

*Case Name:*

**673830 Ontario Ltd. v. Metropolitan Toronto Condominium 673**

**Between**  
**673830 Ontario Limited, Applicant, and**  
**Metropolitan Toronto Condominium 673, Howard Sheldon, Thomas**  
**Berardo and John Malmholt, Respondents**

[2013] O.J. No. 3796

2013 ONSC 5218

Court File No. CV-12-468134

Ontario Superior Court of Justice

**S.N. Lederman J.**

Heard: August 6, 2013.

Judgment: August 16, 2013.

(30 paras.)

**Counsel:**

*Jonathan H. Fine*, for the Applicant.

*Patrick Greco*, for the Respondents.

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**S.N. LEDERMAN J.:--**

**Nature of the Application**

1 The Applicant, 673830 Ontario Limited seeks certain remedies, alleging inadequate disclosure in the Status Certificate which it relied upon in its purchase of a condominium unit ("Unit 13") of Metropolitan Toronto Condominium Corporation No. 673 ("MTCC 673") thereby rendering the special assessments levied by MTCC 673 as inapplicable to the Applicant or to the Applicant's condominium unit.

**Background Facts**

2 MTCC 673 is a condominium corporation consisting of 56 commercial/industrial units and common elements.

3 On or about September 26, 2011, the Applicant made an offer to purchase Unit 13 and an agreement of purchase and sale was entered into. That agreement was conditional, *inter alia*, upon the Applicant obtaining and approving a status certificate.

4 The Status Certificate was provided to the Applicant on or about October 5, 2011 and it stated, among other things, that:

**Budget**

...

12. The Corporation has no knowledge of any circumstances that may result in an **increase in the common expenses** for the unit, except due to the increased cost of utilities. (emphasis added)

### Reserve Fund

13. The Corporation's reserve fund amounts to \$1,247,133.05 as of August 31, 2011.
14. The most recent reserve fund study conducted by the Board was a study update with a site visit on November 4, 2010 and prepared by GENIVAR Consultants Limited Partnership.
15. The balance of the reserve fund at the beginning of the current fiscal year was \$489,659. In accordance with the budget of the Corporation for the current fiscal year, the annual contribution to be made to the reserve fund in the current fiscal year is \$99,200 and the anticipated expenditure to be made from the reserve fund in the current fiscal year amount is \$70,943. **The Board anticipates that the reserve fund will be adequate in the current fiscal year for the expected costs of major repair and replacement of the common elements and assets of the Corporation.** (emphasis added)

5 After receiving the Status Certificate, the Applicant waived the condition thereby firming up the agreement of purchase and sale and took title to the unit on November 10, 2011.

### Expropriation and Roof Repairs

6 Much earlier, the City of Toronto had expropriated a portion of MTCC 673's common elements land for a Toronto Transit Commission ("TTC") project.

7 At MTCC 673's 2011 Annual General Meeting held on May 12, 2011, unit owners were advised that:

- (a) the Board was expecting MTCC 673 to receive in the near future, a partial payment from the City of Toronto on account of the TTC expropriation; and
- (b) roof replacement was urgently required which could be paid for by the TTC funds.

8 On August 10, 2011, MTCC 673 received a payment of the TTC funds in the amount of \$745,232.41.

9 The Board deposited the TTC funds into MTCC 673's Reserve Fund. At that time, the Board intended to use the TTC funds to pay for the roof replacement.

### First Special Assessment

10 On November 29, 2011, the Board issued a special assessment to unit owners in the amount of \$1,000,000.00 based on the estimated total cost of the roof replacement at that time. The first special assessment provided for payment of \$750,000.00 by January 1, 2012 which was to be funded by the TTC funds and \$250,000.00 by July 1, 2012 which would come from either a further TTC payment or, if not, contribution by the unit owners.

11 The first special assessment was cancelled when it was determined that the roof replacement price could be lowered.

12 At a special general meeting on February 28, 2012:

- (a) the Board again explained that it intended to use the TTC funds for the roof replacement in order to avoid an increase in common expenses;
- (b) certain unit owners took the position that those owners who wished to obtain their proportionate share of the TTC funds directly ought to be able to do so; and
- (c) a consensus of owners agreed that the TTC funds simply be used to pay for the repairs directly.

### Second Special Assessment

13 On June 28, 2012, the Board was getting ready to enter into a roof replacement contract and therefore levied a second special assessment in the exact TTC fund amount of \$745,232.41.

14 This second special assessment sought merely to formalize the use of the previously received TTC funds. Each unit owner's *pro rata* obligation, which was due by July 30, 2012, was identical to its share of the TTC funds. In order to balance the interest of all unit owners, the Board provided two payment options:

- (a) the majority of unit owners, who were content to simply have their proportionate share of the TTC funds applied to the roof replacement, could sign a direction to that effect; or
- (b) those owners who wish to be paid their proportionate share of the TTC funds directly could pay their proportionate share of the second special assessment after which MTCC 673 would disburse to that unit its share of the TTC funds.

15 Both options led to the identical outcome - no net change to the unit owners' finances.

16 The Applicant through its legal counsel took the position that neither the first special assessment, which was later cancelled, nor the second special assessment was valid as against Unit 13 due to insufficient disclosure in the Status Certificate, namely, the Applicant was never informed that roof repairs were imminent, that expropriation of funds had been received by MTCC 673 and deposited into the Reserve Fund and were to be utilized for payment of roof repairs. Further, the Applicant demanded payment of Unit 13's proportionate share of the TTC funds.

17 Counsel became involved for both the Applicant and MTCC 673 and asserted their positions as follows:

- (a) the Applicant repeated its position that it was exempt from the second special assessment, demanded a proportionate share of the TTC funds and threatened legal proceedings; and
- (b) MTCC 673 pointed out its repeated notice to owners that the TTC funds would be used for the roof replacement and the support of the majority of owners in doing so, refused to allow the Applicant to profit from the TTC funds without contributing to the roof replacement, and repeated the two payment options available to unit owners.

18 On August 21, 2012, the Applicant provided MTCC 673 with a cheque in the amount of \$14,368.08 for Unit 13's share of the second special assessment which was "paid under protest" and demanded immediate delivery of a proportionate share of the TTC funds. The Applicant was not paid its share of the earmarked Reserve Fund monies and further, it claims it was now out of pocket the \$14,368.08 that it paid under protest. It submits that it is a total of \$28,736.16 behind where it is entitled to be. In other words, the Applicant claims it is out both its share of the earmarked Reserve Fund monies which were not paid to it plus the special assessment which it paid under protest and ought not to have had to pay at all.

#### **Necessity for a Special Assessment**

19 A special assessment is issued when the Board deems it appropriate to seek an increase in the common expenses from each unit owner. The first special assessment may have been necessary since it was based on an estimate of roof repairs which may well have exceeded the TTC funds in the Reserve Fund and would result in collection of an additional levy from the unit owners.

20 However, that first special assessment was cancelled and the second special assessment was issued but was for the purpose of accessing the exact amount of the TTC expropriation funds that were received and deposited into the Reserve Fund. Accordingly, the second special assessment was seeking no increase whatsoever from the unit owners. It was issued solely for administrative purposes to access the portion of Reserve Funds already earmarked for roof repairs. In fact, a special assessment was not even required in order to access those funds. It was utilized in this case solely as a mechanism to accommodate the interests of all unit owners.

#### **Adequacy of Disclosure in the Status Certificate**

21 The Applicant states that it was not informed about pending roof repairs nor about the receipt of expropriation monies from the TTC. MTCC 673 submits that in fact it did provide a copy of the Reserve Fund Study to the Applicant and it accompanied the Status Certificate. The only evidence to this effect is the hearsay statement in the responding affidavit and no direct evidence was so provided. Most telling is the fact that it is not itemized in the list setting out the attachments to the Status Certificate. Although referred to in the Status Certificate, there is no probative evidence that the Reserve Fund Study or a summary of it was attached as required by s.18(1) of Ontario Regulation 48/01, Form 13, para. 33(h), *Condominium Act 1998*, S.O. 1998, c. 19.

**22** It should be noted that there was reference in the Status Certificate to the Reserve Fund Study but the Applicant never asked to see it. Moreover, the Status Certificate indicated that the balance of the Reserve Fund at the beginning of the fiscal year was \$489,659 and that as of August 31, 2011, the amount was \$1,247,133.05 and the Applicant did not ask for an explanation as to why the amount had increased over a few months.

**23** The Applicant argued that based on the information in the Status Certificate, it believed that the Reserve Fund would be depleted by only \$70,943 in the current fiscal year, not \$745,232.41. However, there is no evidence that with an expenditure of that latter amount, the Reserve Fund would be left with a balance that was inadequate or underfunded and would require an increase in common expenses.

**24** The Applicant argued that the use of its share of the Reserve Fund (to the extent of \$14,368.08) was "new money" for it, as it, unlike the other unit owners, did not know of the expropriation funds. Had the Applicant known of this, it submits that it would have negotiated a better purchase price or not closed the deal. However, when the Applicant acquired Unit 13, it had no expectation to entitlement to a share of the TTC funds. Even though the Applicant may not have been fully informed of the pending roof repairs and the receipt of expropriation monies, it was not being called upon to pay any extra amount when the second special assessment was issued. No new money was required from any of the unit owners including the Applicant.

**25** The Status Certificate was accurate when it stated that no increase in the amount of the common expenses was anticipated.

**26** The net effect of all of this is that the second special assessment was not seeking any increase from unit owners; that it was a special assessment in name only and was used only for administrative purposes to allow for the two payment options. The Applicant was not called upon to pay any further fees and accordingly, even though the Status Certificate may not have contained a copy of the Reserve Fund Study, it in no way has impacted on the Applicant.

**Conclusion**

**27** The Applicant has been treated no differently than the other unit holders. On October 9, 2012, shortly before this application was issued, MTCC 673 offered to credit Unit 13 with a proportionate share of the TTC funds, if the Applicant signed a direction that those funds be used to pay for the roof repairs and also offered to return its cheque in the amount of \$14,368.08 that it had paid under protest, thus putting the Applicant in the identical financial position as all other unit owners. The Applicant refused to accept this offer.

**28** Accordingly, this application is not warranted and is dismissed.

**29** An order will go in terms of paragraph 91(b) (i), (ii) or (iii) of the Respondents' Factum, at the Applicant's option, in respect of the disposition of the Applicant's share of the TTC funds.

**30** If counsel cannot agree as to the costs of the application they make written submissions: The Respondents' submissions delivered within 30 days; The Applicant's within 15 days thereafter; Reply, if any, within 10 days thereafter.

S.N. LEDERMAN J.

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