Case Name:

Lightner v. Condominium Plan No. 772 3097

Between
David Lightner, Plaintiff, and
The Owners: Condominium Plan No. 772 3097, Defendant

[2009] A.J. No. 9

2009 ABQB 3

Docket: 0503 08029

Registry: Edmonton

Alberta Court of Queen's Bench
Judicial District of Edmonton

K.D. Yamauchi J.

Heard: December 9-10, 2008.
Judgment: January 5, 2009.
Released: January 6, 2009.

(43 paras.)

Counsel:

David W. Wolanski: for the Plaintiff.

Roberto Noce, Q.C.: for the Defendant.

Reasons for Judgment

K.D. YAMAUCHI J.:--

Introduction

1 This case involves the entitlement of an owner of a condominium unit to assign a parking stall to a subsequent purchaser. When addressing this issue, this Court must examine certain provisions of *The Condominium Property Act*, R.S.A. 1970, c. C-62, the legislation that governs in these proceedings (the "*Act*"), and the effect of certain estoppel certificates that the Defendant issued to the Plaintiff.

Facts

2 On January 30, 1978, the Defendant entered into an agreement (the "1978 Agreement") with Batoni-Bowlen Enterprises Ltd. (the "Builder"), the builder of a condominium complex known as Westwind Estates in Edmonton, Alberta (the "Condominium"). Pursuant to the 1978 Agreement, the Builder leased from the Defendant for a term of 101 years certain portions of the common property which the Defendant designated for use as parking stalls (the "Stalls"). As consideration for the Lease, the Builder transferred title to a unit of the Condominium to the Defendant for its use as a caretaker's unit. It was a term of the 1978 Agreement that the Builder could further assign the Stalls' leases to subsequent purchasers of the Condominium units.

3 The Defendant rents the caretaker's unit to the Condominium's caretaker at a reduced rental rate. The owners of units in the Condominium get the benefit of having a caretaker on-site.

4 No one raised any issue concerning the 1978 Agreement until 1993, when the Defendant's board of directors (the "Board") discussed the issue of the Stalls at its meeting. One of the Board's members wanted these Stalls for storage. The minutes of that meeting stated that the Stalls are part of the Condominium's common property. The Board recommended that a formal notice be given to alleged owners of the Stalls advising of the Defendant's intent to claim those Stalls unless the alleged owners could produce a valid agreement showing their entitlement to the Stalls.

5 Roger Lufkin, a former Board member, testified that the Defendant complied with the 1978 Agreement for over 14 years before another resident, Bob Christie, raised an issue concerning it at which time the Board commissioned an opinion from Defendant's counsel, Duncan & Craig (the "D&C Opinion"). On March 22, 1994, the Board received the D&C Opinion which stated the following:

> In 1978 by the Condominium Property Amendment Act, S.A., c. C-9, Section 21, the Condominium Property Act, R.S.A., 1970, c. C-62 as amended was further amended to add to the Condominium Property Act the following provision:
>
> > 25.1 Notwithstanding Section 25, a corporation may, if its by-laws permit it to do so, grant a lease to an owner of a residential unit permitting that owner to exercise exclusive possession in respect of an area or areas of the common property [emphasis added].
>
> By-law 6(d) of your By-laws reads as follows:
>
> > The Corporation may . . .
> >
> > > grant a lease to an owner under section 25.1 of the Act.
>
> However, there is a limitation imposed on this ability by Sub-Section 6(2) of the Condominium Property Act, which reads as follows:
>
> > 6(2) If a plan presented for registration as a condominium plan includes residential units, that plan shall . . . delineate to the satisfaction of the Registrar the boundaries of the areas that are or may be leased under section 41 to an owner of a residential unit.
>
> We would briefly explain that the present revision of the Condominium Property Act in 1980 changed the Section numbers from 25 and 25.1 to Section 41.

> You will note that there are two important stipulations that must be complied with in order to have an exclusive lease of an otherwise common area property:
>
> > it can only be made to an owner; and
> > the common property to be exclusively leased must be sufficiently delineated on the Condominium Plan as filed with the Registrar of Land Titles to make it easily ascertainable as being an area of exclusive lease from other common property in the complex.

6 Because the condominium plan that the Builder filed with the Registrar of Land Titles did not delineate the Stalls, the D&C Opinion suggested that the leases that flowed from the 1978 Agreement were invalid. The D&C Opinion further suggested that the Defendant could apply to the court for termination of the leases, but such an application would invite lawsuits as most of the present owners obtained the assignment of the leases for valid consideration. Thus, the D&C Opinion recommended that the Defendant advise the present lessees of the Corporation's position and that the Defendant would not consent to a further assignment of the leases. Neither the Plaintiff nor his lawyer had seen the D&C Opinion until sometime in 2004.

7 Peter and Carol Rodd (the "Rodds"), were subsequent assignees of one of the Stalls, being parking stall A referred to in the 1978 Agreement (the "Impugned Stall"), through a number of assignments since 1978. The Rodds listed their unit for sale in the spring of 1994. The unit is legally described as:

> Condominium Plan 772 3097
> Unit 11
> and 137 undivided one ten thousandth shares in the common property
> excepting thereout all mines and minerals
>
> (the "Unit")

8 The Plaintiff was seeking to purchase a condominium unit in the early part of 1995. While looking for a place to buy, he read a "Listing Highlight Sheet" of the Unit. This sheet had in bold letters "TWO extra parking stalls." The Plaintiff viewed the Unit and the Condominium with his realtor and was satisfied with the Unit. The Plaintiff and the Rodds entered into a purchase agreement on January 23, 1995 (the "Purchase Agreement"). The Purchase Agreement specified that the Plaintiff purchased an underground parking stall and the Impugned Stall. The Plaintiff did not separate the purchase price among the various segments he was purchasing, *viz.*, the Unit, the underground parking stall and the Impugned Stall.

9 The Plaintiff discussed the sale with his realtor and his lawyer. The Plaintiff had no contact with the Rodds, a representative of the Defendant or the Condominium's property manager (the "Property Manager"). The Plaintiff was never notified about the Board's position concerning the Impugned Stall until after he signed the Purchase Agreement and January 31, 1995, the date for his waiver of conditions, had passed. However, he was aware that there might be an issue concerning the Impugned Stall before he waived the conditions. His lawyer had received the 1978 Agreement, but received nothing else. The Plaintiff knew there was a risk concerning the Impugned Stall, but decided to proceed with his purchase despite the risk.

10 Ms. Rodd wrote a letter to the Board dated December 4, 1994. The Rodds were aware of the issues concerning the Impugned Stall and wanted clarification of the Board's position. She wanted their situation "grandfathered" to "allow us to transfer the lease to the new buyer." In particular, she was concerned that not to allow the Rodds to transfer the Impugned Stall to their buyer would "cause us untoward aggravation and possibly jeopardize a potential sale." In her letter, she advised that the Rodds "would ensure the next owners are aware of the finite time of their parking agreement at the onset to avoid unpleasant surprises later on."

11 The Board responded to this letter. The Plaintiff's lawyer, Merlin Mittelstadt, received a letter dated January 30, 1995, from the Property Manager saying that the Board provided the Rodds "a relaxation of the prohibition on further assignment to the purchaser of the Rodds unit." The Plaintiff interpreted this statement to mean that he could assign the Impugned Stall to any subsequent purchaser from him.

12 On February 16, 1995, the Plaintiff and the Rodds executed an assignment of lease in which the Rodds assigned their interest in the Impugned Stall to the Plaintiff. Neither the Defendant, the Board nor the Builder acknowledged or signed this document. The transfer of land with respect to the Unit was registered on March 10, 1995, and the Plaintiff took possession around the same time.

13 Sometime after the Plaintiff closed his transaction with the Rodds, he received an Estoppel Certificate ("1995 Estoppel Certificate") from the Defendant stating that "the right to exclusive use will terminate at the time of subsequent sale of [the Unit] by [the Plaintiff]." In other words, the Defendant would no longer consent or allow the Plaintiff to further assign the Impugned Stall and the Impugned Stall would revert back to the Defendant when the Plaintiff sold his unit. The Plaintiff interpreted this to mean that the Board would no longer challenge his absolute right to the Impugned Stall. Despite this, during the summer of 1995, the Plaintiff advised the Property Manager that he saw no basis for the Defendant's position. Subsequently, neither the Board nor Property Manager provided the Plaintiff any clear explanation for the Defendant's position.

14 In 1997, when the Plaintiff was seeking to refinance the Unit, the Defendant issued the Plaintiff another Estoppel Certificate ("1997 Estoppel Certificate"), that contained no prohibition restricting him from assigning the Impugned Stall to a subsequent purchaser. As a result, the Plaintiff considered the matter over. However, the Plaintiff received a letter dated September 24, 2003, from the Property Manager which again, raised the issue of the Impugned Stall. The Plaintiff invited the Board to commence legal proceedings to resolve this matter. As the Board did not commence any such proceedings, the Plaintiff filed a statement of claim on May 9, 2005, which commenced the action with which this Court is dealing.

15 The Plaintiff's position is that he originally paid an increased value for the Unit because of the inclusion of the Impugned Stall in his purchase price and there is an unfairness now to deny him the right to assign the Impugned Stall to his purchaser. In its letter to the Plaintiff dated July 7, 2004, the Property Manager acknowledged the vagueness of the relaxation contained in the January 30, 1995 letter to Ms. Rodd, when it said that "the ambiguity on the letter ... is again unfortunate." This letter makes no reference to the 1997 Estoppel Certificate.

16 Board members differed on their views of how the owners of the Stalls should be treated. Some of the owners voluntarily returned their Stalls to the Defendant. For the ones who did not, some Board members felt the owners should be entitled to retain their Stalls, as they had leased them for some time without the Board disturbing their "ownership." To disturb this would not be fair and the Defendant would gain very little from this, other than court costs. Other Board members felt that the Board's position has not changed since it received the D&C Opinion. Eventually, the Defendant wants all the Stalls, including the Impugned Stall, back in the Defendant's name.

17 Because of the D&C Opinion, the Board chose to negotiate a return of the Stalls from those who leased them. This seemed more cost-effective, as to do otherwise might result in litigation. In other words, certain Board members felt that the leases were void, but felt it would be more cost-effective, and less contentious, for the Board to negotiate with the lessees to have the Stalls returned rather than to have the courts enforce the Defendant's right to have the Stalls returned to the Defendant.

Issues

18 There are numerous issues that arise from these facts. They are:

> Whether the 1978 Agreement is *ultra vires* inasmuch as the Builder prepared it in contravention of the *Act*.
> If the 1978 Agreement is *ultra vires*, whether this Court may nevertheless determine that it is enforceable.
> Whether the 1997 Estoppel Certificate estops the Defendant from raising the facts as set forth in the 1995 Estoppel Certificate.
> Whether the Plaintiff's action is statute-barred pursuant to the *Limitations Act*, R.S.A. 2000, c. L-12.
> Who is entitled to costs of this action?

Analysis

19 The key issue with which this Court must deal is whether the 1978 Agreement is *ultra vires*. If this Court determines that the 1978 Agreement is *ultra vires*, all the remaining issues are moot.

20 The Defendant relies heavily on ***Condominium Plan No. 992 5205 v. Carrington Developments Ltd.***, 2004 ABCA 243, 354 A.R. 371, 329 W.A.C. 371, 34 Alta. L.R. (4th) 238 ("***Carrington***"). The facts of ***Carrington*** are similar to the facts with which this Court is dealing. In that case, the developer of a condominium project, while it controlled the condominium corporation, obtained from the condominium corporation the exclusive right to use a portion of common property, *viz.*, parking stalls, for a period of 101 years. The developer then attempted to sell portions of the exclusive use area to new owners so the owners could park their vehicles. The court struck down the

exclusive use agreement. It concluded at para. 12, that the lengthy term of the exclusive use agreement made it tantamount to a lease and the developer had not complied with the statutory requirements to lease common property as set forth in the *Condominium Property Act*, R.S.A. 1980, c. C-22 ("1980 Act"). Thus, the court held that the leases of the common property were *ultra vires*.

21 Similarly, the Defendant argues that the 1978 Agreement is *ultra vires*. The Builder chose not to designate the Stalls, including the Impugned Stall, as common property areas reserved for exclusive use. As well, the Stalls were not sufficiently delineated on the condominium plan the Builder filed with the Registrar of Land Titles. In ***Carrington*** at para. 9, the court said:

> A condominium corporation owes its existence to the Act and can only exercise the powers granted therein. Unlike a business corporation which enjoys the natural person powers provided by Alberta's Business Corporations Act, R.S.A. 2000, c. B-9, s. 16(1), a condominium corporation operates only within the powers granted by the Act: Francis v. Condominium Plan No. 8222909, [2003] 11 W.W.R. 469, 2003 ABCA 234 (Alta. C.A.).

Thus, Builder, as the condominium corporation at the time in question, must comply with the 1980 Act to exercise its powers.

22 As in ***Carrington***, the Builder did not register the Stalls, including the Impugned Stall, with separate titles. The court in ***Carrington*** at para. 11, held that because of this, the developer could not "transfer" the parking stalls to the new owners. The court concluded that the exclusive use agreement in that case was a lease and the lease "is ineffective as the developer did not comply with" the 1980 Act.

23 In ***Carrington***, the developer argued that the exclusive use agreement was authorized by section 41 of the 1980 Act, which provided:

> Notwithstanding section 40, a corporation may, if its by-laws permit it to do so, grant a lease to an owner of a residential unit permitting that owner to exercise exclusive possession in respect of an area or areas of the common property.

With the exception of its reference to a different section number, section 41 of the 1980 Act is the same as section 25.1 of the *Act* and section 40 of the 1980 Act is substantially similar to section 25 of the *Act*.

24 In the case with which we are dealing, by-law 6(d) of the Condominium's by-laws provides:

> The Corporation may
>
> . . .
>
> grant a lease to an owner under section 25.1 of the Act.

The court in ***Carrington***, however, held that section 41 is subject to section 6(2) of the 1980 Act, which provided:

> If a plan presented for registration as a condominium plan includes residential units, that plan shall, in addition to meeting the requirements of subsection (1), delineate to the satisfaction of the Registrar the boundaries of the areas that are or may be leased under section 41 to an owner of a residential unit.

After so finding, the court said:

> We find that s. 6(2) is determinative. Section 41 cannot permit the Exclusive Use Agreement as the condominium plan did not contain delineated boundaries: a prerequisite of s. 6(2). In a residential condominium, the boundaries must be delineated before the common property is leased. Carrington chose not to delineate the boundaries; as a result, it cannot lease the common property.
>
> ...
>
> We find that ss. 40 and 41 do not authorize the Exclusive Use Agreement. A condominium corporation cannot exceed the authorization granted in the Act. Therefore, the Exclusive Use Agreement and the resulting Purchase Agreements are ultra vires.

With the exception of its reference to a different section number, section 6(2) of the 1980 Act is the same as section 7(2) of the *Act*.

25 ***Carrington*** is, indeed, on all fours with the case with which we are dealing. This Court was presented with a copy of the original condominium plan that the Builder filed with the Registrar of Land Titles. The D&C Opinion, which formed part of the agreed Exhibit Book summarizes this Court's findings with respect to this aspect of this case when it said:

> I would direct you to the Schedule "A" attached to your original Lease from the owners to Batoni-Bowlen Enterprises Ltd. and would indicate that in my view it appears to be a copy of the surface of the condominium complex and while it does contain a detailed picture delineating the actual parking stalls in question, such is not delineated on the actual plan filed at the Land Titles Office in 1977 and accordingly Section 6(2) [*sic*.] of the Condominium Property Act has not been complied with respecting to these Leases and may for that reason alone be totally invalid.

26 The Defendant was empowered by its bylaws to lease the common property. However, the condominium plan that the Builder filed with the Registrar of Land Titles did not comply with the *Act*. While the Plaintiff argues that this amounts to a mistake and not an unauthorized transfer of leasehold that was made beyond the scope of power of the Board, this is a fundamental error. As a result, ***Carrington*** tells us that the 1978 Agreement is *ultra vires*.

27 The Plaintiff argued that if this Court finds the 1978 Agreement to be *ultra vires*, this Court should nonetheless find that it is enforceable. The Plaintiff argued that if, for many years, parties accept and act on an apparently invalid agreement, a court may nonetheless find that the parties are bound by its terms, citing ***Canadian Pacific Railway v. City of Calgary***, [1971] 4 W.W.R. 241 (Alta. S.C. - App. Div.). The Plaintiff cited two other cases in support of his argument, being ***Love's Realty & Financial Services Ltd. v. Coronet Trust*** (1989), 57 D.L.R. (4th) 606, 65 Alta. L.R. (2d) 362 (Alta. C.A.) ("***Love's Realty***") and ***Still v. Minister of National Revenue*** (1997), 154 D.L.R. (4th) 229, 221 N.R. 127 (F.C.A.). In both those cases, the courts found that the agreements were expressly or impliedly prohibited by statute. Nonetheless, they allowed the agreements to be enforced.

28 In ***Love's Realty***, the court said at para. 27, quoting ***Archbolds (Freightage) Ltd. v. S. Spanglett Ltd.*** [1961] 1 Q.B. 374 at 390, "the avoidance of the contract would cause grave inconvenience and injury to innocent members of the public without furthering the object of the statute." Was the Plaintiff an "innocent member of the public"? He knew that there was an issue concerning the Impugned Stall. He even testified that he knew there was a risk, but decided to proceed with his purchase despite the risk. He presented no evidence to show that he paid a premium for the Unit based on the value of the Impugned Stall. In fact, the Unit was listed for $124,000 and he paid $108,000. There was a lack of due diligence on the part of the Plaintiff or his solicitor on his purchase of the Unit to determine the nature and scope of his risk. Had he relied on the Rodds, he might have even had a cause of action against them for misrepresentation on the listing sheet. This is not a case where a party relied on a misrepresentation on the part of the Board or the Defendant. By the time he purchased the Unit, the positions of the Board and Defendant were clear and a simple inquiry of either would have clarified this position. The original assignees of the leases pursuant to the 1978 Agreement might have had a cause of action as "innocent members of the public"; the Plaintiff does not.

29 The copy of the letter dated January 30, 1995, that the Plaintiff's lawyer received in which the Property Manager said that the Board provided the Rodds "a relaxation of the prohibition on further assignment to the purchaser of the Rodds unit" is vague. It is not so vague if one reviews the letters from the Property Manager to the Rodds, which is referenced in the January 30, 1995 letter from the Property Manager to the Plaintiff's lawyer, which makes the Board's position clear. If the Plaintiff's lawyer had not received copies of these letters, one wonders why he did not request them. The Plaintiff interpreted this vague statement to mean that he could assign the Impugned Stall to any subsequent purchaser from him. In the view of the circumstances, this was not a reasonable interpretation.

30 The Plaintiff also argued that the Defendant would be unjustly enriched if this Court were to find that the Defendant can retain the caretaker's unit which it received as consideration for the 1978 Agreement. He then defined unjust enrichment as "the retention of a benefit conferred by another, without compensation, in circumstances where compensation is reasonably expected." This Court does not disagree with this description of that concept, but does not agree with its application to this case. The Defendant may indeed be unjustly enriched by its retention of the caretaker's unit, but at whose cost? In other words, who is entitled to compensation? The Builder might have had a cause of action had a court found the 1978 Agreement to be *ultra vires* allowing the Defendant to retain the caretaker's unit while at the same time disallowing the Builder to retain or assign the parking stalls. Or even possibly an assignee of the parking stalls who shows that it paid a price to the Builder or subsequent assignee specifically for the parking stall with full

knowledge of the Defendant or its Board, who allowed the assignment without taking steps to prevent it. Here, the Plaintiff did not show the latter. In any event, this is a red herring inasmuch as the Plaintiff gains a benefit from the caretaker's unit as a resident of the Condominium.

31 The Plaintiff attempted to tender expert evidence of the value of the caretaker's unit and the Impugned Stall to show the amount to which the Defendant was unjustly enriched. This Court would not permit the Plaintiff to tender that evidence, as he had not complied with the *Alberta Rules of Court*. Because of the foregoing finding, this evidence was unnecessary in any event. However, if this Court were to compensate the Plaintiff for any such enrichment, the Plaintiff would gain a windfall inasmuch as he has suffered no loss from the Defendant being able to retain the caretaker's unit. This Court would be compensating the wrong party.

32 The Plaintiff argued that the 1997 Estoppel Certificate estops the Defendant from raising the facts as set forth in the 1995 Estoppel Certificate. The 1995 Estoppel Certificate said "the right to exclusive use will terminate at the time of subsequent sale of [the Unit] by [the Plaintiff]" whereas the 1997 Estoppel Certificate makes no mention of this.

33 The term "estoppel certificate" is not used in the *Act*. However, a person may request a condominium corporation to provide a statement setting out certain information concerning the financial and general status of the condominium corporation, including whether an owner is up to date in its contributions. The information prevents the condominium corporation from claiming a different set of facts and is "estopped" from so doing. It is not an agreement, as it has none of the trappings of an agreement, such as an offer, acceptance and the exchange of consideration. That said, a person could rely to their detriment on the contents of the statement and could suffer damages as a result.

34 The Plaintiff testified that he requested the 1997 Estoppel Certificate for the purpose of refinancing his unit and not to seek clarification of the status of the Impugned Stall. The Impugned Stall was not separately titled so his mortgagee likely did not care about the status of the Impugned Stall. The 1997 Estoppel Certificate speaks only of the common expense levies and addresses none of the other matters that a mortgagee or owner could request under the *Act*. This was not a situation in which a potential purchaser required much broader information concerning the financial and general status of the condominium corporation.

35 The Plaintiff argued that principles enunciated in ***Halifax County Condominium Corp. No. 5 Cowie Hill v. McDermaid*** (1982), 138 D.L.R. (3d) 356 (N.S.S.C., Tr. Div) ("***Halifax County***") are applicable to this case. In that case, the condominium board passed a resolution allowing the board to borrow money several months before the McDermaids purchased their condominium unit. The borrowing resolution was not in the estoppel certificate. The condominium board issued a $1,500 assessment, which the McDermaids refused to pay. The court determined that the estoppel certificate should have referred to the borrowing information and that it was unrealistic to suggest that a purchaser was obliged to make an inquiry.

36 ***Halifax County*** is distinguishable from the case with which we are dealing. This case involves an estoppel certificate for the purpose of a refinancing and not a purchase. Had the Plaintiff wanted information concerning the Impugned Stall for his refinancing or any other purpose, he could have requested the Defendant to provide that information under section 44(n) of the 1980 Act, which was the legislation in force in 1997. That section requires the condominium corporation to provide "a copy of any lease agreement or exclusive use agreement with respect to the possession of a portion of the common property, including a parking stall or storage unit." His mortgagee likely did not require that information, nor any of the other information listed in the 1980 Act.

37 The Plaintiff argued that the 1997 Estoppel Certificate represented to him that the Defendant must have changed its position from the 1995 Estoppel Certificate and that he relied on that 1997 Certificate to his detriment. This Court fails to see how he relied on the 1997 Estoppel Certificate to his detriment, other than to let the matter rest. In ***Francis v. Condominium Plan No. 8222909*** (1999), ABQB 366 at para. 16 (Master), the court said:

> The certificate is one issued pursuant to s. 36 Condominium Property Act. The Plaintiffs say that they relied on the certificates and the by-laws as they are when they bought their townhouse units. But the certificates do not and cannot freeze the facts for all time as they are at the time that the certificates are issued.

Does this mean that the facts stated in the 1995 Estoppel Certificate are not frozen for all time and they could change at the whim of the Board? With respect, any board that changes its policy so drastically in relation to an owner would surely advise the owner of such change. Here, the Board did not change its position from the time of its issuance of the 1995 Estoppel Certificate and the Plaintiff's assumption that it had, should have provoked an inquiry. Even had he suffered a detriment, he did so of his own choosing, not through any representation from the Board through the 1997 Estoppel Certificate or otherwise.

38 The Plaintiff argued that the doctrine of promissory estoppel applies such that 1997 Estoppel Certificate was intended to affect the legal relationship between the Plaintiff and the Defendant and in reliance on the representation, the Plaintiff acted on it or in some way changed his position, ***Maracle v. Travellers Indemnity Co. Of Canada*** (1991), 80 D.L.R. (4th) 652 (S.C.C.). However, in ***Canadian Superior Oil Ltd. v. Paddon-Hughes Development Co.***, [1970] S.C.R. 932 at para. 15, the court said the doctrine of promissory estoppel "applies where a party to a contract represents to the other party that the former will not enforce its strict legal rights under it..." [emphasis added]. This Court has found that the 1997 Estoppel Certificate is not a contract, so the doctrine does not apply to the case with which this Court is dealing.

39 Similarly, the principle of *contra proferentum* does not apply to the facts with which we are dealing, as that principle applies only to ambiguous provisions of contracts prepared by one party to the detriment of another.

40 The Defendant conceded that if this Court determines that the 1978 Agreement and all resulting agreements are *ultra vires*, the Defendant is prepared to allow the Plaintiff to use the Impugned Stall until the Plaintiff sells the Unit. In other words, the Defendant is prepared to abide by its direction as contained in the 1995 Estoppel Certificate, notwithstanding this Court's determination that the 1978 Agreement is *ultra vires*.

41 The parties argued whether the Plaintiff was statute-barred from bringing this proceeding. Because of its findings, this Court need not deal with this issue. To complete the record, however, it will briefly provide its thoughts concerning this.

42 Part of the prayer for relief the Plaintiff was seeking was a declaration that the 1978 Agreement and documents flowing from it, are binding on the Defendant and requiring the Registrar of Land Titles to allow the Plaintiff to register his lease against the title. This is declaratory and not remedial and is an exception to the definition of remedial order in the *Limitations Act*, R.S.A. 2000, c. L-12, s. 1(I). The Defendant argued that the declaration simply begins a chain of events that results in a remedial order, which assumes that this Court would ultimately award damages. However, the Plaintiff pleaded damages for unjust enrichment in the alternative. Had this Court made the declaration the Plaintiff was seeking, it would have awarded no damages and imposed no duty on the Defendant. Because this Court found that the Defendant was not unjustly enriched, it awarded no damages in favour of the Plaintiff.

Costs

43 The Defendant is entitled to its costs for these proceedings. It seeks solicitor and client costs. Section 18(6) of the *Act* states the bylaws bind the owners of the units in the condominium. The Defendant's bylaws are registered at the Land Titles Office, so the Plaintiff is bound by the bylaws. The Defendant did not produce the bylaws for this Court to consider. However, it submitted that section 73(11) of the Defendant's bylaws states:

> The Corporation is entitled to recover from the owner, tenant, or occupant responsible indemnification for all legal costs (as between a solicitor and client) incurred by the Corporation as a result of any breach or contravention of a By-law or Article of Policy of the Corporation.

The Defendant produced no information to indicate that by commencing these proceedings, the Plaintiff breached or contravened the bylaws or article of policy of the Defendant. Thus, the Defendant is entitled to taxable party-party costs and no more.

K.D. YAMAUCHI J.

cp/e/qlrds/qlmxb

Case Name:

1240233 Ontario Inc. v. York Region Condominium Corp. No. 852

RE: 1240233 Ontario Inc., and
York Region Condominium Corporation #852

[2009] O.J. No. 1

Newmarket Court File No. CV-07-084642-00

Ontario Superior Court of Justice

G.M. Mulligan J.

January 2, 2009.

(48 paras.)

Counsel:

G. Marley, for the applicant.

E. Lam, for the respondent.

ENDORSEMENT

1 **G.M. MULLIGAN J.**:-- This is an application by a commercial condominium unit owner (the applicant) for a declaration that the Condominium Corporation has acted in an oppressive or unfairly prejudicial manner pursuant to section 135 of the *Condominium Act,* 1998. In the event that an order is granted the applicant also seeks further relief flowing from such order.

HISTORY

2 In order to understand the dispute between the parties, it is important to review the history of this particular commercial condominium corporation. The subject property is an indoor retail shopping mall known as "The Shoppes of the Parkway" (the mall) in Richmond Hill. The mall consists of 87 retail, food court and restaurant units. In 1994 the owner of the mall, Captain Developments Limited (the developer) converted the mall to a commercial condominium by registration of a declaration pursuant to the provisions of the *Condominium Act*. The mall became known as York Region Condominium Corporation 852 (Condo 852). The developer then proceeded to sell the individual units to existing tenants or through the real estate marketplace. The developer retained several units for itself including unit #1 either because it was unable to sell them or because it was commercially viable to retain them. One of the largest units in the project was unit #1. At the time of conversion it was leased to a national restaurant chain. This unit constituted almost 26 percent of the units in Condo 852. In comparison, all of the other units were much smaller, constituting just under two percent per unit for the remaining units.

3 The developer, through a related company, also provided management services to the condominium corporation.

4 By 1995 the developer still retained 33 of the 87 units of Condo 852. Only two of these retained units were leased including unit #1, the balance were vacant.

5 The developer encountered financial difficulties and unit #1 was sold under Power of Sale by its mortgagee to the applicant in 1997. The applicant received an *estoppel* certificate and assumed the existing restaurant lease. The applicant, as the owner of unit #1, became a commercial landlord within a commercial condominium corporation. The applicant's unit has experienced some periods of vacancy over the years. When one restaurant tenant went out of business, the applicant re-rented the space to another restaurant tenant. Several years ago the applicant subdivided unit #1 creating unit #1A of about 1,000 square feet to a physiotherapist. This unit faced the rest of the indoor mall and reduced the size of the balance of unit #1 accordingly. This was done, in part, to meet the needs of its new restaurant tenant who sought a smaller space at a more affordable price.

6 In 2002 the developer's related corporation was removed as manager of the affairs of Condo 852 and officers and directors of the developer ceased being board members. In 2002 an officer of the applicant corporation was also a board member of the condo corporation.

THE DISPUTE

7 The dispute between the applicant and the condo corporation centres around the condominium's marketing and promotion fund and whether or not Condo 852 has acted oppressively or unfairly to the applicant with respect to this fund. In order to understand the roots of this dispute it is necessary to review the history of the mall before conversion and the steps taken after conversion by the developer with respect to units retained by it or sold to other various unit owners. It is also necessary to review how this fund was reflected in the audited financial statements of the condominium corporation over the years.

8 Prior to conversion, while it was the mall owner, the developer leased out various units in the mall to commercial businesses. Unit #1 was leased to a restaurant chain. The developer entered into a lease with that tenant which provided for a promotional fund in section 8.01 which provided:

> the tenant shall pay to the landlord, as additional rent in each rental year (or in any other annual period determined by a landlord, from time to time), for the purpose of the creation and maintenance of a common fund (the "promotion fund") for the purchase, maintenance or replacement of seasonal decorations in the commercial mall and/or for the promotion or benefit of the commercial mall ...

9 This is the lease which was assumed by the applicant when it purchased unit #1. It is quite conceivable that all of the other leased units in the mall had a similar clause relating to the promotional fund.

10 An officer of the respondent corporation filed an affidavit containing many of the audited financial statements of the corporation over the years and a series of letters sent by the developer to unit owners over the years. At Tab I, a letter dated September 9, 1997 to one of the unit owners 1074303 Ontario Inc., stated in part:

> Please find enclosed the common area expense and operating budget, for York Region Condominium Corporation #852 for the fiscal year October 1, 1997 to September 30, 1998 ... Commencing October 1, 1997, your monthly payments for the above noted unit are as follows:

	Common area expense and operating budget	$138.29	
	Promotion fund contribution	16.38	

Contribution to common hydro - meter group 1 17.23

	Total before GST	$ 171.90	
	GST	12.03	
	Total monthly payment	$ 183.93	

Please note that your total monthly amount includes a promotional fund contribution which has been

> added. This amount was approved by the unit owners at last year's annual meeting and your contribution has been calculated as follows: square footage of your unit x $1.00 per annum.
>
> Kindly forward 12 post-dated cheques in the above amount payable to York Regional Condominium Corporation No. 852 for the twelve month period commencing October 1, 1997 ...

11 The respondent filed similar letters for the years 1998, 1999 and 2001.

12 There was no provision in these notices for the affected unit owners to opt out of this fund. The promotional account was identified separately and included in the total monthly payment required for the condo fee.

13 It is common ground that the developer chose not to collect this promotional fund from the units it retained as unsold or leased out.

14 The applicant purchased its unit in 1997 and as previously noted, assumed a lease which contained a provision enabling it to collect for the promotion fund. However, within two months of the applicant's purchase the restaurant tenant went out of business. Unit #1 was vacant for a number of months and eventually the applicant settled with that tenant for an undisclosed amount for arrears. At the time of purchase the applicant obtained an *estoppel* certificate signed by an officer of the Condominium Corporation. This officer was also a director of the developer corporation. The *estoppel* certificate made no reference to the promotion fund nor was there any reference to this fund in the attached audited financial statements.

15 In the years immediately following its purchase the applicant was not requested to contribute to the promotion fund although it appears that the other occupied units were contributing to this fund.

16 In 2003, shortly after the Board had replaced the management company for Condo 852, the Board began attempts to have unit #1 contribute to the promotion fund. For the fiscal year 2004 a special arrangement was entered into whereby the Board required the applicant to contribute $97 per month toward the promotion fund. This was far less than the proportionate share that the applicant would otherwise have had to contribute based on the fact that it owned approximately 26 percent of the condo space.

17 In 2005 the condominium board began to treat the promotion fund as a common element expense and therefore with uniform application to all unit owners in accordance with their proportionate shares. This meant that the applicant became responsible for approximately 26 percent of any such promotional expenses.

18 In 2006 the condominium corporation obtained a reserve fund study as it was required to do under the provisions of the *Condominium Act*, 1998. The report indicated a need to supplement the reserves and the Board decided to use an accumulated amount in the promotion fund to meet the needs of the reserves rather than to issue a special levy to all unit owners.

AUDITED FINANCIAL STATEMENTS

19 By way of background it is important to look at how the promotion fund was dealt with in various financial statements over the years. Not all financial statements for all relevant years were filed with this application. The audited financial statements filed with the applicant's *estoppel* certificate for the year ending September 30, 1996 made no reference to the promotion fund. After the change of management in 2002 new auditors were in place. The auditors report dated December 9, 2003 noted under liabilities an entry due to owners promotion fund (note 6) $25,105 for 2003. For 2002 on the comparable entry it showed $6,397. By way of note 6 the auditor stated:

> Promotion fund. The Corporation administers a promotion fund on behalf of some of the store owners who have contributed their share of the assessment. Not all members of the corporation are participating in the promotion fund. As at September 30, 2003 there was a $22,738 fund balance in the name of the promotion fund. With a gross of $47,843 payable to the marketing fund, the corporation has a net payable amount of $25,105.

20 In the auditor's report dated January 17, 2005 the marketing and promotion fund in the amount of $81,621 was noted as a current asset of the corporation. Under current liabilities the sum of zero was shown as due to owners promotion fund note 7. Note 7 stated:

> Promotion fund. The Corporation had started a new marketing and promotion fund from proceeds budgeted for the promotional events on behalf of the retail unit owners. The fund is managed as a separate fund by the same management board of the corporation.

21 The auditor's report dated January 27, 2006 showed current assets under the marketing and promotion fund of $114,373 as at September 30, 2005. Under a separate statement entitled Statement of Promotion Fund it noted a balance at the beginning of the year of $81,621, add transfer from general fund $32,752, balance at the end of the year $114,373.

22 Under note 7 of those financial statements the auditor indicated:

> Promotion Fund. The Corporation had maintained a separate marketing and promotion fund from proceeds budgeted from the promotional events.

23 In 2006 the applicant retained counsel to raise an objection to the use of funds from the common elements budget for promotion of the mall.

24 By notice dated May 30, 2007 the management of Condo 852 sent a notice to all unit owners of a special meeting regarding the promotion fund. The stated purpose of the meeting was:

> The purpose of the meeting is for the Board to present the plans for a promotion fund of $80,000 to the owners, for the unit owners to discuss the promotion fund and for the owners to vote to approve the promotion fund.

25 The vote on this issue at the meeting did not achieve the 66 2/3% majority required for a substantial change under the provisions of the *Condominium Act* and therefore failed. It is the applicant's position that the calling of this meeting was an admission that previous allocations of common expenses to the marketing fund were improper. The respondent disagrees and states that the purpose of the meeting was to change the approach to the marketing fund by hiring a single professional advertising agency to market the mall and to deal with all of the funds in the reserve.

26 The applicant brought this application on June 29, 2007 seeking the relief set out in the Notice of Motion including the oppression remedy set out in section 135 of the *Condominium Act*, 1998.

THE PROMOTION FUND

27 In reply to the application the respondent filed an affidavit of Lawrence Chan president of Condo 852. At paragraph 12 Mr. Chan set out the rationale for the promotional fund as follows:

> The commercial and practical reality is that YRCC852 is a retail mall. The unit owners purchased their respective units as investments and operate their own businesses from their units or leased them to tenants. As such, marketing has always been a concern of the great majority of the owners because customer traffic is necessary for the daily operations of the businesses and the value of the properties themselves. The Board takes these concerns seriously in their management of the affairs of YRCC852.

28 The applicant in support of its application filed an affidavit of May Chiu one of the principal shareholders of the applicant corporation. In her affidavit at paragraph 13 Ms. Chiu stated:

> Neither the applicant nor its tenants, have ever had any desire to participate in this promotion fund. In my opinion, marketing is a business decision for the individual business operating in a unit and is not a proper duty of the Condominium Corporation.
> In addition our tenants perform their own marketing. One of our tenants runs an Indian Restaurant and the marketing campaigns that have historically been done are centred on the events such as the Chinese New Year. As such, the applicant gains nothing from marketing but is being asked to pay for over one-quarter of the total cost of the Corporation.

29 On cross-examination of her affidavit, Ms. Chiu was asked if it was still her position that nothing was gained from marketing and promotion of the mall. She answered: "Well, not gained nothing. We did a little bit, but I doubt it, because mostly ...". Elsewhere in her affidavit she answered:

> Well, I don't have difficulty with paying equally by all the units, okay - equally, but I have - but later on I found out that we have to pay according to the factor. That I don't agree with that, because my unit is just one unit, okay, and then I have to pay 25 or 26 percent of $80,000.

ANALYSIS

30 It is the applicant's position that the use of a portion of the common expenses towards marketing and promotion

is not a proper duty of the corporation and is therefore oppressive or unfair to the applicant.

31 Section 1 of the *Condominium Act*, 1998 defines common expenses as follows:

> Common expenses means the expenses related to the performance of the objects and duties of a corporation and all expenses specified as common expenses in this *Act* or in a declaration.

Section 84(1) of the *Act* provides as follows:

> 84(1) Subject to the other provisions of this *Act*, the owner shall contribute to the common expenses in the proportion specified in the Declaration.

The Declaration of the condominium corporation defines common expenses as:

> Common Expenses - means the expenses of the performance of the objects and duties of the corporation and includes without limiting the generality of the foregoing, any expense specified in the common expenses in the *Act*, this Declaration and Schedule E to this Declaration.

32 Article 5.1(a) of the Declaration provides the duties of the corporation:

> The duties of the corporation shall include but not be limited to the following:
>
> controlling, managing and administration of the common elements and assets of the corporation.

33 The applicant relies on section 135 of the *Condominium Act*, 1998, which provides as follows:

> Oppression Remedy
>
> 135(1) An owner, a corporation, a declarant or a mortgagee of any unit may make an application to the Superior Court of Justice for an order under this section.
>
> Grounds for Order
>
> On an application, if the court determines that the conduct of an owner, a corporation, a declarant or a mortgagee of a unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interest of the applicant, it may make an order to rectify the matter.
>
> Contents of Order
>
> On an application, the judge may make any order the judge deems proper including,
> an order prohibiting the conduct referred to in the application; and
> an order requiring the payment of compensation.

34 Section 135 of the *Condominium Act*, 1998 has been dealt with in a number of recent cases. In *Niedermeier v. York Condominium Corp.*, D.C. Shaw, J. put the issue into context and stated at paragraph 4:

> Section 135 came into effect in 2001. While this is a new concept for Ontario condominium corporations, courts in Canada have dealt with oppression remedies for many years in the context of company law. Those cases have considered whether the conduct complained of falls under the three types of conduct enumerated under statute, namely (i) oppression (ii) unfair prejudice or (iii) unfair disregard. The courts have not drawn clear lines between any of the three statutory tests and have often found that conduct may fit into one or more of the categories. Unfair prejudice and unfair disregard are less rigorous tests than oppression.

35 The Ontario Court of Appeal dealt with section 135 of the *Condominium Act*, 1998 in *McKinstry v. York Condominium Corp. #472* (2003) Carswell Ont. 4948. Juriansz J. quoted a definition for the oppression remedy and went on to state at paragraph 33:

> This new creature of statute should not be unduly restricted but given a broad and flexible interpretation that will give effect to the remedy it created. Stakeholders may apply to protect their legitimate expectations from conduct that is unlawful or without authority, and even from the conduct that may be technically authorized and ostensibly legal. The only prerequisite to the court's jurisdiction to fashion a remedy is that the conduct must be or threaten to be oppressive or unduly prejudicial to the applicant, or unfairly disregard the interests of the applicant. Once that prerequisite is established, the court may "make any order the judge deems proper" including prohibiting the conduct in requiring a payment of compensation. This broad powerful remedy and the potential protection it offers are appropriately described as "awesome". It must be remembered that the section protects legitimate expectations and not individual wish lists, and that the court must balance the objectively reasonable expectations of the owner with the condominium board's ability to exercise judgment and secure the safety, security and welfare of all owners and the condominium's property and assets.

36 The Court of Appeal dealt with the oppression remedy in the context of minority shareholder rights in *Grant Investments Ltd. v. Keeprite Inc.* (1991) 3 O.R. (3d) page 289. McKinlay J. stated at page 301:

> Acting in the best interests of the corporation would, in some circumstances, require that a director or officer act other than in the best interests of one of the group's protected under section 234 [*Ontario Business Corporations Act*, 1982].

At page 320 McKinlay J. sent on to state:

> There can be no doubt that on an application under section 234 the trial judge is required to consider the nature of the impugned acts in a method in which they were carried out. That does not mean the trial judge should substitute his own business judgment for that of managers, directors, or committee such a the one involved in assessing this transaction. Indeed, it would generally be impossible for him to do so, regardless of the amount of evidence before him. He is dealing with the matter at a different time and place; it is unlikely that he will have the background knowledge and expertise of the individuals involved; he could have little or no knowledge of the background and skills of the persons who would be carrying out any proposed plan; and it is unlikely that he would have the knowledge of the specialized market in which the corporation operated. In short, he does not know enough to make the business decision required. That does not mean that he is not well equipped to make an objective assessment of the very factors which section 234 require him to assess.

37 In *re Alldrew Holdings Ltd. v. Nibro Holdings Ltd.* (1993) 16 O.R. (3d) page 718 (Ont. Gen. Div.) MacKenzie J. provided a non-exhaustive list of some of the factors a court ought to consider when dealing with oppression. Those factors were:

> the history and nature of the corporation;
> the type of interest affected;
> general commercial practice;
> nature of the relationship between the complainant and the alleged oppressor;
> the extent to which the impugned acts or conduct were foreseeable;
> the expectations of the complainant;
> the size, structure and nature of the corporation; and
> the detriment to the interests of the complainant.

Those factors provide a helpful background for analyzing the facts in this application.

(i)		**The History and Nature of the Corporation**	

38 The corporation is a commercial condominium corporation operated for the benefit of all the unit owners with a view to attracting customers and income for the various businesses while at the same time attempting to add value to the individual units.

(ii)	**The Type Of Interest**	
	Affected	

39 All of the unit owners operate or lease commercial businesses; however, the applicant has the largest unit occupying approximately 26 percent of the condominium corporation and therefore paying 26 percent of all the condominium corporation's expenses.

(iii) General Commercial Practice

40 It would generally be expected that a prudent and diligent board of directors for a commercial condominium would spend money marketing and promoting the condominium for the benefit of the unit holders. There is nothing in the declaration or by-laws of this condominium corporation that would prevent such expenditures.

(iv)		**Nature of the Relationship Between the Complainant and the Alleged Oppressor**	

41 The applicant is a commercial landlord owning the largest unit by far in the condominium corporation. The promotion fund is aimed at benefiting the entire mall by increasing customer traffic. The applicant by its own affidavit acknowledges that the applicant or its restaurant tenant may gain some advantage from these promotions.

(v)		**The Extent to Which the Impugned Acts or Conduct Were Foreseeable**	

42 The applicant was aware of the promotion fund as established in the existing lease which it took over when it purchased the unit. The applicant found itself exempt from this promotion fund as years went by while all other unit owners were contributing their share. This exemption was not created by by-law or declaration but seems to have been created by the developer for itself, when it owned unit #1. The developer's related company, in providing management to the ongoing condominium corporation, neglected or refused to address this discrepancy. The issue became flagged when the management company for Condo 852 was replaced.

(vi)	**The Expectations Of The**	
	Complainant	

43 The applicant is a commercial landlord who purchased a unit in a mall operated by a commercial condominium corporation. As such, it could reasonably expect that some of the funds of the condominium corporation would be expended toward promotion and marketing even if such expenditures were not included in the financial statements when they first purchased their unit. The existence of the promotion fund did become apparent to the applicant over time through the various references in the subsequent audited financial statements. In addition, a shareholder of the applicant was on the Board of Directors of Condo 852 in 2002.

(vii)		**The Size, Structure And Nature Of The Corporation**	

44 The corporation is a commercial condominium corporation owned by the various unit owners who operate or lease commercial businesses. The applicant is the largest unit owner.

(viii)		**The Detriment To The Interests Of The Complainant**	

45 It is not clear from the affidavit material and the cross-examination of a representative of the applicant, that the applicant received no benefit from the expenditures from the promotion fund. Indeed, for many years the applicant may have benefited from the expenditures from the promotion fund to which it did not contribute. As such, there may have been an element of unjust enrichment for the prior years. The argument of the applicant as set out in the cross-examination of its shareholder would appear to be that the applicant does not object to an equal contribution to the promotion fund but does object to its contribution of 26 percent of the overall fund.

CONCLUSION

46 From the time that the mall was converted to a commercial condominium corporation, the occupied units, except for unit #1, contributed to the promotion fund. Because of the notices sent to the unit holders by the developer manager, I find that this payment was mandatory in nature being included in the monthly common elements fee. The owner of unit #1, originally the developer and now the applicant, was exempted from this payment without any legal basis for doing so. The applicant received the benefit of this non-payment from the time of its purchase until attempts were made to change this by the new condominium management. The applicant acknowledged that it or its tenants may have received some benefit from the promotions and indicated a willingness to pay a lower amount, perhaps equal to what the other unit owners paid. There is nothing in the declaration or by-laws that would prevent a commercial condominium corporation such as this from spending money from the common expenses fund on promotions and marketing. Such expenditures are consistent with its duties to manage and administer the corporation. Although the condo attempted to clarify this by way of the special meeting in 2007, I find that it was not necessary to do so to establish its right to spend some of the common expenses funds on marketing and promotion. Although categorized as such by the auditors, I find that the fund contributed to over the years by the other unit owners was not voluntary, it was mandatory. The applicant was aware of the promotion fund contained in the lease which it assumed upon purchase. It also became aware of the fund by way of notes to the audited financial statements over the years and by way of its participation on the Board in 2002. A commercial condominium unit owner could reasonably expect that it would have to participate in promotion and marketing in accordance with its ownership interest consistent with the contributions made by other unit owners over the years. Under the circumstances, I am not satisfied that the condominium corporation has conducted itself in a manner that would be considered oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant. In the result, the applicant's motion is dismissed.

47 The applicant sought the assistance of the court under section 135 of the *Condominium Act* 1998. Section 135(3) indicates that a judge may make any order the judge deems proper. Although I decline to so order, it is open to the applicant to request the Board and the unit owners to give special consideration to the unique nature of its ownership and its proportionate share of contribution to the promotion and marketing fund. Such a motion could be brought at the annual general meeting or at a special meeting called for the purpose. The applicant, by way of its ownership, has approximately 26 percent of the votes and if 66 and two-thirds percent of the unit owners vote in favour of the special status for unit #1, then the Board may be authorized to charge the applicant for an amount lower than its proportionate share.

COSTS

48 If the parties cannot agree on costs, I am prepared to fix costs. A costs outline and cost submissions should be submitted to me within 30 days of the date of this decision.

G.M. MULLIGAN J.

cp/e/qllqs/qlmxb