Orr v. Metropolitan Toronto Condominium Corp. No. 1056, [2014] O.J. No. 5752

Ontario Judgments

Ontario Court of Appeal
K.N. Feldman, M.H. Tulloch and P.D. Lauwers JJ.A.
Heard: February 19 and 20, 2014.
Judgment: December 2, 2014.
Dockets: C54309, C54310, C54311, C54315 and C54320

[2014] O.J. No. 5752 | 2014 ONCA 855 | 2014 CarswellOnt 16774 | 247 A.C.W.S. (3d) 704 | 327 O.A.C. 228 | 62 R.P.R. (5th) 1

Between Kelly-Jean Marie Orr also known as Kelly-Jean Rainville, Plaintiff (Appellant), and Metropolitan Toronto Condominium Corporation No. 1056, Gowling, Strathy & Henderson, Brookfield LePage Residential Management Services a division of Brookfield Management Services Ltd., Patrick Post, Pamela Cawthorn, Bruce Ward, Larry Boland, Francine Metzger, Michael Kosich and Richard Dorman, Defendants (Respondents), and Richard Weldon, Third Party (Respondent) And between Kelly-Jean Marie Orr, Applicant (Appellant), and Metropolitan Toronto Condominium Corporation No. 1056, Respondent (Respondent) And between Metropolitan Toronto Condominium Corporation No. 1056, Plaintiff (Respondent), and Kelly-Jean Marie Orr, Defendant (Appellant) And between Kelly-Jean Marie Orr also known as Kelly-Jean Rainville, Plaintiff (Respondent), and Metropolitan Toronto Condominium Corporation No. 1056, Gowling, Strathy & Henderson, Brookfield LePage Residential Management Services a division of Brookfield Management Services Ltd., Patrick Post, Pamela Cawthorn, Bruce Ward, Larry Boland, Francine Metzger, Michael Kosich and Richard Dorman, Defendants (Appellant/Respondents), and Richard Weldon, Third Party (Respondent) And between Kelly-Jean Marie Orr also known as Kelly-Jean Rainville, Plaintiff (Respondent), and Metropolitan Toronto Condominium Corporation No. 1056, Gowling, Strathy & Henderson, Brookfield LePage Residential Management Services a division of Brookfield Management Services Ltd., Patrick Post, Pamela Cawthorn, Bruce Ward, Larry Boland, Francine Metzger, Michael Kosich and Richard Dorman, Defendants (Respondent), and Richard Weldon, Third Party (Appellant)

(152 paras.)

[Editor's note: Supplementary reasons for judgment were released June 8, 2015. See [2015] O.J. No. 2961.]

Case Summary

Damages — For torts — Affecting property — Real property — Betterments — Value of realty — Diminished — Fraud and misrepresentation — Appeal by purchaser from dismissal of action against condominium corporation and property manager allowed in part — Appeal by law firm from finding of liability and dismissal of cross-claim dismissed — Cross-appeal by condominium corporation from award of damages dismissed — Appeal by vendor from award of punitive damages dismissed — Purchaser purchased unit, which had illegal third storey — Condominium corporation not entitled to occupation rent for third story — Purchaser entitled costs to repairs and legal expenses — Purchaser entitled to damages for loss of value of third storey — No basis to overturn punitive damages against vendor.

Legal profession — Barristers and solicitors — Liability — Real estate transactions — Negligence — In real estate transactions — Search of title — Consequences of negligence — Appeal by law firm from finding of liability dismissed — Purchaser purchased a condominium unit listed as three-storey — Vendor illegally created third storey using common elements — Declaration stated that unit was two storey, but estoppel certificate indicated there were no violations — No basis to disturb finding of negligence.

Professional responsibility — Self-governing professions — Duties — Duty of care — Standard of care — Negligence — Interests of client — Liability — Damages — Professions — Legal — Barristers and solicitors — Appeal by law firm from finding of liability dismissed — Purchaser purchased a condominium unit listed as three-storey — Vendor illegally created third storey using common elements — Declaration stated that unit was two storey, but estoppel certificate indicated there were no violations — No basis to disturb finding of negligence.

Real property law — Condominiums — Bylaws — Types — Regarding maintenance and repair of units and common elements — Condominium corporation — Liability — Liability for damage — Liability of directors — Rights and obligations — Building management — Repair obligations — Units — Common elements — Declarations — Registration of — Description — Essential elements — Boundaries of units — Estoppel certificates — Purchase and sale of — Unit holders — Duties of — Payment of share of common expenses — Adherence to bylaws and rules — Rights of — Changes to common elements — Selling or assigning unit — Appeal by purchaser from dismissal of action against condominium corporation and property manager allowed — Appeal by law firm from finding of liability and dismissal of cross-claim dismissed — Cross-appeal by condominium corporation from award of damages dismissed — Appeal by vendor from award of punitive damages dismissed — Plaintiff purchased condominium unit listed as three-storey, but third storey was illegally created by vendor using common elements — Estoppel certificate incorrectly stated that there were no violations and purchaser relied on certificate to her detriment — Condominium corporation and law firm breached duty of care.

Tort law — Negligence — Appeal by purchaser from dismissal of action against condominium corporation and property manager allowed — Appeal by law firm from finding of liability and dismissal of cross-claim dismissed — Cross-appeal by condominium corporation from award of damages dismissed — Appeal by vendor from award of punitive damages dismissed — Plaintiff purchased condominium unit listed as three-storey, but third storey was illegally created by vendor using common elements — Estoppel certificate incorrectly stated there were no violations and purchaser relied on certificate to her detriment — Condominium corporation and law firm breached duty of care.

Tort law — Fraud and misrepresentation — Fraudulent misrepresentation — Specific elements — Known falsity — Particular relationships — Sale of land — Known falsity — Appeal by purchaser from dismissal of action against condominium corporation and property manager allowed — Appeal by law firm from finding of liability and dismissal of

cross-claim dismissed — Cross-appeal by condominium corporation from award of damages dismissed — Appeal by vendor from award of punitive damages dismissed — Plaintiff purchased condominium unit listed as three-storey, but third storey was illegally created by vendor using common elements — Estoppel certificate incorrectly stated there were no violations and purchaser relied on certificate to her detriment — Condominium corporation and law firm breached duty of care.

Appeal by the purchaser from the dismissal of her action against the condominium corporation and the property manager. Appeal by the law firm from the finding of liability against it and from the dismissal of its cross-claim for contribution and indemnity. Cross-appeal by the condominium corporation from the award of damages. Appeal by the vendor from the award of punitive damages. The purchaser purchased a condominium unit from the vendor listed as three-storey, but Declaration described it as two-storey. The vendor illegally created the third storey in the attic space without permission from the condominium corporation of the renovations or the attempt to correct the Declaration. After beginning renovations, the purchaser discovered deficiencies. She complained to the condominium corporation, which inspected the unit and advised that the third storey was illegal. The purchaser refused the condominium corporation's offer to repair the roof and the grant for lease of the third floor. Eventually, the condominium corporation obtained stop work order and ordered compliance with by-laws. The purchaser commenced a claim that she relied on the estoppel certificate, which did not disclose any violations of the declaration, and would not have completed the purchase had she known the third storey was illegal. The condominium corporation cross-claimed for an order directing her to stop work and close up the third floor and issued a third party claim against the vendor for contribution and indemnity arguing he was liable for concealing the third floor. The trial judge allowed the action against the law firm for solicitor's negligence and allowed the actions against the condominium corporation and the property manager in part. She ordered the law firm to pay damages and ordered the condominium corporation to pay one-half of the cost of repairs the purchaser had made to the common elements. However, she refused to make an order amending the Declaration to regularize the third storey. She allowed the condominium corporation's action against the purchaser and ordered her to close up the third floor and to pay the condominium corporation occupation rent for the third floor. She also allowed the condominium corporation's action against the vendor for breach of fiduciary duty and ordered him to pay occupation rent and indemnify the condominium corporation for the damages it was to pay to the purchaser for the cost of repairs and punitive damages.

HELD: Appeal by the purchaser allowed in part.

Cross-appeal by the condominium corporation dismissed. Appeal by the law firm dismissed. Appeal by vendor dismissed. The trial judge erred in concluding the condominium corporation was not negligent in completing the estoppel certificate and that the purchaser did not rely on the estoppel certificate in completing the purchase. The condominium corporation owed the purchaser a duty of care in the preparation of the estoppel certificate and there were no policy considerations negating such a duty. As the Declaration described the unit as a two-storey unit, the existence of the third-storey was a violation of the Declaration and the statement in the estoppel certificate that there were no violations was incorrect. The purchaser relied on the estoppel certificate in completing the purchase. The property manager, as the condominium corporation's agent, did not own the purchaser an independent duty of care. The condominium corporation was estopped from demanding to close up the third floor and for occupancy rent and claim for one-half the value of repairs. There was no basis to disturb the finding of negligence against the law firm or to allow the cross-claim. The trial judge erred in her assessment of damages. The purchaser was entitled to her entire proven costs of repairs as the condominium corporation was obligated to repair the common elements and the purchaser was not required to avoid her loss by applying to the Ontario New Home Warranty Plan. As the purchaser was entitled to return to the position she would be in had the negligence not occurred, she was also entitled to her full legal expenses and to damages for loss of value of the third storey calculated as the difference between the value of the unit as a renovated three-storey unit and as a two-storey unit. There was no basis to overturn the award of punitive damages against vendor.

Statutes, Regulations and Rules Cited

Condominium Act (former), s. 32(8), s. 41

Condominium Act, 1998, S.O. 1998, c. 19, s. 76, ss. 89-90, s. 109(2), s. 109(3)

Negligence Act, R.S.O. 1990, c. N.1, s. 1

Appeal From:

On appeal from the judgment of Justice Darla A. Wilson of the Superior Court of Justice, dated August 18, 2011, with reasons reported at 2011 ONSC 4876.

Counsel

Geoffrey D.E. Adair, Q.C., for Kelly-Jean Marie Orr, also known as Kelly-Jean Rainville.

Barry A. Percival, Q.C. and Theodore B. Rotenberg, for Metropolitan Toronto Condominium Corporation No. 1056, Bruce Ward, Larry Boland and Richard Dorman.

Robert J. Clayton, for Brookfield LePage Residential Management Services, a division of Brookfield Management Services Ltd., Patrick Post and Pamela Cawthorn.

David Gadsden, J. Brian Casey and Matt Saunders, for Gowling, Strathy & Henderson.

Thomas W. Arndt, for Richard Weldon.

The judgment of the Court was delivered by

P.D. LAUWERS J.A.

1 Kelly-Jean Rainville (formerly Kelly-Jean Marie Orr) bought what she believed was a three-storey condominium townhouse unit from Richard Weldon in the Grand Harbour development in Etobicoke, Ontario. The condominium documentation, however, revealed that the unit was only two storeys. The third floor was illegally built into the common element attic space. This is a set of grouped appeals about where liability falls for the difference in the number of permitted storeys.

2 Ms. Rainville's unit, townhouse 113, is located in a building governed by Metropolitan Toronto Condominium Corporation No. 1056 ("MTCC 1056"). Ms. Rainville and her real estate lawyer at Gowlings did not know that the third floor of the townhouse was illegally constructed when she purchased the unit. When Ms. Rainville found out, she brought claims against MTCC 1056, Gowlings, Brookfield LePage Residential Management Services ("Brookfield"), which was the property manager for MTCC 1056, and several individual defendants. The defendant MTCC 1056 added Mr. Weldon as a third party.

3 The trial judge dismissed Ms. Rainville's claims against Brookfield and the individual defendants, but found Gowlings, MTCC 1056, and Mr. Weldon liable and ordered damages against them. She ordered Ms. Rainville to close up the third floor and to pay MTCC 1056 occupation rent for the third floor.

A. FACTUAL OVERVIEW

4 The factual overview is largely taken from paras. 15-109 of the trial judge's reasons.

(1) The Condominium Development

5 In the late 1980s, Mr. Weldon and Larry Boland, principals of Rylar Development Ltd., built the Grand Harbour condominium development. The development was composed of two high-rise tower buildings and an arrangement of townhouses. The three portions of the development were governed by three separate condominium corporations. The real estate market deteriorated in the early 1990s and many unit purchasers refused to close their deals. Mr. Weldon and Mr. Boland each agreed to buy one unit in the development. Mr. Weldon took townhouse 113.

6 Mr. Weldon decided to expand the size of townhouse 113, which was originally 3000 square feet over two storeys, by building a third floor into the common element attic above his unit. Mr. Boland, with whom Mr. Weldon discussed the idea, told him that the additional third floor area might cause the development to exceed its permitted square footage, and advised him to seek approval from the Committee of Adjustment. Mr. Boland and Lou Andre, the construction manager for the development, both urged Mr. Weldon to obtain a building permit. Mr. Weldon did not follow their advice.

7 Construction of the third floor began in the spring of 1993, and was largely complete when Mr. Weldon and his family took possession of the townhouse on July 17, 1993. The third floor held a large family room with two skylights, a fourth bedroom, an ensuite bathroom, a storage area and a small furnace room. Mr. Weldon took title to the unit on April 7, 1994, and paid approximately $400,000 for it.

8 MTCC 1056 became a condominium corporation on July 5, 1993 with registration of its Declaration.

9 Mr. Weldon was president of MTCC 1056 from 1994 to 1997, but he did not take steps to have the Declaration amended to add the third floor to the unit's title. As a result, the description of townhouse 113 that formed part of the Declaration continued to show that it was a two-floor unit with common element attic space on the third floor. The description referenced the survey

sheets that had been deposited in the Land Registry Office when the condominium was registered, which also showed that townhouse 113 was two storeys.

(2) Ms. Rainville's Purchase of Unit 113

10 Mr. Weldon listed townhouse 113 for sale in late 1996 or early 1997, with an asking price of $1,075,000. In September 1997 Ms. Rainville and her then husband Michael Orr were looking to buy a home in Toronto. She and her real estate agent, Joy Garrick, visited a number of units in the development. She was attracted to townhouse 113 in particular due to its large size, as a result of the third floor. Mr. Weldon's listing agent, Ed Wery, was present. Ms. Rainville was given a copy of the listing agreement, which described the townhouse as a three-storey unit. The unit appealed to Ms. Rainville, and after viewing it a second time and discussing potential renovations with her husband, on September 29 she offered to buy it for $975,000, with a closing date of December 19, 1997. Mr. Weldon accepted the offer.

11 All three condominium corporations associated with the Grand Harbour development were initially managed by CBS Property Management. Brookfield took over as property manager for MTCC 1056 on October 1, 1997. According to Brookfield, the records CBS kept were unsatisfactory and were transferred to Brookfield "in dribs and drabs".

12 Brookfield had a contractual obligation under its management agreement with MTCC 1056 to complete estoppel certificates for prospective purchasers on behalf of the corporation. In late October 1997, Ms. Rainville received an estoppel certificate prepared by Karin Stevens, a Brookfield employee. The certificate stated that there were restrictions on pets, that the reserve fund was less than Ms. Rainville had initially been told, and that there were continuing violations of the Declaration. Patrick Post, who was the regional manager for Brookfield and also assistant secretary to MTCC 1056, signed the estoppel certificate on behalf of MTCC 1056. However, it soon came to light that the estoppel certificate was incorrect, because it referred to another condominium corporation within the Grand Harbour development.

13 As a result, Brookfield completed a second estoppel certificate for townhouse 113, which Pamela Cawthorn of Brookfield sent to Gowlings on December 12, 1997. This certificate stated that there were "no continuing violations of the declaration, by-laws, and/or rules of the Corporation". After reviewing the unit file for townhouse 113 Mr. Post signed the certificate.

14 Ms. Rainville testified that she was "comforted" by the second estoppel certificate. However, because she owned several cats, she continued to worry about the certificate's restriction on pets. Ms. Rainville claimed that she would not have closed the purchase transaction for the townhouse if the estoppel certificate had identified an issue about ownership of the third floor.

15 Ms. Rainville and her husband sought to rescind the deal based on their concerns about the pet restriction and certain other possible misrepresentations made by Mr. Weldon, but ultimately decided to move forward with the purchase, at a reduced price, after Mr. Weldon threatened to sue. The parties extended the closing date to January 16, 1998. That day, Ms. Rainville went to the Gowlings office to sign the closing documents. She thought she was meeting with Katherine Latimer, the lawyer who was to handle the transaction, but she actually met Cathy Ridout, a law clerk.

16 Ms. Rainville testified that Ms. Ridout advised her that the boundaries of townhouse 113

extended from the "upper most surface of the drywall to the concrete level in the basement", which Ms. Rainville understood to mean from the ceiling of the third floor to the basement floor. Ms. Ridout did not show Ms. Rainville any plans of survey depicting the unit boundaries. At trial, Ms. Rainville alleged that Gowlings had a copy of the listing agreement, which incorrectly indicated that townhouse 113 was three storeys, in its file when she attended at its office. Ms. Latimer had no recollection of seeing the agreement until after the illegality of the third floor was discovered. The trial judge concluded on the balance of probabilities that the listing agreement was in Gowlings' file at the time of closing.

(3) The Renovations Reveal Defects

17 Before moving into the townhouse, Ms. Rainville began renovations, which soon revealed defects in the unit's construction, including mould, water damage, and leakage problems with the roof. Her litigation lawyer, Martin Doane of Gowlings, sent letters to both MTCC 1056 and Brookfield to advise them of the various problems. MTCC 1056's lawyers responded by letter dated February 19, 1998, telling Ms. Rainville to "stop all further work in the unit until further notice." Ms. Rainville wanted to move in by the end of April and did not want a delay, so she did not tell her contractor, Mark Penman, to stop work. Mr. Penman advised her that she could pursue compensation from the Ontario New Home Warranty Program ("ONHWP").

18 MTCC 1056 retained an engineering firm, Halsall Associates Limited, to provide an opinion on the work that was necessary to fix the unit's leaky roof. The Halsall engineer visited townhouse 113 in February 1998. The engineer noticed the third floor and wondered if it encroached on common element space. Halsall reviewed the Declaration and survey sheets and advised Mr. Post that townhouse 113 was supposed to have two storeys, and that the third floor was built in common element space. MTCC 1056's lawyers sent a letter to Ms. Rainville dated April 1, 1998, advising her that the third floor was common element space. This was Ms. Rainville's first indication that she might not have title to the third floor.

19 Except for a brief period during the first week of April 1998, Ms. Rainville continued with the renovations, including the third floor, even though she knew its legality was in question. She described Brookfield as being "supportive" during this period and expected MTCC 1056 to pay for repairs she had made to the common elements to remedy water penetration.

20 The ongoing construction prevented Ms. Rainville and Mr. Orr from moving in at the end of April as they had intended. They leased a house in the interim, ultimately moving into the Grand Harbour townhouse on December 19, 1998.

(4) Litigation Starts

21 Litigation began once it became clear that the third floor was built in the condominium's common elements. MTCC 1056 issued an application, returnable April 16, 1998, for an injunction and compliance. That application was eventually converted into one of the actions that was consolidated for trial.

22 In the spring of 1998, MTCC 1056's lawyers made an offer of settlement to Ms. Rainville under which it would repair the roof and grant her a lease for the third floor. Ms. Rainville refused to sign the release, on the advice of her counsel, and continued with the renovations.

23 On September 3, 1998, Ms. Rainville started an action against Mr. Weldon, the City of Toronto and the real estate agents involved in the purchase and sale of the townhouse. She claimed damages for negligence and misrepresentation. The parties exchanged pleadings, but this action proceeded no further.

24 In November 1998, MTCC 1056's lawyers withdrew the offer to settle and demanded strict compliance with all terms and provisions of the Declaration, by-laws, and rules. MTCC 1056 also demanded that Ms. Rainville cease "using, altering, repairing, occupying or entering" the third floor of the townhouse. Ms. Rainville testified that MTCC 1056's change in position shocked her.

25 On March 5, 2001, Ms. Rainville started the action against Gowlings, MTCC 1056, Brookfield and a number of individual defendants. MTCC 1056 cross-claimed against Ms. Rainville and sought an order directing her to stop all work on her unit and to close up the third floor at her own expense. MTCC 1056 issued a third party claim against Mr. Weldon, alleging that he had breached the fiduciary duty he owed to MTCC 1056 as a member of the Board of Directors. MTCC 1056 also claimed contribution and indemnity from Mr. Weldon for any damages the corporation owed to Ms. Rainville.

B. THE DECISIONS BELOW

26 A number of proceedings were consolidated and heard together by the trial judge.

(1) Ms. Rainville's Claims

27 To recapitulate, Ms. Rainville sued Gowlings, MTCC 1056 and several individuals who were at different times members of MTCC 1056's Board or unit owners. She also sued Brookfield, together with Brookfield employees Mr. Post and Ms. Cawthorn.

28 The trial judge granted Ms. Rainville judgment against Gowlings for solicitor's negligence, and awarded damages of over $400,000 inclusive of prejudgment interest. She ordered Gowlings to pay to MTCC 1056, on behalf of Ms. Rainville, the cost of restoring the third floor to common element attic space, with such cost to be determined on a reference before a construction lien master. She also ordered Gowlings to reimburse Ms. Rainville for certain decorating and renovation costs associated with the third floor, with the sum to be determined on a reference to a construction lien master.

29 The trial judge allowed Ms. Rainville's actions against MTCC 1056 and Brookfield in part. She ordered MTCC 1056 to reimburse Ms. Rainville in the amount of about $20,000 for her repairs to common elements defects.

30 The trial judge refused, however, to make an order under s. 109(2) of the *Condominium Act*, 1998, S.O. 1998, c. 19 ("the former Act"), amending the Declaration to regularize the third floor. MTCC 1056's Cross-Claim Against Ms. Rainville

31 The trial judge allowed MTCC 1056's action against Ms. Rainville, and ordered that she pay MTCC 1056 about $56,000 plus per diem interest for her use of the common elements in the third floor of the townhouse and that she close up the third floor, returning it to attic space. The

trial judge directed a reference before the construction lien master for directions on the implementation and costs of the remedial close-up work.

(2) MTCC 1056's Third-Party Action against Mr. Weldon

32 The trial judge granted MTCC 1056 judgment in its third party action against Mr. Weldon for breach of fiduciary duty. She ordered him to pay occupation rent for the third floor of more than $18,000 plus interest. She also ordered him to indemnify MTCC 1056 for the sum of about $20,000 plus interest, which MTCC 1056 was to pay Ms. Rainville for her repairs to the common element defects. The trial judge also ordered Mr. Weldon to pay punitive damages of $50,000 to MTCC 1056.

(3) Costs

33 The costs of the proceedings, which included a three-month trial, were considerable. The trial judge ordered Gowlings to pay costs to Ms. Rainville in the sum of $300,000 inclusive of fees, disbursements and applicable taxes. She ordered costs in the total amount of $200,000 inclusive of fees, disbursements and taxes to be paid to the Brookfield defendants, in the proportion of $150,000 by Ms. Rainville and $50,000 by Gowlings. The trial judge ordered Gowlings to pay $500,000 inclusive of fees, disbursements and taxes to MTCC 1056, divided equally between the insured and uninsured claims. She ordered Mr. Weldon to pay MTCC 1056 costs in the amount of $25,000.

C. THE APPEALS

34 Ms. Rainville asks this court to allow her appeal against Brookfield and MTCC 1056. She argues: first, that the trial judge erred in dismissing her case against Brookfield and MTCC 1056 in view of the "strong evidence of negligence on their part in issuing the estoppel certificate"; second, that the trial judge made a palpable and overriding error in finding that Ms. Rainville did not rely on the estoppel certificate; and third, that the damage award was too low to restore her to the position she would have been in but for the negligence of Gowlings, Brookfield and MTCC 1056.

35 Gowlings appeals against the finding of liability on the basis that: first, it provided legal services to Ms. Rainville at the standard of care expected of a real estate solicitor in the late 1990s; and second, that as a matter of law, Ms. Rainville did obtain title to the third floor of the townhouse when she purchased it. Gowlings also asks that its appeal from the dismissal of its cross-claim for contribution, indemnity and relief from MTCC 1056 be allowed. This cross-claim is relevant only if Ms. Rainville's appeal against MTCC 1056 is successful.

36 MTCC 1056 cross-appeals against the trial judge's decision to award Ms. Rainville one-half of the value of the common element repairs that she made before she was ordered to stop work by MTCC 1056.

37 Mr. Weldon appeals on the basis that the trial judge made an error in principle in awarding punitive damages against him.

D. ANALYSIS

38 For convenience, I will break the issues down by each appeal.

(1) Ms. Rainville's Appeal Against Brookfield and MTCC 1056

39 In this appeal, Ms. Rainville argues that Brookfield and MTCC 1056 were negligent in completing the estoppel certificate. The trial judge concluded Brookfield was not liable for negligence on the basis that its employees did not fall below the applicable standard of care and that Ms. Rainville did not rely on the estoppel certificate in deciding to purchase the townhouse. In my view, with respect, the trial judge's reasoning on this issue reveals reversible errors. These are detailed below.

40 The basis for Ms. Rainville's claim is some important text in the second estoppel certificate, which provided:

> There are no continuing violations of the declaration, by-laws and/or rules of the Corporation, apart from any involving assessment obligations for which the current unit owner is responsible and the status of which is disclosed in paragraph 1 of this certificate.

41 The Declaration described townhouse 113 as a two-storey unit, and indicated that the third storey was common element space. The survey sheets referenced in the Declaration were consistent with this description. As a result, the existence of the built-out third floor was a violation of the Declaration and the statement in the estoppel certificate to the contrary was incorrect.

42 Ms. Rainville's claim against Brookfield and MTCC 1056 sounds in negligent misstatement or misrepresentation. The elements of that cause of action are set out in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87:

> (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted. (Para. 33, p. 110)

43 I address each element in turn.

(a) **MTCC 1056 Owed Ms. Rainville a Duty of Care**

44 The first element of negligent misstatement is somewhat complicated by the nature of the relationship between MTCC 1056 and Brookfield. Nonetheless, in my view, there is no need at this stage of the analysis to distinguish between these two parties with respect to the completion of the estoppel certificate. The actions of Brookfield's employees in completing the certificate are, in law, MTCC 1056's actions. This flows from MTCC 1056's statutory obligations, even though Brookfield was contracted by MTCC 1056 to complete the estoppel certificates. As a result, Brookfield was MTCC 1056's agent for the purpose of the estoppel certificates.

45 The version of the management agreement in evidence was not signed, but MTCC 1056 and Brookfield agreed that its terms were accurate. Brookfield agreed to:

> Prepare for execution by the Corporation ... Certificates of lien in the form prescribed by Regulation pursuant to the Act and to issue and provide Estoppel Certificates together with the statements and information required pursuant to the Act to any person or person acquiring or proposing to acquire an interest in any unit ... The Manager shall be responsible for inspecting the common elements appurtenant to the unit and when the Manager has reason to believe that the unit has been unoccupied or may have been altered without permission by the Owner or occupant and upon the direction of the Board, the Manager shall inspect the unit to determine whether or not the corporation has any claim for damages against an owner as contemplated by section 41(6) and (7) of The Act or whether any violation exists prior to issuing the Estoppel Certificate. The Manager is responsible for the accuracy and completeness of all information contained in the Estoppel Certificate, however, the Manager shall not be liable for any information within the knowledge of the board but not communicated to the manager and which should be included in the estoppel certificate. [Emphasis added]

Mr. Post was appointed as assistant secretary to MTCC 1056, which enabled him to sign the certificates for MTCC 1056. In reviewing and signing the completed certificates, Mr. Post was acting on behalf of MTCC 1056 as its agent.

46 The trial judge erred in her analysis by focusing on Brookfield's duty and ignoring that of MTCC 1056. A condominium corporation, such as MTCC 1056, is obliged by s. 32(8) of the former Act and s. 76 of the current *Condominium Act*, S.O. 1998, c.19 ("the current Act"), to provide estoppel certificates (called status certificates under the current Act) if requested by prospective purchasers. Section 32(8) of the former Act, which was in force at the time the estoppel certificate for Ms. Rainville's townhouse was issued, provided:

> Any person acquiring or proposing to acquire an interest in a unit from an owner may request the corporation to give a certificate in the prescribed form in respect of the common expenses of the owner and of default in payment thereof, if any, by the owner, together with such statements and information as are prescribed by the regulations, and the certificate binds the corporation as against the person requesting the certificate in respect of any default or otherwise shown in the certificate, as of the day it is given.

47 As the condominium corporation for the unit Ms. Rainville was purchasing, MTCC 1056 owed Ms. Rainville a duty of care in the preparation of the estoppel certificate (*Fisher v. Metropolitan Toronto Condominium Corporation No. 596* (2004), 31 R.P.R. (4th) 273 (Ont. Div. Ct.), at para. 8). The two-stage test for establishing a duty of care set out by the Supreme Court at paras. 30-31 of *Cooper v. Hobart*, 2001 SCC 79, is satisfied. First, the relationship between MTCC 1056 and Ms. Rainville is sufficiently proximate that it was reasonably foreseeable that carelessness by MTCC 1056 in executing the estoppel certificate could cause harm to Ms. Rainville.

48 As for the second stage of the *Cooper* test, there are no policy considerations that should negative recognizing a duty of care in the circumstances. To the contrary, the purpose of estoppel certificates supports recognizing a duty of care. One of the main goals of the *Condominium Act* is consumer protection (*Lexington on the Green Inc. v. Toronto Standard*

Condominium Corp. No. 1930, 2010 ONCA 751, 102 O.R. (3d) 737, at para. 49). Estoppel certificates must be interpreted in light of this objective; they are the vehicle through which condominium corporations provide important information to prospective purchasers. MTCC 1056 could not escape this special relationship and its duty of care by contracting out or delegating the completion of estoppel certificates to Brookfield.

49 Brookfield employees may have done much of the work necessary to complete the certificates as agents for MTCC 1056. MTCC 1056 was still ultimately responsible for the contents of the certificates. This is evidenced by the requirement that Mr. Post sign each certificate in his role as an MTCC 1056 secretary.

50 The trial judge found that, under the former Act, the limited role of an estoppel certificate was to "provide financial information about a condominium that would not otherwise be available to a potential purchaser" (para. 217), not to report "whether the unit was in violation of the declaration" (para. 219). However, in this case Brookfield had inserted into its form of the estoppel certificate, which it executed on behalf of MTCC 1056, an assertion that there were "no continuing violations of the declaration, by-laws, and/or rules of the Corporation".

51 The fact that this provision went beyond the minimum statutory requirements does not mean that MTCC 1056 had no duty to make an effort to verify its accuracy.

(b) **The Second Estoppel Certificate was Incorrect**

52 The trial judge found, at para. 235: "It is beyond dispute that the estoppel certificate was incorrect." This conclusion was based on the statement in the estoppel certificate that there were no violations of the Declaration. The existence of the third floor was a violation of the Declaration, since the Declaration described townhouse 113 as a two-storey unit. As a result, the trial judge's conclusion on this point is unassailable.

(c) **MTCC 1056 Fell Below the Standard of Care in Completing the Estoppel Certificate**

53 The trial judge found that neither Ms. Cawthorn nor Mr. Post of Brookfield was negligent in the preparation of the second estoppel certificate (para. 229). In my view, for the reasons set out below, her reasoning regarding the applicable standard of care reveals errors.

54 The standard of care applicable to negligent misstatement is that of an ordinary, reasonable and prudent person in the position of the representor, in the circumstances (*Queen v. Cognos Inc.*, at p. 121, para. 56; *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, at para. 28). In other words, the representor must exercise such reasonable care as the circumstances require to ensure that the representation is accurate and not misleading (*Queen v. Cognos*, at p. 121, para. 56). What is reasonable must be determined on an objective basis with consideration for the context of the particular case, such as the likelihood of a foreseeable harm, the gravity of the harm, and the cost of avoiding the harm (*Ryan*, at para. 28). The court may consider "external indicators" of what is reasonable, such as custom, trade practice, and statutory or regulatory standards (*Ryan*, at para. 28).

55 The purpose of the estoppel certificate was to ensure Ms. Rainville was given sufficient information regarding the property to make an informed purchase decision (*Durham*

Condominium Corp. No. 63 v. On-Cite Solutions Ltd., 2010 ONSC 6342, 99 R.P.R. (4th) 68 (S.C.), at para. 21). It follows that there was an obligation on MTCC 1056 to take reasonable steps to ensure the information in the estoppel certificate was correct, even if the information was not statutorily mandated. This obligation flows from the common law and not from the statute.

56 There was no expert evidence at trial on the standard of care applicable to a condominium corporation or its delegate, such as a property manager like Brookfield. The trial judge appears to have considered the standard of care applicable to Brookfield and MTCC 1056 to be, in fact, Brookfield's actual practice. She described this practice as follows:

> Post testified that it was not the practice at the time to conduct a physical inspection inside the unit unless there was something in the documentation that raised a flag. To enter a unit required permission from the owner. In his practice, each unit had its own file that contained correspondence with the owners and prior estoppel certificates. In the usual course of business, Post did not go beyond the unit file and other records from the corporation. He did not, for example, review the as-built drawings to determine if there was a breach of the Declaration or By-Laws.
>
> ...
>
> The evidence was clear from Post about the procedure followed prior to completing estoppels certificates and there was nothing to suggest that the appropriate procedure was not followed in this case. (Paras. 223, 232)

57 As a matter of principle, however, the actual practice of Brookfield and MTCC 1056 in and of itself is not capable of setting the standard, and it was an error for the trial judge to conduct her negligence analysis on this basis.

58 In no way can Brookfield's work be seen as "reasonable and prudent", to borrow words from *Cognos*. The transition between property managers was chaotic. The trial judge found that the records kept by the previous property manager were unsatisfactory and were transferred to Brookfield "in dribs and drabs". With respect, this should reasonably have heightened Brookfield and MTCC 1056's vigilance and diligence; it cannot justify their poor performance.

59 Inexperienced Brookfield employees prepared both estoppel certificates. Mr. Post then reviewed and signed them. This exercise can only be described as woefully sloppy. For the first certificate, the employees relied on materials in their files, which they knew were incomplete. Mr. Post conceded that the first certificate, which is not at issue in this appeal, was wrong "in its entirety". He testified that he "missed" the fact that the first estoppel certificate was incorrect in stating that there were continuing violations of the Declaration.

60 Brookfield's performance did not improve with the second estoppel certificate -- which is at issue in this appeal. The trial judge made a specific finding that Brookfield did not have "possession of, or certainly access to, all relevant documents which would have disclosed the building of the third floor". (Para. 229) While this statement is technically correct, since the knowledge of the third floor's illegality did not surface until Halsall's involvement in 1998, it is unduly exculpatory.

61 On the evidence, it is clear that Brookfield had the Declaration, which described townhouse

113 as two storeys, in its possession at the time it prepared the second estoppel certificate. In completing the estoppel certificate Brookfield employees confined their inquiries to the condominium documentation and the information in the townhouse's unit file. Although the management agreement stated that Brookfield should inspect the "common elements appurtenant to the unit", which would include the third storey of Ms. Rainville's townhouse, before completing the estoppel certificate, it failed to do so. Although Mr. Post did not conduct a formal inspection, he admitted that in October 1997 he noticed a window on the third floor of townhouse 113, which led him "to believe that there was in fact a third floor built up there". Even though Mr. Post would have known that the vast majority of the townhouses were two floor units, he did not make any further inquiries when the time came to sign the estoppel certificate.

62 In the absence of evidence and expert testimony as to appropriate industry practice, this court is not equipped to set out a detailed list of steps a condominium corporation or a property manager must take to comply with the standard of care in completing an estoppel or status certificate. I conclude simply that Brookfield's failure to make virtually *any* inquiries into the veracity of the representation that townhouse 113 complied with the Declaration was not reasonable or prudent in the circumstances, and could not meet any reasonable standard of care. The management agreement expressed the common expectation of Brookfield and MTCC 1056 that the estoppel certificates would be accurate and complete. As the standard of care set out in *Queen v. Cognos* suggests, MTCC 1056 was obliged to take steps to ensure that the estoppel certificate was correct. The failure to do so amounted to a breach of any reasonable standard of care.

63 MTCC 1056 should not be surprised at being held to their representation that there were no violations of the Declaration. I agree with Professor Bruce Feldthusen that there is "much to be said for approaching this area as a modification to traditional contract law ... The law should be such that a reasonable defendant would not be surprised when legal consequences flow from her negligent information or advice" (Bruce Feldthusen, *Economic Negligence*, 6th ed. (Toronto: Carswell, 2012), at p. 27).

(d) **Ms. Rainville Detrimentally Relied on the Estoppel Certificate**

64 If the estoppel certificate had been completed correctly, it would have stated that there were ongoing violations of the Declaration, since the third floor of the townhouse was illegally built into the common elements, contrary to the description and survey sheets. The trial judge's recitation of the facts makes it clear that the existence of the third floor was significant to Ms. Rainville. The trial judge found that "[i]t is clear that had Rainville been advised that the third floor did not form part of the unit she was purchasing, she would not have gone ahead with the transaction." (Para. 278)

65 As noted in the trial judge's reasons, the agreement of purchase and sale was signed on September 30, 1997. Ms. Rainville did not receive the first estoppel certificate until sometime around October 31, 1997. The second estoppel certificate was delivered even later, with a letter dated December 12, 1997.

66 The trial judge's self-instruction that Ms. Rainville must prove that she relied on the information contained in the estoppel certificate to establish a negligent misstatement claim was correct in law.

67 Ms. Rainville testified that she relied on the estoppel certificate. She was not cross examined on this testimony. Even so, the trial judge concluded that Ms. Rainville did not rely on the certificate:

> While the Plaintiff said that she felt "comforted" by the estoppel certificate, in my view that falls far short of demonstrating that she relied on it to ensure she was getting proper title to the townhouse or that it gave her any assurance about the number of floors the unit had. (Para. 235)

68 Ms. Rainville could not prove reliance, according to the trial judge, because she had "signed the agreement of purchase and sale without reviewing an estoppel certificate or indeed without reviewing the agreement with her lawyer." (Para. 233)

69 This statement shows that the trial judge misapprehended the role of an estoppel certificate in the purchase of a condominium unit. Estoppel or status certificates are virtually never provided by the condominium corporation to the purchaser before the agreement of purchase and sale is signed. Instead, the request for a certificate or permission to request a certificate is typically contained *within* the agreement of purchase and sale, as it was in this case (see Ontario Real Estate Association Standard Form Agreement of Purchase and Sale -- Condominium Resale (Form 101, 2014), at para. 13). The contents of the estoppel certificate become relevant after the agreement of purchase and sale is signed but prior to closing. If the certificate identifies a serious breach of the Declaration, for example, then the purchaser may be able to rescind the agreement. It is now common for a purchaser to make his or her offer expressly conditional on receipt and review of the status certificate (Audrey Loeb, *Condominium Law and Administration*, loose-leaf (Toronto: Carswell, 1995), at p. 9-4).

70 The usual practice is precisely what occurred in this case. The agreement of purchase and sale contained a provision stating that "[t]he Vendor consents to a request by the Purchaser or his authorized representative for an Estoppel Certificate from the Condominium Corporation."

71 When the question of reliance is focused on the date Ms. Rainville closed on the condominium unit rather than the date when she signed the agreement of purchase and sale, the trial judge's other findings show conclusively that Ms. Rainville relied on the estoppel certificate. As the trial judge's recitation of the facts demonstrates, in addition to restrictions on pet ownership, the size of the townhouse was of primary importance to Ms. Rainville's decision to purchase the unit. She expressed concerns about possible violations of the Declaration after receiving the first estoppel certificate, and even sought to rescind the agreement. However, the second estoppel certificate provided comfort to her. Ms. Rainville reasonably relied on the statement that there was no violation of the Declaration in making the final decision to purchase the unit.

72 As a result of her reliance, Ms. Rainville suffered harm. She purchased a condominium that was one floor smaller than she anticipated and wanted. This impacted her use of the unit as an inhabitant and also decreased the unit's resale value. Detrimental reliance -- the final element of negligent misstatement -- is therefore established.

(e) **Conclusion on MTCC 1056's Liability for Negligent Misstatement**

73 In my view, effect should be given to this ground of appeal against MTCC 1056. Ms. Rainville successfully made out the elements of liability for negligent misstatement on the part of MTCC 1056 in respect of the second estoppel certificate, and is entitled to damages against MTCC 1056.

74 I would dismiss Ms. Rainville's appeal against Brookfield. While the trial judge's ultimate holding that Brookfield is not liable was correct, I would reach that conclusion on the basis that Brookfield was MTCC 1056's agent and did not owe Ms. Rainville an independent duty of care. Nor is there evidence that Ms. Rainville relied specifically on Brookfield, as opposed to MTCC 1056.

75 It follows from this conclusion and the incorrect statement in the estoppel certificate that MTCC 1056 is estopped from demanding that Ms. Rainville close up the third floor and restore the unit to its two storey configuration at her own expense and that she pay occupancy rent for the third floor. Those elements of the judgment below must be set aside.

76 It also follows that MTCC 1056's cross-appeal against Ms. Rainville for one-half of the value of the common element repairs that she made before she was ordered to stop work must be dismissed.

(2) The Gowlings Liability Appeal

77 Gowlings contests the finding of liability on two bases: first, that the trial judge erred in finding that the law firm did not provide legal services to Ms. Rainville at the standard of care expected of a real estate solicitor in the late 1990s; and, second, that, as a matter of law, Ms. Rainville obtained title to the third floor of the unit. Gowlings also asks that its cross-claim for contribution, indemnity and relief against MTCC 1056 be allowed.

(f) Did the Legal Services Gowlings Provided Fall Below the Applicable Standard of Care?

78 The trial judge considered the expert evidence on this issue at paras. 259-278. Ms. Rainville called Robert Aaron and Gowlings called Donald Thomson. The trial judge preferred the evidence of Mr. Aaron, and concluded that "Latimer fell below the standard of care of a real estate lawyer practising in Toronto in 1998." (Para. 270)

79 The trial judge considered that the lawyer's primary responsibility in a condominium transaction is to ensure that the client "is getting title to what they believe they have transacted for." (Para. 271) She went on to explain that in order to confirm this, "the client must be shown the plans to ensure that their unit is the one identified, in the correct location, the size, whether it has a terrace which might be an exclusive use common element, whether it is a single storey unit or multi-level."

80 The trial judge noted, at para. 275, that the "main point of contention between the two experts was whether the standard of practice required the vertical plan to be shown to the client." While Mr. Aaron testified that it did, Mr. Thomson testified that "only the horizontal plan had to be shown to the client."

81 The trial judge rejected Gowlings' submission that even if the horizontal plan had been reviewed with Ms. Rainville, "it would not have revealed that there was an illegal third floor." (Para. 272) She stated:

> The horizontal plan shows the Plaintiff's unit, first floor, and there is a staircase that is shown to another level. I agree with Mr. Aaron's statement that this should have led the lawyer to look for the next floor of the unit, which would require a review of the plan showing the cross sections illustrating unit boundaries. That document clearly shows unit 7 level 1 as having a rather small basement, a first floor, a second floor above which appears to be open space going to a peaked roof. It is clear that the area above the second floor is not part of the unit. Had Rainville been shown this plan, as she ought to have been, it would have been obvious that the unit being purchased was not a 3 storey unit, but rather a 2 storey unit with a basement. (Para. 272)

82 In argument before this court, Gowlings took the position that the horizontal plan did not show the staircase, so the trial judge must have been mistaken. This was shown in reply to be an error on counsel's part. The relevant plan was attached to Mr. Aaron's report.

83 The trial judge stated more than once that she preferred Mr. Aaron's evidence, and her assessment of the expert evidence is entitled to deference. Gowlings has not identified any palpable and overriding error. There is no basis for disturbing the trial judge's finding that Gowlings was negligent.

(g) **Did Ms. Rainville Obtain Title to the Third Floor of the Townhouse Unit?**

84 Gowlings argues that, as a matter of law, title to the third floor was conveyed to Ms. Rainville and was never a condominium common element.

85 Gowlings does not dispute that the Declaration and the survey sheets describe or show the third storey as part of the common elements, not part of townhouse 113. Nonetheless, Gowlings argues that the "controlling document with respect to title" is not the survey sheet or sheets, but the actual physical features of the unit. This argument is based on s. 4 of the Declaration, which provides:

> Boundaries of Units
>
> The monuments controlling the extent of the units are the physical surfaces mentioned in the boundary of the units contained in Schedule "C" attached hereto.

Schedule "C" then sets out the legal boundaries for this unit as follows:

> BOUNDARIES OF RESIDENTIAL UNITS
>
> Horizontally (see cross-sections on Part 1, Sheet 3 of the Descriptions)
>
> ...
>
> b) The upper surface and plane of the concrete floor slabs in the basements of Units ... 4, 5, 6 and 7 on Level 1.
>
> ...

g) The upper surface and plane of the drywall ceiling in the uppermost story of ... Units 2 to 9 inclusive on Level 1.

The ceiling of the third floor in townhouse 113 would fit within this description in these provisions.

86 Gowlings argues that there is an error on the survey sheets since they show only two storeys and not three. Gowlings asserts that this error occurred because the survey sheets for the unit were prepared by the surveyor when the framing was in place for the two storey unit. Gowlings argues that the surveyor ought to have been called back after the construction was finished to complete the survey for the unit, which would then have included the third storey. The survey sheets ought to be corrected, but they do not control title. According to Gowlings, albeit quite by accident perhaps, by operation of law Ms. Rainville got what she bargained for as a result of the law firm's work, being title to all three floors of the unit.

87 I do not agree with this argument for two reasons. First, the argument that the physical features of the unit trump the Declaration and the survey sheets was never put to the trial judge. The evidence necessary to explore that issue properly was not led by the parties. The experts were not examined on the practice that is followed in situations where a unit's physical features diverge from the Declaration and the survey sheets. The argument, in short, smacks of novelty and implausibility. It cannot be resolved on the evidence presented at trial or before this court (*767269 Ontario Ltd. v. Ontario Energy Savings L.P.*, 2008 ONCA 350, at para. 3; *Pirani v. Esmali*, 2014 ONCA 145, 94 E.T.R. (3d) 1, at para. 74). The court's normal practice of refusing to entertain entirely new issues on appeal should apply (*Pirani*, at para. 74; *Kaiman v. Graham*, 2009 ONCA 77, 75 R.P.R. (4th) 157, at para. 18).

88 Second, it is not clear to me that accepting the validity of this argument would eliminate Gowlings' liability. Instead of delivering Ms. Rainville a unit with clear title, Gowlings would have delivered her into a lawsuit with MTCC 1056 about the enforceability of the Declaration. This is not what a domestic real estate client reasonably expects from her lawyer. Gowlings' failure to discover the basic problem with the size of the unit was negligent, as the trial judge concluded.

(h) **Gowlings' Cross-Claim Against MTCC 1056**

89 Gowlings asks that its cross-claim for contribution, indemnity and relief against the negligent MTCC 1056 be allowed. In my view, there is no merit in the cross-claim, for the reasons expressed by the trial judge. She rejected the submission that Ms. Latimer was entitled to rely on the estoppel certificate for title purposes:

> While Latimer testified under cross-examination that she relied "in part" on an estoppel certificate that stated compliance with the Declaration, I found this evidence self-serving. Latimer had only the vaguest recollection of the documents she reviewed in the file prior to closing. Certainly, she did not rely on the certificate in terms of guiding her actions concerning what steps she needed to take to ensure her client received proper title to her townhouse. The estoppel certificate was never intended to provide evidence of proper title to a property. (Para. 276)

90 I see no error in this conclusion.

(3) Ms. Rainville's Damages Appeals Against Gowlings and MTCC 1056

91 The trial judge devoted more than 100 paragraphs of her decision to assessing damages. Her lament throughout, with which I agree, was the absence of credible evidence to substantiate many of Ms. Rainville's damage claims. Mr. Adair, who was not trial counsel for Ms. Rainville, stated in his factum, with his customary candour:

> On the matter of the repair, renovation and decorating costs, it is acknowledged that for whatever reason the evidence was poorly presented in a disorganized way that made the assessment of damages very difficult for the trial judge.

92 The damages awarded by the trial judge against Gowlings and MTCC 1056 are set out in the following table:

Damage item and amount claimed	Disposition	Reasoning
1. Fees paid to contractor Penman [$205,000]	Not awarded	There was no explanation of what the amount claimed represented. [Para. 284]
2. Renovations to all floors of the unit [$106,475.89]	Not awarded	Damages not proven. [Para.287]
3. Redecoration and renovations to third floor [$89,966.59]	Awarded against Gowlings	Decorating costs were owed, but it was impossible to determine which invoices related to work on the third floor versus other portions of the unit. Master appointed to conduct a reference and determine amounts spent by Ms. Rainville on third floor decorating and renovations. [Para. 372]
4. Gowlings Account [$44,521.97]	Gowlings obliged to repay $18,542.19	Ms. Rainville was entitled only to reimbursement of amounts paid to Gowlings to complete real estate deal and related to the third floor dispute. [Paras. 311-314]
5. Cost of delay in moving into unit in 1998 [$94,442.53]	Not awarded	The costs for alternative housing in 1998 were not reasonable and not caused by the defendants' actions. [Para.321]
6. Loss of value of third floor [$225,000]	Awarded against Gowlings	"This loss flows directly from the negligence of Gowlings." [Para. 307]
7. Cost of removing third floor [$179,126.26]	Awarded against Gowlings	Gowlings to pay provisional amount of $84,000 into court, with remaining balance to be determined on reference to a master. [Paras. 337, 343]
8. Costs associated with conversion of third floor [$53,095.91]	Awarded against Gowlings	Ms. Rainville was entitled to cost of converting third floor back into attic space. [Para. 323]
9. Registration costs [$43,183.76]	Not awarded	Not analyzed by trial judge. Not clear from record what these are.

93 Ms. Rainville's focus at trial was on the legalization of the third floor. She sought damages in two measures: the first was on the premise that the trial judge would legalize the third floor, and the second was on the premise that the third floor would not be legalized. Since the trial judge rejected Ms. Rainville's request for legalization of the third floor, she was left to deal with the damages claim on that basis. Before this court Ms. Rainville is pursuing damages as the primary remedy, and legalization of the third floor only in the alternative.

94 On appeal, Ms. Rainville altered her damages claim to include recovery for the repair,

renovation and decorating costs related to the entire unit. She claims she is entitled to damages payable by Gowlings, Brookfield and MTCC 1056 "in an amount equal to that incurred for the entire repair, renovation and decorating costs in respect of Townhouse 113 during the period from January 16, 1998-December 1, 1998 together with prejudgment interest thereon."

95 This was not how the case was argued at trial. Appeal counsel proposes a new approach given the lamentable state of the evidence:

> It appears necessary in order to do justice between the parties that the issue of the total assessment of repair, renovation and decorating costs incurred at the time of purchase and in the months thereafter ought to be the subject of a reference to a Construction Lien Master at Toronto. This will not cause any undue delay or inconvenience to the parties given that a reference has already been ordered on other necessary aspects of the damages.

96 Since Ms. Rainville did not advance this approach to damages at trial, I would decline to grant the requested relief. This court generally will not allow an appellant a second opportunity to prove damages that should have been shown at trial as an essential element of the cause of action (*Lombardo v. Caiazzo* (2006), 52 C.L.R. (3d) 187 (Ont. C.A.), at para. 19). There are some exceptions to this rule, such as where the nature of the damages render proof and quantification inherently complex (*Eastern Power Ltd. v. Ontario Electricity Financial Corp.*, 2010 ONCA 467, 101 O.R. (3d) 81), or where the significance of the loss merits more than nominal damages despite evidentiary deficiencies (*Martin v. Goldfarb* (1998), 41 O.R. (3d) 161 (C.A.); *Rosenhek v. Windsor Regional Hospital*, 2010 ONCA 13). Neither of the exceptions apply to this case.

97 This court's role is to consider whether the relief the trial judge granted was appropriate. The standard of review that applies to a trial judge's assessment of damages is highly deferential. To interfere, an appellate court must find that the trial judge made an error in principle or a palpable and overriding error: *de Montigny v. Brossard*, 2010 SCC 51, [2010] 3 S.C.R. 64, at para. 27.

98 The trial judge made some such errors with respect to damages. First, the trial judge erred by refusing to award Ms. Rainville the entire proven cost of her repairs to the common elements. Second, in requiring Gowlings to reimburse Ms. Rainville for only a portion of her legal fees, the trial judge failed to apply the appropriate test for damages in negligence. Finally, the trial judge erred in the manner of setting damages to account for the fact that Ms. Rainville did not get the three-storey townhouse she paid for. I address each of these issues in turn.

(a) **Repairs to Common Elements**

99 At trial Ms. Rainville sought to recover what she paid to remedy common element defects in 1998, and claimed $201,880.51. The trial judge noted that "[b]oth the Act and the declaration of MTCC No. 1056 make it clear that it is the corporation who has the responsibility to repair and maintain the common elements." (Para. 351) Despite difficulties with quantification, the trial judge accepted the calculation of MTCC 1056's expert quantity surveyor for the cost of the repairs to the common elements at $41,681. Nonetheless, she awarded Ms. Rainville only half of that amount, at $20,840.50 against MTCC 1056. (Para. 369)

100 The trial judge appears to have based this reduced recovery on the letter from MTCC 1056

to Ms. Rainville dated February 19, 1998. She explained that while it was permissible for Ms. Rainville to proceed with repairs when she took possession of the townhouse because the situation "was dire", she should have ceased repairs when she got the stop work letter from MTCC 1056. Having "attended to the urgent work", after receiving the letter "she proceeded at her own peril." (Para. 368)

101 With respect, there is no legal basis for apportioning the damages in this manner. Pursuant to both the former and current versions of the *Condominium Act*, MTCC 1056 had a statutory obligation to repair the common elements (see s. 41 of the former Act and ss. 89-90 of the current Act). MTCC 1056's Declaration contained a similar requirement. The stop work letter did not shift this responsibility from MTCC 1056 to Ms. Rainville. The trial judge made a factual finding that Ms. Rainville incurred reasonable expenses of $41,681 to make necessary repairs to the common elements (although Ms. Rainville claimed to have spent far more). Under both the relevant legislation and MTCC 1056's Declaration, MTCC 1056 must reimburse Ms. Rainville for this full amount, not simply one-half as the trial judge concluded.

102 In its cross-appeal, MTCC 1056 takes the position that Ms. Rainville should have applied to ONHWP for reimbursement for her repairs to the common elements. MTCC 1056 argues that given this alternative possibility for reimbursement, Ms. Rainville's damages were avoidable and are not recoverable from MTCC 1056.

103 I disagree. This argument ignores MTCC 1056's statutory responsibility to repair the common elements. Further, MTCC 1056 itself submitted an application to ONHWP and recovered more than $180,000 for major structural defects.

104 Not only was Ms. Rainville not required to avoid her loss by applying to ONHWP, it would also have been impossible for her to do so. She submitted a claim to ONHWP in 1999. Although by then the applicable ONHWP warranty period had expired, ONHWP noted in its response that Ms. Rainville was not entitled to reimbursement since many of the claimed damages related to common elements, which were the responsibility of MTCC 1056. As a result, MTCC 1056 is not entitled to any diminution in the damage award as a result of a potential ONHWP claim.

(b) **Recovery of Legal Fees Paid by Ms. Rainville to Gowlings**

105 As discussed above, the trial judge properly concluded that Gowlings was negligent in its provision of legal services to Ms. Rainville. While this finding of liability was correct, the trial judge erred in her assessment of the associated damages. The trial judge concluded that Ms. Rainville was entitled to reimbursement for her legal fees related to both the purchase of the townhouse and the dispute regarding the third floor. However, the trial judge denied Ms. Rainville any recovery for legal fees stemming from the dispute regarding the common element repairs. This distinction was justified on the basis that "the work related to the common element problems was not reasonably foreseeable as a result of the negligence of Latimer". (Para. 311)

106 This conclusion ignores the guiding principle for assessing damages in negligence: as Ms. Rainville argues, the appropriate remedy is to return the plaintiff to the position she would have been in had the negligence at issue not occurred (*Athey v. Leonati*, [1996] 3 S.C.R. 458, at para. 32). The trial judge did not advert to or apply this principle in her reasons.

107 On this basis Ms. Rainville is entitled to reimbursement for all fees paid to Gowlings. But for

Gowlings' negligence, Ms. Rainville would not have purchased the townhouse. Had she not done so, she would not have incurred any expenses related to the common element repairs and associated legal disputes. In order to return Ms. Rainville to her prior position, she must be reimbursed for these legal fees, plus pre-judgment interest based on the interest calculation method set out by the trial judge at para. 307.

(c) **Damages for Negligence**

108 Ms. Rainville is entitled to damages for loss of the value of the third floor as a result of the trial judge's undisturbed finding that Gowlings was negligent and based on my finding that MTCC 1056 is liable for negligent misstatement in the estoppel certificate. Both Gowlings and MTCC 1056 caused Ms. Rainville's injury. As a result, *under* s. 1 of the *Negligence Act*, R.S.O. 1990, c. N.1, their liability is joint and several.

109 The remedy for negligent misstatement is ordinarily to award damages to return the plaintiff to the position he or she would have been in had the misrepresentation not occurred (*BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12, at p. 37, para.46). The trial judge measured Ms. Rainville's damages as the loss of the extra value of the third floor. She relied on the evidence of an appraiser called by Ms. Rainville, who set the value of the third floor when the unit was purchased in 1998 at $225,000. I note that the appraiser fixed the relative value in 2009 at $400,000.

110 The circumstances of this case render valuation on the date of purchase inappropriate. As noted above, had Ms. Rainville been aware that the third floor was a violation of the Declaration, she would not have closed the purchase transaction for the unit. Nonetheless, she ultimately relied on the misstatement in the estoppel certificate and completed the transaction, which cannot now be undone.

111 This is not to say that Ms. Rainville should be denied any remedy. There is no doubt that she has suffered significant damages as a result of the negligence of Gowlings and MTCC 1056. In my view, Professor Feldthusen's suggestion that the principles of contract law may be relevant to negligent misstatement is helpful here. While this court must be cautious not to collapse the distinction between contract damages and tort damages, the unique circumstances of this case necessitate an adaptation of the normal *principles* governing remedies for negligent misstatement. As the Supreme Court has held, while there is "a conceptual difference between damages in contract and in tort ... in many instances the same quantum will be arrived at, albeit by somewhat different routes." (*V.K. Mason Construction Ltd. v. Bank of Nova Scotia*, [1985] 1 S.C.R. 271, at p. 285, para. 28)

112 Ms. Rainville reasonably believed that she was buying a three-storey townhouse, and reasonably expected that eventually she would sell it as a three-storey townhouse. She invested heavily to improve the property. The negligence of Gowlings and MTCC 1056 has deprived her of the opportunity to sell townhouse 113 as a renovated three-storey unit.

113 In my view, justice in this case can only be done if Ms. Rainville's damages are measured by the loss she will suffer from losing the opportunity to sell her property as if it had been a renovated three-storey townhouse. She lost this opportunity because she relied on MTCC 1056's representations in the estoppel certificate.

114 In my view, the Supreme Court's approach to damages for negligent misstatement adopted in *V.K. Mason Construction Ltd.* is appropriate for this appeal. The Court adopted a measure of damages for negligent misrepresentation which recognized that a plaintiff can recover the value of its lost opportunity. In that case, a contractor claimed against a bank for negligent misrepresentation stemming from the bank's advice that a property developer was adequately financed. The Court concluded that but for the bank's misrepresentation, the contractor would have undertaken a different project on which it would have earned a profit. In other words, the bank's misrepresentation caused the contractor to lose an opportunity to profit. The measure of damages was fixed as the anticipated profit the contractor lost as a result of the misrepresentation -- in other words, its expectation damages.

115 Applying the principles of *V.K. Mason* to this appeal, the existence of the third floor was crucial to Ms. Rainville's decision to purchase townhouse 113. The trial judge found that, had Ms. Rainville known the unit was not three floors, she would not have completed the purchase. It is also fair to say that Ms. Rainville would not have spent what she did on renovating the townhouse. The negligence of Gowlings and MTCC 1056 cost Ms. Rainville the opportunity to sell her townhouse as a renovated three-storey unit. Her inability to crystallize her real loss up to this point is attributable in part to the ongoing uncertainty about legal title to the third storey resulting from the trial and appeal process.

116 In the unique circumstances, I would find that Gowlings and MTCC 1056 are liable to Ms. Rainville for the difference between the value of townhouse 113 as a renovated three-storey unit and as a two-storey unit. Since the value of the condominium is likely to rise and fall over time due to the vagaries of the real estate market, in order to provide the parties with certainty and finality, I would set the valuation date as the date this decision is released.

(d) **Legalizing the Third Floor**

117 At trial, Ms. Rainville requested that the trial judge use her discretionary power under s. 109(3) of the current Act to order MTCC 1056 to amend the Declaration and legalize the third floor. MTCC 1056 resisted legalization of the third floor and insisted that it be returned to common element attic space. The trial judge agreed with MTCC 1056's position. However, MTCC 1056 anticipated that the reconstruction would be at someone else's cost. That has changed. Ms. Rainville has no obligation to close up the third floor, and is not liable to MTCC 1056 for occupation rent. Any reconstruction would be at MTCC 1056's own cost.

118 The trial judge refused to make an order under s. 109(2) of the former Act amending the Declaration to regularize the third floor. This was based on her finding that the failure to include the third floor as part of the description of townhouse 113 in the Declaration was not an error or an inconsistency (paras. 127, 130). She was also persuaded that this remedy would be undesirable since it would be unfair to the other townhouse owners, and MTCC 1056 would thereafter be unable to refuse applications from other owners who had similar third floor potential. It would also result in a dispute with the two other condominium corporations within the Grand Harbour development about proportional expenses under a shared facilities agreement. The other two corporations had the view that MTCC 1056 was already unfairly advantaged as a result of the larger size of the townhouses. Increasing the size of the units within MTCC 1056 even more raised the prospect of the other corporations demanding re-negotiation of these

proportional expenses, which could have resulted in higher common expenses for the townhouse unit owners (paras. 137-150).

119 Ms. Rainville has not demonstrated any error in the trial judge's analysis on this issue.

120 That said, the interests of the parties now array somewhat differently. Perhaps the way for the parties to sort out their respective liabilities at the least cost would be for the third floor to be legalized. MTCC 1056 may now wish to consider whether the appropriate course of action is to legalize the third floor of townhouse 113.

(4) Claims Between MTCC 1056 and Brookfield

121 At trial Ms. Rainville argued that both MTCC 1056 and Brookfield breached the duties they owed to her by issuing an incorrect estoppel certificate. MTCC 1056 and Brookfield cross-claimed against each other for contribution, indemnity and relief over for any amount each party was required to pay to Ms. Rainville.

122 Brookfield argued that although its management agreement with MTCC 1056, excerpted above, provided that Brookfield was responsible to MTCC 1056 for the accuracy and completeness of the information in the estoppel certificates, the exception within that provision was engaged. The exception provided that Brookfield was not responsible to MTCC 1056 "for any information within the knowledge of the Board but not communicated to the manager and which should be included in the estoppel certificate." Brookfield argued that knowledge of the third floor on the part of both Mr. Weldon and Mr. Boland was to be attributed to MTCC 1056, and that as a result, Brookfield had no obligation to indemnify MTCC 1056.

123 MTCC 1056 argued in response that the undisclosed knowledge of one or two condominium corporation directors should not be attributed to the corporation. If the estoppel certificate contained errors or omissions, it was the fault of Brookfield. MTCC 1056 claimed contribution and indemnity from Brookfield in the event it was found liable in relation to the estoppel certificate.

124 Given the trial judge's conclusion that neither Brookfield nor MTCC 1056 was liable for negligent misstatement arising from the estoppel certificate, she did not go on to address whether the knowledge of the third floor on the part of Mr. Weldon and Mr. Boland should be attributed to MTCC 1056. However, she did consider this issue in the context of Gowlings' argument that MTCC 1056 should be deemed to have the same knowledge as Mr. Boland.

125 Although the trial judge acknowledged that in some circumstances it may be appropriate to impute the knowledge of one director to the board as a whole, she concluded this would not be appropriate in the case of Mr. Boland. At paras. 206-208 she distinguished the situation before her from *On-Cite Solutions*, where the knowledge of a board member was attributed to the condominium corporation, on the basis that Mr. Boland was not the president of the Board, he did not learn of the illegality of the third floor through his position on the Board, and unlike in *On-Cite Solutions*, where the president signed the certificate, Mr. Boland played no role in the execution of the estoppel certificate.

126 I see no error in this reasoning, and I would extend it to Mr. Weldon. I am reluctant to impute the knowledge of a condominium director to its board as a general matter. Doing so

would have the potential to vastly increase the liability of condominium corporations and would certainly make risk management on their part all but impossible.

127 In the result, Brookfield cannot rely on the exception in the management agreement to avoid liability to MTCC 1056 for its error in completing the second estoppel certificate. Brookfield must indemnify MTCC 1056 for the damages it owes Ms. Rainville as a result of the negligent estoppel certificate.

(5) Mr. Weldon's Appeal and MTCC 1056's Cross-Appeal on Punitive Damages

128 Mr. Weldon argues that the trial judge erred in requiring him to pay punitive damages of $50,000 to MTCC 1056. MTCC 1056 argues in its cross-appeal that this court should increase the punitive damage award to $140,000.

129 The trial judge addressed this issue at paras. 401- 420. She found that Mr. Weldon's failure to advise Ms. Rainville and the Board of the illegal status of the third floor was intentional, and that his culpability was enhanced by the fact that this failure breached his fiduciary duties as a director. At para. 417, she put the blame for the various lawsuits squarely on Mr. Weldon:

> It is the intentional conduct of Weldon, his fraudulent misrepresentation, that is responsible for the years of litigation that have ensued since 1998 and the associated costs. The objective of punitive damages is to punish, not compensate. They are to be imposed "*only* if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour." *Whiten*, [*Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595] at paragraph 94.

130 In setting the award at $50,000, the trial judge expressly took account of the Supreme Court's direction in *Whiten*, at paras. 112-126, that an award must be proportional, taking into account the blameworthiness of Mr. Weldon's conduct, which she found to be "reprehensible", the vulnerability of the other parties and the potential harm to them, the need for deterrence, the other penalties likely to be inflicted on him for the same misconduct and the advantage wrongfully gained from the misconduct.

131 It is also noteworthy that the standard of appellate review of a punitive damage award is quite high. It is whether a "reasonable jury, properly instructed, could have concluded that an award in that amount, and no less, was rationally required to punish the defendant's misconduct." (*Whiten*, at para. 107)

132 Mr. Weldon asserts that his conduct was not "sufficiently egregious or outrageous to warrant punitive damages", that the quantum is too high, and that the trial judge failed to notice that awarding punitive damages would result in double recovery. He argues that the punitive damages were "excessive and thus irrational", and that a lesser award would have fully satisfied the objective of deterrence. Further, Mr. Weldon argues that the trial judge "failed to articulate the basis of that quantum or to indicate whether it was the lowest amount that would achieve the objectives of the law".

133 Mr. Weldon's argument regarding double recovery is rooted in the fact that he was ordered to pay occupancy costs for the third floor of townhouse 113 in the amount of almost $19,000 and

to indemnify MTCC 1056 for the amount that it owed Ms. Rainville for her share of the common element repair costs, which was approximately $20,000,

134 It is noteworthy that the trial judge made the following observation in the costs award:

> [Mr. Weldon's] conduct was the subject of my comments in my Reasons and I ordered that he pay punitive damages as a result of his deceitful behaviour. In these circumstances, it would not be fair to order that he pay the costs of Mr. Rotenberg in defending the action on behalf of the condominium and I decline to do so. (Para. 69 of the costs award, 2012 ONSC 4919)

135 In my view, there is no merit to Mr. Weldon's appeal. The trial judge was fully aware of the legal principles at play and applied them appropriately. The award is not outside the applicable range (see *Pate Estate v. Galway-Cavendish (Township)*, 2013 ONCA 669, 117 O.R. (3d) 481, at para. 140 and following). I would, accordingly, dismiss Mr. Weldon's appeal.

136 MTCC 1056 argues in its cross-appeal, on the other hand, that the punitive damages award should be increased from $50,000 to $140,000 on the basis that Mr. Weldon has been left with a $90,000 benefit from the sale of the third floor of townhouse 113, and that a significant part of that benefit -- $40,000 -- remains with him. MTCC 1056 asserts that based on the criteria in *Whiten*, the trial judge made a palpable and overriding error in failing to award a sum for punitive damages that was proportionate to Mr. Weldon's conduct. MTCC 1056 argues that Mr. Weldon's conduct was deceitful, that it had a devastating impact on the people involved and that he failed to show remorse or acknowledge responsibility for his actions. As a result, MTCC 1056 argues that, as a matter of principle, no element of financial benefit for the third floor should be left in his pocket.

137 I am unable to conclude that the trial judge made a palpable and overriding error in her award of punitive damages against Mr. Weldon. She was applied the correct principles and considered appropriate facts. Her conclusion is entitled to deference. I would dismiss MTCC 1056's cross-appeal on the punitive damages issue.

E. DISPOSITION

138 Based on the foregoing analysis, I would dispose of the claims of the various parties as follows.

139 I would allow Ms. Rainville's appeal and find that MTCC 1056 is liable for negligent misstatement in relation to the estoppel certificate.

140 I would set damages for negligence and negligent misstatement, for which Gowlings and MTCC 1056 are jointly and severally liable, as the difference between the value of townhouse 113 as a two-storey unit and a three-storey unit with the valuation date set as the date this decision is released.

141 I would dismiss Ms. Rainville's appeal against Brookfield.

142 I would allow Ms. Rainville's appeal against MTCC 1056 regarding reimbursement for common element repairs and substitute judgment for $41,681. It follows that I would dismiss MTCC 1056's related cross-appeal against Ms. Rainville.

143 I would also allow Ms. Rainville's appeal against Gowlings regarding legal fees and substitute an award of $28,379.02.

144 I would dismiss Gowlings' appeal, and its cross-appeal against MTCC 1056 for indemnity.

145 I would allow MTCC 1056's claim over against Brookfield under the management agreement for indemnity for the damages MTCC 1056 owes Ms. Rainville as a result of negligent misrepresentation.

146 Finally, I would dismiss Mr. Weldon's appeal and MTCC 1056's related cross-appeal.

147 The trial judge's damage awards that are not consistent with these reasons would be set aside.

148 Interest would be payable on the awards to be calculated in the manner set by the trial judge.

F. COSTS

149 This is a case in which the perils of disproportionality are on full display. It exemplifies how "undue process and protracted trials, with unnecessary expense and delay, can *prevent* the fair and just resolution of disputes", in the words of the Supreme Court in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 24.

150 The trial took 43 hearing days over three months, including the argument over costs. The legal costs of such a lengthy, multi-party and multi-counsel trial were considerable. The trial judge gave extensive reasons for her awards of costs, and the consequences are set out in paras. 70- 73 of the costs decision:

> The Defendant Gowlings shall pay to the Plaintiff her costs fixed at $300,000 inclusive of fees, disbursements and taxes.
>
> The Plaintiff shall pay to Brookfield 75% of its costs fixed at $200,000 inclusive of fees, disbursements and taxes and the Defendant Gowlings shall pay the remaining 25%.
>
> A Sanderson order shall issue requiring the Defendant Gowlings to pay the costs of the Defendant MTCC 1056 fixed at $500,000 inclusive of fees, disbursements and taxes, payable in the sum of $250,000 for the insured claims and $250,000 for the uninsured claims.
>
> The Third Party Weldon shall pay to the Defendant MTCC 1056 the sum of $25,000 in costs for the claim for his occupancy of the illegal third floor.

151 Gowlings seeks leave to appeal costs, and argues that saddling the firm with almost $900,000 in costs would be "outlandish" given its limited trial involvement, especially since the "acrimonious relationship" between MTCC 1056 and Ms. Rainville caused unnecessary delay and complexity. MTCC 1056 also seeks leave to appeal costs and pursues approximately $87,000 in additional costs against Ms. Rainville on a substantial indemnity basis.

152 The outcome of this appeal will no doubt affect the submissions of the parties on costs. In

the circumstances, I would direct the parties to file supplementary arguments on costs of not more than five pages each within 45 days, if they are unable to agree on the appropriate quantum and allocation of costs following their review of these reasons.

P.D. LAUWERS J.A.
K.N. FELDMAN J.A.:— I agree.
M.H. TULLOCH J.A.:— I agree.

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