

COURT OF APPEAL FOR ONTARIO

CITATION: Metropolitan Toronto Condominium Corporation No. 590 v. The
Registered Owners and Mortgagees of Metropolitan Toronto Condominium
Corporation No. 590, 2020 ONCA 471

DATE: 20200721
DOCKET: C67385

Juriansz, Fairburn and Nordheimer JJ.A.

BETWEEN

Metropolitan Toronto Condominium Corporation No. 590

Applicant (Appellant)

and

The Registered Owners and Mortgagees of Metropolitan Toronto Condominium
Corporation No. 590

Respondents (Respondents)

Eli S. Lederman and Kelly Hayden, for the appellant

Mark H. Arnold, for the respondents

Heard: July 2, 2020 by video conference

On appeal from the judgment of Justice Andrew A. Sanfilippo of the Superior
Court of Justice dated July 25, 2019, with reasons reported at 2019 ONSC 4484,
8 R.P.R. (6th) 299.

Nordheimer J.A.:

A. OVERVIEW

[1] Metropolitan Toronto Condominium Corporation No. 590 appeals, in part, from the judgment of the application judge dated July 25, 2019. In that judgment, the application judge granted the appellant's application to amend its declaration (the "Declaration"), to specify that the dedicated chimney flues, which exclusively service 22 residential units in the condominium, are exclusive use common elements. He dismissed the balance of the appellant's application. The appeal is from the application judge's refusal to grant an order amending ss. 22 and 23 of the Declaration under s. 109(3) of the *Condominium Act, 1998*, S.O. 1998, c. 19 (the "*Condominium Act*"). For the following reasons, I would allow the appeal, set aside paragraph two of the order below, and substitute an order granting an amendment to the Declaration.

B. BACKGROUND

[2] This appeal arises out of a long-standing dispute among the unit owners in this condominium as to who should bear the costs of replacing the chimney flues that have passed the end of their useful life. There is no dispute that the chimney flues are currently unusable.

[3] The appellant is the corporate entity responsible for operating the common elements of a high-rise condominium building located at 30 Wellington Street East in the City of Toronto, which was created on November 26, 1982 upon the

Declaration's registration. The building, which was constructed in the early 1980's, has 20 floors with 120 residential units.

[4] Of the 120 residential units in the building, 23 contain wood-burning fireplaces. The fireplaces were built at the time the building was constructed. Each of the units that have fireplaces are located on the top four floors of the building. Each fireplace is serviced by an individual flue and chimney which is dedicated to that fireplace. The chimney flues begin at the fireplace and extend through the building to the roof, where they are grouped in six clusters laterally supported by steel bracing and cabling.

[5] In 2013, the appellant's Board of Directors hired specialists to investigate the state of the fireplaces. The specialists determined that the chimney flues had deteriorated to the point that they were no longer serviceable, and needed to be replaced or removed from service. In order to mitigate the safety concerns, the Board advised the unit owners that the fireplaces should not be used, and arranged for the fireplace dampers to be sealed and tagged as unsafe for use.

[6] Over the next few years, further investigations were undertaken to determine what could be done with respect to the chimney flues. It was estimated, in 2016, that it would cost approximately \$1.5 million to remove and replace the chimney flues. It was also estimated that it would cost approximately \$13,000 to cap and decommission all of the chimney flues.

[7] The unit owners that have fireplaces want the appellant to bear the cost of removing and replacing the chimney flues. The appellant does not wish to incur that expense. It argues that the individual owners of units with fireplaces should bear the cost of removing and replacing the chimney flues or, alternatively, the costs of capping and decommissioning the chimney flues.

[8] The appellant brought an application in which it sought, under s. 109(3) of the *Condominium Act*, to amend the Declaration in two main respects. First, it sought to amend the Declaration to add Schedule F that would specify that the chimney flue servicing each individual unit fireplace was an exclusive use common element. Second, it sought to amend ss. 22 and 23 of the Declaration to make it clear that the owners of units with fireplaces, and not the appellant, were responsible for the maintenance and repair of all exclusive use common elements.

[9] In response, the respondents brought a separate application in which they sought, among other things, an order requiring the appellant to repair or replace, at its cost, the chimney flues. The hearing of the respondents' application was ordered to await the determination of the appellant's application. It remains outstanding.

C. THE DECISION BELOW

[10] The application judge granted the first remedy sought by the appellant but denied the second. The application judge determined that it was clear, from reading the Declaration as a whole, that there was an intention to distinguish between common elements enjoyed by all unit owners and those common elements that were enjoyed by only specific unit owners. He said, at para. 80:

I find that these nine references in the Declaration and By-Laws to exclusive use common elements show a recognition that certain of the common elements would be used permanently and exclusively by some unit owners but not all, and an intention that the Declaration would distinguish between the rights and duties attaching to all common elements as distinct from the rights and duties attaching to exclusive use common elements. I conclude, then, that the failure on the part of [sic] Declaration to specify “any parts of the common elements that are used by the owners of one or more designated units and not by all the owners”, as required by section 3(1)(f) of the *1980 Condominium Act*, if there are such elements within the Building, would be an error or inconsistency in the Declaration.

[11] The application judge refused to grant the relief respecting amendments to ss. 22 and 23 of the Declaration. On this issue, he found that there was no error or inconsistency in those sections that would give jurisdiction under the *Condominium Act* to amend the Declaration. Rather, the application judge concluded that these sections created a mutual obligation to maintain the exclusive use common elements as between the appellant and the unit owners.

He rejected the appellant's argument that a mutual obligation to maintain was inconsistent and contradictory. He said, in part, at para. 119:

When section 22(a) and section 23(a) are read together, they impose on the unit owner a duty to maintain the common elements of which the owner has exclusive use and a corresponding duty on the condominium corporation to maintain and repair after damage these common elements. There is no ambiguity. I acknowledge that this creates a mutual obligation to maintain, shared on the part of both the unit owner and the condominium corporation but do not see how this constitutes an "error or inconsistency". No case authority was provided that supports MTCC 590's submission that it is.

[12] No appeal is taken from the first conclusion. It is the second conclusion that is in issue on this appeal.

D. ANALYSIS

(1) Standard of review

[13] The respondents contend that the application judge's decision is a fact-based decision that should attract a high degree of deference. I disagree. The issue whether there is an error or inconsistency between the two sections of the Declaration, thus invoking the court's authority under s. 109(3) of the *Condominium Act*, is a question of law. Section 109(3) reads:

The court may make an order to amend the declaration or description if satisfied that the amendment is necessary or desirable to correct an error or inconsistency that appears in the declaration or

description or that arises out of the carrying out of the intent and purpose of the declaration or description.

[14] This is not a factually driven issue. To the contrary, the issue turns on the words used in these two sections of the Declaration, the proper interpretation of those words, and whether that proper interpretation demonstrates an error or inconsistency. These are questions of law. Questions of law attract a standard of review of correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8.

[15] In reaching that conclusion, I am aware of the caution expressed in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 54, against courts too readily finding extricable questions of law when engaged in contractual interpretation. Here, though, while a declaration under the *Condominium Act* could be characterized as a contract, is not the type of private contract negotiated between two parties, to which the comments in *Sattva* were directed. A declaration is a special form of contract, the structure of which is prescribed by statute. It must adhere to certain statutory requirements. Indeed, the *Condominium Act* provides, in s. 7(5), that, if there is any conflict between the statute and the declaration, the statute prevails.

(2) There is an inconsistency in the Declaration

[16] In my view, the application judge erred in his conclusion that there was no inconsistency between the two sections of the Declaration. Indeed, the

application judge's conclusion that the sections create a mutual obligation to maintain exclusive use common elements demonstrates that inconsistency. I begin by setting out the relevant parts of the two sections:

Section 22 - Maintenance and Repairs to Units

(a) Each owner shall maintain and repair his unit, including the maintenance and repair of the air conditioning and heating units from the shut off valve, and all ducts and services within the unit as well as maintaining any part of the common elements which he has exclusive use of, at his own expense.

Section 23 - Maintenance and Repairs to Common Elements

(a) The Corporation shall maintain and repair the common elements after damage. This duty to maintain and repair shall extend to all doors which provide access to the units, all windows (except maintenance to the interior surface thereof, the responsibility for which shall be left to the affected unit owner), and all exclusive use portions of the common elements.

[17] Section 22 requires unit owners to maintain and repair their units including the air conditioning and heating units within their units, but only to maintain any part of the common elements which they have exclusive use of, at their own expense. Section 22 says nothing about repair with respect to those exclusive use common elements.

[18] Section 23 requires the appellant to maintain and repair the common elements "after damage". It then goes on to provide that "this duty" extends to all exclusive use portions of the common elements. This provision would, at first

blush, appear to overlap with the requirements of s. 22. However, the use of the words “after damage” suggest that the duty under s. 23 is only triggered by the occurrence of an event that then leads to the need to repair. It does not appear to contemplate repairing common elements that have simply worn out or are otherwise inoperative simply through the passage of time. If that is so, and one looks only at the two sections, a gap then appears, because neither section addresses the duty to repair (as opposed to maintain) the exclusive use common elements in the normal course.

[19] Two provisions of the *Condominium Act* reinforce my view of the two sections of the Declaration. Section 89(1) requires the corporation to repair the units and common elements after damage. Section 89(2) reads, in part:

The obligation to repair after damage includes the obligation to repair and replace after damage or failure
...

Section 90(1) says that the corporation shall maintain the common elements and each owner shall maintain the owner’s unit. It does not specifically address exclusive use common elements. Section 90(2) goes on to read:

The obligation to maintain includes the obligation to repair after normal wear and tear but does not include the obligation to repair after damage.

[20] These sections create two separate repair obligations. Under s. 90(1), the corporation maintains common elements and the unit owner maintains their

individual unit. In doing so, s. 90(2) defines the general duty to maintain, which includes the duty to repair after normal wear and tear.

[21] Separate and apart from this general duty to maintain is the duty to repair after damage, which is necessary in situations where there is an unanticipated event that causes damage, for example, a severe storm. In that situation, s. 89 requires that the corporation repair the resulting damage, both to the common elements and to the units. A separate duty to repair after damage makes sense, since it will likely involve work that needs to be undertaken on an urgent basis. For the benefit of all unit owners, there should be no delay in undertaking the needed repair work.

[22] One further aspect of the *Condominium Act* needs to be considered. The *Condominium Act* allows for the Declaration to alter the obligations to maintain and to repair after damage and, in this regard, specific mention is made of exclusive use common elements. Section 91 states:

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;
- (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.

[23] The wording of s. 91 suggests that the legislature anticipated that a condominium might choose, in its declaration, to deal differently with the obligation to maintain and repair when it comes to common elements generally, or exclusive use common elements in particular, and, in the case of the latter, to impose that obligation on the unit owners who have that exclusive use.

[24] In this case, there was no independent event that caused damage to the chimney flues. The chimney flues became inoperable as a result of the passage of time, in other words, through normal wear and tear as that term is used in s. 90.

[25] On its face, s. 23 requires the appellant to maintain and repair the common elements after damage. Section 22 requires the unit owners to maintain the exclusive use common elements but it does not expressly require them to repair those elements, unless one reads the obligation to repair into the obligation to maintain. I accept that one could use s. 90(2) of the *Condominium Act* to accomplish that reading-in. The resulting interpretation of s. 22 would be that the unit owner's duty to maintain "any part of the common elements which he has exclusive use of, at his own expense" includes the duty to repair the chimney flues after normal wear and tear. However, such a reading-in does not result in the section, on its face, clearly delineating what the unit owner's obligation is.

[26] I return to the application judge's conclusion that sections imposed a mutual obligation to maintain and repair the exclusive use common elements. That conclusion is not consistent with the language of the two sections, for the reasons that I have already pointed out. It is also an unsatisfactory result. Finding that there is a mutual obligation immediately raises the question as to which of the two parties has the positive duty to fulfill the obligation. Each side can point to the other as being the one that needs to take the first step. It also does not allow for either party to know what their respective financial responsibilities are, and to plan accordingly. There is also the practical reality that it may not be possible for the necessary work to be divided between the parties, or to permit different contractors to undertake different parts of it. The bottom line is that it is an unworkable result. It is also inconsistent with the clear demarcation made in the *Condominium Act*, as between condominium corporations and unit owners, when it comes to maintenance and repair responsibilities.

[27] Whether confusion about maintenance and repair would constitute an inconsistency was addressed in one of the authorities that was provided to the application judge. In *Carleton Condominium Corp. No. 26 v. Nicholson*, [2009] O.J. No. 1831, 2009 CarswellOnt 2640 (S.C.J.), aff'd 2010 ONCA 80, Power J. concluded that apparent conflict or confusion regarding the obligations to maintain and repair as between the condominium corporation and the unit

owners was an “error or inconsistency” as those terms are used in the *Condominium Act*.

[28] The purpose of the Declaration is to clearly delineate the responsibilities of the condominium corporation, on the one hand, and the unit owners, on the other. Here that purpose is not achieved. Sections 22 and 23 are inconsistent, or at the very least unclear, in the obligations that they impose.

(3) The appropriate amendments to the Declaration

[29] The appellant suggested extensive amendments to both sections to correct the problem. Alternatively, the appellant suggested a narrower amendment to s. 23. In my view, the extensive amendments suggested are overbroad. They go beyond that which is necessary to fix the inconsistency. At the same time, I find that the narrower amendment does not address the problem as I see it. The narrower amendment was to add the words “the duty to repair after damage” into s. 23. However, that solution does not address the gap that I referred to above. It only makes clear what the appellant’s duty is regarding the maintenance and repair of exclusive use common elements after damage, something that I view as already being clear in s. 23. The narrower amendment does not deal with where the normal wear and tear obligation rests.

[30] In the end result, the intention was clearly to place on the unit owners the duty to maintain and repair their unit, and to maintain and repair any part of the

common elements over which they have exclusive use, after normal wear and tear or the effluxion of time, and to do so at their own expense. In reaching that conclusion, I stress the use of the words “any part” of the exclusive use common elements that are used in s. 22. Those words would clearly embrace the entirety of the chimney flues.

[31] It is equally clear that the appellant was to bear the responsibility of maintaining and repairing all of the common elements, save and except for the common elements over which a unit owner had exclusive use. With respect to those, the appellant’s obligation was restricted to maintain and repair after damage only.

[32] One way to achieve what was intended would be to amend s. 22 to read:

Each owner shall maintain and repair his unit, including the maintenance and repair of the air conditioning and heating units from the shut off valve, and all ducts and services within the unit as well as maintaining and repairing any part of the common elements which he has exclusive use of, at his own expense. For greater certainty, this duty to maintain and repair includes the obligation to repair after normal wear and tear.

[33] This wording is different than what the appellant proposed. The respondents have not had an opportunity to make any submissions as to its efficacy. Consequently, I would allow the parties the opportunity to consider this, or any other wording, to address the problem. If the parties can agree on the wording, they can so advise the court, and it can be included in the court’s order.

If the parties cannot agree, then they can arrange for a case conference with me for the purpose of discussing what next steps ought to be taken.

[34] Before concluding, I will address one other contention advanced by the respondents, which was that this issue ought to be determined with reference to the *Condominium Act*, R.S.O. 1980, c. 84 (the “1980 Act”). That was the statute in effect in 1982 when the condominium was created. In advancing their argument on this point, the respondents also reference certain amendments that have been made to the *Condominium Act* but which have not, as yet, been proclaimed into force.

[35] In my view, for the purpose of determining the issue raised, nothing turns on whether one applies the *1980 Act* or the *Condominium Act*. The issue here turns on the wording of the Declaration: on which party does it place the duty to replace the chimney flues? I note, in that regard, that both the *1980 Act* and the *Condominium Act* contain a provision that permits the declaration to alter the obligation to maintain or to repair exclusive use common elements after damage that is set out in the statute. I have set out s. 91(c) of the *Condominium Act* above. The *1980 Act* contains essentially the same language in s. 41(5)(d).

[36] Therefore, regardless of which statute is applied, the issue returns to the wording of the Declaration for resolution. I will conclude on this point by saying that I am not prepared to rely on amendments that have not been proclaimed into

force to assist in resolving this issue nor did I understand the respondents to be suggesting this.

E. CONCLUSION

[37] The appeal is allowed, the order below is set aside, and in its place, an order is granted amending the Declaration in a manner to be agreed upon by the parties, consistent with these reasons, or further order of this court.

[38] The appellant is entitled to its costs of the appeal fixed in the agreed amount of \$15,000 inclusive of disbursements and HST.

Released: JUL 21, 2020 "RGJ"

"I.V.B. Nordheimer J.A."
"I agree. R.G. Juriansz J.A."
"I agree. Fairburn J.A."