CITATION: Sharon MacKay v. Metropolitan Toronto Condominium Corp. 2014 ONSC 2863
COURT FILE NO.: CV-13-949386-0000
DATE: 20140512

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
SHARON MACKAY and TOM CHENEY	)	*Natalie Schernitzki*, for the Applicants
	)	
Applicants	)	
	)	
– and –	)	
	)	*Jason P. Mangano*, for the Respondents
METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 985, MARILYN SNEAD, JOHN ELWOOD, JACK WILLIAMS, JACOB HOWARD SWITZER a.k.a. JAY SWITZER and ADALSTEINN BROWN	)	
	)	
Respondents	)	
	)	
	)	
	)	**HEARD:** 28 & 30 April 2014

REASONS FOR DECISION
(Trial of issues in an application under section 134 of *The Condominium Act*, 1998, S.O. 1998, C. 19)

MEW J.

[1] On the evening of 24 June 2013, Sharon MacKay and Tom Cheney (the "owners") became aware of a strong smell of cigar smoke in their Toronto condominium unit. The smell was quite overwhelming. They promptly made a report to the evening concierge on duty in the building.

[2] The owners suspected that the source of the cigar smoke was a neighbour whose unit was one floor immediately above their own. Mr. Cheney knocked on the door of this unit, but to no avail.

[3] By 9 July 2013, the smell of cigar smoke continued to infiltrate the owners' unit. They called their insurance company which sent an adjuster to investigate. He concluded that the unit was uninhabitable. Arrangements were made for the owners to move to a hotel, at the insurer's expense.

[4] Over 10 months later, the owners have still not moved back into their unit. As far as they are concerned, it continues to be uninhabitable due to the odour of cigar smoke.

[5] After more than 5 months, during which they felt that their concerns had not been adequately addressed, on 6 December 2013 the owners commenced an application under s. 134(1) of *The Condominium Act*, 1998, S.O. 1998, C. 19 seeking declarations that the condominium corporation had breached its duty to repair common elements of the building after damage (s. 89 of *The Condominium Act*) and breach of its duty to maintain the common elements (s. 90 of *The Condominium Act*). The application also sought a declaration that the failure to address the problems in the owners' unit constitutes discrimination against the owners on the basis of disability, contrary to ss. 2(1) and 11(1)(a) of the *Ontario Human Rights Code*, R.S.O. 1990, c. H. 19 as well as a declaration that the individual defendants, all of whom are directors of the condominium corporation, breached their duty to act honestly and in good faith and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances in accordance with s. 37 of the *Condominium Act*.

[6] Other relief claimed includes claims for injunctive or mandatory orders remedying the problems giving rise to the incursion of cigar smoke and its odour as well as damages.

[7] Counsel for the parties attended before Madam Justice Low on 18 December 2013 seeking an application date on an urgent basis. Low J. ordered that there should be a one day trial of the following issues:

(a) Has the respondent MTCC No. 895 breached its duty to repair the units and common elements after damage in accordance with s. 89 of *The Condominium Act*?

(b) Has MTCC No. 895 breached its duty to maintain the common elements in accordance with s. 90 of *The Condominium Act*?

(c) If (a) or (b), what must MTCC No. 895 do in order to comply with the *Act*?

(d) Are the applicants entitled to costs of this trial of the issues?

[8] Low J. dispensed with the need for a pre-trial and set a trial date of 3 March 2014. That date was adjourned on consent to 28 April 2014.

[9] A considerable volume of documentation has been generated over the past 10 months which found its way into the Application Record. In addition, oral testimony was heard from two engineers who were qualified as experts for the purpose of giving opinion evidence and from

another engineer retained by the condominium corporation to try and address what was thought to be a smoke migration problem, who was called as a fact witness.

[10] In the following paragraphs I have attempted to summarize the evidence which explains my decision. In the interests of delivering my decision sooner rather than later - as requested by the parties (and in particular by the owners) - I have tried to avoid becoming too bogged down in detail which is not germane to the issues I have been asked to decide.

[11] I would add that my remit does not go beyond determining whether a breach of ss. 89 or 90 of *The Condominium Act* has occurred and, if so, making a compliance order pursuant to s. 134(1) of *The Condominium Act*. All of the other issues identified in the notice of application remain to be dealt with at some future time.

[12] The owners' initial complaint was formally acknowledged on Wednesday, 26 June 2013, i.e. approximately 36 hours later, by the building's property manager, Nataliya Lysenko. She said she would investigate.

[13] On 28 June 2013, Ms. Lysenko met with the occupant of the unit immediately above the owners' unit to discuss the issue of smoke possibly migrating from his unit to the owners' unit. This individual acknowledged that he was a cigar smoker. He agreed to stop smoking for the time being and advised that he would be leaving Toronto on 30 June 2013 and not returning until September 2013.

[14] Ms. Lysenko left a voicemail for the owners advising them of her discussion with their neighbour.

[15] From 29 June until 17 July, Ms. Lysenko was away on a scheduled vacation.

[16] In the meantime, the owners continued to experience the strong odour of cigar smoke in their unit.

[17] On 1 July 2013, Mr. Cheney spoke to the evening concierge and asked him to come to the unit to smell cigar smoke. The evening concierge did so and recorded the visit in the log book. Then, on 3 July 2013, Mr. Cheney spoke to the full-time concierge, and requested that the condominium corporation take steps to investigate and correct the problem.

[18] On 6 July 2013, the owners concluded that continuing to live in the unit was no longer an option because neither of them could tolerate the intense smoke odour any longer. They booked themselves into a hotel for 3 nights. They also contacted their insurance company.

[19] On 9 July 2013, an insurance adjuster and a contractor attended the owners' unit to assess the situation. The adjuster concluded that the unit was uninhabitable due to the intense odour, that the premises and contents were smoke damaged and that the insurer would reimburse the owners the costs of alternate accommodations. The adjuster speculated that the smoke was coming through the HVAC system and the exhaust fans in the bathrooms. The adjuster

recommended that a HVAC consultant should be retained to assess the HVAC/pressure problem. In the meantime, scrubber units were placed in the owners unit to help clean the air by mechanical filtration.

[20] On 13 July 2013, Envirocare Systems Inc., a contractor retained by the insurer, attended at the unit and conducted an inspection of the mechanical systems and recommended that a mechanical engineer should perform an audit on the make-up air system.

[21] Despite having, on a number of occasions, attempted to ascertain from the concierge what (if anything) was being done by the corporation, it was not until Ms. Lysenko returned from vacation that Mr. Cheney spoke with someone in authority (Ms. Lysenko) who advised him that she had "heard nothing" and could provide no update.

[22] In the meantime, Marilyn Snead, the President of the Board of the condominium corporation, had herself returned from a vacation on 12 July 2013. She immediately contacted the corporation's solicitors for guidance.

[23] On 15 July 2013, the owners consulted solicitors themselves. The same day, a lawyer's letter was sent to the Board of Directors and Ms. Lysenko advising, *inter alia*, that the applicants had been forced to find alternative accommodation because of the pollution of their unit and demanding both action and compensation.

[24] Letters were then sent from the condominium corporation's lawyers on 25 July 2013 to both the owners and the occupant of the unit above theirs. The owners were advised that the corporation was in the process of arranging an inspection of their unit's fan coil units as well as "smoke bomb" test to determine possible migratory roots of cigar smoke into the owners unit. The occupant of the unit above was asked for his continued cooperation as investigations proceeded and to refrain completely from smoking cigars in his unit in the meantime.

[25] There was a meeting of the Board of the condominium corporation on 31 July 2013 at which the problems involving the owners unit were first raised. It would appear, however, that the view was taken by the Board at that time (if not before) that the owners' complaint should be resolved between the lawyers engaged by the parties. From that point forward, no steps were taken by the Board without lawyers being consulted.

[26] On 31 July 2013, the owners retained an engineer, Balazs Farkas from Hidi Rae Consulting Engineers. He attended at their unit to assess the HVAC system and air circulation within the unit in relation to smoking incursion from the unit above.

[27] On 9 August 2013, Mr. Farkas of Hidi Rae recommended:

1. Sealing openings between the owners unit and the unit above to prevent air transfer between the suites;

2. Establishing higher positive air pressure in the owners unit compared to adjacent units;

3. Installing a make-up air system dedicated to the owners unit to ensure that their unit is positively pressurized; and

4. Removal of the odour from the finishes in the owners unit.

[28] On 14 August 2013, at the request of the condominium corporation, Fire Consulting Services Ltd. conducted smoke migration diagnostic testing to evaluate the fire separations between the owners' suite and the unit above it. In a report prepared the following day, FCS advised the condominium corporation that there was, indeed, smoke migration between the two units indicating that smoke from the den in the upper unit was migrating to the owners unit and that there was movement around the HVAC units. The report went on:

> "This migration poses a fire safety risk…The origin of the deficiency is unknown; however the lack of integrity between suites has been confirmed and is a violation of the Ontario Fire Code. This must be addressed as soon as possible.
>
> …
>
> At this time we propose conducting preliminary remedial repairs of the HVAC mechanical systems between [the] suites…as soon as possible."

[29] Also on 14 August 2013, at the corporation's request, a company called Climanetics Inc. assessed the vertical fan coil units in the owners' suite. Climanetics recommended replacing the access doors/baffle insulation lining, cleaning and vacuuming the unit and spraying it with anti-bacterial solution.

[30] The condominium corporation's Board discussed the FCS report at its next meeting on 28 August 2013. The minutes reflect that "Further follow up work would be required." Notwithstanding this, nothing further seems to have been done by or at the behest of the Board until over a month later. However, this did not prevent the solicitors for the condominium corporation writing a letter to the owners' solicitors stating that it was not clear to them why the owners could not return to their unit.

[31] On 20 September 2013, a specialist make-up air technician from Dass Enterprises, contracted by Hidi Rae, attended at the owners' unit to perform an air flow measurement test on the corridor make-up air supply system. Dass concluded that the air flow in the corridors of the condominium building was about one-third of the designed capacity and was also well below applicable Building Code requirements. Hidi Rae prepared a report dated 7 October 2013 stating that "the shortage of supply air in the corridor can be a contributing factor to the unwanted air circulation between the suites".

[32] From 9 to 11 October 2013, Climanetics performed regular maintenance on the fan coil units in each of the suites in the building. At around the same time – 11 October 2013 to be precise, FCS attended to conduct further smoke bomb testing and reported that it was able to:

a. Isolate the immediate areas of smoke migration from the floor above into the owners' unit;

b. Verify that the fan coil units were defective (also permitting smoke to enter the owners' unit); and

c. Confirm that the pressurization of the building was significantly out of balance.

[33] According to Mr. Cheney, FCS told him, at the time of their attendance on 11 October, that they were prepared to immediately commence remedial work, but that they were waiting for authorization from the corporation.

[34] The perspective of the condominium corporation at this time is captured by the respondents' factum which recites that "FCS then performed further smoke diagnostic testing which revealed the earlier repairs were not sufficient to eliminate the smoke migration" and "The Board was not happy with FCS's work".

[35] Also reflecting the attitude of the corporation, on 22 October 2013 the corporation's solicitors sent an email to the owners saying that, since the occupant of the upstairs unit was under an order not to smoke, "there is no good reason" why the owners could not return to and live in their unit. The owners, in the factum filed on their behalf, note that this letter was written "despite the fact that the remedial work had not been completed and every surface and furnishing in the Unit is the source of dangerous emissions associated with second-hand and third-hand smoke and has to be cleaned of smoke residue. MTCC is well aware that the smoke damage in the Unit is so extensive that the insurer has agreed that some of the drywall has to be taken down and replaced due to smoke damage."

[36] At its meeting on 30 October 2013, the condominium corporation's Board of Directors discussed getting another company in.

[37] On 11 or 12 November 2013, the lawyers for the condominium corporation retained Namcan Engineering and Construction Management Inc. ("Namcan") to apply smoke and fire stopping sealant material at all four pipe floor penetrations of the four fan coil units in the suite immediately above the owners' unit. Namcan subsequently advised that it had successfully sealed "all penetrations" between the units.

[38] On 26 November 2013, the owners received an email from the corporation's lawyers advising that it was the lawyers "preliminary understanding" that the necessary work had been done to stop migration of smoke into their unit.

[39] On 29 November 2013, Terra Energy Management Services Inc. ("Terra") was retained to review the building's air pressurization. Terra advised that the air volume in the building was "very good" and there were no issues.

[40] The attitude of the corporation at the time, or at least one of its board members, appears to be summed up by an exchange which took place on 1 December 2013 between Mr. Cheney and a board member. The board member asked Mr. Cheney how he was doing. Mr. Cheney said that he would be doing much better if he had not been out of the unit for the past five months. The board member responded by saying "this was your choice" before adding "no one else in the building is having the problem and it was your choice to stay out".

[41] Sometime in November, after the workmen had been in to seal the pipe floor penetrations, the occupant of the unit above of the owners' unit smoked some cigars (despite having said he would not do so). As a result, on 1 December 2013, when visiting their unit, the owners both smelled fresh cigar smoke.

[42] On 3 December 2013, the owners' solicitor received an email from the condominium corporation's solicitor stating that he had reviewed reports which were in the "process" of being finalized and which confirmed that "the problem is taken care of".

[43] The owners commenced their application on 6 December 2013.

[44] A report from Namcan dated 9 December 2013 stated that the potential areas of smoke migration between the two units had been sealed.

[45] On 17 December 2013, Hidi Rae provided the owners with its comments on the 9 December 2013 Namcan report and advised that until further testing to ensure proper sealing of the penetrations had taken place, smoke migration could continue to occur and the work could not be considered complete. Verification of the remedial work was therefore recommended. Hidi Rae also reviewed the Terra report and challenged Terra's conclusion that the ventilation/supply air rates for the building were very good.

[46] Namcan then reviewed Hidi Rae's 17 December 2013 letter and advised that:

> "the ceiling in [the owners' unit] is a drop ceiling. Accordingly, if smoke had been migrating from fan coil units floor penetrations of [the unit above], it could possibly, enter [the owners' unit] at various points after travelling through the drop ceiling area. All of the possible fan coil unit floor penetration points in [the upstairs unit] from which cigar smoke could escape [the upstairs unit] were sealed. Cigar smoke cannot migrate from [the upstairs unit] and, accordingly, in my view, any problem has been solved and there is no need for further testing."

[47] This invited a further response from Hidi Rae which noted that the smoke tests conducted on 14 August and 11 October 2013 had detected smoke entering the owners' suite at penetrations other than the fan coil unit floor penetration points. Noting that the Namcan correspondence was

silent on the existence of other potential openings and unsealed penetrations at plumbing rises, at plumbing fixtures, at the window system or electrical conduits penetrating the demising floor slab, Hidi Rae challenged the statement that cigar smoke could no longer migrate from the upstairs unit and that all problems had been solved and that further testing was not required. Hidi Rae continued:

> "…until proof of complete air tightness of the demising floor slab between the two suites has…been obtained, either by visual inspection or by a further smoke testing…it should be assumed that the potential of air and smoke transfer between the two suites still exists."

[48] On 10 March 2014, Carmichael Engineering Ltd. attended at the building and increased the air pressure in the hallways to bring it back to the building's original design criteria.

[49] On 7 March 2014, the condominium corporation retained Pinchin Environmental Ltd. to perform further smoke migration diagnostic testing. This testing was done on 27 March 2014 and resulted in a report dated 2 April 2014 in which Pinchin confirmed that cuts to the drywall in the master bathroom and guest bathroom of the owners' unit disclosed further possible migration.

[50] Having concluded the problem did not emanate from any of the four fan coil pipe penetrations that had previously been sealed by Namcan, air gaps were detected by Pinchin around the master and guest bathtub drain pipes of the upstairs unit. Further testing conducted in the vicinity of the master bathroom drain pipe disclosed no further leakage after the sealing was applied. There was insufficient time to conduct similar testing after the guest bathroom drain pipe was sealed, but Pinchin felt comfortable expressing the opinion that the problem had now, indeed, been solved.

[51] Mr. Farkas of Hidi Rae, who gave evidence in court, agreed that the problem is now close to being resolved. He recommended further iterative testing to eliminate any possibility that there remain any other routes for smoke to infiltrate the owners' unit from the unit above. He continues to also recommend the installation of a make-up air system dedicated to the owners unit to ensure that their unit is positively pressurized. He also supports retrofitting the fan coil units so that odour from the drains cannot migrate back through the stack.

[52] Phillip Brearton, the engineer responsible for the Pinchin report, contacted the manufacturer of the condensate drain pipe to see whether the retrofitting recommended by Hidi Rae, namely the insulation of a "P-trap", was feasible. He came to the conclusion that it was not. In Mr. Brearton's view it is very unlikely now that there will be further problems. He acknowledged, however, that one could even have a higher confidence about this if further testing were undertaken. One of the difficulties, he explained, is that smoke bomb testing is in and of itself very invasive, particularly for the owner of the unit in which the "smoke bombs" are being let off.

[53] Both Mr. Brearton and Mr. Skaffa of Namcan, who also testified, feel that the installation of a make-up air system is unnecessary. It may also be impractical.

[54] It can be seen from the foregoing that things have now got to a point where a solution does appear to be in sight. The parties still disagree about whether further iterative testing should be undertaken and whether any of the other modifications recommended by Hidi Rae are feasible.

[55] The question of whether the condominium corporation is in breach of its maintenance and repair obligations engages a discussion of the adequacy of the corporation's responses to the owners' complaints.

[56] Not surprisingly, context is everything. The nature of the problem at the owners' unit was such that they felt unable to continue to live there. They were supported in this regard by their insurer.

[57] It is probably worth noting that there is a waiver of subrogation arrangement (a not unusual feature of condominium corporation by-laws and regulations), the practical effect of which is that the owners' insurer will not be able to subrogate against the condominium corporation for the no doubt considerable expense of the owners being put up in a hotel for ten months (so far). For the same reason, it may not be possible for the insurer to recover from any third party source the cost of replacing drywall and other fabric within the owners' unit. This, of course, takes some of the pressure off a condominium corporation to respond in a timely and effective way to a maintenance or repair issue.

[58] The condominium corporation and its directors seem to rely heavily on the fact that they followed legal advice throughout and that they hired appropriate contractors and advisers (even if the advice they received was not always correct). This may be sufficient to discharge the obligations of the directors of the corporation under s. 37 of *The Condominium Act*, 1998, which deals with the standard of care owed by officers and directors of condominium corporations (although I make no finding in that regard as it is not one of the questions that I am asked to answer). But the fact that the Board obtained and acted on advice is not, in my view, as effective an answer to alleged breaches of s. 89 (repair after damage) and s. 90 (maintenance).

[59] I pause to note that, at times, duelling correspondence between the lawyers for the parties may distracted efforts to effectively deal with the smoke migration issue.

[60] Section 89(1) of the *Condominium Act, 1998* provides:

> "Subject to sections 91 and 123, the corporation shall repair the units and common elements after damage."

[61] The evidence of Pinchin is that the problem has been solved. This conclusion seems more plausible than the earlier, (as it turns out) erroneous, determination by Namcan that a solution had been effected.

[62] Hidi Rae feels that more should be done to be certain that the problem has, in fact, been fully corrected. But as matters presently stand, neither the owners or Hidi Rae can definitively refute Pinchin's position.

[63] I am satisfied that there is now good reason to believe that the corporation is in compliance with its obligations under s. 89(1) so far as the common elements (which, the parties agree, would include the sleeves in the concrete floor slab that allow connection of the respective suites to common services such as water supply lines, drains and vents). Put differently, it has not been established that there is a continuing problem.

[64] With respect to the repairs that are required in the owners' unit, it appears to be recognized that the condominium corporation's obligation to repair units is altered by s. 12 of MTCC's declaration which provides that owners are responsible for maintaining and repairing their unit after damage.

[65] In coming to this conclusion with respect to s. 89, I should not be taken to necessarily agree that nothing more needs to be done at this juncture. It is a matter for the professional judgment of the engineers advising the parties – principally Pinchin and Hidi Rae – whether further iterative testing would be prudent or whether any other remedial measures (such as a make-up air system in the owners' unit) are reasonable in all of the circumstances and for the Board to decide how to react to such advice. Having spent the amount of time and effort that has already been invested, it would seem that, at the very least, there is an arguable case for conducting further iterative testing provided that this does not unduly prejudice or harm any other unit owners or their property.

[66] Section 90 of the *Condominium Act* provides:

> "(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."

[67] At this time, the condominium corporation would, for similar reasons to those expressed in connection with section 89(1), seem to be maintaining the common elements in a satisfactory manner. Again, I offer the caveat that this does not necessarily mean that it would not be prudent for the corporation to do more.

[68] In light of my findings with respect to ss. 89 and 90, it is not necessary for me to give formal directions or otherwise make specific orders with respect to the conduct of the condominium corporation going forward.

[69] While it was suggested by the corporation that by suing, the owners have acted precipitously, it is my view that they have not. I find that the condominium corporation, in all of the circumstances, did not act with sufficient dispatch and, indeed, adopted an unfortunate

attitude toward the owners, who were quickly branded as complainers who had far too quickly ran off to their own lawyers.

[70] The owners initially took reasonable steps to try and get the condominium corporation to pay attention to them. Even allowing for the fact that there were people on vacation at the time that the cigar smoke problem first arose, it was unacceptable that it took more than a month before FCS first attended. Having identified violations of the Fire Code and the need to act with dispatch, the response of the condominium corporation was, effectively, not do anything of significance for nearly two months. Unfortunately, FCS and Namcan then incorrectly concluded that the problem had been solved when, in fact, it had not. That is not, of course, directly the fault of the condominium corporation. However, throughout this time, a negative attitude towards the owners continued and in my view coloured the condominium corporation's decision making.

[71] The condominium corporation is to be commended for eventually retaining Pinchin. Both Mr. Farkas of Hidi Rae and Mr. Brearton of Pinchin came across as sensible, thorough, and reasonable professionals. I expressed the view to counsel during the course of argument that had these gentlemen been given an opportunity to confer with each other at an earlier stage, the issues between the parties would almost certainly have been solved without the need for the expense of the hearing that ultimately took place.

[72] It follows from my view that the condominium corporation did not act with sufficient dispatch that, until the intervention of Pinchin, had I been asked to do so, I likely would have concluded that the condominium corporation was not compliant with its obligations under ss. 89 and 90 of the *Condominium Act*, 1998.

[73] I do not find it unreasonable that the owners found it necessary to commence their application. Less formal efforts to obtain a satisfactory response from the condominium corporation had not worked. Accordingly, despite the fact that I have concluded that the condominium corporation is not presently in breach of its obligations, I would exercise my discretion under section 131(1) of the *Courts of Justice Act*, R.S.O. 1990, Chap C.43, to award costs in favour of the applicants. I would provisionally do so on a partial indemnity scale although if there are circumstances, such as settlement offers, which would warrant a different disposition on costs, the parties may make appropriate submissions.

[74] The applicants should provide a bill of costs and a costs submission of not more than three pages in length within two weeks from the date of these reasons being released. The costs submissions of the respondents should be delivered within one week of receipt of the applicants' costs submissions.

[75] I will remain seized of this matter for the purpose of giving further directions with respect to the manner in which the remaining issues between the parties should be litigated, but not beyond that. The parties should contact my assistant to schedule a hearing for such directions to be given.

Mew J.

Released: 12 May 2014

CITATION: Sharon MacKay v. Metropolitan Toronto Condominium Corp. 2014 ONSC 2863

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

SHARON MACKAY and TOM CHENEY

Applicants

– and –

METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 985, MARILYN SNEAD, JOHN ELWOOD, JACK WILLIAMS, JACOB HOWARD SWITZER a.k.a. JAY SWITZER and ADALSTEINN BROWN

Respondents

REASONS FOR JUDGMENT

Mew J.

Released: 12 May 2014