CITATION: Amlani v. York Condominium Corporation No. 473, 2020 ONSC 194
COURT FILE NO.: CV-18-598709
DATE: 20200113

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
NASIRALLI AMLANI and NASIMBANOO AMLANI	)	*Rodrique Escayola, David Plotkin,* for the applicants
	)	
Applicants	)	
	)	
– and –	)	
	)	*Jonathan Fine* for the respondent
YORK CONDOMINIUM CORPORATION NO. 473	)	
	)	
Respondent		
	)	
	)	
	)	**HEARD:** November 21, 2019

KOHENEN J

Overview

[1] The Applicants ask me to restrain the sale of their apartment pursuant to a lien that the respondent purported to register under s. 85 of the *Condominium Act*, 1998, SO 1998, c 19 (the "*Act*"). I grant their application.

[2] Section 85 of the *Act* allows for the automatic registration of a lien in respect of common expenses. Section 134 of the *Act* provides that expenses in respect of compliance and enforcement expenses can only be liened with a court order. I find that the expenses at issue here fall under s. 134 of the *Act.* Since there was no court order authorizing a lien of those expenses, the lien is invalid and must be discharged.

[3] The applicants also claim damages under the *Act's* oppression remedy. I grant damages in the amount of $9,679.75 for oppression. The respondent acted oppressively in refusing to discuss the issue in dispute between the parties. Instead, it ran up approximately $25,000 in legal

fees, sought to impose those costs on the applicants through a facially invalid lien and then tried to sell the respondents' apartment pursuant to the invalid lien.

[4] All of this arose in respect of an issue to which the evidence indicates there are simple, low cost solutions. The respondent refused to discuss solutions despite the applicants' requests to do so. In so refusing, the respondent breached its own constating documents which call for good faith negotiation of issues before taking legal steps. Here, a good faith discussion would likely have led to a resolution that met the goals of all of the condominium's residents at a fraction of the costs reflected in the lien, let alone the cost of this litigation.

I. The Facts

[5] In 2013, the applicants, Mr. and Mrs. Amlani were looking to purchase a condominium unit. They were attracted to unit 2802 in the respondent, York Condominium Corporation No. 473 (the "Corporation"). Given that Mr. Amlani had smoked for 56 years, he wanted to ensure that the Corporation had no rules against smoking. As a result, he had a lawyer review the Corporation's constating documents to ensure this was the case. After receiving confirmation that there were no rules against smoking, the Amlanis purchased the unit and began living there December 2013.

[6] In 2015, some of the applicants' neighbours complained that the smell of smoke was filtering from the Amlanis' unit into their own apartments. The Corporation hired a contractor to seal certain openings in the applicants' unit to prevent the smell from escaping. The Corporation absorbed the cost of doing so. The work appears to have been successful and complaints about Mr. Amlani's smoking stopped.

[7] In March 2017, new complaints arose about the smell of smoke leaving Mr. Amlani's unit. In response, the Corporation wrote Mr. Amlani on April 27, 2017 stating:

> "… you are requested to be circumspect with respect to your smoking and/or refrain from smoking in order to protect other residents."

[8] In response, Mr. Amlani restricted his smoking in the unit to an enclosed sunroom which he believed was sealed. He also installed an air filter in the sunroom.

[9] The next communication from the Corporation to Mr. Amlani was a letter from the Corporation's lawyers, Fine & Deo dated July 6, 2017. After stating that Mr. Amlani's smoking was a danger and a nuisance it concluded:

> "The Board of YCC 473 hereby demands that you immediately cease and desist from smoking in your unit. Please confirm to me, in writing, on or before July 20, 2017 that you are willing to cooperate and comply."

[10] The letter also warned Mr. Amlani that he would be liable for the Corporation's costs of enforcing his compliance.

[11] Mr. Amlani responded with a letter from his own lawyer which noted that, in the past, Mr. Amlani had cooperated in addressing any inconvenience his smoking caused and sought a dialogue with the Corporation to resolve the issue. On July 20, 2017 Mr. Amlani wrote his own letter to the property manager asking for a meeting with the Corporation's Board of Directors and the residents of the 28th floor to "discuss openly, without prejudice in a transparent manner, to sincerely attempt to resolve the matter at hand." Mr. Amlani also asked the property manager for relevant application forms that may be required to refer the issue to mediation. On August 11, 2017, Mr. Amlani's lawyer indicated that he was prepared to hire an engineering company, at his own cost if necessary, to prepare a report to determine if the problem could be solved. He also indicated that he would be prepared to use any company the Corporation could recommend for this purpose.

[12] On August 25, 2017, Mr. Deo wrote to Mr. Amlani's lawyer indicating that he had left two messages that week had not heard back from him, asked that Mr. Amlani immediately stop smoking in the unit until the matter could be resolved and asked Mr. Amlani for $2,000 as an interim deposit for the engineering report that the Corporation would be commissioning.

[13] On September 1, 2017 Mr. Amlani advised Fine & Deo that, on September 7, 2007, he would be moving out until the issue was resolved. In addition, he indicated that he had spoken to three professionals who said that there were simple solutions to the problem but that it would help them to get more details about the specific complaints so that they could design solutions tailored to those complaints. Mr. Amlani therefore asked for redacted copies of the complaint letters to enable the service providers to devise a solution more closely tailored to the circumstances.

[14] On September 6, 2017, Mr. Amlani had The BSG Group inspect his apartment to propose solutions. BSG proposed some relatively inexpensive solutions including a perimeter gasket around the entry door to the apartment and better sealing of openings through which smoke smell could migrate such as light fixtures, light switches and water pipes.

[15] As promised, the Amlanis vacated their unit on September 7, 2017 and rented it to a tenant. They included a no smoking clause in the lease even though the Corporation did not have a rule against smoking.

[16] On September 14, 2017 the Corporation issued a Compliance Demand Notice addressed to Mr. Amlani demanding a full and immediate cessation of smoking in the unit by September 22, 2017, even though Mr. Amlani had already moved out.

[17] On November 6, 2017 Mr. Amlani requested mediation. On the same day he sent the Corporation a copy of the BSG report. BSG prepared a second report in March 2019. It provides a little more technical detail but is not materially different in its conclusions and recommendations.

[18] In response to the request for mediation, the Corporation appointed a mediator and set the mediation date, both without consulting Mr. Amlani. Mr. Amlani nevertheless cooperated and participated in the mediation. Part way through the mediation, counsel and the representative Board member indicated that he had another appointment and left.

[19] The Corporation then sought to impose the entire mediation cost on Mr. Amlani, even though the Corporation's bylaws provide that mediation costs should be shared.

[20] In April 2018, the Corporation passed a non-smoking rule which prohibited smoking in all units. The rule contained a grandfathering provision that allowed smoking residents to apply to the Board for an exemption while they lived in the unit.

[21] Mr. Amlani applied under the grandfathering provision. The Corporation rejected his request because Mr. Amlani was no longer living in the unit.

[22] The Corporation hired its own expert for this proceeding, Mr. Philip Brearton, of Cion Coulter. In his report, Mr. Brearton states:

> "Further effort to seal Suite 2802 is not recommended because this is an unrealistic goal. There is no lower threshold for safe exposure to tobacco smoke consequently, to be "smoke-free", a perfect seal in Suite 2802 must be achieved at all times. Beyond the challenge of managing the opening of the unit's entrance door, achieving a "perfect seal" is not possible with current building materials and construction practices."

[23] On cross-examination, Mr. Brearton admitted that steps could be taken to decrease the smell of smoke in neighbouring units but his mandate did not include proposing or assessing such steps. He was asked only to opine about whether a "perfect seal" was possible.

[24] Mr. Brearton admitted on cross-examination that there are "relatively easy techniques" to seal openings through which the smell of smoke can migrate. These include sealing gaps in floors, walls, doors, ductwork or between walls and pipes.

[25] In March 2018, the Corporation served the Amlanis with a Notice of Intention to Enforce Security. It states that the Amlanis owe the Corporation $25,108.77, that the Corporation has placed a lien on the unit and that the Corporation will enforce the lien by selling the Amlani's apartment. This prompted Mr. and Mrs. Amlani to bring this application to restrain the sale.

[26] The entire amount of the lien reflects the legal fees of the Corporation's lawyers, Fine & Deo. The last demand for payment of legal fees that the Corporation sent Mr. Amlani before he moved out was sent on August 23, 2017 and was for $863.99. While Fine & Deo docketed an additional approximately $1,500 more before Mr. Amlani actually moved out, it is clear that the vast majority of the legal fees arose after Mr. Amlani vacated his unit.

II. Legal Analysis

A. The Statutory Provisions

[27] The enforceability of the lien turns on whether the amount the Corporation claims falls within s. 85 or s. 134 of the *Act*.

[28] Section 85 of the *Act* provides:

> 85 (1) If an owner defaults in the obligation to contribute to the common expenses payable for the owner's unit, the corporation has a lien against the owner's unit and its appurtenant common interest for the unpaid amount together with all interest owing and all reasonable legal costs and reasonable expenses incurred by the corporation in connection with the collection or attempted collection of the unpaid amount.

[29] Section 134 of the *Act* allows the Corporation, among others, to apply to the Superior Court of Justice for an order "enforcing compliance" with any provision of the Act, the condominium's declaration, bylaws or rules (which I may refer to from time to time as its constating documents) and recover the costs of doing so in a court order:

> 134 (1) Subject to subsection (2), an owner, an occupier of a proposed unit, **a corporation**, a declarant, a lessor of a leasehold condominium corporation or a mortgagee of a unit **may make an application to the Superior Court of Justice for an order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules** or an agreement between two or more corporations for the mutual use, provision or maintenance or the cost-sharing of facilities or services of any of the parties to the agreement (Emphasis added).
>
> (5) If a corporation obtains an award of damages or costs in an order made against an owner or occupier of a unit, the damages or costs, together with any additional actual costs to the corporation in obtaining the order, shall be added to the common expenses for the unit and the corporation may specify a time for payment by the owner of the unit.

[30] The Corporation submits the lien amounts fall within s. 85 of the *Act* and are automatically enforceable. The Amlanis submit that the lien amounts fall within section 134 of the *Act* and are not enforceable in the absence of a court order that awards the Corporation damages or costs. Since there has been no court order, the Amlanis submit that the lien is invalid and must be vacated.

[31] In determining which interpretation I adopt, the Corporation submits that I must keep in mind the overall purpose of those sections and of the *Act* which is to place the financial burden created by the conduct of any one unit holder on that particular unitholder rather than on the Corporation. If the financial burden is placed on the Corporation, it is effectively placed on innocent unitholders who must pay for the Corporation's expenses by way of common expenses or special assessments: *Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc.*, [2005] O.J. No 1604 at para. 40.

[32] I accept that this is part of the overall scheme of the *Act* but am nevertheless of the view that the expenses the Corporation claims are not common expenses under s. 85 but are expenses that relate to "enforcing compliance." It is clear that s. 134 costs cannot be added to the common expenses of the Amlanis' apartment without an order under section 134 (5): *Metropolitan*

Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc., [2005] O.J. No 1604 at para. 35 (C.A.). Here, however, the Corporation seeks to shift the financial burden from itself to Mr. Amlani without a court order authorizing it to do so.

[33] Common expenses, in their most traditional form, apply to the monthly fees each unit owner pays for utilities and the general upkeep of the condominium project. If a unit owner defaults on those monthly obligations, the default can be liened and the unit can be sold to enforce the lien. Section 84 (1) of the *Act* underscores this interpretation when it provides that a unitholder shall pay common expenses in the proportions specified in the declaration.

[34] It is one thing to allow the corporation to enforce, by way of lien, common expenses that are applicable to all unit holders and that a majority of unitholders have approved. It is entirely another to allow a condominium corporation the unfettered, unilateral right to impose whatever costs it wants on a unitholder, refer to them as common expenses and thereby acquire the right to sell the unitholder's apartment.

[35] I am strengthened in this view by other provisions in the *Act* that specifically allow a condominium corporation to add certain types of costs unique to a single owner to the common expenses of the particular unit holder without a court order. By way of example, sections 92(1) and (4) provide that a corporation can carry out certain repairs if an owner fails to do so and can add the cost of such repairs to the owner's common expenses. In a similar vein, section 105(2) provides that if an owner causes damage, the lesser of the cost of repair or the corporation's insurance deductible may added to the owner's common expenses. Legal fees and enforcement costs do not fall into these categories.

[36] In the Corporation's communications with Mr. Amlani and in its law firm's accounts, the services in respect of which the Corporation seeks reimbursement are described as compliance and enforcement expenses, not as common expenses. By way of example:

(a) The Fine & Deo letter of July 6, 2017 stated that if Mr. Amlani failed to "comply" he would be held liable for the Corporation's "cost of enforcing your compliance by means inclusive of a court application under section 134 of the Act".

(b) The Fine & Deo account of October 4, 2017 is for "legal costs incurred in enforcement of the Corporation's Declaration and Rules."

[37] It is only in the notice of lien that these enforcement costs are referred to as "common expenses".

[38] The Corporation submits that the Declaration allows it to add these costs to Mr. Amlani's common expenses through two provisions: the definition of common expenses and an indemnification provision.

(i) The Definition of Common Expenses

[39] The Declaration defines common expenses as:

> "(1) Common expenses means the expenses of the performance of the objects and duties of the Corporation and, without limiting the

> generality of the foregoing, shall include those expenses set out in Schedule "E" attached hereto.

[40] Schedule "E" includes legal expenses among those costs permitted to be included in common expenses. In the absence of anything more, however, the common expenses referred to in clause (1) of the definition refer to the monthly expenses for which each owner is rateably liable.

[41] This is clear from sub-paragraph two of the definition of common expenses in the Declaration provides:

> (2) Each owner, including the Declarant shall pay to the Corporation his proportionate share of the common expenses, as may be provided for by the bylaws of the Corporation, and the assessment and collection of contribution toward the common expenses may be regulated by the Board pursuant to the bylaws of the Corporation.

[42] This reiterates the concept that common expenses are the proportionate share of the Corporation's costs of managing the project that are attributable to each unit rather than costs that the Corporation can unilaterally ascribe to a particular unit.

(ii) The Indemnity

[43] The Corporation argues the Declaration contains an indemnity in article 11 which allows it to act as it has. The indemnity provides:

> "**Each owner shall indemnify** and save harmless **the Corporation** from and **against any** loss, **cost,** damage, injury or liability whatsoever which **the Corporation may** suffer or **incur** resulting from or **caused by an act** or omission **of such owner**, … **to** or with respect to **the common elements and/or all other units** except for any loss, costs, damages, injury or liability caused by an insured (as defined in any policy or policies of Insurance) and insured against by the Corporation. (Emphasis added)
>
> All payments pursuant to this clause are deemed to be additional contributions toward the common expenses and recoverable as such."

[44] The Corporation interprets the indemnity as meaning that the legal expenses of its lawyers are lienable under section 85 (1) of the Act and relies on *London Condominium Corporation No. 13 v. Awaraji*, 2007 ONCA 154 for the proposition that a court should not interfere with a condominium corporation's interpretation of its declaration unless it is unreasonable.

[45] In my view, the Corporation's interpretation of the indemnity is unreasonable.

[46] The indemnity applies only with respect to costs the Corporation incurs arising out of acts by owners "to or with respect to the common elements and/or all other units." There was no act of Mr. Amlani to the common elements or to all other units. Moreover, the costs the Corporation incurred after Mr. Amlani left his unit could not possibly arise out of acts by Mr. Amlani to the common elements or all other units because he was out of the building and was not engaging in any acts with respect to the common elements or otherwise. Finally, the interpretation the Corporation advances contravenes section 134 (5) of the *Act* because the costs it claims related to compliance and enforcement costs without being embodied in a court order. An interpretation that contravenes a statutory provision is, by definition, unreasonable. Here again it is relevant to note that the legal accounts for which the corporation claims indemnity describe the services as relating to the "enforcement of the Corporation's Declaration and Rules" and not as relating to the protection of any common elements.

B. Safety Concerns and The Law of Nuisance

[47] The Corporation submits that it had no choice but to proceed as it did because:

(a) The smell in neighbouring units was actually secondhand smoke.

(b) I should take judicial notice that secondhand smoke kills.

(c) Section 3(1) of the *Occupiers Liability Act,* R.S.O. 1990, c. O.2, imposes a duty to take such care as is reasonable to ensure that persons entering premises are reasonably safe.

(d) Section 23(6) of the *Act* provides that a judgment against a condominium corporation is a judgment against all unit holders.

[48] To demonstrate the urgency of the situation the Corporation faced, Mr. Fine combined these four points into an example of a unit owner contracting cancer from secondhand smoke, suing the Corporation for its failure to stop the migration of secondhand smoke and obtaining a judgment for which all unitholders were personally liable.

[49] The Corporation argues that diminishing the dissipation of smoke from Mr. Amlani's unit was no solution. In support of this proposition the Corporation points to Mr. Brearton's expert report which, states that:

> "There is no lower threshold for safe exposure to tobacco smoke consequently, to be "smoke-free", a perfect seal in Suite 2802 must be achieved at all times."

[50] According to Mr. Fine, the circumstances imposed a real obligation on the Corporation to take immediate action against the secondhand smoke emanating from Mr. Amlani's apartment.

[51] In my view, Mr. Fine overstates the health and safety concern. While I am sensitive to the right of other unitholders to be free from the smell of smoke, to characterize the matter as one of life and death as Mr. Fine suggests, belies the Corporation's own the behaviour. Recall that in 2015, the Corporation seemed to have fixed the problem by taking minor remedial steps. In April 2017, when new complaints arose, the Corporation merely suggested that Mr. Amlani be

"circumspect" while smoking in his apartment. In addition, even after the Corporation passed a non-smoking rule, it grandfathered a number of owners and permitted them to continue smoking in their units.

[52] Although Mr. Brearton testifies about the safety levels associated with secondhand tobacco smoke, I have a number of difficulties with that evidence. Mr. Brearton is an engineer, not a medical or safety expert. Mr. Brearton admitted on cross examination that he had no direct knowledge or expertise about safety levels for exposure to smoke but had heard this secondhand in a previous job. Mr. Brearton appears to equate the smell of smoke in a neighbouring unit with the same danger as inhaling secondhand smoke when seated beside a smoker. There may well be a difference between inhaling smoke when seated beside a smoker and smelling smoke after it has been filtered through a number of barriers between apartment units. In essence, the Corporation submits that even if there were no smell dissipating into neighbouring units, there would still be a health hazard because a perfect seal is never achievable and there is no safe level of dissipated smoke. While I do not dismiss that possibility, I am not prepared, without medical evidence, to find that a diminution in the dissipation of smoke to the point that it is no longer noticeable, amounts to a health hazard.

[53] I do not, however, need to a determine the health issue because the smell of smoke can still amount to nuisance without it having to cause cancer or other illnesses associated with smoking.

[54] The common law and the Declaration contain prohibitions on nuisance.

[55] The Consolidated Rules and Regulations of the Corporation provide, among other things:

> "11. … No owner shall obstruct or interfere with the rights of other owners, or in any way injure or annoy them, …
>
> 12. Owners… shall not create, or permit the creation of or continuation of any noise or nuisance which, in the opinion of the Board of Directors or the Property Manager, may or does disturb [the] comfort or quiet enjoyment of the property by the owners…"

[56] The Corporation the submits that Mr. Amlani smoking in his unit constituted a nuisance to other unit holders.

[57] The test for nuisance was articulated by the Supreme Court of Canada in *Antrim Truck Centre Ltd. v. Ontario (Transportation)* [2013] 1 S.C.R. 594 at para. 19 as requiring that the interference with the owner's use or enjoyment of property must be both substantial and unreasonable. I find that the smell of smoke from the Amlanis' apartment could amount to a nuisance if it continued unabated.

[58] In the Corporation's view a finding of nuisance is decisive because it has an obligation under section 17(3) of the Act to enforce its constating documents including its rules.

[59] In Carleton Condominium Corp. No. 279 v. Rochon, [1987] O.J. No. 417, 21 O.A.C. 249 the Court of Appeal highlighted the importance of the constating documents of a condominium corporation:

> The declaration, description and bylaws, including the rules, are therefore vital to the integrity of the title acquired by the unit owner. He is not only bound by their terms and provisions, but he is entitled to insist that the other unit owners are similarly bound.

[60] I agree that Mr. Amlani must abide by the constating documents and cannot impose a nuisance on other owners.

[61] In my view, however, although Mr. Amlani's smoking could rise to the level of nuisance if it continued unabated, it did not rise to the level of nuisance in the circumstances as they stood before he moved out.

[62] To constitute a nuisance, the interference with the owner's use or enjoyment of land must be both substantial and unreasonable: *Antrim* at para. 19. The requirement for substantial interference can incorporate a component of frequency and duration: *Antrim* at paragraph 26. The element of unreasonableness relates to the defendant's conduct. Although nuisance does not depend on the quality of a defendant's conduct as negligence does, the nature of the defendant's conduct is not irrelevant. Where the defendant's conduct is neither malicious nor careless, that will be a significant factor in the reasonableness analysis although a finding of reasonable conduct will not necessarily preclude a finding of liability: *Antrim* at paragraph 29. After setting out these principles, in *Antrim*, the Supreme Court of Canada quoted with approval the following extract from *Fleming's The Law of Torts*:

> At the same time, evidence that the defendant has taken all possible precaution to avoid harm is not immaterial, because it has a bearing on whether he subjected the plaintiff to an unreasonable interference, and is decisive in those cases where the offensive activity is carried on under statutory authority. . . . [I]n nuisance it is up to the defendant to exculpate himself, once a *prima facie* infringement has been established, for example, by proving that his own use was "natural" and not unreasonable. [Emphasis added.]

[63] *Antrim* therefore demonstrates that the duration of the conduct and the reasonableness of the defendant are relevant considerations in determining whether a nuisance has occurred. In the circumstances of this case, Mr. Amlani sought a dialogue with the Corporation to ensure that the nuisance was eliminated. That conduct was eminently reasonable. It was the Corporation that refused to discuss solutions (see in particular paragraphs 64 to 82 below). The Corporation should not be able to take advantage of its own refusal to work out a solution as a basis for finding that Mr. Amlani's smoking amounted to nuisance. Although I am not unsympathetic to the neighbours who were exposed to the smell of smoke between April and September when Mr. Amlani moved out, the duration of the exposure would have been substantially less had the Corporation sat down with Mr. Amlani in April 2017 to see if a practical solution could be found.

C. The Duty to Negotiate

[64] Just as Mr. Amlani is bound to abide by the condominium's constating documents, so is the Corporation. As set out below, Mr. Amlani did, the Corporation did not.

[65] Paragraph 21.01 of the Corporation's General Bylaw Number Five provides:

> 21.01 Negotiated Solution
>
> The Corporation and owners shall use their best efforts to resolve any disputes which may arise between them, through good faith negotiations (subject to compliance with the provisions of the Act, declaration, bylaws and rules) and shall resort to mediation, arbitration or legal proceedings only after attempts fail to clarify, resolve and minimize the scope of any issues in dispute.

[66] On the evidence before me, the Corporation did not behave in accordance with this bylaw. Instead of abiding by its bylaws, the Corporation refused to meet with Mr. Amlani despite his request to do so.

[67] When complaints revived in 2017, the Corporation asked Mr. Amlani to be "circumspect" when smoking in his unit.

[68] The fact that the problem was not solved after asking Mr. Amlani to be "circumspect" comes as no great surprise. Being circumspect can mean different things to different people. Mr. Amlani thought he was being circumspect by smoking in what he believed was a sealed sunroom. Without a dialogue between Mr. Amlani, the Corporation and his neighbours, there would be no way for Mr. Amlani to know whether smoking in the sunroom solved the problem. In the absence of further feedback from the Corporation, it was reasonable for Mr. Amlani to assume that smoking in the sunroom met the Corporation's needs.

[69] If it did not, the more appropriate step for the Corporation would have been to meet with Mr. Amlani, bring a sealing expert into his unit and agree to have Mr. Amlani undertake work to mitigate the migration of smoke smell to the point that it no longer bothered his neighbours.

[70] This was clearly possible. In 2015, the Corporation had in fact paid for remedial work that appears to have fixed the problem, at least until 2017. The remedial work done consisted of minor caulking and weatherstripping to help seal Mr. Amlani's apartment. It comes as no surprise that caulking and weather stripping will deteriorate over time and may require regular maintenance. Even when complaints arose again in 2017, at least one of the complaints noted that the smell was not as bad as it had been in 2015. This suggests that the dissipation of the smell of smoke into neighbouring units could be reduced to a level below that which constitutes a nuisance.

[71] Instead of meeting with Mr. Amlani to discuss solutions, however, the Corporation got its lawyers involved and demanded that Mr. Amlani stop smoking immediately and warned him of enforcement costs. Its position became intractable. For whatever reason, it appears to have become rigid and motivated by an animus towards Mr. Amlani that blinded the Corporation to simple, practical solutions.

[72] In oral argument, the Corporation tried to characterize Mr. Amlani as the intractable one. In my view, the Corporation's submissions in this regard do not fairly reflect the evidence.

[73] The Corporation cites portions of Mr. Amlani's cross-examination transcript to argue that Mr. Amlani insisted on a resolution that would allow him to continue smoking even though he knew that his smoking was a nuisance to his neighbours. What he actually said was that he wanted a resolution that would allow him to continue smoking without harming anyone.

[74] The Corporation also cites an email of September 5, 2017 from Mr. Deo to Mr. Amlani's lawyer in which Mr. Deo asks Mr. Amlani to stop smoking immediately and provide a deposit of $2,000 for an engineering report to determine if Mr. Amlani's smoke can be prevented from entering the common elements and other units. Mr. Amlani did not pay the $2,000 deposit. According to the Corporation, Mr. Amlani was merely going through empty motions of cooperation without having any intention of cooperating. I do not agree. The demand for $2,000 was made after Mr. Deo was told that Mr. Amlani would be moving out on September 7, 2017. Mr. Amlani says he did not pay the deposit because he was uncomfortable forwarding the sum as only a deposit without any written quote, scope of work or without knowing who the expert was.

[75] Given the Corporation's continued refusal to even meet with Mr. Amlani, I can understand his reluctance to pay the deposit. Mr. Amlani had a legitimate interest in ensuring that the Corporation retained someone with a mandate to determine whether practical solutions were possible.

[76] As it turned out Mr. Amlani's concerns were legitimate. When the Corporation did hire an expert, it was not to fix the problem but to determine whether it was possible to encase the unit in a "perfect seal". A perfect seal is not the issue. The issue was whether one could seal the apartment to the point where neighbours were no longer bothered by the smell of smoke.

[77] Finally, the Corporation submits that Mr. Amlani should have simply done the repairs suggested by BSG Group and then tested those repairs. Given that the work was undertaken for the benefit of his neighbours, it was not appropriate to expect Mr. Amlani to undertake the work unilaterally. It was appropriate that his neighbours, through the Board, have input into what steps were taken. This is all the more so given that Mr. Amlani's experts had asked for greater detail about the complaints so that they could tailor solutions to the specific problems. By way of example, it may well be relevant for the service provider to know what units had filed complaints, whether those unit holders noticed the smell of smoke more strongly in some parts of their apartments than others, whether the smell was uniform at all times or whether it varied according to weather or time of day. That information might give greater insight into the locations through which the smoke was seeping into neighbouring units and into whether atmospheric conditions with different air pressure affected the smell. Both experts appear to agree that the migration of smells is affected by air pressure and wind and that an effective solution should take these factors into account.

[78] In my view, it was the Corporation that was the intractable one. Its attitude was best summarized by Mr. Fine in oral argument when, at various points he justified the Corporation's refusal to meet by saying:

- "What really was there to talk about if Mr. Amlani was not going to quit smoking. There was really nothing to talk about."

- "What is there to talk about. His smoking is a health and safety danger. I really doubt his neighbours want to talk about ways he can continue smoking."

- "No one is interested in talking because he is still smoking. He shows absolutely no contrition."

[79] There was, however, much to talk about; namely steps that could be taken to diminish the migration of smoke smell into neighbouring units. That would have solved the problem more quickly and cheaply than running up $25,000 in legal fees would.

[80] When the Corporation refused any discussion, Mr. Amlani requested mediation, again in accordance with the Corporation's constating documents. The Corporation's response to this is telling. Mr. Fine described Mr. Amlani as "threatening mediation" and that "underlying the threat of mediation is the fact that Mr. Amlani thinks he has a right to smoke in his unit." He did have the right to smoke, provided he was not causing a nuisance. The Corporation seemed to view the idea of discussion through mediation or otherwise as a threat rather than a commonsense solution and a requirement of its constating documents.

[81] The Corporation submits that the obligation to negotiate in the bylaws is superseded by the indemnity in the Declaration. In the event of a conflict between the bylaw and the indemnification provision in the Declaration, the Corporation says the Declaration governs.

[82] I disagree. There is no conflict between the Declaration and the bylaws. Not only is it possible to read the obligation to negotiate harmoniously with the duty to indemnify, it its preferable to read them in this way. It is a cardinal rule of construction that courts should prefer interpretations that give each term a meaning over interpretations that negate the utility of one term. A harmonious reading is easily possible. There is first a duty to negotiate. If negotiations fail, then the Corporation may have resort to the indemnity, provided of course that the indemnity applies on its language which, as I have found, it does not.

D. The Business Judgment Rule and Grandfathering

[83] The Corporation submits that its decision not to grandfather Mr. Amlani's apartment should not be challenged for two reasons.

[84] First, it submits that Mr. Amlani's situation differed from those of unitholders who were grandfathered because the grandfathered owners were not subject to complaints.

[85] That was not, however, the reason the Board gave for rejecting Mr. Amlani's application. I note that the letter rejecting Mr. Amlani's grandfathering claim was written by Mr. Fine's firm. This was not a situation where a layperson may have expressed imperfectly, the basis on which a decision was made. The basis of the decision was articulated by counsel who specialize in condominium law and who had been involved in the situation for many months. The only reason they gave to reject Mr. Amlani's grandfathering application was that he was not a resident of the building.

[86] Second, the board submits that its decision on the grandfathering application is protected by the business judgment rule.

[87] The Ontario Court of Appeal has held that the business judgment rule applicable in the context of business corporations is also applicable to condominium corporations: *3716724 Canada Inc. v. Carleton Condominium Corp. No. 375*, 2016 ONCA 650 at para. 51. The business judgment rule holds that board decisions should not be subject to microscopic examination. If the decision was made honestly, prudently, in good faith and on reasonable grounds, it will not be second-guessed by courts. See for example *CW Shareholdings Inc. v. WIC Western International Communications Ltd.* (1998), 39 O.R. (3d) 755.

[88] In my view the Board is not entitled to the protection of the business judgment rule.

[89] The refusal to grandfather Mr. Amlani's apartment because he was no longer a resident is not reasonable. Mr. Amlani was no longer a resident because he acted with consideration towards his neighbours to stop subjecting them to the smell of smoke when the Board refused to discuss solutions to the problem. The Board's refusal to meet with or negotiate with Mr. Amlani was unreasonable. To exercise judgment, the Board must give some consideration to available alternatives. Without speaking to Mr. Amlani or his experts, the Board shut itself off from alternatives. There was no evidence before me to suggest that the Board considered alternatives on its own.

[90] Under the business judgment rule, the Board is presumed to act in in good faith. However, the Board's refusal to meet, refusal to negotiate, retaining an expert to determine if Mr. Amlani's unit could be hermetically sealed rather than to determine if the problem could be diminished to the point of no longer bothering the neighbours and its behaviour in walking out of the mediation for another appointment even though the Corporation unilaterally selected the mediation date lead me to conclude that the Corporation and its Board were not acting in good faith.

E. Oppression

[91] Mr. Amlani seeks relief for oppression. Section 135 (2) of the *Act* provides that a court may make an order to rectify the matter if it determines that the conduct of a condominium corporation, among others, is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant. Under section 135 (3) the court may make any order it deems proper including an order requiring payment of compensation.

[92] The oppression remedy protects a party's reasonable expectations. The failure to meet such an expectation will trigger a remedy where the failure falls within concepts of oppression, unfair prejudice or unfair disregard of a claimant's interests: *BCE Inc., Re*, [2008] 3 S.C.R. 560 at para. 89.

[93] In *Couture v. Toronto Standard Condominium Corp. No. 2187*, 2015 ONSC 7596 at para. 61, however, Myers J. held that a unit owner has a reasonable expectation that a condominium corporation would deal with him or her lawfully, in good faith, in a neighbourly manner commensurate with living in a condominium community, and in accordance with the terms of the constating documents of the condominium corporation. He continued at para. 62 to note that the imposition of facially invalid liens and the refusal to mediate or arbitrate as required were not reasonable responses by a board seeking to manage the affairs of the corporation reasonably and in good faith. Responses of that nature are burdensome and oppressive.

[94] Mr. Fine distinguishes *Couture* based on the facts of that case which were admittedly more extreme than the ones here. That does not, however, detract from the principles articulated by Myers J. to the effect that a condominium corporation is bound to act in accordance with the terms of its constating documents, in good faith and in a neighbourly manner.

[95] The Corporation also relies on the recent judgment of Justice H. Williams in *Mohamoud v. Carleton Condominium Corporation N. 25,* 2019 ONSC 7127 where Williams J. noted at para. 34 -35 that a condominium corporation is not expected to be perfect; it is expected to act reasonably to "strive to achieve the greatest good for the greatest number." I accept that. I also take into account the Board of a condominium corporation are volunteers without any particular business experience.

[96] I nevertheless conclude that the Corporation has acted oppressively here. As noted above, the Corporation did not behave in accordance with its constating documents by refusing to negotiate in good faith. By refusing to negotiate, the Corporation certainly did not try to achieve "the greatest good for the greatest number." It did not even ask whether it was possible to accommodate both Mr. Amlani and his neighbours. It simply insisted that Mr. Amlani stop smoking.

[97] I underscore here, that by referring to the duty to negotiate, I do not mean to suggest that a condominium corporation is obliged to compromise with a unit holder, no matter what the circumstances. The precise content of the duty will obviously depend on the circumstances. Here, where it was evident that a simple, practical solution had worked in the past, the duty required the Corporation to explore, in good faith, whether there continued to be a practical solution to the problem. The corporation refused to do so. In so refusing, the Corporation breached its own constating documents and therefore breached the Amlani's reasonable expectations. It incurred legal fees which it tried to impose on the Amlani's through a lien that contravened s. 134 of the *Act* and then tried to use the invalid lien to sell their unit. The Corporation's attempt to sell the Amlani's unit contrary to the provisions of the *Act* is oppressive, unfairly prejudicial to and unfairly disregards the interests of the Amlanis.

F. Damages

[98] The applicants claim damages of $50,000.

[99] The Corporation submits that I should not consider damages because the issue was not addressed in the applicants' factum. Although not addressed in the factum, it was addressed in the initial notice of application, the amended notices of application and in the affidavit of Mr. Amlani.

[100] Given that the Corporation said it was taken by surprise by the damage claim during oral argument, I gave it additional time to make written submissions on the point and allowed the applicants time to reply.

[101] The applicants claim out of pockets expenses of $32,353. The itemization of that claim and my disposition of each item is set out below:

(a) $565 for the BSG report

I disallow this claim. Although I am granting the Amlani's application, I also find that the obligation and cost of mitigating the dissipation the smoke smell from their unit is their responsibility. As a result, they would have had to incur the BSG expense in any event to determine what steps to take to resolve the issue.

(b) $988.75 for the applicants' share of the mediator's fees.

I allow this claim. Had the Corporation acted in good faith and in accordance with its bylaws to begin with, a mediation should not have been necessary.

(c) $1,800 for truck rental and movers.

I allow this claim. The Corporation objects to this claim because the Amlanis have no receipts for these expenses and because their move was undertaken of their own accord. In my view, a move would not have been necessary had the Corporation acted in good faith as it did in 2015. Although the applicants have no receipts, Mr. Amlani has testified under oath that he paid this amount. The amount appears reasonable.

(d) $1,255 on account of common expenses for the month of September 2017.

I allow this claim. The Corporation objects to this payment because owners are obliged to pay common expenses even if they do not reside in the unit. I agree. However, I nevertheless find that the applicants are entitled to compensation for this amount. The amount was for common expenses for the month of September 2017. The applicants could not recover those expenses because of the time it took to refurbish and rent out the unit; steps that were necessary because of the Corporation's conduct.

(e) $3,616 in realtor commissions.

I allow this claim. The Corporation objects to payment of this amount of the basis that there is no evidence that the applicants researched any Internet services that allow owners to advertise their own units for rent. While that may be the case, there is no obligation on a unit owner to make use of such services. There is nothing unreasonable about retaining the services of a realtor to rent out one's unit.

(f) $400 to clean the unit.

I allow this claim. The Corporation objects to payment of this amount on the basis that the applicants chose to have the unit cleaned and do not have a receipt for the cleaning. It is reasonable for the applicants to have cleaned their unit to prepare it for rental. While the applicants do not have receipts, Mr. Amlani has sworn that this amount was paid. The amount appears reasonable.

(g) $1,620 to repair and paint the entire unit.

I allow this claim. The Corporation objects on the basis that the applicants do not have receipts. As for other expenses above, Mr. Amlani as sworn that they were incurred. Once again, the amount strikes me as reasonable.

(h) $508.30 to repair the range and washer.

I disallow this claim. The Corporation objects to paying this amount on the basis that there is no invoice or receipt for such repairs and that Mr. Amlani admitted on cross-examination that the range and washer were working but the tenant wanted to enhance their performance. If there was a performance issue, it would probably relate to an expense that the applicants would have had to incur on their own had they remained in the unit for a longer period of time.

(i) $21,600, which the applicants say is the $800 monthly difference between the $3,200 rent they received for unit 2802 in the Corporation and the $4,000 rent they say they could have received had they rented the unit they moved into.[1] The applicants multiply the $800 per month difference for the 27 months between September 2017 to November 2019.

I disallow this expense. There is no material before me to allow me to demonstrate that the unit into which the applicants moved could be rented out for $4,000. The only evidence to this effect is a simple statement by Mr. Amlani. While I was content to accept simple statements from Mr. Amlani on issues like moving or painting costs, the difference in rental market value between units is an issue on which I would require something more than a conclusory statement.

[102] The total allowed expenses set out above comes to $9,679.75. I award that amount as compensation under the oppression remedy because the damages arise out of corporate conduct that I have found to be oppressive.

[103] I decline to award general, exemplary or aggravated damages as the applicants request. To award general damages I would need more evidence of harm suffered than I have before me. With respect to exemplary damages, in my view, the Board having to report to unit holders that they will have to pay the Corporation's legal fees, damages to the Amlanis and possibly the Amlanis legal fees (assuming that costs will follow the event, which I have not yet determined) amounts to sufficient incentive to this and other boards to behave more reasonably when they encounter issues with residents than the Corporation did.

[104] The Corporation strongly objects to the award of any damages to the applicants. They refer to that possibility as a "travesty of justice". They remind me that the imposition of any damages is an imposition on the other unit holders.

[1] It appears the Amlanis own the apartment into which they moved. There was no evidence before me about when they bought the unit or, if they bought it long ago, what they did with it.

[105] While I appreciate that the other unit holders in the building will ultimately pay those costs, a damage award is the only way that condominium boards can be restrained from acting contrary to their constating documents or otherwise behaving oppressively. In addition to compensating an aggrieved party, damage awards remind counsel to condominiums and condominium boards themselves that they must take steps to determine whether low cost, practical solutions to problems are available rather than turning every problem into a legal issue. Once more I underscore that this is not intended to tie the hands of condominium boards when faced with recalcitrant unitholders. It is simply to say that where a unitholder is willing to discuss a practical solution and practical solutions appear evident, boards have an obligation to explore those solutions in good faith.

III. Relief Granted

[106] As a result of the foregoing, I order as follows:

(a) All collection processes pursuant to the condominium lien registered on October 17, 2017 as Instrument No. AT4707363, including any sale proceeding shall be stayed;

(b) The lien registered as Instrument No. AT4707363 shall be discharged forthwith;

(c) The legal costs and expenses the Corporation claimed through the lien shall not be imposed on the applicants either directly or indirectly except that, to the extent that the amount reflected in the lien becomes part of the expenses of the Corporation that are paid via the collection of common expenses, the Amlanis will continue to pay their proportionate share of common expenses as reflected in the Declaration;

(d) The Board's decision on the Amlani's grandfathering application is set aside. The Amlanis unit shall be grandfathered under the Corporation's no smoking rule for Mr. Amlani alone, provided that the dissipation of the smell of smoke from the unit can be reduced to a level at which it does not disturb other residents of the Corporation.

(e) Before Mr. Amlani resumes smoking in the unit, he shall take such steps as are required to reduce the dissipation of the smell of smoke from the unit to a level at which it does not disturb other residents of the Corporation.

[107] If there are any issues that arise in the implementation of this order, either party may approach me through Judges' Reception at 361 University Avenue to resolve them.

Costs

[108] Any party that seeks costs arising out of these reasons may make written submissions within 15 days of receipt of the reasons. A responding party will have seven days to respond with five further days for reply.

Koehnen J.

Released: January 13, 2020

CITATION: Amlani v. York Condominium Corporation No. 473, 2020 ONSC 194
COURT FILE NO.: CV-18-598709
DATE: 20200113

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

NASIRALLI AMLANI and NASIMBANOO AMLANI

Applicants

– and –

YORK CONDOMINIUM CORPORATION NO. 473

Respondent

REASONS FOR JUDGMENT

Koehnen J.

Released: January 13, 2020