Court of Queen's Bench of Alberta

Citation: Regehr v. Camrose Crown Care Corporation, 2006 ABQB 296

Date: 20060426
Docket: 0512 000506
Registry: Wetaskiwin

Between:

Leo Regehr, Elfie Regehr and Evelyn Schmidt

Plaintiffs

- and -

Camrose Crown Care Corporation

Defendant

Reasons for Judgment
of the
Honourable Mr. Justice J.L. Foster

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[1] This is an application pursuant to Rule 232 of the **Alberta Rules of Court** for the opinion of the Court on a question of law.

[2] The parties have agreed to the following facts:

1. The following facts are agreed upon between the parties, for the purpose of stating a special case for the opinion of the Court under Rule 232 of the Alberta Rules of Court.

2. The facts are accepted by the parties for the purpose of this stated case only. The parties are not bound to accept them for any other purpose in this action or in any other action or proceeding.

3. The Defendant developed a residential condominium in Camrose, Alberta, and is the registered owner of some of the units in the building.

4. Each of the Plaintiffs occupy units in the building owned by the Defendant, pursuant to arrangements commonly called "Life-Leases."

5. The rights of the parties are defined in the Occupancy Agreements and where applicable, by the By-Laws of the corporation. The Defendant drafted both these documents.

   (a) The Occupancy Agreements provide that a portion of the sum paid by the life resident at the time it acquired the right to occupy the unit, would be repaid by the Defendant within 180 days after termination of the Occupancy Agreements. The repayment was to be made on a declining scale and deducted from the original amount depending upon the period the life resident occupied the unit.

   (b) In order to secure the Defendant's covenant to repay the Plaintiffs pursuant to the terms of the Occupancy Agreements, Mortgages were granted by the Defendant to the Plaintiffs and registered against title to the condominium unit occupied by the Plaintiffs.

6. The rights of the parties are defined partly by the Condominium Property Act, R.S.A. 2000, c. C-22, including Sections 26 and 80.

7. Each of the Occupancy Agreements between the Plaintiffs and Defendant contains the following clause:

   > Crown (the Defendant) retains the right to vote for the Housing Unit as subscribed by the Condominium Act.

8. Each of the Plaintiffs has signed and delivered to the Condominium Corporation, a Notice of Mortgage notifying the Condominium Corporation of their Mortgage and that they intend to exercise the voting rights for the unit subject to their Mortgage.

9. The Condominium Corporation has sued the Defendant:

   a. In Action No. 0303 05471, for alleged unpaid condominium fees;

   b. In Action No. 0303 05465, as a result of alleged water infiltration and toxic moulds in the building. There are several other Defendants in Action No. 0303 05465;

   c. In Action No. 0503 10060, for an Administrator to be appointed under the Condominium Property Act.

   The Defendant wishes to assert the voting rights in respect of the units occupied by the Plaintiffs and other life-tenants.

10. The Plaintiffs Leo Regehr and Elfie Regehr life-leased their unit, Unit 11, Condominium Plan 982 6403, in the spring of 2005 and gave Notice of their Mortgage on June 12, 2005.

11. The Plaintiff Evelyn Schmidt and her husband life-leased Unit 12, Condominium Plan 982 6403, in 1999. The life-lease was made by Evelyn Schmidt and her husband, John Schmidt, and they gave Notice of their Mortgage at the time they completed the life-lease documents. John Schmidt died in December of 2000.

12. Attached to this Agreed Statement of Facts are copies of:

    Tab 1 - By-Laws of the Condominium Corporation.

    Tab 2 - Mortgage granted by the Defendant to John and Evelyn Schmidt, which Mortgage:

    - Includes Occupancy Agreement;

    - Is registered against title to the Unit as Instrument 992 110 179.

Tab 3 - Amendment to the Mortgage, registered as Instrument 002 602 087.

Tab 4 - Title to Unit 12, Condominium Plan 982 6423.

Tab 5 - Notice of the Schmidt's Mortgage given to the Condominium Corporation.

Tab 6 - Mortgage granted by the Defendant to Leo and Elfie Regehr, which Mortgage:

- Purports to attach Occupancy Agreement, but does not actually do so. For the purposes of this special case, it will be taken to be in the same form as the Schmidt Occupancy Agreement;

- Is registered against title to the Unit as Instrument 052 211 304.

Tab 7 - Title to Unit 982 6423

Tab 8 - Notice of Regehr's Mortgage given to the Condominium Corporation and acknowledged by the President of the Board.

[3] The agreed upon question in the Notice of Motion is as follows:

1. Is Clause 2.11 of the Occupancy Agreement to be interpreted so as to give the Defendant all and the only voting rights?

2. If the answer to Question 1 is yes:

   (a) Is Clause 2.11 inconsistent with Section 26(2) of the Condominium Property Act?

   (b) Do the By-Laws give the Plaintiffs a right to vote which over-rides Clause 2.11?

3. If the answer to Question 2(a) is yes, is Clause 2.11 rendered inoperative by Clause 5.5 of the Occupancy Agreement?

4. If the answer to Question 2(a) is yes, does Section 26(2) apply notwithstanding Clause 2.11 by virtue of Section 80(1) of the Act?

[4] Clause 2.11 of the Occupancy Agreement reads as follows:

> Crown retains the right to vote for the Housing Unit as subscribed by the Condominium Act.

[5] The *Condominium Property Act* c. C-22:

> 26(2) When an owner's interest is subject to a registered mortgage, a power of voting conferred on the owner by this Act or the bylaws may be exercised as follows:
>
> (a) first, by the mortgagee, if any, who is first entitled in priority if that mortgagee has notified the corporation of the mortgage in writing and is present at the meeting at which the vote is being conducted;
>
> (b) second, by the owner;
>
> (c) third and subsequently, in order of their priority among themselves, by any other mortgagees who are subsequent in priority to the mortgagee referred to in clause (a) if the subsequent mortgagee wishing to exercise the power of voting has notified the corporation of the mortgage in writing and is present at the meeting at which the vote is conducted.
>
> 80(1) This Act applies notwithstanding any agreement to the contrary and any waiver or release given of the rights, benefits or protections provided by or under sections 12 to 17 is void.

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[6] The written brief of the Plaintiffs is as follows:

1. The Condominium Property Act, R.S.A. 2000, c. C-22 ('the Act') applies to these parties and to this property.

2. The Act provides in Section 26(2), that where (as here), an owner's interest in a unit is subject to a registered mortgage, the power of voting may be exercised by the mortgagee if the mortgagee gives notice to the condominium corporation. Clearly, a mortgagee may choose to vote or to let the owner vote.

3. The Defendant seeks to prevent the Plaintiffs from exercising their choice to vote because the Occupancy Agreement the Plaintiffs have signed includes the provision:

> 2.11 Voting Rights for Condominium
>
> Crown retains the right to vote for the Housing Unit as subscribed by the Condominium Act.

4. The Plaintiffs' arguments against the Defendant's position are summarized as follows:

> (a) The proper interpretation of 2.11 limits any right of the Defendant to that given by the Act - see Paragraph 5(a) of this Brief;
>
> (b) If 2.11 of the Occupancy Agreement is interpreted to override s. 26(2) of the Act, 2.11 is inoperative under 5.5 of the Occupancy Agreement - see Paragraph 5(b) of this Brief;
>
> (c) If the meaning of 2.11 or 5.5 of the Occupancy Agreement is not clear, it is to be given the meaning contrary to that proposed by the Defendant - see Paragraph 6 of this Brief;
>
> (d) The By-Laws, another document prepared by the Defendant, do recognize the right of the Plaintiffs as mortgagees to vote - see Paragraph 7 of this Brief, and ought to be given preference over the Occupancy

Agreement under 5.5 of the Occupancy Agreement or contra proferentem;

(e) If all these arguments fail, Section 26(2) of the Act operates to give the Plaintiffs the option to vote notwithstanding 2.11 of the Occupancy Agreement - see Paragraphs 8 - 10 of this Brief.

5. The Occupancy Agreement itself:

(a) Only purports to 'retain' for the Defendant, whatever right to vote is 'subscribed by the Condominium Act.' 'Subscribed' would normally mean signed at the bottom - see Black's Law Dictionary, Revised 4th ed., but in this clause must mean 'prescribed' or as laid down or given by the Act. The act gives an owner the right to vote only if a mortgagee chooses not to, and this is all that is 'retained.'

The wording of the provision does not purport to give the Defendant any right to vote beyond what is 'subscribed' by the Act, or to force the Plaintiffs to give up any option they have as 'subscribed' by the Act.

(b) The Occupancy Agreement provides in 5.5 that:

> This Agreement will be governed by Alberta Law. If it should appear that any of the terms herein are in conflict with any such laws, then the terms of this Agreement which may be in conflict shall be deemed inoperative and null and void insofar as they may be in conflict therewith, and shall be deemed modified to conform to such laws and this Agreement as so modified shall remain in full force and effect.

> If 2.11 of the Occupancy Agreement is interpreted to take away the Plaintiffs rights as mortgagees to choose whether to vote, it is in conflict with s. 26(2) of the Act, then 2.11 is deemed inoperative by 5.5 of the Occupancy Agreement.

6. If there is any ambiguity as to what is meant by 2.11 or 5.5 of the Occupancy Agreement, such ambiguity is to be resolved against the interpretation desired by the Defendant - see CED (West.) (3rd), Title 34 CONTRACTS, 520:

> Where a contractual provision is sufficiently ambiguous that it is reasonably capable of more than one construction, it will be construed against the party responsible for drafting and tendering the document in favour of the opposite party . . .

7. The By-Laws of the Condominium Corporation bind the Defendant as owner of the units, and the Defendant as occupant of the units, by virtue of Section 32(2) of the Act. The By-Laws:

> (a) Define 'Life-Lease' in 1.1(w), but do not appear to contain any other reference to 'Life-Leases;'
>
> (b) Define 'Mortgagees' in 1.1(y). The Plaintiffs are 'Mortgagees' as defined. Had the Plaintiffs not given notice to the Corporation, they would not be 'Mortgagees' and under By-Law 10.2 the Board would have no obligations to them;
>
> (c) Provide in Paragraph 1.5 that the By-Laws conflict with the Act, the Act prevails;
>
> (d) Recognize in 5.3 that Mortgagees are entitled to notice of meetings, allow in 5.10 a Mortgagee to demand a poll, and recognize in 5.17 and 5.19 a Mortgagee's right to vote instead of an Owner.

8. Section 80(1) of the Act provides:

> 80(1) This Act applies notwithstanding any agreement to the contrary and any waiver or release given of the rights, benefits or protections provided by or under sections 12 to 17 is void.

9. While neither of Section 26(2) or 80(1) of the Act appear to have been judicially considered, Sections 26(5) and 58 of the Act were considered in Tataryn v Owners: Condominium Plan 7810994, 2003 ABQB 810. Madam Justice Coutu in Tataryn states at paragraph 16:

> The rule of statutory interpretation is that meaning should be given to every word as it is presumed the word adds something which would not be there if the word was left out.

10. There are two phrases in Section 80(1). The second phrase specifically overrides any purported waiver of the consumer protection provisions to buyers of new condominium units. Applying the rule of statutory interpretation, the phrase 'This Act applies notwithstanding any agreement to the contrary' must also be given meaning. Its meaning is clear. If 2.11 of the Occupancy Agreement is interpreted to override Section 26(2) of the Act, then Section 26(2) applies notwithstanding the Occupancy Agreement.

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[7] The written brief of the Defendant in response is as follows:

A. INTERPRETATION OF CLAUSE 2.11 OF THE OCCUPANCY AGREEMENT

1. Plain and Ordinary meaning

> Clause 2.11 of the Occupancy Agreement should be interpreted firstly, by reading the clause in the grammatical and ordinary sense and secondly, within the context of the parties intention when they entered into the agreement.
>
> Ruth Sullivan in ***Sullivan and Driedger ('Sullivan')*** stated on page 20:

> if the ordinary meaning is plain it will prevail, in the absence of a valid reason to reject it.

The same principle was applied in the case of ***Chieu v Canada (Minister of Citizenship & Immigration),*** [2002] 1 S.C.R. 84 (S.C.C.) *at paragraphs 33-34*;

And in ***R v Wonderland Gifts Ltd*** (1996), 140 Nfld. & ***P.E.I.R.*** 219 (Nfld.) C.A. *at paragraph 28*;

Clause 2.11 of the agreement states that

> *Crown (Defendant) will retain the right to vote for the Housing Unit as subscribed by the Condominium Act.*

The Plaintiffs have argued that the Act gives an owner the right to vote only if the Mortgagee chooses not to, and that is what the Defendant had 'retained.'

The right of the Mortgagee under section 26(2) of the Act is subject to interpretation as the legislature has used permissive language by using the word 'may' instead of the word 'shall,' which point is argued by the Defendant under 'Interpretation of section 26(2).' The Defendant's right to vote is not subject to the Mortgagee first declining its right to vote. The Defendant argues that Section 26(1) of the Act gives the owner of a unit the right to vote. The Mortgagee may assert its right to vote under section 26(2) only if it had the right to vote in the Mortgage security. The Defendant is merely retaining the right to vote as provided in the Condominium Act in clause 2.11.

2. Intention of the Parties

The Occupancy Agreement (agreement) entered into between the Plaintiffs and the Defendants was an agreement to occupy the unit. The Defendant had no intention of selling the units to the Plaintiffs and the Plaintiffs had no intention of purchasing the units. They were lessees of the units until such time as the agreement was terminated upon occurrence of certain events as provided in the agreement. Ownership in the units remained with

the Defendant.

Given the intention of the parties not to sell or buy the units respectively, the words contained in clause 2.11 can only mean that the parties agreed that the Defendant would retain its power to vote and continue to exercise its power to vote as owner of the units pursuant to the Condominium Property Act.

The Mortgage security itself provided further clarification of the parties' intention to allow the Defendant to retain its power to vote. The Mortgage did not contain a provision entitling the Plaintiffs as Mortgagees to exercise the power to vote. Nor did the Defendant assign its power to vote in the Mortgage security to the Plaintiff as Mortgagees.

In the case of ***Carleton Condominium Corporation No. 347 v Trendsetter Developments Limited*** 94 D.L.R. (4th) 577, 57 O.A.C. 258, reference is made to Madam Justice McKinlay stating that she was expressly following the *Keyes* decision with respect to the developer's entitlement to exercise its voting rights as reserved ***in its mortgage security. {Emphasis added}***

Madam Justice McKinlay further determined that any other interpretation would unduly constrict the contractual rights of the mortgaging parties with respect to the assignment of the owner's right to vote and further states that

> limitation . . . could only be done by the clearest possible language . . .

B. BY-LAWS OF THE CORPORATION

The By-laws of the condominium corporation apply to all owners and occupants of the units. The By-laws contain a definition of life residents and owners. The Plaintiffs occupy the units as life residents and accordingly should be regarded as lessees of the units. As such, only provisions respecting tenants and lessees contained in the By-laws of the Condominium Corporation apply to the Plaintiffs.

Section 53(2)(b) of the Condominium Property Act (Act) states that where the owners unit has been rented . . .

> *Any person in possession of that unit shall not . . . contravene the by-laws.*

Paragraphs 5.15, 5.16 and 5.17 on page 24 of the By-laws of the Corporation speaks to voting and although paragraph 5.17 states that

> *the Mortgagee of a first Mortgage is alone entitled to vote in priority to the owner . . .;* it is limited by paragraph 5.19 of the By-laws.

Paragraph 5.19 on page 24, line 2 of the By-Laws of the condominium corporation provide that:

> *'Notwithstanding the provisions of this By-law . . .' and in line 2 states that . . . '* ***and*** *where the Mortgage or this By-Law or any statute provides that the power to vote conferred on the owner may or shall be exercised by the Mortgagee . . .*'

The By-laws do not confer on the Mortgagee the right to vote, it merely recognizes the Mortgagees right to vote ***if {*****Emphasis added}** the By-laws, Mortgage or any statute provides the Mortgagee may exercise the power of vote conferred on an owner. The power to vote in the By-laws is conferred on the owner of a unit, and not upon the Mortgagee. The Mortgagee's power to vote must be obtained from the Mortgage security itself and or assigned by the owner to the Mortgagee in the Mortgage security. The Defendant did neither.

C. INTERPRETATION OF SECTION 26(2) OF THE CONDOMINIUM PROPERTY ACT

The starting point for statutory interpretation, as stated in ***Donovan v MacCain Foods Ltd*** [2004] NLCA 12, 234 is the ordinary meaning rule. One begins with reading the legislative text in its grammatical and ordinary sense. If the ordinary meaning is plain it will prevail, in the absence of a valid reason to reject it.

Since Section 26(2) has not been judicially considered to date, it is likely

not possible to infer a plain meaning on the basis of a simple reading of the legislation.

Section 10 of ***Interpretation Act***, R.S.A. 2000, c. 1-8 provides that

> *every Provincial enactment must be given a fair, large and liberal construction and interpretation that best ensures the attainment of its objects.*

The Condominium Property Act does not provide a general statement of the object of the Act and accordingly, it would be appropriate to analyse the interpretation of section 26(2) in light of the tests below.

Elmer A. Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983) at p. 87; and in the case of ***Bell ExpressVu Limited Partnership v Rex*** [2000] 2 S.C.R. 559, 2002 SCC 42 (S.C.C.), at paragraph 26 states that the contextual approach to legislation requires that . . .

> *the words of an Act . . . are read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of the legislature.*

TESTS

1. Plausibility - is it in compliance with the legislative text?
2. Efficacy - does it promote the legislative intent?
3. Acceptability - does the outcome comply with legal norms; is it reasonable and just?

1. PLAUSIBILITY

With respect to the plausibility or compliance with the legislative test, and having regard to the plain meaning rule, the legislature in section 26(2) chose to use the word ‘may’ instead of ‘shall’ when stating that the power of voting ‘may’ be exercised as follows. If this provision is read broadly with regard to the plain meaning rule, it would seem plausible to say that the use of permissive language in section 26(2) indicates that the power of

voting could be exercised in other ways, such as the contractual provision contained in the occupancy agreement attached as schedule 'A' to the Mortgage. It could also mean that the Mortgagee has to have the power to vote conferred upon it in the Mortgage contract itself.

In the case of ***Tataryn v Condominium Plan No. 7810994*** (2003) ABQB 810, where the Court considered other provisions of the Act, including section 58(1) the Court stated statutory interpretation mandates that . . .

> *. . . meaning should be given to every word as it is presumed the word adds something which would not be there if the word was left out.*

The legislation in section 26(2) has used the word 'may' and not 'shall."

2. EFFICACY

By not using more restrictive language and through the use of the word 'may' in section 26(2), the legislation is promoting its legislative intent to allow the parties to contract for a variation of rights including the right to vote. Additionally, if the legislation intended the Mortgagees to have an unfettered entitlement to the right to vote, without regard to the owners right as contained in the Act, it would have used a more restrictive word.

Section 26(2) should be interpreted as giving the Mortgagees ***priority {Emphasis added}*** in voting where the Mortgagee's entitlement to exercise its voting rights are reserved in its Mortgage security. The Mortgage security of the Plaintiffs did not contain such an entitlement. To interpret it otherwise would constrict the contractual rights of the mortgaging parties with respect to the assignment of owners right to vote.

As stated above, Madam Justice McKinlay expressly followed the *Keyes* decision with respect to the developer's entitlement to exercise its voting rights as ***reserved in its mortgage security. {Emphasis added}*** Madam Justice McKinlay further went to say that

> *limitation . . . could only be done by the clearest possible language . . .*

The language in section 26(2) is not clear in granting an unfettered right to vote to the Mortgagee.

D. INTERPRETATION OF SECTION 80(1) OF THE CONDOMINIUM PROPERTY ACT

The maxim of statutory interpretation, ***Expressio Unius Est Exclusio Alterius,*** which, in accordance with *Black's Law Dictionary*, at p. 381, means that the expression of one thing to the exclusion of another, or that when a statute assumes to specify the effects of a certain provision, other exceptions or effects are excluded.

In Sullivan & Driedger on the Construction of Statutes, 4th ED. (Toronto: Butterworths, 2002) (Sullivan & Driedger) at pages 186-187, Ruth Sullivan states that:

> An implied exclusion argument lies wherever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes ground for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied. The force of the implication depends on the strength and legitimacy of the expectation of express reference. The better the reason for anticipating express reference to a thing, the more telling the silence of the legislature.

It is important to note that section 80(1) does not use non-exhaustive language such as 'including' but rather uses the term 'any waiver . . . under sections 12 to 17 is void.' Thus, this section can be distinguished from the case of United Taxi Drivers' Fellowship of Southern Alberta v Calgary (city), (2004) CarswellAlta 355. Supreme Court of Canada, 2004, at paragraph 14. where the language of the statute has indicated that the provision is non-exhaustive and the ***Expressio*** maxim has not been used.

In the case of ***Tatayn v Condominium Plan No 7810994 (2003) ABQB 810,*** where the Court considered other provisions of said act, including section 58(1) the Court stated that statutory interpretation mandates that

meaning should be given to every word as it is presumed the word adds something which would not be there if the word was left out

Although not expressly cited as an application of the ***Expressio*** maxim, it is possible to infer that the inclusion of a restriction of waiver or release of rights with regard to sections 12 to 17 only implies that a waiver or release of rights with respect to other sections of the Act is permissible.

CONCLUSION

In examining the various principles of statutory interpretation, the By-laws of the Condominium Corporation, the Mortgage and Occupancy Agreement, interpretation of sections 80(1) and 26(2) of the Condominium Property Act as proposed herein, does not appear unreasonable or unjust.

The Plaintiffs and the Defendant agreed to the terms of the Mortgage and the Occupancy Agreement. The Plaintiffs had full knowledge that the Mortgage security did not assign the owner's right to vote to the Mortgagee and that the Mortgagee was not entitled to vote. Further, the right to vote was specifically retained by the owner pursuant to clause 2.11 of the Occupancy Agreement.

Clause 2.11 of Schedule A to the Mortgage does not violate the provisions of the Condominium Property Act and is enforceable against the Mortgagees under the Mortgage.

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[8] The written supplemental brief of the Defendant is as follows:

INTERPRETATIONS OF SECTION 80(1) OF THE CONDOMINIUM PROPERTY ACT

Should the Court find that Section 26(2) of the Condominium Property Act (Act) is interpreted as granting the Mortgagee the statutory right to vote where the owner's unit is subject to a registered Mortgage; the Defendant argues herein that the Act does not prohibit the parties from contracting out of such statutory right to vote.

RECOGNITION BY THE ACT:

The provisions of the Act recognize that the affairs of the condominium corporation may be governed by other than the Act itself, that is, the By-Laws of the condominium corporation. Section 2(1) and section 5(3) of the Act refer to other legislation that apply, such as the Builders Lien Act, the Municipal Government Act and The Land Titles Act but specifically exclude sections of those other legislation, which do not apply. The only restriction is contained in Section 32(7) of the Act where it states that when the provisions of the By-laws are in conflict with the provisions of the Act, the Act will prevail. Accordingly, it is plausible to imply that the Act recognizes that parties may contract out of the Act to govern their relationship. It follows, therefore, that if the parties have entered into a contract or agreement, then the common law respecting contracts will also apply.

The Defendant submits that the sole prohibition from contracting out of certain provisions of the Act is contained in Section 80(1) of the Act. The Defendant resubmits its arguments in its written brief previously submitted with respect to interpretation of statutes. Section 80(1) of the Act uses exhaustive language and must be read by applying the 'plain and ordinary meaning' rule in its entirety and also by considering the spirit and intention of section 80(1) in relation to the whole Act.

The entire section 80(1) of the Act refers to protection and remedies offered to the ***purchaser of a unit {Emphasis added}.*** It specifically prohibits contracting out of particular sections of the Act being sections 12 to 17 as it relates to a purchaser of a unit. Thus, by implication, the Act does not restrict or prohibit contractual arrangements between a Mortgagor and a Mortgagee. If it were the intention of the legislation to restrict and or prohibit the parties from entering into any agreements other than those referred to in the Act, such as a purchase agreement, it would have used explicit and non-exhaustive language in section 80(1). The legislation would have placed a period after the words 'This Act applies notwithstanding any agreement to the contrary.' Instead, the legislation uses the word 'and' after the word 'contrary' to clarify its intention of restricting any agreement, which is contrary to the benefits and remedies granted to a purchaser of a unit under sections 12 to 17 of the Act.

Accordingly and by implication, the Act contemplates the ability to enter into other agreements and contractual arrangements, which are outside of the Act.

THE MORTGAGE CONTRACT

The Defendant submits that the occupancy agreement attached to and forming part of the Mortgage is a contractual arrangement governing the relationship between the Plaintiff and the Defendant. Thus, the principles of common law relating to contracts apply, including the determination of the parties' intention in entering into a Mortgage and occupancy agreement.

The Mortgage granted by the Defendant to the Plaintiff is not a usual and ordinary mortgage such as one granted by a borrower to a lender for the purchase of property. Under such a Mortgage, the Mortgagor not only has the benefit of ownership fo the unit but also enjoys occupancy of the unit. In this case, The Defendant did not borrow money from the Plaintiff to purchase the unit, it already owned it at the time it entered into the occupancy agreement with the Plaintiff. The Plaintiff, as Mortgagee and not the Defendant, enjoyed occupancy of the unit. The Plaintiff, as a lessee of the Defendant's unit chose to pre-pay its rent to the Defendant, which rent the Defendant agreed to refund upon certain terms and conditions contained in the occupancy agreement.

The Mortgage was a form of security, a contract entered into between the Defendant and the Plaintiff to secure its covenant to repay a portion of the rent prepaid by the Plaintiff to the Defendant upon termination of the occupancy agreement. Under the terms of the contract, the parties agreed that the Defendant would retain voting rights pursuant to the Act. This must only be interpreted as the Defendant, as owner, retaining voting rights granted to the Plaintiff as Mortgagee under the Act. Any other interpretation would not reflect the parties' intentions. If it were the intention of the parties that the Defendant would retain voting rights only after the Mortgagee has chosen not to exercise them pursuant to section 26, as the Plaintiff has argued, then clause 2.11 would be redundant as the Defendant would then have the ability to vote regardless of whether the parties agreed that the Defendant retain the voting rights or not. Clause 2.11 can only mean what the parties intended; that the Defendant retained voting rights which the Mortgagee may have pursuant to the Act.

The Plaintiffs have argued that the legislation and particularly, sections 26 and 80(1) of the Act is for the benefit and protection of the Mortgagee and thus the parties cannot contract out of those benefits. This argument must be debated within the context of the occupancy agreement and in light of what protection the legislation is granting to

the Mortgagee.

The Defendant submits that the Plaintiffs, like any other Mortgagee, are seeking protection of its monetary investment. In the case at bar, the Plaintiff is a lessee, in occupation of the unit owned by the Defendant. A certain portion of monies paid by the Plaintiff is to be returned only if the occupancy agreement is terminated. Until such time, the Mortgagee's 'investment' being the prepaid rent, is being applied as rent owed to the Defendant. The Mortgagee is utilizing and depleting its investment. It might be that if the occupancy agreement was terminated at a point in time where the 'investment' was entirely depleted, the Plaintiff, as Mortgagee would not require any protection from the legislation at all of its 'investment.'

If the Defendant fails to repay the monies to the Plaintiff under the circumstances contemplated under the occupancy agreement, the Plaintiff as Mortgagee would have all the remedies available to it such as a remedy of foreclosure as provided in the Mortgage. The Defendant did not attempt to remove any such rights available to the Plaintiff either in the Mortgage or the occupancy agreement. The Defendant submits that the monetary interest of the Plaintiff, as Mortgagee of the unit, such as it is depleted over time, is still protected under the terms of the Mortgage.

The Defendant submits that the contractual arrangement, being the occupancy agreement between the Plaintiff and the Defendant overrides section 26 of the Act. The parties agreed in clause 2.11 of the occupancy agreement that the Defendant, as owner of the unit would continue to protect and preserve its unit by exercising the voting rights.

CONTRA PROFERENTUM

The Plaintiff has argued that clause 2.11 of the occupancy agreement is ambiguous and accordingly must be interpreted against the Defendant, the maker of the occupancy agreement.

The Defendant submits that clause 2.11 is clear and not ambiguous and the principle of Contra Proferentum cannot apply to the case at bar.

In the case of ***Kuhberg v Slave Lake Native Friendship Centre Society, 2003 ABQB 32,*** The Honourable Mr. Justice E.F. Macklin at para 30 refers to the application of the principle of Contra Proferentum contained in ***The Law of Contracts in Canada, (3 ed) (Toronto:***

Carswell 1994) at page 471 as applying

. . . 'where the signatories do not really have the opportunity to negotiate the terms, but is obliged to sign . . .'

and further in the same case at ***para 31*** refers to the decision of ***Davies v Zurich Life Insurance Co (1981), 39 N.R.,*** where the court held

. . . 'there is every reason to apply a contra Proferentum construction to a contract of adhesion . . .'

The Defendant submits that the case at bar is not a contract of adhesion. The Plaintiff had the opportunity to change the terms of the contract. The occupancy agreement is different from an insurance contract, which is drawn up on a pre-printed form, or a contract for rental of a car, which is also drawn up on a pre-printed form. In those circumstances, the signatory to the contract does not have an opportunity to change the terms of the contract. The rule of contra Proferentum would apply in those instances.

In the case of ***Henning v Clarica Life Insurance Company, 2001 ABQB 893 at para 40, The Honourable Madam Justice M.B. Bielby,*** held that

. . . 'where there is an ambiguity in an insurance contract and the ***joint intention*** **{Emphasis added}** of the parties cannot be determined, the contra Proferentum rule will apply . . .'

Thus, there has to be a level of doubt, sufficient to justify that the clause is ambiguous and the parties' joint intention cannot be determined by reading the contract.

In the case of ***Canadian Crude Separators Ltd v Jacobson, 1998, ABQB 590, para 102,*** the court referred to Justice L.J. Lindley as stating:

. . . 'this principle ought only to be applied for the purpose of ***removing a doubt, {Emphasis added}*** not for the purpose of creating a doubt, or magnifying an ambiguity . . .'

In the case at bar, the parties intention in the occupancy agreement is clear as to what the agreement was purporting to do; to give the voting rights granted pursuant to the Act to the Defendant. There cannot be

any doubt that the parties had agreed that the Plaintiff would not exercise voting rights it has or might have under the Act. There cannot be a doubt that the parties intended that the Defendant exercise the Plaintiff's voting right as Mortgagee only if the Mortgagee, under section 26 of the Act chose not to do so. Clause 2.11 reflects the parties clear intention that the Defendant retains voting rights, inclusive of the Mortgagees right to vote. The occupancy agreement has to be read as a whole to determine the joint intention of the parties. By interpreting clause 2.11 as ambiguous as the Plaintiffs have argued, is creating and or magnifying a doubt. The defendants submit that doubt does not exist.

Consideration must be given as to why the owner intended to retain the right to vote. The Defendant submits that the occupancy agreement is clear in that it wanted to retain control and vote its unit factors as allowed under the Act in order to protect its interest in the unit as owner. The unit was to eventually revert to the Defendant and accordingly, it has a vested interest in controlling the unit and voting its unit factors as owner to protect its interest. The Act permits the owner to vote for the very same reason. The Plaintiff is a lessee with a right to terminate its arrangement with the Defendant at any time and thereby obliging the Defendant to repay monies to the Plaintiff and take possession of the unit. The only way in which the Defendant as owner of the unit would be able to protect its interest is by exercising its right to vote. If it did not retain the right to vote by agreement, it would have to terminate the occupancy agreement in order to regain control of its interest in the unit as owner. Clearly, the Defendant intended to retain the right to exercise all and any voting rights to protect its own interest in the unit without having to terminate the occupancy agreement to regain control of the leased unit.

The Plaintiff agreed to this provision when it entered into the occupancy agreement with the Defendant. The Defendant submits that the Plaintiff had knowledge that the Defendant wanted to retain control and ownership of the unit. That is why the Defendant did not sell the unit to the purchaser. Given the intention of the parties in the occupancy agreement, reference to 'voting rights' in clause 2.11 could only mean any voting rights that the Act granted, whether it is to an owner of the unit or to a Mortgagee under section 26(2) of the Act. It cannot mean anything else. The occupancy agreement has to be read in its entirety to determine the parties' intention with respect to clause 2.11.

CONCLUSION

In examining the rule of Contra Proferentum, principles of statutory interpretation, the By-laws of the Condominium Corporation, the Mortgage and Occupancy Agreement, interpretation of sections 80(1) and 26(2) of the Condominium Property Act as proposed herein and in the written brief previously submitted, it does not appear unreasonable or unjust to determine that the parties intended that the Defendant retain voting rights.

Clause 2.11 of Schedule A to the Mortgage does not violate the provisions of the Condominium Property Act and is enforceable against the Mortgagees.

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[9] The written supplemental response of the Plaintiffs is as follows:

1. The Occupancy Agreement is reproduced as part of Tab 2 of the Agreed Statement of Facts. It is obviously a pre-printed form with a few blanks to fill in, and has been agreed to have been prepared by the Defendant. It meets the requirements of Mr. Justice Macklin in the authority cited by Ms. Premji, for the Contra Proferentum rule to apply.

2. As to whether there is an ambiguity, Clause 2.11 does not purport to limit or take away any of the Plaintiffs' rights, only to 'retain' whatever right to vote is given to Crown as 'subscribed.' The possible conclusions are:

(a) There is no ambiguity:

- The Clause may emphasize Crown (not the resident) is the owner, and
- Crown retains what the Act gives it which is the right of the Owner to vote if the Plaintiffs as Mortgagees choose not to;

(b) There is an ambiguity:

- The intended meaning may be as above, or it may be that the Clause attempts to take away all rights the Plaintiffs have as Mortgagees or otherwise. It is a mistake to argue that the

Defendants must have wanted this latter meaning, so there is no ambiguity.

3. To repeat arguments already made:

(a) If there is an ambiguity, it should be resolved against the Defendant who authored the Agreement;

(b) The Clause does not clearly and unequivocally take away the Plaintiffs' statutory voting option, and a Clause should not be interpreted to do so unless it is clear and unequivocal;

(c) Even if Clause 2.11 is interpreted to take away the Plaintiffs' statutory voting rights, Clause 5.5 of the Occupancy Agreement, and/or Section 80(1) of the Act, give priority to the Plaintiffs' statutory voting rights and the Plaintiffs also have the right to vote as Mortgagees under By-law 5.19.

In response to the further submissions dealing with the interpretation of the mortgage contract:

1. The Plaintiffs are totally or substantially financing the Units. They have paid $129,000.00 per Unit. Their investment is not simply prepaid rent which might all be used up.

2. The least the Plaintiffs will receive back is $116,100.00 (90% of $129,000.00). Under the Occupancy Agreement, the Plaintiffs' investment cannot be depleted as rent. The only time the Plaintiffs' investment ends, is when their Occupancy Agreements are terminated and their Mortgages are paid out. At that point they will of course have no investment to protect and no voting rights under Section 26 of the Act or otherwise.

3. To repeat an argument already made, the Plaintiffs have substantial investments in the property secured by

Mortgages, and the purpose of giving statutory voting rights to Mortgagees is to give them the ability to protect their investment.

In response to the further submissions dealing with interpretation of Section 80(1) of the Act:

1. A reading of the whole Act leads to the conclusion that the statutory provisions are to have priority over:

   (a) By-laws (see s. 32(7) of the Act;

   (b) Any contrary provision in a contract (see the first portion of s. 80(1) of the Act, and give meaning to every phrase in the Section;

   (c) Any waiver or release of Sections 12-17 of the Act (see the second portion of s. 80(1) of the Act.

   The legislative intent appears clear that the provisions of the Act are to apply even if a contract (or By-law, or waiver) says otherwise. There is no reason to interpret the first portion of s. 80(1) as meaning something other than what it clearly says.

2. Section 80(1) is not limited to waivers or releases of ss. 12-17, and should not be interpreted as being so limited. Section 80 is found in the general section at the end of the Act, which apply to the whole Act. There are some provisions in ss. 12-17 which would not be found in any contract between a developer and purchaser, for example, copies of management agreement between the condominium corporation and a manager and the by-laws of the condominium corporation. If Section 80(1) was meant to apply only to Sections 12-17:

(a) It would be found at or around Section 18;

(b) It would not contain the first portion, or the first portion would be limited to Sections 12-17 as the last portion is.

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[10] This application is determined by the interpretation to be given to Section 80(1).

[11] This section applies to two types of instruments:

1. Any "agreement" contrary to the Act

2. Any "waiver or release" under Sections 12 to 17 of the Act

[12] Any "agreement" that is contrary or inconsistent with any portion of the Act is invalid and the provisions of the Act prevail. No party therefore may contract out of the specific provisions of the Act, in particular, Section 26(2).

[13] The "waiver or release" reference to Sections 12 to 17 does not define or limit the interpretation or scope of "agreement" in the whole of the Act. Section 80(1) is not limited in its application to Sections 12 to 17.

[14] An owner's power of voting passes firstly to a mortgagee upon notification; secondly, to the owner; and thirdly, to other subsequent mortgagees upon notification. This power is statutory and is promulgated in Section 26(2). Any agreement between owner and mortgagee which is contrary to these provisions is invalid and unenforceable.

[15] Clause 2.11 of the Occupancy Agreement purports to contract out of the provision of Section 26(2) and "retain" the right to vote for the Defendant.

[16] This clause is invalid and unenforceable on two grounds:

1. It is contrary to Section 26(2) and by virtue of Section 80(1), the Act prevails.

2. If I am incorrect in 1. above, and it is possible to contract out of the provisions of Section 26(2), such an agreement must specifically recognize the rights granted in Section 26(2), be clear, unequivocal and unambiguous. Clause 2.11 purports to "retain" a vote that is "subscribed" by non-existent legislation. This clause surely fails this test.

[17] I agree with the Plaintiffs' submission in these matters.

[18] The Plaintiffs have the right to vote.

[19] The answer therefore to question 1. is NO.

Heard on the 20th day of March, 2006.
Dated at the City of Red Deer, Alberta this 21st day of April, 2006.

J.L. Foster
J.C.Q.B.A.

Appearances:

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