

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Barbara M. Hamilton
Mr. Justice Martin H. Freedman
Mr. Justice Alan D. MacInnes

BETWEEN:

08 259 136

RICHARD E. OLSCHESKI)	M. U. Kramer
)	<i>for the Appellant</i>
<i>(Plaintiff) Appellant</i>)	
- and -)	G. M. Wood and
)	G. M. Sarcida
520 PORTAGE AVENUE LTD. and)	<i>for the Respondents</i>
HART MALLIN)	
)	<i>Appeal heard and</i>
<i>(Defendants) Respondents</i>)	<i>Decision pronounced:</i>
)	September 10, 2008

HAMILTON J.A. (for the Court):

1 The plaintiff appeals, and the defendants cross-appeal, the judgment, after trial, declaring the square footage of the plaintiff's condominium unit to be 1,500 square feet and ordering that the purchase price for the unit be adjusted downward to reflect that square footage.

2 The listing agreement stated that the living area of the condominium unit was 1,823 square feet. Prior to the closing, the plaintiff disputed this square footage and commenced an action. In an effort to resolve the dispute, the parties consented to the order of Spivak J. dated June 30, 2006, pursuant to which they agreed as to how the abatement of the purchase price, if any, would be calculated. More importantly for these appeals, the order stated that "the method as to calculating the actual square footage of the Condo Unit is [sic] shall be determined by the parties herein by no later than July 14th, 2006 failing

which the method will be determined by [the Court of Queen's Bench on] application by either party.”

3 The parties could not agree and the plaintiff applied for a determination of the actual square footage in accordance with the order.

4 The trial judge described the two issues before her arising from the consent order: 1) how the boundaries of the unit should be determined; and 2) whether the balcony and open space on the second level should be included.

5 In our view, the issue before the judge was not one of whether the plaintiff had satisfied a legal onus, as argued by the defendants on appeal. Rather, the onus was simply an evidentiary onus faced by both parties. This is because the parties agreed that the trial judge would determine the methodology and the square footage pursuant to the order of Spivak J.

6 The plaintiff argues that the judge erred by not accepting the evidence of the only land surveyor who testified as an expert. He calculated that the square footage was 1,390 square feet on the basis of a certain methodology and did not include the balcony or open air space. The defendants argue that the judge erred when she did not accept the evidence of other experts who use a different methodology, which would include the square footage of the balcony and the open air space area.

7 In our view, the judge made no such errors. She carefully reviewed the evidence and she preferred the evidence of certain expert witnesses over others, all of which she explained and which she was entitled to do.

8 Neither party in their respective appeals has identified any error of law or

any palpable and overriding error of fact or mixed fact and law. See *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

9 The trial was required to resolve a fact-specific dispute between the parties pursuant to the consent order of Spivak J. In the circumstances, neither the judgment of the trial judge, which we sustain, nor this decision should be construed as endorsing any particular method or standard for the calculation of square footage in the condominium industry. The evidence demonstrates that there is confusion and debate in the industry with respect to the calculation of square footage of condominium units as there is more than one method of calculation used in the industry. The trial judge noted this and wrote that (at para. 41):

.... [T]he confusion could be greatly reduced if [*The Condominium Act*, C.C.S.M., c. C170] specified how unit boundaries in a condominium are to be determined, and the Guidelines [of the Winnipeg Real Estate Board] were clearer about determining the Actual Living Area of a condominium. These are problems that have to be solved elsewhere, and they should be.

We agree.

10 Both the appeal by the plaintiff and the cross-appeal by the defendants are dismissed. There is no order as to costs.

_____ J.A.

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