Superior Court of Justice

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FROM:	Justice J. N. Morissette	
PAGES:	11 (including cover page)	
DATE:	September 3, 2015	
RE:	**Mazzilli v. Middlesex** **Court File No: 1276/15**	
MESSAGE:	Please see attached the Endorsementof Madam Justice J. N. Morissette in the above-noted matter, released on September 3, 2015.	

ORIGINAL TO FOLLOW BY MAIL: Yes ( ) No(x)

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CITATION: Mazzilli v. Middlesex, 2015 ONSC 5504
COURT FILE NO.: 1276/15
DATE: 2015/09/03

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Gianni Mazzilli (Applicant)

AND:

Middlesex Standard Condominium Corporation No. 823, Salvatore Pacifico, Silvana Pacifico, Altaf Jiwaji, Jeff Johnson, Bruce Betteridge, Charlene Aquilina, Dennis Killion and Joseph Mindorff (Respondents)

BEFORE: Justice J. N. Morissette

COUNSEL: Laura McKeen, for the applicant

Kevin Sherkin, for the respondents

HEARD: September 1, 2015

Application Under Sections 130, 134 and 135 of *the Condominium Act, 1998*, S.O. 1998, c. 19 and Rules 14(d) and (g) of the *Rules of Civil Procedure*, R.S.O. 1990, Reg. 194

ENDORSEMENT

OVERVIEW:

[1] The applicant is one of the owners of a condominium in London, Middlesex Standard Condominium Corp. No. 823 (MSCC 823).

[2] The respondents are MSCC 823, as well as the board of directors of MSCC 823 (the board).

[3] MSCC 823 is a condominium corporation in London, Ontario and is more commonly known as Masonville Gardens. It consists of 332 low rise residential units located in four buildings which were originally built and completed from 1988 to 1990 (25 years ago).

[4] At issue is whether some or all of the construction projects approved, started and/or completed by MSCC 823 are "substantial changes" to the common

elements or are "repairs and maintenance" as defined by section 97 of the *Condominium Act, 1998* (*Act*).

[5] On August 11, 2015, Justice Howard endorsed that paragraphs 1(a) and (b) of the Notice of Application will proceed on an urgent basis, with the remaining issues to be heard at a later date. Paragraphs 1 (a) and (b) are as follows:

> (a) A declaration that one or more of the following construction projects constitutes a substantial change to the common element within the meaning of section 97 of the *Act*:
>
> i) change the existing wood balcony guards with vinyl siding to a tempered glass/ballast system;
>
> ii) change the existing windows, which are a combination of sliders, casement and fixed windows, to vinyl windows;
>
> iii) change the existing asphalt shingles to pre-finished steel roofing;
>
> iv) change the existing brick and vinyl cladding to a combination of brick, stone and stucco; including the installation of a product known as Kerlite;
>
> v) change the existing electric forced heating units in the hallways to gas fired units; and /or,
>
> vi) renovations to the interior lobby areas.
>
> (b) A declaration that MSCC 823 did not obtain approval from the owners to make substantial changes to the common elements as required by section 97 of the *Act*.

[6] Essentially, the issue to be determined by this court is whether or not the manner and process that the board followed in approving the work contravenes section 97 of the *Act*.

[7] The applicant's position is that the construction projects to the common elements are "substantial" and are an "addition, alteration or improvement".

[8] The respondent's position is that all of the subject work is for "repairs and maintenance".

[9] Section 97 of the *Act* distinguishes "repairs and maintenance" from work that is considered an "addition, alteration or improvement" to the common elements. If the work is "repairs and maintenance" the board can proceed with the work without notice or owner approval. If the work is an "addition, alteration or improvement" the board must follow certain procedures dictated by the *Act*; Notice to the owners is required, and owner approval is necessary in certain circumstances.

[10] It is important to review the board's obligations under the *Act*. Section 89 and 90 of the *Act* set out the mandatory duties and obligations of a condominium board:

a. the condominium shall repair the units and common elements after damage, but does not include the obligation to repair after damage to improvements made to a unit.

b. the condominium shall maintain the common elements.

c. the condominium shall repair the common elements after normal wear and tear.

THE EVIDENCE:

[11] I will address each construction project to the common elements that are at issue in this litigation: balconies, windows, roof, brick/vinyl cladding, hallway heaters and the lobby renovations.

Balconies:

[12] In or about 2012 and 2013, MSCC 823 had received many insurance claims relating to water penetration caused by the balcony design which were made out of 2x4 wood studs covered by plastic siding, and a scupper which was a 1/4" high by one foot wide drain to one side.

[13] The insurer had suggested that if this issue was not resolved the insurer would not be able to continue to provide MSCC 823 coverage due to the recurring problem caused by the same defects.

[14] In or around February of 2013, the board commissioned an engineer's report to review the existing wood balcony guards. The engineer's report dated March 7, 2013, confirmed that the current balcony design did not allow water/ice/snow to properly drain from the balcony deck area, which in turn was causing water damage to the condo buildings. It further found that the removal of ice and snow by shovel was also causing damage to the waterproofing membranes on the balconies. Finally, it opined that the previous years of built up of water/ice had caused damage to the existing brick and window sills.

[15] As a result of its findings, the engineers recommended that the existing balconies be replaced with a "more standard type of balcony guard", such as tempered glass/ballast system with a gap between the bottom of the guard and the balcony to allow for proper water drainage. The new balconies would also meet the current building code requirements to permanently resolve the water leakage issues.

[16] The board agreed to proceed with the repairs to the balconies as recommended by the engineers.

[17] The applicant takes issue with the fact that the board did not consider other methods of balcony guards because the main focus of the board's decision was based on providing a "more attractive balcony for the purpose of increasing property values by upgrading the design of the balconies."

[18] For reasons that will follow, this court cannot find that even if the decision to repair a problem with a new type of material, which would not have been available 25 years ago, and as a result improves the look, cannot be found to be an "addition, alteration or improvement" by reasonable interpretation of section 97 of the *Act*.

Windows:

[19] The applicant argues that the board has proposed to change the existing windows, which are a combination of sliders, casement and fixed windows, to vinyl windows that will have a colour to match the new exterior walls. He states that the style of window selected by the board was a design choice.

[20] The board submits that the intent is to install new windows because the current windows allow water to penetrate into the walls of the units below, and the seals have failed causing reduced insulation. Therefore, the board wishes to replace "old", "defective" and "worn out" windows with "new", "improved" and "upgraded" material and design.

[21] The engineers recommended an awning window to combat water penetration into the walls below due to open windows during heavy rains, and it offers better air tightness in the winter months.

[22] The applicant states that the board deliberately changed the style of the new windows to select windows that would not fit an air conditioning unit in the window. Further he states that the engineers found that most windows were not required to be changed at this time, however, it was recommended that "carrying out the window replacement simultaneously with the vinyl siding replacements would allow proper tie-ins and waterproofing around the windows."

[23] The board agreed to go ahead with the recommended window replacement at the same time as the exterior replacement. It argues that this was necessary as a repair or in the alternative to prevent water leakage and mold in the units.

The roof:

[24] The board is changing the existing asphalt shingles to pre-finished steel roofing. The engineers found that the slope of the roof was unusually low and as a result recommended against asphalt shingles because they provide less water leakage protection. Further, the engineers advised the board that given the slope of the roofs, earlier failure of the shingled roof is to be expected.

[25] The applicant submits that the engineers did not recommend the metal roofing but rather provided the option between the two options.

[26] The property condition report prepared by the engineer "Exp" stated, "it appears that the existing asphalt roofing systems are deteriorating prematurely, and it is recommended that a more robust roofing system be installed on all buildings." It further advised that asphalt shingles specified have an estimated normal lifespan of 15 years, while the metal roofing shingles specified have an estimated normal lifespan of 40-50 years thereby requiring replacement of asphalt shingles three times within the lifespan of the metal roofing shingles system. Accordingly, the board found that although the upfront cost for the metal shingles is 2.69 times greater, it is anticipated that over the lifespan of the roof, the metal roof would be more economical option.

[27] The applicant submits that given the decision to upgrade to metal roofing, it required a vote of the owners. I will come back to this issue.

The cladding:

[28] The existing cladding for the condo buildings is a combination of brick and vinyl veneer, which is the original when constructed in 1990.

[29] According to the board's evidence, there are visible vertical cracks in the masonry from the foundation to the roofline. The cracks seem to be travelling through the middle of the brick. The engineer Exp advised that removal of the bricks would be the only way to reveal the condition of the framing and brick ties which was suspect in these areas.

[30] The property condition assessment by Exp dated January 6, 2015, states that there were severe structural issues with the brick cladding on the condo buildings. According to the report, brick cladding is supposed to have a brick cavity between the brick and the frame that allows for air circulation and drainage between the vapour barrier and the brick veneer. It did perform a test cut which revealed that

the brick cavity behind the bricks is filled with mortar, and therefore there is not sufficient air space behind the brick veneer. The water penetration caused by the current brick veneer has rotted out a substantial amount of the wood and caused carpenter ant infestation, which puts the integrity of the wood structure at risk.

[31] At the January 2015 meeting, the engineer said that "he does not see an immediate need to remove and replace the bricks." However, if the brick cladding was not repaired immediately, there was a possibility that sections of brick might fall which could cause a hazard.

[32] The engineer suggested two options: either full replacement of the brick veneer or a fully sealed moisture control cladding system to be installed over the brick veneer. In short, the engineer recommended the full replacement of the brick as the "better remedy".

[33] With respect to the vinyl siding, the board's evidence is that it has become brittle and faded over time, with damage from lawn mowers and snow removal and warping from the heat of balcony barbeques.

[34] The board finally decided to replace the brick and vinyl cladding with a combination of stone, stucco and porcelain tile called "Kerlite". Of note, I accept the evidence that these construction techniques did not exist when the condo buildings were originally built 25 years ago.

Hallway air units:

[35] The board has proposed to change the existing electric forced heating units to gas fired units. The applicant submits that this change from electric to gas is not warranted.

[36] The board's evidence is that the engineer stated that "given the age and condition of the units, it is recommended that they should be replaced with gas fired units to provide conditioned air to the common spaces."

[37] I accept that the board's decision to change from electric to gas was a cost effective measure.

Lobby renovations:

[38] In 2013, the board decided to renovate the lobby areas of the condo buildings because the lobby areas were last renovated in 1994, and had become old, very dirty, and the tiles could not be cleaned anymore.

[39] Most of the work done was to paint, replace old lighting with new lighting and to replace a bulletin board with a video screen in a more effective way to distribute information to residents and visitors, thereby keeping up with technology.

[40] For reasons that follow, the lobby renovations can only be characterized as "maintenance" obligations by the board under the *Act*.

SECTION 97 OF THE ACT:

[41] Where the board has an obligation to repair or maintain units or common elements and it does so using materials that are "as reasonably close in quality to the original as appropriate in accordance with current construction standards", the work is deemed by section 97(1) of the *Act* to not be an "addition, alteration or improvement". If however, the work is an addition, alteration or improvement, there are various procedural requirements that apply under the *Act* before the board can undertake the work.

[42] Section 97(3) of the *Act* states that if the work is "an addition, alteration or improvement to the common elements" then, before the work can be commenced, the board must provide the following notice to the owners:

a. a description of the proposed work;

b. a statement of the estimated cost of the proposed work and an indication of how the work will be paid for;

c. notice to the owners that they have 30 days to requisition a meeting of the owners, under section 46 of the Act, in order to vote on the proposed work; and,

d. a copy of section 46 and section 97 of the Act. Section 46 states that the meeting can only be called if there is support from 15% of owners.

[43] The meeting of the owners, if properly requested after the board provides notice of the proposed work, requires a quorum of 25 percent of the units of the corporation. If the meeting of the owners is held, the proposed work can only be approved by a majority of the votes cast by owners present at the meeting in person or by proxy if there is a quorum at the meeting.

[44] Section 97(4) states that if an "addition, alternation or improvement to the common elements" is considered a "substantial change", the corporation cannot complete the work "unless the owners who own at least 66.66 per cent of the units of the corporation vote in favour of approving it".

[45] Section 97(6) of the *Act* states an addition, alteration, improvement or change is substantial if:

> (a) its estimated cost, based on its total cost, regardless of whether part of the cost is incurred before or after the fiscal year, exceeds the lesser of,
>
> > (i) 10 per cent of the annual budgeted common expenses for the current fiscal year, and
> >
> > (ii) the prescribed amount, if any; or
>
> (b) the board elects to treat it as substantial.

[46] Section 97(2) sets out certain situations where an "addition, alteration or improvement to the common elements" may be completed by the board without notice to the owners and with only a resolution of the board. The relevant exclusion is set out at in section 97(2)(b), where "in the opinion of the board, it is necessary to make the addition, alteration, improvement or change to ensure the safety or security of persons using the property or assets of the corporation or to prevent imminent damage to the property or assets".

[47] Section 97(7) of the *Act* states that the cost of an addition, alteration, improvement or change shall form part of the common expenses.

[48] It is significant to note that, according to the *Act*, if a repair or maintenance work is not an "addition, alteration or improvement" then sections 97(3), 97(4) and 97(6) have no application. Meaning, the board has an obligation to complete the repair and maintenance work without providing notice, and without the owner's approval.

[49] Further, the *Act* provides that the board can elect to treat an "addition, alteration, or improvement" as a "substantial change", but the *Act* does not allow a board to elect to treat work that is not an "addition, alteration or improvement" as a substantial change. Meaning, work that is "repair and maintenance" cannot be considered a substantial change.

[50] In addition, if the repair or maintenance work is not an "addition, alteration or improvement", it is irrelevant whether the estimated cost of the work exceeds "10 per cent of the annual budgeted common expenses for the current fiscal year" or "the prescribed amount". As stated above, the board has an obligation to complete the repair and maintenance work without unit owner notice or approval.

APPLICATION OF THE LAW TO THE FACTS:

[51] The applicant asks for a declaration that the construction projects constitute a "substantial change" to the common elements within the meaning of section 97 of the *Act*. In other words, he asks this court to find that the board failed to obtain the required vote by the owners to effect the changes as described above.

[52] As indicated above, the *Act* states that when materials for the repair and maintenance work are used and are "as reasonably close in quality to the original as appropriate in accordance with current construction standards", the work is deemed to **not** be an "addition, alteration or improvement". [emphasis added]

[53] If the work contemplated falls within the description set in s.97(1), it accordingly cannot and will not constitute an "addition, alteration or improvement", (let alone a substantial one), for the purpose of any part of section 97, including the provisions of 97(4) and 97(6).[1]

[54] The courts have held that replacement of "old", "defective" or "worn out" common elements with "new", "improved" or "up-graded" material, equipment or design still constitutes "repair and maintenance", and this is so even when the result has a different, more contemporary, aesthetic appearance.[2]

[55] In my view, the work to replace the balconies is "repair and maintenance" because the work was required to remedy the water penetration into the units, and the rotting wood that affected the balconies' structural integrity. The board followed the recommendations of the engineers to replace them with tempered glass/ballast system with a gap between the bottom of the guard and the balcony, to allow for proper water drainage. The fact that the look of the new balconies meant a more contemporary design does not mean that the work is an "addition, alteration or improvement".

[56] I also find that the replacement of the windows is also considered as repair and maintenance because the current windows allow water penetration and the remedial work is to prevent such continued damage.

[57] With respect to the roof, given its age of being close to the end of its useful life, and given its slope/angle, the board's decision to replace it with a product that will provide a better structural feature to avoid any further issues into the future must be viewed as repair and maintenance. Correcting a structural defect must be

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[1] Harvey v. Elgin Condominium Corp. No. 3, 2013 ONSC 1273, para 89.
[2] Ibid, para. 92(d);

considered maintenance.[3]The fact that the metal shingles are less costly to the owners in the long run must also be considered as maintenance.

[58] The original existing veneer of brick and vinyl is to be replaced with a cladding technology that didn't exist when the building was constructed 25 years ago. Given the areas of defects identified above, the board made the decision to replace the "old" with "new" material and design. As indicated earlier, the fact that the final "look" will be more aesthetically pleasing with an effect of increasing property values does not mean that the board made the decision to simply alter or improve, but rather repair what was foreseen as a future problem.

[59] As for the hallway units, two needed to be repaired and the change from electric to gas was a sound decision given the decrease in cost. Finally, the "up-dating" of the lobbies must also be seen as a sound board decision to maintain the lobbies in a good state of repair including upgrading to new technology from bulletin boards to video screens.

Conclusion:

[60] Having found that the work done or to be done by MSCC 823, identified herein, as proper "repair and maintenance", the board did not require owner notice or approval pursuant to section 97 of the *Act*.

[61] Accordingly, I dismiss paragraphs 1 (a) and (b) of the Notice of Application.

Costs:

[62] Should the parties be unable to agree on the issue of costs, I can review brief written submissions on costs within 30 days hereof.

Justice T. N. Morissette

Date: September 3, 2015

[3] York condominium Corp. No. 59 v. York condominium Corp., [1983] O.J. No. 3088 at para. 16