

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION (GENERAL)**

Citation: *Neil's Pond (Phase III) Condominium Corporation v. J.M.J. Holdings Ltd.*, 2010 NLTD(G) 199
Date: 20101216
Docket: 201001G4786

BETWEEN:

**NEIL'S POND (PHASE III) CONDOMINIUM
CORPORATION**

APPLICANT/RESPONDENT

AND:

J.M.J. HOLDINGS LTD.

RESPONDENT/APPLICANT

Before: The Honourable Mr. Justice Robert M. Hall

Place of Hearing: St. John's, Newfoundland and Labrador

Date of Hearing: November 18, 2010

Appearances:

Geoffrey K. Penney Counsel for the Applicant/Respondent

Annette E. Scott Counsel for the Respondent/Applicant

Authorities Cited:

CASES CONSIDERED: *York Region Condominium Corp. No. 771 v. Year Full Investment (Can.) Inc.*, 10 O.R. (3d) 670 (Ct. J.); *York Region Condominium Corp. No. 771 v. Year Full Investment (Can.) Inc.*, 12 O.R. (3d) 64 (C.A.).

STATUTES CONSIDERED: *Condominium Act*, R.S.N. 1990, c. C-29.

REASONS FOR JUDGMENT
ON DETERMINATION OF
PRELIMINARY POINT OF LAW/FACT

HALL, J.:

BACKGROUND

[1] This matter was commenced by an Originating Application (*Inter Partes*) (the “Originating Application”) issued by Neil’s Pond (Phase III) Condominium Corporation (“the Condominium Corporation”). In the Originating Application the Condominium Corporation seeks to compel J.M.J. Holdings Ltd. (“J.M.J.”) to perform duties imposed upon it by the Declaration and By-law No. 1 of the Condominium Corporation.

[2] J.M.J. at all material times to the Originating Application was the Declarant as defined by the Declaration of the Condominium Corporation and J.M.J. submitted the Declaration and Plan to the Registry of Condominiums for registration thereby creating the Condominium Corporation. The sole director of J.M.J. is one Joseph McCarthy.

[3] Apparently from the Deed of Registration and creation of the Condominium Corporation on February 28, 2006, until approximately May 2, 2009, the property and affairs of the Condominium Corporation were administered and operated by J.M.J. On May 2, 2009, the Condominium Corporation’s first board of directors was formally appointed after which the Board of Directors assumed responsibility for the administration and operation of the Condominium Corporation. Mr. Joseph McCarthy was a director of the Condominium Corporation on behalf of J.M.J. and served as the Condominium Corporation’s president from May 2, 2009, to approximately March 10, 2010. J.M.J., as the Declarant, was the owner of the freehold estate of the land and owner of the building and all units comprising the property of the Condominium Corporation. Article 5.05 of the Declaration states:

Each owner shall pay for the maintenance, repair and renewal of each common element and shall pay the expenses of the performance of the objects and duties of the Corporation and the expenses as listed in paragraph 5.02 (hereinafter collectively called the "Common Expenses") in the proportion assigned to his unit in Schedule "D" hereto.

[4] Article 5.03 of the Declaration states:

Each owner, including the Declarant, shall pay to the Corporation his proportionate share of the common expenses, as may be provided for by this Declaration and the By-laws of the Corporation.

[5] Under Schedule "D" to the Declaration the percentage which each common element is to relate to each unit in the Condominium Corporation is 7.15%, an identical percentage for each of the fourteen units in the development.

[6] In the Originating Application the Condominium Corporation claims that J.M.J., as Declarant, failed to pay its proportion of the share of the common expenses of the Condominium Corporation for units which it continued to own from February 28, 2006, up to and including approximately May 22, 2008 (being the approximate date upon which the last unit owned by J.M.J. was sold for the first time). It states that as a result of this non-payment J.M.J. failed to comply with the duties imposed upon it by the Declaration and By-law No. 1. As a result, the Condominium Corporation seeks an order pursuant to section 18(1) of the *Condominium Act*, R.S.N. 1990, c. C-29, that J.M.J. be directed to perform its duty under Article 5.03 of the Declaration and to pay to the Condominium Corporation J.M.J.'s share of common expenses for all units owned by it from time to time, which share of common expenses as alleged to total \$25,968.20. The Condominium Corporation further seeks an order pursuant to section 12(4)(b) of the *Condominium Act* and Article 13(b) of the Condominium Corporation By-law No. 1 ordering payment as a debt due by J.M.J. to the Condominium Corporation, of all legal fees and expenses incurred by the Condominium Corporation in enforcing J.M.J.'s obligations with respect to units owned by it from time to time, together with interest on all unpaid contributions at the rate of 2% above the interest rate charged from time to time by the Bank of Canada, compounded monthly.

THE POSITION OF J.M.J.

[7] J.M.J. denies these assertions and says that common expenses were neither assessable nor payable with respect to units owned by it until these units were ready for occupancy. J.M.J. asserts that it subsidized the costs associated with providing services to both sold and unsold units by charging the Condominium Corporation only a portion of the actual costs of such services. Other issues in dispute between the parties were denied by J.M.J. However, those issues are not subject of this current application. J.M.J. sought an order of this court pursuant to Rule 38.01.(1)(a) and 38.01.(2), the *Condominium Act* as amended, and the Regulations thereunder as well as pursuant to the Declaration and By-laws of the Condominium Corporation. The referenced portions of Rule 38 read as follows:

38.01. (1) The Court may, on the application of any party or on its own motion, at any time prior to a trial or hearing,

(a) determine any relevant question or issue of law or fact, or both;

(2) Where in the opinion of the Court, the determination of any question or issue under rule 38.01(1) substantially disposes of the whole proceeding, or any cause of action, ground of defence, or counterclaim, the Court may thereupon order the entry of such judgment or make such order, as is just.

[8] J.M.J. therefore seeks determination of the question as to when expenses become payable with respect to unsold condominium units and asserts that such a determination, if decided in its favour, would dispose of the whole of the within proceedings as set out in the Originating Application.

DISCUSSION

[9] The preamble to the Condominium Corporation's Declaration states that the Declarant therein, namely J.M.J., is the owner of the freehold estate and of the building containing the fourteen condominium units. By extension, at the time of registration J.M.J. was the owner of all fourteen units, until same were sold or conveyed by it. There is nothing which I could discern and to which I was directed in the *Condominium Act*, the Declaration or the By-laws which in any way changed

the position of J.M.J. as owner or which dealt with the obligation of J.M.J. to pay its proportionate share of common expenses.

[10] Article 5.03 of the Declaration states:

Each Owner, including the Declarant, shall pay to the Corporation his proportionate share of the common Expenses, as may be provided for by this Declaration and the By-Laws of the Corporation.

[11] Article 5.01 of the Declaration states:

Each Owner shall pay for the maintenance, repair and renewal of each Common Element and shall pay the expenses of the performance of the objects and duties of the Corporation and the expenses as listed in Paragraph 5.02 (hereinafter collectively called the "Common Expenses") in the proportion assigned to his Unit in Schedule "D" hereto.

[12] Section 15(1) of the *Condominium Act* states:

The owner of a unit shall be bound by and shall comply with the terms, conditions, obligations and restrictions imposed on the owner by the declaration and by-laws.

[13] The *Condominium Act* does not impose any conditions or restrictions on these obligations.

[14] Section 10(2) of the *Condominium Act* dictates that the ownership of a unit is inseparable from a unit owner's interest and obligations with respect to the common elements as follows:

The ownership of a unit with its common elements are inseparable and an instrument or order purporting to separate or divide a unit from its common elements is void.

The Condominium Corporation submits that J.M.J. cannot claim that despite the fact that it owned units it had no interest in the common elements because occupancy permits therefor had not been issued and, therefore, J.M.J. had no obligation to pay its share of expenses for the unsold units. Further, the Condominium Corporation argues that any order of this Court which purported to separate J.M.J.'s unit ownership from its obligations with respect to the common elements would be void by virtue of section 10(2) of the *Condominium Act*.

[15] The *Condominium Act* states at section 11(1) that a unit owner has responsibility for payment of taxes, assessments, etc. commencing upon the date of registration of the Declaration, not at some later date, as claimed by J.M.J., as follows:

11.(1) All rates, real property taxes, assessments, charges and taxes which may be levied or imposed by a body or authority under an Act upon the owner or occupier of, or in respect of property which has been subdivided into separate units with common elements under this Act, shall, from the date of registration of a declaration under this Act and during the time the property is subject to this Act, be levied and imposed upon the owner or occupier of or in respect of a unit in the property.

[16] The Condominium Corporation asserts that J.M.J.'s contractors and trades people were facilitated through usage of common water and electrical services. Insurance coverage applied to the entire condominium complex, including the unsold units owned by J.M.J. Common services and upkeep and maintenance of common areas no doubt assisted in the marketability of J.M.J.'s units, the Condominium Corporation submits. The Condominium Corporation indicates that items such as parking lots, roof, walls and supports, stairs, corridors and elevators, pipes, cables, wires, etc. servicing more than one unit, as well as electrical/mechanical rooms and heating equipment are all common elements and are not applied to the benefit of some units and not to others.

[17] I note that there is nothing in section 5.03 of the Declaration which puts a time limit on the commencement of liability for common expenses. I must conclude therefore that pursuant to common law, J.M.J. as the owner of the project remained liable for the expenses for each unit pursuant to the contract provisions

set out in the Declaration, unless that liability was amended by the Declaration or the *Condominium Act*, which it is not.

[18] Obviously, a prospective purchaser would not purchase a unit in a condominium project where that purchaser did not know with some certainty what its percentage of the common expenses would be. That certainty is provided by the Declaration of the Condominium Corporation which, in the case at hand, provides that the share of the common expenses for each unit is 7.15%. However, if I were to apply the theory of J.M.J., then the percentage of common expenses would not be known or knowable by a prospective purchaser. Suppose for example J.M.J. continued to own 50% of the units. Applying J.M.J.'s theory, the share of the common expenses to be born by that new purchaser would not be 7.15% but actually double that, namely 14.30%. Such uncertainty could never have been intended to arise under the operation of the *Condominium Act* or the By-laws. That is the reason why an owner of an unsold unit is treated under the *Condominium Act* and the By-laws no differently than an arm's length purchaser.

[19] **York Region Condominium Corp. No. 771 v. Year Full Investment (Can.) Inc.**, 10 O.R. (3d) 670 (Ct. J.), affirmed by the Ontario Court of Appeal in 12 O.R. (3d) 64 (C.A.), provides an excellent summary of the philosophy behind condominium developments and common expenses as follows:

18 The philosophy of a condominium development is that the common expense proportions cannot be examined under a microscope. The persons occupying a unit on the first floor cannot avoid any cost of the elevator because they don't use it. Similarly, a family with a large number of members may use a lot more of the utilities than a single person. Different retail units have different requirements of various services in the condominium. It is not until there is a flagrant excessive use such as the present one that there should be an adjustment.

...

20 Similarly with garbage it should not be necessary to determine whether a scrap of paper or a can came from its premises or somewhere else. The general expenses of the condominium corporation should be shared in the proportion specified in the declaration even though this may not be the precise proportion in which the unit owners benefit from these expenses.

CONCLUSION

[20] **IT IS THEREFORE ORDERED** that the liability of J.M.J. for payment of the common expenses of the Condominium Corporation commenced on the date of registration of the Declaration in the Condominium Registry and continued in respect of units unsold by J.M.J. to the respective dates of first sale of each unit by J.M.J.

[21] **IT IS FURTHER ORDERED**, pursuant to Article 13A of the Declaration, that arrears of payment of common expenses ordered herein to be paid by J.M.J. to the Condominium Corporation shall bear interest at a rate equal to 2% per annum above the interest rate charged from time to time by the Bank of Canada to chartered banks compounded monthly.

[22] With respect to costs, I am not satisfied that at this juncture, notwithstanding my foregoing ruling, that all matters in dispute between the parties are resolved. Thus I am not prepared to order costs to be paid by J.M.J. to the Condominium Corporation on a solicitor and client basis until I am satisfied that all matters between the parties as set out in the Originating Application have been resolved. Therefore, **IT IS ORDERED** that costs on the preliminary application are to be paid by J.M.J. to the Condominium Corporation on a party and party basis unless otherwise ordered by this Court.

ROBERT M. HALL
Justice