. 4195 (Gen. Div.); and *Wu v. Peel Condominium Corp. No. 245*, 2015 ONSC 2801.

[64] The applicant relies on the decision of *YCC 59*. The case involved a dispute between two condominium corporations regarding contribution by one of them to the costs associated with the roof above a pool used by the members of both condominiums. Although the case did not deal with individual condominium owners, the Court of Appeal noted that "it is concerned with the relationship between two condominium corporations which form integral parts of a composite plan for condominium living. The development plan contemplated the mutual enjoyment and use of the pool by the occupants of both condominium corporations. The mutual enjoyment of a facility calls for a mutual obligation of repair." Cory J.A. (as he then was) articulated the factors that a condominium corporation must take into account in balancing the various interests of stakeholders to achieve a fair and equitable result. Whether a condominium corporation has breached its repair and maintenance obligations is a fact-specific inquiry in the particular circumstances. Cory J.A., speaking on behalf of the court, stated:

> The concept of repair in such a situation should not be approached in a narrow legalistic manner. Rather, the Court should take into account a number of considerations. They may include the relationship of the parties, the wording of their contractual obligations, the nature of the total development, the total replacement cost of the facility to be repaired, the nature of the work required to effect the repairs, the facility to be repaired and the benefit which may be acquired by all parties if the repairs are effected compared to the detriment which might be occasioned by the failure to undertake the repairs. All pertinent factors should be

2023 ONSC 4908 (CanLII)

> taken into account to achieve as fair and equitable a result as possible.

[65] The applicant also relies on the 1992 decision of Keenan J. in *Roy*. At issue in *Roy* was a request by a condominium owner that the court order the corporation to repair a patio, to which she had exclusive use, to an aesthetically acceptable standard. Keenan J. cited the passage in *YCC 59* in describing the condominium corporation's duty to repair. He went on to observe that:

> There is no absolute requirement that the original appearance be replicated when repairs are undertaken. Changes in fashion and building materials make it reasonable if not predictable that a different appearance may be chosen. Aesthetic considerations are both subjective and objective. Appearance is subjective; quality of material and workmanship is objective. 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.

[66] The applicant submits that the following reasonable expectations were breached by the respondent corporation:

i. that the respondent corporation would respond to the applicant's requests and complaints;

ii. that the respondent corporation would investigate the applicant's noise complaints in the same way it would normally investigate noise complaints;

iii. that the respondent corporation would not require the applicant to retain and pay for an acoustical engineer to investigate the noise issues;

iv. that the respondent corporation would address the applicant's legitimate security concerns;

v. that the respondent corporation would treat the safety of the Victorian residents and property as seriously as it does the Main Building;

vi. that the respondent corporation would treat the maintenance needs of the Victorian in the same way it does the Main Building;

vii. that the respondent corporation would treat the aesthetic needs of the Victorian in the same way it does the Main Building; and

2023 ONSC 4908 (CanLII)

viii. that the respondent corporation would not cause the applicant emotional and financial harm.

[67] The respondent corporation submits that the applicant is asking the corporation's Board of Directors to prioritize his wish list of items instead of balancing the rights and obligations of all unit owners. Furthermore, the allegations regarding the common elements, if substantiated, would nevertheless be properly considered to be *de minimis* or trivial. The allegations that the members of its Board of Directors have acted in such a manner as to personally benefit themselves are vexatious and scandalous, intended solely to embarrass the directors or cause them discomfort for having carried out their statutory duty to manage the corporation in the interests of all owners, and entirely improper.

[68] Subsection 135(1) of the Act allows an owner to bring an application against a condominium corporation for oppression. Subsection (2) further provides:

> (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.

[69] In *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, at para. 68, the Supreme Court established the analytical framework for the oppression remedy, setting out a two-part test for oppression in the corporate law context. This test has been applied in considering s. 135 of the Act. The claimant must establish 1) that there has been a breach of their reasonable expectations and 2) that the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard": *Metropolitan Toronto Condominium Corp. No. 1272 v. Beach Development (Phase II) Corp.*, 2011 ONCA 667, 285 O.A.C. 372, at para. 6; *Noguera v. Muskoka Condominium Corporation No. 22*, 2020 ONCA 46, 10 R.P.R. (6th) 1 ("*Noguera (ONCA)*"), at para. 17.

[70] Oppressive conduct is coercive, harsh, harmful, or an abuse of power. 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 the company's affairs are being conducted. Unfair prejudice has been found to mean a limitation on or injury to a complainant's rights or interests that is unfair or inequitable from others similarly situated. Unfair disregard means to ignore or treat the interests of the complainant as being of no importance: *Hakim v. Toronto Standard Condominium 1737*, 2012 ONSC 404, 16 R.P.R. (5th) 315, at paras. 33-35; *Niedermeier v. York Condominium Corp., No. 50*, 45 R.P.R. (4th) 182 (Ont. S.C.); *Walia Properties Ltd. v. York Condominium Corp. No. 478*, 60 R.P.R. (4th) 203 (Ont. S.C.), varied 2008 ONCA 461, 67 R.P.R. (4th) 161; *1240233 Ontario Inc. v. York Region Condominium Corp. No. 852* (2009), 57 B.L.R. (4th) 88 (Ont. S.C.); and *Beach Development*. Further, courts in Ontario have held that the use of the word "unfairly" to qualify the words "prejudice" and "disregard" suggest that some prejudice or disregard is acceptable provided it is not unfair: *Niedermeier*, at para. 9.

2023 ONSC 4908 (CanLII)

[71] The oppression remedy is an equitable remedy that "seeks to ensure fairness — what is 'just and equitable'. It gives a court a broad, equitable jurisdiction to enforce not just what is legal but what is fair": *BCE*, at para. 58, citing *Wright v. Donald S. Montgomery Holdings Ltd* (1998), 39 B.L.R. (2d) 266 (Ont. Gen. Div.), at p. 273.

[72] The oppression remedy protects the reasonable expectations of shareholders or unit owners. Reasonable expectations should be determined according to the arrangements that existed between the shareholders or unit owners of a corporation: see *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (C.A.). In addition, the court must examine the cumulative effect of the conduct complained of.

[73] In *BCE*, at para. 72, the Supreme Court of Canada indicated that to determine whether reasonable expectations exist, courts can consider factors including: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders.

[74] Consideration of the statutory regime may be a significant factor: *Noguera v. Muskoka Condominium Corporation No. 22*, 2018 ONSC 7278, 2 R.P.R. (6th) 116 ("*Noguera (ONSC)*"), at para. 35. In the context of whether it would be "just and equitable" to grant a remedy, the court must determine "whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations": *BCE*, at para. 62. As noted by Matheson J. in *Noguera (ONSC)*, at para. 35, "The concept of reasonable expectations is objective and contextual. The actual expectations of a particular stakeholder are not conclusive." The subjective expectation of the claimant is not conclusive; rather the question is "whether the expectation is reasonable having regard to the facts of the specific case, the relationship at issue, and the entire context, including the fact that there may be conflicting claims and expectations: *Noguera, 2020 ONCA* 46, at para. 17.

[75] There is a body of cases in the condominium law context which establishes that "the court must balance the objectively reasonable expectations of an 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 assets": *Hakim*, at para. 38; see also *McKinstry v. York Condominium Corp. No. 472* (2003), 68 O.R. (3d) 557 (S.C.), at para. 33. The courts have held that oppressive conduct includes conduct that is burdensome, harsh and wrongful. In *Hakim* at paras. 33–36, B. O'Marra J. describes what constitutes oppression, unfair prejudice or unfair disregard as follows:

> [33] *Oppression* is conduct that is coercive or abusive. 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 the company's affairs are being conducted.
>
> [34] *Unfair Prejudice* has been found to mean a limitation on or injury to a complainant's rights or interests that is unfair or inequitable.

2023 ONSC 4908 (CanLII)

> [35] *Unfair Disregard* means to ignore or treat the interests of the complainant as being of no importance. *Niedermeier, supra*, at paras. 5-8.

[76] A condominium board has several duties imposed by the Act. Pursuant to s. 17(1), the "objects of the corporation are to manage the property and the assets, if any, of the corporation on behalf of the owners." Section 17(2) provides that the corporation has a "duty to control, manage and administer the common elements and assets of the corporation."

2023 ONSC 4908 (CanLII)

[77] Section 119(1) of the Act states:

> A corporation, the directors, officers and employees of a corporation, a declarant, the lessor of a leasehold condominium corporation, an owner, an occupier of a unit and a person having an encumbrance against a unit and its appurtenant common interest shall comply with this Act, the declaration, the by-laws and the rules.

[78] In addition, in *Hakim*, at para. 39, B. O'Marra J. provided some of the duties of a condominium corporation as follows:

> 1. The corporation has a duty to control, manage and administer the common elements and the assets of the corporation. s.17(2)
>
> 2. the corporation has an obligation to enforce the Act, Declaration, bylaws and rules against owners and occupiers of a unit. s.17(3)
>
> 3. The corporation, the directors, officers and employees of a corporation, a declarant, the lessor of a leasehold condominium corporation, an owner, an occupier of a unit and a person having an encumbrance against a unit and its appurtenant common interest shall comply with the Act, the declaration, the bylaws and the rules. s.119(1)

[79] Section 135 of the Act protects legitimate expectations and not individual wish lists, and 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 assets. *Hakim*, at para. 38, *McKinstry*, supra, at para. 33.

[80] A condominium's board of directors must manage the affairs of the corporation and is obliged to oversee and manage the common elements of the condominium: s. 27(1) of the Act; *3716724 Canada Inc. v. Carleton Condominium Corporation No. 375,* 2016 ONCA 650, 77 R.P.R. (5th) 1, at para. 10; *MTCC No. 985 v. Vanduzer*, 2010 ONSC 900, at para. 28.

[81] The standard of care of a board of directors is set out in s. 37(1) and requires that the directors act honestly and in good faith in the discharge of their duties. The relevant provision states:

> 37 (1) Every director and every officer of a corporation in exercising the powers and discharging the duties of office shall,
>
> (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.

[82] The courts have given deference to decisions made by boards as a result of the so-called "business judgment rule". The Supreme Court noted in *BCE* that a court reviewing a board's decision must show some deference: at paras. 40, 111-112. This rule recognizes the autonomy and integrity of corporations, and the fact that directors and officers are in a far better position to make decisions affecting their corporations than a court reviewing a matter after the fact: *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc*. (2004), 250 D.L.R. (4th) 526 (Ont. C.A.), at para. 6; *Brant Investments Ltd. v. KeepRite Inc.* (1991), 3 O.R. (3d) 289, at p. 320 (C.A.). A court will not second-guess a decision rendered by a board as long as it acted fairly and reasonably: *Maple Leaf Foods Inc*. *v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (C.A.), at p. 191.

[83] A review of the materials indicate that the respondent corporation's Board of Directors appears to be discharging their duties honestly and in good faith to manage the assets of the corporation. I reject the notion that there is preferential treatment of Board members. I now turn to the applicant's list of issues raised in the amended Notice of Motion, and his reasonable expectations, as set out above.

[84] The applicant has not established that the respondent corporation treats the maintenance needs of the Victorian differently than that of the Main Building.

[85] The applicant says that the motion sensors and porch lights at the front of the Victorian are in a state of disrepair, as is the yard in front of the Victorian. The respondent corporation says that they do work but are partially obstructed by a large flag that the applicant has put up outside the building and, in the result, does not always detect the applicant exiting his unit. The applicant says that they do not work because of an alleged obstruction caused by a large tree in front of the sensor as well as the trees in the school yard across the street. There is no actual evidence from the applicant that the motion sensors do not work. The applicant's assessment is based on conjectures, and it is not clear that he is able to provide this opinion evidence to the court. This issue though is a minor one, and in my assessment, even if the motion sensor does not work, there is no evidence before me to indicate that the respondent corporation would not be prepared to remedy the situation. I note that the applicant had raised many more issues which were resolved between the parties.

[86] As for the porch lights, the respondent corporation contends that they were not "repaired" but rather two bulbs were replaced. There is no evidence that the porch lights are in a state of disrepair. Given the ease with which this issue may be resolved, it is hardly an issue of disrepair.

[87] The applicant contends that the lawn is in a state of disrepair due to the respondent corporation digging up the yard to bury the downspout, leaving gravel and stones on the lawn, and

2023 ONSC 4908 (CanLII)

removing the dwarf evergreens. On the other hand, the respondent corporation contends that the condition of the grass in that yard has been negatively affected by the applicant's own behaviour in permitting his dogs to urinate and defecate on the grass. The applicant has not denied the assertions made by the respondent corporation, which is apparently backed up by video footage. Having reviewed the photos filed on this application by the applicant, I am not satisfied that the lawn is in a state of disrepair. The court will defer to the priorities that the Board has to make given its budget and the willingness of unit owners to fund items to be completed in any given year. Aesthetic is of course subjective and objective. I do not find that the respondent corporation treats the aesthetic needs of the Victorian differently than it does the Main Building. I note that the applicant also has access to the courtyard, which he stated is well maintained, and which is a common element for owners of the Victorian as well.

[88] The applicant also points to the timing of the replacement of the windows in the Main Building versus the Victorian. The respondent corporation is in fact in the process of replacing all the windows in the units as part of its window replacement project. The Victorian is part and parcel of the window replacement policy to be completed in 2024 or 2025. That project has apparently been delayed for all units due to global supply chain issues. There is no actual evidence before me to indicate that any of the applicant's windows or any other residence at the Victorian required repair. The applicant's complaint appears to be that the Main Building was started first. On the other hand, the respondent corporation submits that the window replacement policy is economically responsible and sensible.

[89] The applicant also contends that the respondent corporation favours the security concerns of the Main Building, which allegedly enjoys far more security features than those available to the Victorian. He argues that the Main Building is only accessible by going through a secured entranceway, is locked to outsiders, has an enter phone and has the benefit of security cameras throughout, with the courtyard protected by a high-security fence.

[90] On the materials before me, the applicant has not established that the respondent corporation has failed to address the applicant's security concerns and is not treating the safety of the Victorian residents and property as seriously as it does the Main Building.

[91] The applicant claims that he lives in a high-crime area. He asks that the fence be raised around the Victorian. The applicant submits that several of his neighbours brought the gate issue to the respondent corporation. The applicant contends that the respondent corporation has not put a lock on the gate nor has the respondent corporation addressed the other security issues raised by him. In fact, the applicant's affidavit affixes an email from a neighbour, which is hearsay. Regardless, there is no mention of putting a lock on the gate, but rather the reference was to fix a broken lock on an exterior access door and addressing an issue with a gate closing. On the materials before me, only the applicant has raised the issue of putting a lock on the gate. I agree with the respondent corporation that the issue of the lock on the gate involves consideration of the other residents of the Victorian.

[92] The respondent corporation asserts that it is not aware of any "recent developments in the neighbourhood" that "have caused the crime rate to surge" in the Moss Park neighbourhood, or of

2023 ONSC 4908 (CanLII)

any increase in the incidence of crime in the Moss Park neighbourhood generally. Aside from the applicant's bald assertions, there is no actual evidence before the court to indicate that the applicant lives in a high-crime area. The respondent corporation contends that there was one isolated incident where an unknown person gained access on May 2, 2021 because an entry/exit door to the common area was left ajar. The respondent corporation indicates there have been no similar incidents before or after this isolated incident, and the incident had nothing to do with the height of a fence or a lock or self-closing mechanism on a gate.

[93] Mr. Ramsden provided his own assessment on the security issue, stating that there are frequent individuals on the street who entered the front yard. He claimed that he has feared for his own safety. There is no evidence from him that he has been approached, confronted, or assaulted by anyone when visiting the applicant. Mr. Ramsden's evidence on issues of security is not very helpful as it is not clear whether the individuals to whom he referred have a right to enter the front yard and, by his own admission, he had last visited the applicant in 2019. He did not indicate that he encountered any individuals on the street trespassing when he visited in September 2022 to take the videos of Ms. Seppanen's unit.

[94] The respondent corporation has raised the practical consideration that it is not able to control third-party parcel or food delivery workers, including whether those workers leave the gate ajar in the course of making their deliveries. The respondent corporation has also raised another practical concern, that being if a lock were to be installed on the gate, this would impede individuals making deliveries from completing their deliveries, thereby causing a significant inconvenience for all other unit residents. There is no evidence that the lack of a lock on the gate is causing or contributing to a present security risk.

[95] The respondent corporation contends that it is not aware of any threats or other aggressive behaviour that has been directed toward any resident by any member of the community. Indeed, the applicant has not indicated that he has been accosted, threatened or been the subject of any aggressive behaviour. I agree with the respondent corporation that there is no objective evidence of any actual security issue regarding the height of the fence in front of the Victorian. A small section of the fence was apparently previously raised to align with the height of the remainder of the fencing. The Board continues to evaluate the issue of the height of the fence. There is no evidence that the fence is in a state of disrepair. There is no evidence that the height of the fence is causing or contributing to a security risk. The applicant has filed videos of primarily delivery people entering onto the property and leaving without closing the gates. There are a few videos of people entering onto the property and the applicant has provided his own interpretation as to why they were on the property. While there may have been valid instances of people trespassing onto the property, it was in fact the applicant who chased people from the property.

[96] Aside from the security issues, the applicant says there is a discrepancy in expenditure and attention to the landscape surrounding the Victorian as compared to the Main Building's courtyard. The property manager on cross-examination indicated that there is a contractor landscaper who works for four hours per day, three times a week. The applicant challenges this assertion, and states that there is a landscaper regularly tending to the Main Building courtyard. He says that the front

2023 ONSC 4908 (CanLII)

lawn of the Victorian was well maintained when he moved in more than 25 years ago and well maintained for years.

[97] The applicant also submits that it was his expectation that the respondent corporation would not cause him emotional and financial harm. Aside from bald statements made by the applicant, there is no medical or other actual evidence to indicate that the respondent corporation caused the applicant emotional harm. On the evidence, I also do not accept that the respondent corporation caused the applicant "financial harm". As stated above, the respondent corporation responded relatively promptly to the applicant's complaints of noise from his neighbour's unit. The respondent corporation took positive steps to address the issue. The relief sought in the application expanded significantly after the noise issue was dealt with.

[98] The oppression remedy is broad and flexible and permits any type of corporate activity to be subjected to judicial scrutiny. Nevertheless, the legislative intent is to balance the interests of those claiming rights from the condominium corporation against the ability of the corporation to manage and conduct business in an efficient manner: *McKinstry*, at para. 31; *Hakim*, at para. 37.

[99] As the court noted in *Carleton Condominium Corporation No. 375,* at para. 51:

> Moreover, the rationale underlying the business judgment rule in the corporate law context is also applicable to condominium corporations. As representatives elected by the unit owners, the directors of these corporations are better placed to make judgments about their interests and to balance the competing interests engaged than are the courts. For instance, in this case the security concerns arose in part as a result of the condominium's location, and the Board members' knowledge of that area is clearly an advantage that they enjoy over any court subsequently reviewing their decision.

[100] During oral submissions, counsel for the applicant devoted significant time to the landscaping of the courtyard. The courtyard however is open to all unit owners, including owners of the Victorian, such as the applicant.

[101] Section 1(1) of the Act defines "common expenses" as "the expenses related to the performance of the objects and duties of a corporation and all expenses specified as common expenses in this Act, in the regulations or in a declaration". Under the 1970 Act, in force when the declaration was registered, clause (j) of section 1(1) provided as follows:

> (j) "common expenses" means the expenses of the performance of the objects and duties of a corporation and any expenses specified as common expenses in a declaration.

The current Act has therefore expanded to include expenses specified in the Act or in the regulation.

2023 ONSC 4908 (CanLII)

[102] In *Carleton Condominium Corp. No. 279 v. Rochon* (1987), 59 O.R. (2d) 545 (C.A.), at para. 37, the Court of Appeal noted that a condominium corporation is a creature of statute and has no greater authority than as set out in the Act.

[103] The jurisprudence establishes that the Board's balancing of the interests of a complainant against competing concerns under s. 135 of the Act should be afforded deference. If the decision reached by the Board is within a range of reasonable choices, it cannot be said to have unfairly disregarded the interests of a complainant.

[104] In *1240233 Ontario Inc.*, at para. 37, citing *Alldrew Holdings Ltd. v. Nibro Holdings Ltd.* (1993), 16 O.R. (3d) 718 (Gen. Div.), reversed on other grounds (1996), 25 B.L.R. (2d) 302 (Ont. C.A.), the court provided a non-exhaustive list of factors to consider when dealing with oppression. The applicant relies on the factors set out in *Alldrew Holdings Ltd.* by MacKenzie J. as follows:

i. the history and nature of the corporation;
ii. the type of interest affected;
iii. general commercial practice;
iv. nature of the relationship between the complainant and the alleged oppressor;
v. the extent to which the impugned acts or conduct were foreseeable;
vi. the expectations of the complainant;
vii. the size, structure and nature of the corporation; and
viii. the detriment to the interests of the complainant.

[105] As the applicant relies on *Alldrew Holdings Ltd.*, the court will use the factors identified by MacKenzie J. as, for the most part, they encompass the factors set out in *BCE*, above.

a. The history and nature of the corporation/the type of interest affected

[106] The Condominium's Declaration is dated August 22, 1979. In this case, the applicant has owned the unit since 1998.

b. General commercial practice

[107] There is no evidence before the court regarding the general commercial practice with respect to any of the issues raised on this application.

c. The nature of the relationship between the complainant and the alleged oppressor

[108] As was recognized by Hoy A.C.J.O in *Carleton Condominium Corporation No. 375*, at para. 8, citing *Re 511666 Ontario Ltd. et al. v. Confederation Life Insurance Co.* (1985), 50 O.R. (2d) 181 (H.C.), at pp. 189-190, "A condominium is a form of property ownership which combines individual property interests, exclusively owned by individual 'unit owners', and common elements that are jointly owned by all unit owners as tenants in common". Section 11(2) of the Act provides that: "The owners are tenants in common of the common elements and an undivided interest in the common elements is appurtenant to each owner's unit."

2023 ONSC 4908 (CanLII)

[109] The common elements are owned and managed by the condominium corporation, a corporation of which the unit owners are shareholders. It is the owners of the units and not the corporation who own the common elements: *Cheung v. York Region Condominium Corporation No. 759*, 2017 ONCA 633, 139 O.R. (3d) 254, at para. 70.

2023 ONSC 4908 (CanLII)

d. The extent to which the impugned acts or conduct were foreseeable

[110] The applicant can reasonably expect that the respondent corporation and its Board of Directors would manage the condominium corporation honestly, in good faith, and with due diligence required by the statutory standard of care pursuant to the Act. I do not accept, on the evidence, that the Board of Directors have acted otherwise, and the assertions by the applicant that one of the Board members is receiving preferential treatment with respect to short-term rentals, is not borne out by the evidence.

[111] On the evidence, neither the Victorian generally, nor the applicant, in particularly, has been treated unfairly or inequitably in the spending of the respondent corporation's funds. The amounts spent on the common elements have been spent fairly and equitably on the Victorian and the Main Building. Between 2016 and 2022, the respondent corporation spent approximately $810,000 on maintaining, repairing, and replacing portions of the units and the common elements. Of this amount, approximately $110,000, or approximately 13.5 percent of the overall amount, was spent on the Victorian which contains four units, including the applicant's unit. The Victorian only makes up 12.5 percent of the total units in the Condominium.

e. The expectations of the complainant

[112] The expansive amendments to the Notice of Application and the list put forward by the applicant on this application suggests the items are his "wish list". The list ignores the statutory duties of the respondent corporation and its Board, which is no doubt circumscribed by a budget. I do not find that the list contains items that are in a state of disrepair or that are inadequately maintained. In exercising its discretion, the court must balance the reasonable expectations of an owner with the duties of the Board to the ownership at large: *Orr v. Metropolitan Toronto Condominium Corp. No. 1056*, 2011 ONSC 4876, 11 R.P.R. (5th) 189, at para. 171; *Hakim*, at para. 40.

f. The size, structure and nature of the corporation

[113] The Victorian consists of 12.5 percent of the total units of the Condominium. Mr. Kalpin's uncontradicted evidence is that the overall spending for the Victorian and the Main Building is roughly the same. In fact, approximately 13.5 percent of the budget spending is related to the Victorian. In the result, there is no unequal, unfair or inequitable treatment with respect to budgeting.

g. The detriment to the interests of the complainant

[114] The applicant has not demonstrated harm to his interests nor harm that is distinct from the interest of others. In order to maintain an action for oppression, the petitioner must establish harm

to his or her peculiar interests, and that harm must be distinct from the interests of others: *Jaguar Financial Corp. v. Alternative Earth Resources Inc.*, 2016 BCCA 193, 56 B.L.R. (5th) 8, at para. 179.

VI. Conclusion

[115] Given my finding that the amendment is not oppressive, I need not address the relief sought for damages. If I am wrong, I would not award any amount for general damages. In my view, the respondent corporation has carried out its obligations under the Act in a reasonable manner. Although the applicant argues that he suffered from anxiety and other emotional sequelae as a result of the excessive noise transmission from his neighbour's unit, aside from the significant gap in his complaints, there is no medical record or information before the court. As for the requests that the respondent corporation pay for the cost of the SS Wilson Report, I note that the Report was obtained in the midst of Ms. Seppanen's attempt to remedy the situation.

VII. Disposition

[116] For the reasons above, the application is dismissed.

VIII. Costs

[117] If the parties are not able to agree on costs, the respondent corporation may deliver their costs submissions and Costs Outline within 20 days of the date of these reasons. The applicant may deliver his costs submissions within 20 days thereafter.

[118] The costs submissions, excluding the Costs Outline, Bill of Costs and any supporting case law, must be no longer than five pages, double-spaced.

[119] Any authority referred to may be hyperlinked to a free online source for decisions.

[120] The costs submissions should also be provided in Word format and emailed to Ms. Diamante. All submissions and supporting materials on costs must also be uploaded to Caselines.

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A.P. Ramsay J.

Date: December 27, 2023

2023 ONSC 4908 (CanLII)