

Amended this 25th day of May, 2022

Pursuant to Rule 26.02(a)

Court File No./N° du dossier du greffe: CV-17-00000042-0000

Chantal Henderson



Local Registrar, Superior Court of Justice

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Date: 2022.05.25 09:58:57 -04'00'

Court File No. 17-42

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Electronically issued
Délivré par voie électronique : 25-May-2022
Cobourg

NORTHUMBERLAND STANDARD CONDOMINIUM CORPORATION NO. 72

Plaintiff

-and-

1573454 ONTARIO LTD., PHOENIX GENESIS FINANCIAL INC., J.E. DOUBT
ASSOCIATES INC., S.G. MACDONALD CONSULTING ENGINEER INC.,
THE TOWN OF COBOURG

Defendants

FRESH AS AMENDED STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES,

LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$2,000.00 for costs, within the time for serving and filing your statement of defence you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$400 for costs and have the costs assessed by the court.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date: May 18, 2017

Issued by "Mackenzie Affleck"

Local registrar

Address of court office:

860 William Street
Cobourg, Ontario
K9A 3A9

TO: 1573454 ONTARIO LTD.
425-975A Elgin St.
Cobourg, ON K9A 5J3

AND TO: PHOENIX GENESIS FINANCIAL INC.
425-975A Elgin St.
Cobourg, ON K9A 5J3

AND TO: J.E. DOUBT ASSOCIATES INC.
68 King St., East
Cobourg, ON K9A 1L1

AND TO: S.G. MACDONALD CONSULTING ENGINEER LTD.
14 Fallingbrook St.
Whitby, ON L1R 1H3

AND TO: THE TOWN OF COBOURG
55 King St., West
Cobourg, ON K9A 2M2

CLAIM

1. The Plaintiff claims against the Defendants:

- a. Damages in an amount to be determined prior to trial for breach of contract, breach of warranties, negligence and breach of statutory and/or fiduciary duties;
- b. Punitive damages in the amount of \$150,000 against the Town of Cobourg for breach of its duty to act fairly and in good faith;
- c. An easement over the adjacent property identified as PIN No. 51094-0442 owned by 1573454 Ontario Inc. to allow for, amongst other things, permanent emergency exit egress from the Plaintiff's property; Pre- and post-judgement interest;
- d. its costs of this action on a substantial indemnity scale; and
- e. such further and other relief as this Honourable Court may deem just.

The Parties

2. The Plaintiff, Northumberland Standard Condominium Corporation No. 72 (hereinafter "the Corporation" or "NSCC 72") is a four/five storey condominium building comprised of 35 residential units, 22 locker units and 55 parking units (hereinafter "the Building"). NSCC 72 was converted from a public school (Thomas Gillbard School) to a residential condominium. The original building shell was maintained, but the remainder of the building underwent major renovations as part of the conversion. The condominium was created by the registration of a Declaration and Description on August 19, 2011 in accordance with the *Condominium Act, 1998* S.O. 1998, c. 19 (hereinafter "the Act"). This claim is being

advanced by the Corporation on its own behalf and on behalf of owners of the units in the condominium, in accordance with the Act.

3. The Defendant, Phoenix Genesis Financial Inc. is a corporation incorporated under the laws of Ontario with head offices in Oakville, Ontario. Phoenix Genesis Financial Inc. was the developer and builder of the units and common elements of NSCC 72.
4. The Defendant, 1573454 Ontario Ltd., is a corporation incorporated under the laws of Ontario with head offices in Cobourg, Ontario. 1573454 Ontario Ltd. was the Declarant of NSCC 72 and the vendor of the units in the Building.
5. In addition to being the Declarant and vendor of NSCC 72, 1573454 Ontario Ltd. is also the owner of a parcel of land identified by Parcel Identification No. 51094-0442 that is located adjacent to NSCC 72's property (the "Adjacent Lands"). Originally, 1573454 Ontario Ltd. intended to develop NSCC 72 as a phased condominium (sharing certain services and building components between two condominiums) with phase 2 to be located on the Adjacent Lands. However, to date no construction of phase 2 has taken place and the timeframe in which a further phase of NSCC 72 could be completed has now expired.
6. Phoenix Genesis Financial Inc. and 1573454 Ontario Ltd. are hereinafter collectively referred to as "Phoenix".
7. The Defendant, J.E. Doubt Associates Inc. (hereinafter "Doubt Associates") is a corporation in the business of providing consulting engineering services. Doubt Associates was responsible for the design of the structural and architectural elements of the units and

common elements of the Building, and was responsible for the review of the construction of the Building.

8. The Defendant, S.G. MacDonald Consulting Engineer Ltd. (hereinafter “S.G. MacDonald”) is a corporation in the business of providing consulting electrical engineering. S.G. MacDonald was responsible for the design and review of all fire and life safety features and elements of the Building.
9. The Defendant, the Town of Cobourg (hereinafter “the Town”) is the municipality in which the condominium is located. The Town was responsible for the review of the plans and specifications for the construction of the Building, the issuance of the required municipal permits, and the inspection of the Building during various stages of construction in accordance with applicable provincial legislation and municipal by-laws.

Background

10. Following completion of construction of the Building and creation of NSCC 72 (on August 19, 2011), the Board was largely comprised by individuals who were also directors and/or shareholders and/or representatives of the Phoenix companies. In particular, John Lee, who was at all material times a principal of the Phoenix companies, was a member of the Board of NSCC 72 from inception, until November 2014.

11. Also following creation of NSCC 72, the Board appointed 1573454 Ontario Ltd. (the builder/vendor of NSCC 72) as the property manager for NSCC 72.

12. The involvement of the Phoenix companies in the Board and the management of NSCC 72 continued until November 20, 2014. On November 20, 2014, a requisitioned meeting of owners was held, during which the owners voted to remove John Lee from the Board and to replace him with a unit owner of NSCC 72. As of this date, the Board was comprised entirely by purchasers of units within NSCC 72.
13. In and around the same time, 1573454 Ontario Ltd. was terminated as the property manager for NSCC 72. Upon assuming control of NSCC 72, the new Board promptly appointed an independent property manager for the Corporation.
14. Despite the initial refusal of John Lee to accept his removal and replacement, the new Board ultimately transitioned control and management from John Lee and the Phoenix companies, to the purchasers of units within NSCC 72.
15. Following this transition, the new Board became aware of the fact that notwithstanding the requirements of the *Condominium Act, 1998*, S.O. 2001, c. 19, as amended (the “Act”), a performance audit was never prepared for NSCC No. 72.
16. The new Board accordingly arranged for the requisite performance audit, which was prepared by Pichler Engineering and received by the Board on or about May 20, 2015 (the “Performance Audit”). The Performance Audit identified a number of defects in the construction of NSCC 72. While some defects have been addressed by Phoenix, many remain outstanding and/or were required to be addressed at the expense of NSCC 72.

The Defects

17. The Performance Audit has revealed that the conversion work on the Building and adjacent landscaped areas was not completed in accordance with the specifications and/or design and/or was not designed or constructed in compliance with the *Ontario Building Code*, the Town's by-laws and/or good and prudent practices in the construction industry at the relevant time.

18. The defects identified in the Performance Audit include the following unresolved items:

- a. Defects in the installation of paver stones throughout the landscaped areas of the NSCC 72 property, including incomplete and/or inadequate installation;
- b. A missing catch basin in the driveway of the property;
- c. Catch basin sumps and storm piping are filled with debris resulting in risk of flooding;
- d. Landscaping was not completed in accordance with the landscaping plans;
- e. Fencing around the perimeter of the property is damaged and/or incomplete;
- f. Missing, incomplete and/or inadequate thresholds around all garage man doors and overhead doors;
- g. Missing light fixtures in garage soffits;
- h. Missing, incomplete and/or inadequate wall finishes on exterior garage/carport walls;

- i. Missing, incomplete and/or inadequate cladding, roof and soffit finishes on garage/ carport roofs, including missing drip edges, loose soffits, and inadequately sized sheathing;
- j. Missing, incomplete and/or inadequate fire separations between garage structures;
- k. Missing, incomplete and/or inadequate cement board ceilings in carports;
- l. Missing, incomplete and/or inadequate cladding on the residential building;
- m. Missing, incomplete, inadequate and/or damaged exterior flashing on the residential building, resulting in water penetration in some cases;
- n. Inadequate installation of the roof membrane on the residential building, resulting in water penetration to upper floor units;
- o. Inadequate installation of pitch pockets on flat roofs of the residential building;
- p. Inadequate and/or improper installation of parapet wall on west side of the Building (resulting in excessive movement of parapet wall);
- q. Missing, incomplete and/or inadequate flashing and/or finishing around all exterior doors of the residential building;
- r. Unfinished stone veneer on lower wall at south-central exit doors;
- s. Missing and/or inadequate emergency lighting and signage;
- t. Missing, incomplete or inadequate patio stones on the roof patio;

- u. Inoperative make up air unit;
- v. Missing, incomplete and/or inadequate make up air supply ductwork throughout the Building;
- w. Missing, incomplete and/or inadequate insulation in attic spaces of the residential building;
- x. Missing, incomplete and/or inadequate exterior cornice trim, column capital trim and column bases;
- y. Missing, incomplete and/or inadequate sealant around windows;
- z. Improper vent covers on all exterior HRV vents, resulting in water infiltration, or possible water infiltration, into vent spaces;
- aa. Missing, incomplete and/or inadequate guard railings around recessed exterior patios;
- bb. Damaged ceiling tiles throughout common element hallways and elevator lobby areas;
- cc. Missing and/or incomplete sinks, drains and faucets in garbage rooms and garbage compactor room;
- dd. Missing and/or inadequate exhaust ventilation in garbage rooms, garbage compactor room and utility/transformer room;

- ee. Exposed electrical wiring, inadequately terminated wiring and/or incomplete/inadequate installation of wiring in garbage rooms, 1st floor atrium, 4th floor common meeting room and 4th floor courtyard common area;
- ff. Missing covers on junction boxes;
- gg. Improper, inadequate and/or poor construction finishes throughout common areas, including damaged/cracking drywall, damaged door frames and trim, poorly installed moulding, baseboards and floor coverings;
- hh. Poor and/or incomplete exterior door installation and/or finishes, including missing door closure mechanisms, doors that are easily opened from the exterior when locked (inadequately secured), and air/water infiltration;
- ii. Missing, incomplete and/or inadequate fire stopping around wall and/or fire wall penetrations throughout the Building;
- jj. Missing, incomplete and/or inadequate fire rated wall assembly in corridors on all floors;
- kk. Missing and/or inadequate second egress exit path for suites 405 and 406;
- ll. Missing, incomplete and/or inadequate handrails in common area stairwells;
- mm. Defects in installation of floor tiles, resulting in the restriction of opening of unit doors;
- nn. Disconnected/non-operational garbage chute sprinklers;

- oo. Fire alarm and circuit breaker panels are not labelled;
- pp. Missing water heater for 4th floor common area washroom and meeting room;
- qq. Incomplete fencing and finishing of 1st floor storage lockers;
- rr. Missing high level water alarm on electrical room sump pump;
- ss. Incomplete vent in west wall of utility room “B”, resulting in significant air infiltration;
- tt. Inadequate insulation and/or finish of west wall of garbage compactor room, resulting in significant heat loss;
- uu. Missing and/or expired and/or cancelled elevator operating permits;
- vv. Exposed insulated concrete form blocks on west exterior wall, resulting in early deterioration/failure of the insulation;
- ww. Inadequately secured light fixtures in common area corridors;
- xx. Improper and/or inadequate access door/panel to crawl space in exercise room;
- yy. Missing, incomplete and/or inadequate exhaust ventilation in crawl space west of exercise room resulting in excessive moisture and mould growth;
- zz. Water damage to corridor ceiling south of suite 103; and
- aaa. Improper and/or inadequate installation and finish of windows, resulting in some cases in water infiltration and/or air infiltration.

19. Since completing the performance audit NSCC 72 has determined that the Town approved construction of the condominium as a two-phased condominium on the assumption that both phases would be constructed, notwithstanding the requirements of section 146 of the *Condominium Act, 1998*, SO 1998, C 19 [*Condominium Act*].

20. As such, NSCC 72's compliance with the *Ontario Building Code* and *Ontario Fire Code* is dependent upon completion of both of the originally contemplated phases. However, to date Phoenix has either refused, or failed, to complete phase 2 and the time limit to complete the second phase has expired. As such, the features of NSCC 72 that relied upon the completion of phase 2 for compliance with the applicable codes will accordingly never meet those codes without amendment to the original planned development and correction to what are effectively incomplete features.

21. NSCC 72 has determined that there are defects respecting the construction of the west wall, which are noted above. In particular the west wall was originally constructed as a temporary wall to be completed when Phoenix built phase 2 of the condominium on the Adjacent Lands. However, given that phase 2 was never built (and will not ever be built), NSCC 72 now requires the west wall to be reconstructed or repaired so that it is a permanent wall that conforms with all applicable building codes, bylaws, and applicable standards.

22. Phoenix has made efforts to repair some of the defects. In many cases, Phoenix has not provided adequate details of, information respecting, or engineering certificates for, the repairs undertaken by Phoenix. Ultimately, Phoenix's attempted repairs have not been reasonable or effective. As a result, NSCC 72 is now required to effect proper repairs, at its own expense.

23. In particular, NSCC 72 is aware that Phoenix installed an exterior fire exit on the west side of the Building (along the west wall), in an effort to provide a second means of egress to the residents of units 405 and 406. This work was, however, undertaken without the consent of NSCC 72. NSCC 72 is not aware of any approval provided to Phoenix by the Town (or otherwise) for such work.

24. While the exterior fire exit provides for escape in the event of an emergency, it is deficient in that it requires occupants to egress onto the Adjacent Lands owned by 1573454 Ontario Ltd., which do not comprise part of NSCC 72's property. As a result, NSCC 72 requires a permanent easement over the Adjacent Lands to allow for proper egress from the fire exit on a permanent and unconditional basis.

25. NSCC 72 also requires the permanent easement over 1573454 Ontario Ltd.'s Adjacent Lands to allow for maintenance and repair of the Building's components. Specifically, some of NSCC 72's services are located on the Adjacent Lands (including a sump pit providing drainage to certain components of the Building) so the Corporation will require access to the Adjacent Lands permanently for maintenance and repair of those services. Further, NSCC 72 will require access to the Adjacent Lands to repair and maintain the west wall and fire escape, which are located along NSCC 72's property line with the Adjacent Lands.

The Town's Orders to Comply

26. Notwithstanding the defects in NSCC 72's construction, including certain fire and life safety defects, the Town issued either partial or final occupancy permits for NSCC 72's units. This allowed Phoenix to complete sales of the units and allowed purchasers to take occupancy of

their units, despite the fact that the Building does not meet the applicable codes and no occupancy permit(s) had been issued for the common elements.

27. Since the date of the performance audit, the Town has conducted several site inspections to identify outstanding deficiencies related to NSCC 72's construction and has issued Orders to Comply against the following parties involved in the original design and construction of NSCC 72:

- a. May 15, 2017 against Phoenix (and its directors, John Lee and Laurel Clarry) re: various deficiencies;
- b. October 13, 2017 against OTS Engineering LTD re: General Review;
- c. February 9, 2018 against S.G. MacDonald re: General Review; and
- d. August 3, 2018 against Phoenix (and its directors, John Lee and Laurel Clarry) re: outstanding deficiencies and lack of building permits.

28. The purpose of the Orders to Comply were to have the parties involved in NSCC 72's original design and construction complete the construction in compliance with the applicable codes and to have the consultants involved in the original construction complete their general reviews.

29. Notwithstanding the foregoing, the Town also issued an Order to Comply against NSCC 72 on August 3, 2018. It requires the Corporation, which was turned over from the Declarant to the unit owners in 2014, to correct the outstanding construction deficiencies and lack of

building permits, notwithstanding the fact that the unit owners were not involved in the original design and construction of NSCC 72.

30. In response, NSCC 72 issued an Application (Court File No. CV-18-81) against the Town in August 2018 (and other parties involved in the original construction/conversion of NSCC 72) to set aside the Order to Comply and to require the Town to pursue the relief it sought against the parties responsible for NSCC 72's original design and construction.
31. In exchange for NSCC 72 agreeing to stay the within Claim and its Application against the Town, the Town agreed to pursue an Application to enforce the outstanding Orders to Comply noted above against the parties responsible for NSCC 72's original design and construction (i.e. 1573454 Ontario Ltd., Laurel Clarry, John Lee, Phoenix Genesis Financial Inc.; Phoenix Genesis Developments Inc., Patrick Bonneville, OTS Engineering Ltd.. Larry Perez, S.G. MacDonald Consulting Engineers Inc.; Stephen G. MacDonald, and JE Doubt & Associates Inc., and James Ernest Doubt) (the "Abeyance Agreement").
32. Ultimately, the Town dismissed its Application against four of the named consultants (i.e. OTS Engineering Ltd., Larry Perez, and JE Doubt & Associates Inc., and James Ernest Doubt) and instead, obtained an order from the Honourable Justice A. Sosna dated May 31, 2021, against Phoenix (and the individual directors of its corporations) and the consulting engineer (S.G. MacDonald Consulting Engineers Inc.). The Order requires Phoenix to comply with the Orders to Comply against it and complete construction of the Building to bring it into compliance with the applicable codes and appoint an architect or engineer to complete the required general reviews and submit them to the Town.

33. To date, though, the Town has not taken any steps to enforce Justice Sosna's Order. Instead, it takes the position that it has now taken all reasonable steps to enforce the Orders to Comply against the parties responsible for NSCC 72's original construction/conversion, notwithstanding the fact that the Town's actions have not resulted in the actual resolution of the outstanding building deficiencies that relate to Code compliance. Rather than providing any benefit at all, the Town's actions have left NSCC 72 no further ahead than it was several years ago when it agreed to put its Application and the within claim in abeyance while the Town attempt to resolve these matters. In short, the Town's actions have done nothing but delay NSCC 72 in its efforts to resolve the deficiencies identified in the within claim.

Claim Against the Builder

34. Phoenix impliedly or expressly warranted that the units and common elements of NSCC 72 would be constructed in a good and proper manner, fit for human habitation and in compliance with all provisions of the applicable building codes and the Town's by-laws and good and prudent practices in the construction industry at the relevant time. NSCC 72 and its owners relied on Phoenix to fulfil its contractual obligations.

35. Phoenix had a duty of care to NSCC 72 to design, construct and/or supervise the construction of the Building, as well as the repair of the defects identified in the Building, in a good and proper manner with good quality materials and in compliance with the provisions of the applicable building codes and by-laws and good and prudent practices in the construction industry at the relevant time. NSCC 72 and its owners relied on Phoenix to fulfil this duty.

36. Phoenix designed, constructed and/or supervised the construction of the Building, as well as the repair of the defects identified in the Building, in a negligent manner, with poor quality

workmanship and/or materials, and/or in contravention of applicable provisions of the relevant building codes and by-laws, and /or good and prudent practices in the construction industry at the relevant time.

37. Phoenix failed to arrange for appropriate design and review of the construction of the Building, and of the repairs undertaken to the Building, as required by the Ontario Building Code. Therefore, Phoenix is in breach of the warranties set out above and the duties set out above.

Claim Against Doubt Associates

38. Doubt Associates was retained to undertake the design and the review of the construction of the structural and architectural elements of the Building. It was the obligation of Doubt Associates to ensure that the construction of the structural and architectural elements was in general conformity with the building documents (including the drawings and specifications) forming the basis for the issuance of a building permit, and with the Ontario Building Code in effect at the time the Building was constructed.

39. Doubt Associates impliedly or expressly warranted that the structural and architectural elements of the Building would be constructed in a good and proper manner, fit for human habitation and in compliance with all provisions of applicable building codes, provincial and federal regulations, Town by-laws and good and prudent practices in the construction industry at the relevant time. The Corporation and its owners enjoy the benefit of such warranties in accordance with the Act.

40. In addition to the express or implied warranties described in the preceding paragraph, Doubt Associates owed a duty to NSCC 72 and the owners of units at the condominium to design the Building and review the construction with care and skill so as to properly fulfil the duties described in the preceding paragraphs and to ensure that the units and common elements of the condominium would be constructed in a good and proper manner, fit for human habitation and in compliance with all provisions of applicable building codes, provincial and federal regulations, Town by-laws and good and prudent practices in the construction industry at the relevant time. The Corporation and its owners relied on Doubt Associates to fulfil these duties.

41. NSCC 72 states that Doubt Associates was negligent in failing to properly review and inspect the construction of the Building. In particular, Doubt Associates should have:

- a. prepared a design that contained sufficient detail and instruction to ensure that the builder and all trades could properly understand the required construction at the relevant locations;
- b. prepared a design that complied in all respects with applicable codes and industry standards at the time of the design;
- c. reviewed the construction with reasonable care and skill, and in accordance with the standards contained in the *Professional Engineers Act*, R.S.O. 1990, c. P. 28, its regulations and the Practice Guidelines and Bulletins of Professional Engineers Ontario;

d. as a result of the aforesaid review, identified the defects in some locations, and taken steps to ensure that the defects were rectified in all locations, including the following steps:

- i. bringing the defects to the attention of the builder and trades;
- ii. giving instruction for rectification of the defects in the observed locations;
- iii. giving instruction required to avoid any repeat of the defects in the ensuing construction;
- iv. investigating other similar locations for the same defects in completed work, and then giving instruction for remediation of those defects; and
- v. refusing certification of the work until the defects had been remedied to the satisfaction of the architect (including careful review of the remediation).

Claim Against S.G. MacDonald

42. S.G. MacDonald was retained to undertake the design and the review of the fire and life safety components of the Building. It was the obligation of S.G. MacDonald to ensure that the construction and installation of the fire and life safety components of the Building was in general conformity with the building documents (including the drawings and specifications) forming the basis for the issuance of a building permit, and with the Ontario Building Code and Ontario Fire Code in effect at the time the Building was constructed.

43. S.G. MacDonald impliedly or expressly warranted that the fire and life safety elements of the Building would be constructed in a good and proper manner, fit for human habitation and in compliance with all provisions of applicable building and fire codes, provincial and federal regulations, Town by-laws and good and prudent practices in the construction industry at the relevant time. The Corporation and its owners enjoy the benefit of such warranties in accordance with the Act.

44. In addition to the express or implied warranties described in the preceding paragraph, S.G. MacDonald owed a duty to NSCC 72 and the owners of units at the condominium to design the Building and review the construction with care and skill so as to properly fulfil the duties described in the preceding paragraphs and to ensure that the life and fire safety elements of the Building would be constructed in a good and proper manner, fit for human habitation and in compliance with all provisions of applicable building and fire codes, provincial and federal regulations, Town by-laws and good and prudent practices in the construction industry at the relevant time. The Corporation and its owners relied on S.G. MacDonald to fulfil these duties.

45. NSCC 72 states that S. G. MacDonald was negligent in failing to properly review and inspect the construction and installation of the fire and life safety elements of the Building. In particular, S.G. MacDonald should have:

- a. prepared a design that contained sufficient detail and instruction to ensure that the builder and all trades could properly understand the required construction of the fire and life safety elements at the relevant locations;

- b. prepared a design that complied in all respects with applicable codes and industry standards at the time of the design;
- c. reviewed the construction with reasonable care and skill, and in accordance with the standards contained in the *Professional Engineers Act*, R.S.O. 1990, c. P. 28, its regulations and the Practice Guidelines and Bulletins of Professional Engineers Ontario;
- d. as a result of the aforesaid review, identified the defects in the fire and life safety at some locations, and taken steps to ensure that the defects were rectified in all locations, including the following steps:
 - i. bringing the defects to the attention of the builder and trades;
 - ii. giving instruction for rectification of the defects in the observed locations;
 - iii. giving instruction required to avoid any repeat of the defects in the ensuing construction;
 - iv. investigating other similar locations for the same defects in completed work, and then giving instruction for remediation of those defects; and
 - v. refusing certification of the work until the defects had been remedied to the satisfaction of the architect (including careful review of the remediation).

Claim Against the Town

46. The Town owed a duty of care to NSCC 72 and to the owners of units at NSCC 72 to discharge its obligations under applicable provincial legislation and applicable municipal by-laws in a competent manner. Specifically, the Town was responsible for:

- a. reviewing and approving the design for the construction of the Building;
- b. issuing the building permit for the construction of the Building;
- c. inspecting the construction of the Building;
- d. issuing occupancy permits;
- e. ensuring that the design of the Building and the general review of the original construction of the Building was carried out by an architect or a professional engineer in a competent manner in accordance with standard practices then in effect; and,
- f. issuance of deficiency/work orders as appropriate.

47. The Corporation and its owners relied on the Town to fulfil its duties as set out above.

48. The Town was negligent in the performance of the obligations noted in the preceding paragraphs. In particular, the Town should have detected the defects, and arranged for their rectification, during its review of the design and/or review of the construction.

49. Further, pursuant to the Abeyance Agreement, the Town agreed to take steps to compel Phoenix and Phoenix' original consultants to comply with the Town's Orders to Comply by

commencing and pursuing its own enforcement application against them. By offering that assurance to NSCC 72, the Town intended to induce NSCC 72 to abeyance or delay its own action against Phoenix and its original consultants and to shield itself from any allegations that might subsequently be made by NSCC 72 against it for nonfeasance.

50. By representing to NSCC 72 that it would pursue its own Application against Phoenix and Phoenix' original consultants, and by inducing NSCC 72 to abeyance its own action, the Town expressly, or impliedly, owed NSCC 72 a legal duty of good faith and honest performance. In particular, NSCC 72 states that the Town owed it a duty to compel Phoenix and Phoenix' original consultants to comply with its Orders to Comply and to require them to rectify the deficiencies in the Building and to achieve compliance with the applicable building codes.

51. In reliance on the Abeyance Agreement, and in reliance on the Town's duty of good faith and honest performance towards it, NSCC 72 agreed to abeyance its own legal claims against Phoenix and its original consultants while the Town pursued its application for enforcement of its Orders to Comply. NSCC 72 did so on the understanding that it would not suffer any prejudice by the delay and that the Town would require the Building's deficiencies to be rectified by Phoenix.

52. NSCC 72 states that in light of the Abeyance Agreement, the Town knew or ought to have known that NSCC 72 was relying on it to compel compliance by Phoenix and its original consultant and was forgoing or forestalling its own legal right to pursue Phoenix and others involved in the original construction of the Building, for rectification of the Building's deficiencies.

53. NSCC 72 states that the Town breached its duty of good faith and honest performance and instead engaged in one or more acts of nonfeasance, misfeasance and/or malfeasance in that:

- a. It failed to take any necessary, or reasonable, steps, to enforce its own orders against Phoenix or Phoenix's original consultants;
- b. It failed to take any necessary or reasonable steps to pursue Phoenix or Phoenix's original consultants for compliance with its Orders to Comply;
- c. It failed to establish any or adequate protocols, policies, and procedures with respect to the pursuit of its legal rights against Phoenix or Phoenix's original consultants;
- d. It wilfully or recklessly abandoned its application against Phoenix's original consultants despite its agreement with NSCC 72 to pursue the application honestly and in good faith;
- e. It wilfully or recklessly compromised its legal rights against Phoenix and/or Phoenix' original consultants despite its undertaking to NSCC 72 to pursue its legal rights honestly and in good faith;
- f. By abandoning its application and/or compromising its legal rights against Phoenix and Phoenix' original consultants, the Town downloaded its legal duties and responsibilities onto NSCC 72 and its purchasers and owners, forcing them to prosecute Phoenix for compliance with the *Building Code Act*;

g. It wilfully misrepresented its intention to compel Phoenix or its original consultants to comply with its Orders to Comply, knowing that its Application was nothing more than a legal ruse intended to persuade NSCC 72 and its purchasers that the Town had fulfilled its own obligations under the *Building Code Act*.

54. NSCC 72 states by inducing it to abeyance its own action against Phoenix or its original consultants, the Town imposed further delay on NSCC 72 and its purchasers, thereby causing further harm.

55. In the alternative, and notwithstanding the Abeyance Agreement, the Town engaged in nonfeasance, misfeasance and/or malfeasance by failing to take any steps, or adequate steps, to enforce Justice Sosna's Order. In particular, having obtained Justice Sosna's Order, NSCC 72 states that the Town owes a duty to NSCC 72 and its owners and purchasers to take all reasonable steps to enforce the Order. The Town has failed in that duty by failing or refusing to take any, or adequate, steps to enforce the Order. As a result, NSCC 72 and its owners have suffered damages.

Claim Against Phoenix, Doubt Associates, S.G. MacDonald and the Town

56. The Defendants have failed to provide NSCC 72 and its owners with a building that is constructed in a good and proper manner, fit for human habitation and in compliance with all provisions of the applicable building codes and the Town's by-laws and good and prudent practices in the construction industry at the relevant time.

57. The Defendants are jointly and severally liable to NSCC 72 for damages sustained by the Corporation and/or by individual owners at NSCC 72 arising out of the negligence, breaches of contract, and/or breaches of warranty described in the preceding paragraphs.

58. NSCC 72 and the owners of units at NSCC 72 relied upon Phoenix, Doubt Associates, S.G. MacDonald and the Town to fulfil their obligations as described in the preceding paragraphs.

Damages Sustained

59. As a result of the Defendants' failures, the Corporation and its owners have incurred or will incur costs including but not limited to the following:

- a. costs related to the repair of the defects noted above and any damage arising as a result or as a consequence of such defects;
- b. costs related to the required work to rectify the previously completed repair work;
- c. engineering, consulting and inspection fees related to the identification, evaluation and rectification of the above noted defects;
- d. inconvenience and discomfort suffered by residents of units at NSCC 72 including the loss of use of the units and/or common elements or parts of the units, and/or common elements;
- e. damages as a result of the reduced market value of units at NSCC 72;
- f. costs related to the repair of the interiors of units; and
- g. legal costs.

60. The Plaintiff pleads and relies on the provisions of the *Condominium Act*, the *Negligence Act*, RSO 1990 C N.1, the *Building Code Act*, 1992, S.O. 1992 c.23, and the *Courts of Justice Act*, RSO 1990, C C.43, as amended.

61. The Plaintiff proposes that this action be tried in Cobourg, Ontario.

Date: April, ___ 2017

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COURT FILE NO.: 17-42

**NORTHUMBERLAND STANDARD CONDOMINIUM
CORPORATION NO. 72**

-and-

1573454 ONTARIO LTD. ET AL

Plaintiff

Defendants

***ONTARIO*
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED
AT COBOURG

**FRESH AS AMENDED STATEMENT OF
CLAIM**

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