

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT
ACT, R.S.C. 1985, c. C-36, AS AMENDED AND THE JUDICATURE
ACT, R.S.A. 2000, c. J-2 AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF MEDICAN HOLDINGS LTD., MEDICAN DEVELOPMENTS INC.,
R7 INVESTMENTS LTD., MEDICAN CONSTRUCTION LTD.,
MEDICAN CONCRETE INC., 1090772 ALBERTA LTD.,
1144233 ALBERTA LTD., 1344241 ALBERTA LTD.,
9150-3755 QUEBEC INC., AXXESS (GRANDE PRAIRIE) DEVELOPMENTS
LTD., AXXESS (SYLVAN LAKE) DEVELOPMENTS LTD., CANVAS
(CALGARY) DEVELOPMENTS LTD., ELEMENTS (GRANDE PRAIRIE)
DEVELOPMENTS LTD., HOMES BY KINGSLAND LTD., LAKE COUNTRY
(SITARA) DEVELOPMENTS LTD., MEDICAN (EDMONTON TERWILLEGAR)
DEVELOPMENTS LTD., MEDICAN (GRANDE PRAIRIE) HOLDINGS
LTD., MEDICAN (KELOWNA MOVE) DEVELOPMENTS LTD., MEDICAN
(LETHBRIDGE- FAIRMONT PARK) DEVELOPMENTS LTD., MEDICAN
(RED DEER-MICHENER HILL) DEVELOPMENTS LTD., MEDICAN
(SYLVAN LAKE) DEVELOPMENTS LTD., MEDICAN (WEST BANK)
DEVELOPMENTS LTD., MEDICAN (WESTBANK) LAND LTD., MEDICAN
CONCRETE FORMING LTD., MEDICAN DEVELOPMENTS (MEDICINE
HAT SOUTHWEST) INC., MEDICAN ENTERPRISES INC., LES
ENTERPRISES MEDICAN INC., MEDICAN EQUIPMENT LTD.,
MEDICAN FRAMING LTD., MEDICAN GENERAL CONTRACTORS
LTD., MEDICAN GENERAL CONTRACTORS 2010 LTD.,
RIVERSTONE (MEDICINE HAT) DEVELOPMENTS LTD.,
SANDERSON OF FISH CREEK (CALGARY) DEVELOPMENTS LTD.,
SIERRAS OF EAUX CLAIRES (EDMONTON) DEVELOPMENTS
LTD., SONATA RIDGE (KELOWNA) DEVELOPMENTS LTD.,
SYLVAN LAKE MARINA DEVELOPMENTS LTD., ESTATES
OF VALLEYDALE DEVELOPMENTS LTD., LEGEND (WINNIPEG)
DEVELOPMENTS LTD. and WATERCREST
(SYLVAN LAKE) DEVELOPMENTS LTD.

PROCEEDINGS

Calgary, Alberta

June 10, 2011

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1 Proceedings taken in the Court of Queen's Bench of Alberta, Courthouse, Calgary, Alberta

2 _____
3 June 10, 2011 Afternoon Session

4
5 The Honourable Court of Queen's Bench
6 Madam Justice Horner of Alberta

7
8 F. Dearlove For CIBC
9 D. Legeyt For Medican Holdings Ltd.
10 K. Barr For the Monitor RSM Richter
11 J. Pawlyk (by telephone) For Condominium Corporation
12 A. Doucet Court Clerk

13 _____
14
15 THE COURT: Thank you, counsel. Please be seated.

16
17 Mr. Pawlyk, have we got you on line?

18
19 MR. PAWLYK: I am here, My Lady.

20
21 **Reasons for Judgment**

22
23 THE COURT: Medican and its group of companies including
24 Axxess (Grande Prairie) Developments Ltd., hereinafter referred to as Axxess, are in a
25 *Companies' Creditors Arrangement Act* stay pursuant to an initial stay order issued May
26 26th, 2010, which will be referred to hereafter as the Initial Order and, most recently, the
27 stay order was extended to July 28th, 2011.

28
29 Prior to the Initial Order, Axxess had developed a 177-unit condominium project in
30 Grande Prairie, Alberta of which approximately eight units remained unsold and registered
31 in the name of Axxess at the time of the Initial Order. These assets comprised all of the
32 assets of Axxess.

33
34 Axxess began selling units in the project at the end of January 2008 for occupancy at the
35 end of March 2008. As is customary in condominium developments, fees are assessed
36 and collected monthly by the Condominium Board, which is formed at the outset of the
37 sale of the units. Here, that Board is Condominium Corporation No. 0627724, and I will
38 hereinafter refer to it as the Condominium Corporation.

39
40 Axxess, with the knowledge and approval of its monitor, RSM Richter Inc. and the first
41 secured creditor, Canadian Imperial Bank of Commerce, who I will hereinafter refer to as

1 the CIBC, stopped paying the monthly condominium fees on the remaining units at the
2 time of the Initial Order.

3
4 Axxess advised Condominium Corporation that the fees would be paid in return for clear
5 estoppel certificates on the closing of sales of each of the respective units once that
6 occurred. This has, indeed, happened on at least one such sale. There remain seven units
7 to be sold. Of these, three are under a contract of sale to close eminently, and four are
8 listed for sale and being actively marketed.

9
10 Financing for the Axxess Development was obtained by Axxess from the CIBC, who
11 holds a blanket mortgage registered against the titles in March 2006. As at May 2nd,
12 2011, owing under that mortgage to the CIBC is \$1,441,000 with an additional related
13 debt owing by the Medican Group bringing the total debt secured by the mortgage to
14 approximately \$8,623,793.20.

15
16 In July 2009, the Condominium Corporation received a report from Shahnaz (phonetic),
17 Popik & Associates, hereinafter referred to as the Shahnaz report, that addresses certain
18 structural issues, equipment issues, and maintenance issues that then existed at the Axxess
19 development. Two further reports have been tendered, those being the Fritz report, and
20 the Carver report dealing with some or all of these issues.

21
22 Mr. Yeo, an officer of Condominium Corporation, states that conservatively it would cost
23 the Condominium Corporation \$2 million plus to address the issues outlined in the
24 Shahnaz report. The Condominium Corporation asserts that Axxess is liable in tort or
25 contract or both for some or a substantial portion of these items.

26
27 The Condominium Corporation purported to levy a special assessment in the amount of
28 \$2,153,574.13 against Axxess and Axxess only and filed caveats in April 2011 against
29 each Axxess unit claiming an interest in that unit pursuant to the special assessment.

30
31 The Condominium Corporation's position is that it will discharge its caveats only upon an
32 undertaking from Medican or an order of this Court that the whole of the sale proceeds
33 after closing costs are deducted be held in trust.

34
35 Axxess, the CIBC, and the monitor take the position that the CIBC mortgage takes
36 priority to the claims of the Condominium Corporation and that the net sale proceeds after
37 payment of ordinary condominium fees must be paid to the CIBC.

38
39 The applications before this Court were as follows: The Condominium Corporation
40 originally applied to lift the stay of proceedings as it related to Axxess only, a direction
41 that Axxess bring the condominium fees current and address the deficiencies or,

1 alternatively, that the net sale proceeds be held in trust pending an agreement between the
2 parties or further order of the Court.

3
4 At the hearing of the application, Condominium Corporation agreed that it was only
5 seeking the latter relief.

6
7 CIBC has applied for an order holding Condominium Corporation in contempt for filing
8 their caveat in the face of this Court's initial stay of proceedings as extended and for a
9 declaration that any amounts owing to Condominium Corporation are subordinate to the
10 secured claim of the CIBC and for an order declaring that Section 39(2)(b) of the
11 *Condominium Property Act*, hereinafter referred to as CPA, is in violation of the federal
12 provincial division of powers vis-a-vis claims of creditors dealt with in the *Bankruptcy*
13 *and Insolvency Act* and the *Companies' Creditors Arrangement Act* and, therefore, Section
14 39(2)(b) of the CPA does not apply.

15
16 Axxess and the Medican group of companies seek declarations that: (1) Condominium
17 Corporation be compelled to issue estoppel certificates upon payment to it of arrears of
18 ordinary condominium fees and penalties thereon; (2) the special assessment against
19 Axxess in the amount of \$2,153,574.13 be declared invalid and be vacated; (3) that
20 Condominium Corporation be enjoined from levying any other assessment, special or
21 otherwise, against Axxess related to the items arising out of the Shahnaz report or other
22 alleged deficiencies.

23
24 Additionally, Axxess seeks a declaration to the registrar of the North Alberta Land
25 Registration District to discharge the caveats registered by the Condominium Corporation.

26
27 At the hearing of these applications on May 27th, 2011, Condominium Corporation
28 withdrew its application to lift the stay, agreed that the special assessment it had levied
29 was invalid and agreed to discharge its caveats voluntarily. It maintains, however, its
30 right to withhold the issuance of estoppel certificates pursuant to Section 14 of the CPA
31 in the event of the sale of the Axxess units unless the whole of the net sale proceeds are
32 held in trust and thus, the parties remain at an impasse.

33
34 The only issue before this Court, then, is whether Section 14 of the CPA applies to these
35 facts such that Axxess, as the developer, is obligated to hold the net sale proceeds in trust.
36 The relevant portions of Section 14 of the CPA read as follows:

37
38 Section 14(1)(c):

39
40 Developer includes any person who, on behalf of a developer, acts
41 in respect to the sale of a unit or a proposed unit or receives

1 money paid by or on behalf of a purchaser of a unit or a proposed
2 unit pursuant to a purchase agreement.

3
4 Section 14(1)(e):

5
6 Substantially completed means subject to the regulations: (I) in the
7 case of a unit, when the unit is ready for its intended use; (ii) in
8 the case of related common property, when the related common
9 property is ready for its intended use.

10
11 Section 14(4) reads:

12
13 Notwithstanding subsection (3), if a unit is not substantially
14 completed, the developer shall hold in trust money other than rents
15 or security deposits paid by the purchaser of the unit so that the
16 amount of money held in trust will be sufficient when combined
17 with the unpaid portion of the purchase price of the unit, if any, to
18 pay for the cost of substantially completing the construction of the
19 unit as determined by a cost consultant.

20
21 And Section 14(5):

22
23 Notwithstanding subsection (3), if the related common property is
24 not substantially completed, the developer shall hold in trust
25 money other than rents or security deposits paid by the purchaser
26 of the unit so that the amount of money held in trust will be
27 sufficient when combined with the unpaid portion of the purchase
28 price of the unit, if any, to pay for the proportionate cost of
29 substantially completing the construction of the related common
30 property as determined by a cost consultant based on the unit
31 factors of the units sharing the same related common property.

32
33 Condominium Corporation's position is that Section 14 is consumer legislation enacted to
34 protect condominium purchasers from the risk of their purchase price being used by the
35 developer to pay other expenses prior to substantial completion of either the unit or the
36 common area. It submits that the legislation creates an express trust in favour of the
37 Condominium Corporation as representative of the purchasers. The precise extent of the
38 trust can be ascertained by the appointment of a cost consultant.

39
40 As the subject matter of a trust, the purchase monies never form part of the estate of
41 Axxess and, therefore, the Canadian Imperial Bank of Commerce mortgage has nothing to

1 attach to.

2

3 Axxess asserts that the Axxess development is substantially complete within the meaning
4 of Section 14 of the CPA and has been since January 2008 when it was judged
5 substantially complete by the project architect and engineers. It appears that occupancy
6 permits were issued sometime in late March 2008 as per answer to undertaking No. 4 on
7 the cross-examination of Mr. Yeo.

8

9 As the project has long been substantially complete, CIBC takes the position that Sections
10 14(4) and (5) do not apply. Alternatively, the CIBC asserts that Section 14 is essentially
11 a separate code within the CPA to protect an individual purchaser of a bare land
12 condominium against paying the purchase price and receiving in return a property that is
13 not substantially completed and as such is not applicable here.

14

15 Both Axxess and the monitor support the position of the CIBC. As an alternative
16 position, rather than just the seven owned by Axxess, the monitor asserts that as some
17 kind of compromise, perhaps the total approximate cost of the items outlined in the
18 Shahnaz report be divided by the total number of units and a holdback of that amount be
19 directed for each of the seven remaining units.

20

21 In order for Section 14 of the CPA to apply, it must be established that the project was
22 not substantially complete. I believe the onus to establish substantial completion is on
23 Axxess.

24

25 Axxess points to the Axxess (Phase 3) Grande Prairie, Alberta progress report of February
26 2008 as establishing substantial completion of the project by the architects and engineers.
27 This was discussed in the cross-examination of Mr. Schneider on his affidavit.

28

29 Further, Axxess relies on the occupancy permits being issued in late March 2008, the sale
30 of 170 units since January 2008, one such sale having taken place since the date of the
31 Initial Order and three further such sales being under contract and pending eminent
32 closing. These facts, they state, establish that the units and the common area are
33 substantially completed as they are clearly being used for their intended use as per the
34 definition of substantial completion in Section 14.

35

36 The Condominium Corporation argues that as a result of the Shahnaz report, the items to
37 be addressed are such that the ability of the owners to use the units and common area for
38 their intended use are negated and the Axxess Development, including the remaining
39 seven units, cannot be said to be substantially complete.

40

41 However, when the proof of claim filed by the Condominium Corporation as an unsecured

1 creditor in the claims procedure established by this Court is carefully reviewed, it is clear
2 that, by and large, the items the Condominium Corporation would like to hold Axxess
3 legally liable for are almost totally deficiency items, having come to light long after the
4 project was completed, sold, and largely occupied. These items include such matters as
5 frozen heating lines, undervented HVAC units, water recirculation issues, and concrete
6 settling. Those that are not deficiencies comprise what I would call a wish list of items
7 that the Condominium Corporation would like Axxess, with hindsight, to have been
8 legally obligated to provide. These include fencing, signage, and powered parking stalls.

9
10 In my view, the claim by the Condominium Corporation here is nothing more than an
11 attempt to leverage its position as a plaintiff in a breach of contract and tort action into
12 that of a trust beneficiary entitling it to what amounts to a prejudgment attachment order.
13 Deficiencies do not change a substantially completed project into one that is not
14 substantially completed.

15
16 On the evidence before me, I am satisfied that Section 14 of the *Condominium Property*
17 *Act* does not apply as the Axxess Development is substantially complete and has been
18 since at least late March 2008 when the occupancy permits were issued by the City of
19 Grande Prairie.

20
21 Having made this determination, it follows that the following relief is granted.

22
23 In case it hasn't already been dealt with, counsel, is it required that an order be granted
24 directing the registrar of the North Alberta Land Registration District to vacate the caveats
25 filed by Condominium Corporation, or has that been accomplished?

26
27 MR. PAWLYK: It's Mr. Pawlyk, My Lady. It has not been done
28 yet and it doesn't matter to me whether we have an order of not. They will be vacated.

29
30 THE COURT: It seems to me, Mr. Pawlyk, it's probably easier
31 if we include that in the order, but I leave it to counsel's discretion as to what they
32 require.

33
34 MR. DEARLOVE: I think it should be, My Lady, just so that if
35 something doesn't get done, there is a basis to rely on.

36
37 THE COURT: Yes. And to be clear, it's the caveats which
38 were filed in April of 2011. It's not any caveats which the Condominium Corporation
39 filed with respect to protection of ordinary fees and penalties.

40
41 MR. DEARLOVE: Correct.

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THE COURT: All right. Okay. The special assessment levied by the Condominium Corporation is vacated. That's the one in the amount of \$2,153,000 or so. I direct that the Condominium Corporation issue estoppel certificates once it has been paid its ordinary fees and penalties on the sale of the remaining seven units.

Now, Mr. Dearlove, the Canadian Imperial Bank of Commerce asked for an injunction enjoining the Condominium Corporation from issuing any further special levies. I'm not -- I don't think under the circumstances without further argument I would grant that.

I think, Mr. Pawlyk, my position is clear if -- I mean, I leave it to your client to determine what their next step is.

MR. PAWLYK: Understood.

THE COURT: With respect to -- Mr. Pawlyk, the only other thing I thought might be entertained today would be an application by yourself for a stay of my order pending an application for leave to appeal.

MR. PAWLYK: I don't have instructions, My Lady, and I think we'll leave it for today.

THE COURT: Okay. And then the only other matter, counsel, is the matter of approval of the sales of the three pending -- of the three condominium units. I must confess my record keeping is not very good and I don't recall if I've actually granted those orders or if they were pending.

I see I'm not the only one with poor record keeping.

MR. DEARLOVE: No, it's recollection, not record keeping, I think, My Lady, is my problem anyway.

THE COURT: Well, okay. Let me -- sorry, Mr. Barr.

Submissions by Mr. Barr

MR. BARR: I was going to say, My Lady, I don't think there has been an approval, but what I recall asking you on not the last occasion but the occasion before, is if we could simply, once we have the consent of parties, take it in front of a justice in ordinary chambers to have --

1 THE COURT: Yes, I think I do recall that, yes.

2

3 MR. BARR: -- to have them approved and you'd indicated
4 that was fine with you so long as all counsel consented. So if that's still acceptable to the
5 Court, if they're not already approved, that's what we can do.

6

7 THE COURT: That is completely acceptable to me. Any
8 objections from anybody on that, as long as it's with consent and/or on notice? Okay.
9 That's what will happen there. And I can freely confess, counsel, that's all I can -- that's
10 all I thought of that we might need to deal with it today as a result of my decision.
11 Mr. Dearlove?

12

13 **Submissions by Mr. Dearlove**

14

15 MR. DEARLOVE: Only that I'd like to include in the order, and I
16 think you've contemplated this, the right to argue -- leave open the issue should we have
17 to come back on the impact --

18

19 THE COURT: Section 39?

20

21 MR. DEARLOVE: Yeah, well, on the impact of a new purchaser.
22 If a new purchaser walks in tomorrow and then under that 39(2) gets nailed again, you
23 may say, "Well, that's fair game, or no, that's not the intention."

24

25 THE COURT: No, I have not decided that issue. Specifically,
26 Mr. Pawlyk, I did not get into the Section 39(2) argument. I did not think -- I thought
27 my recollection of our last hearing was that you were not exerting that, and I apologize if
28 you were.

29

30 **Submissions by Mr. Pawlyk**

31

32 MR. PAWLYK: Well, My Lady, the effect of your order is that
33 we must issue estoppel certificates and so I don't see any way that we could argue that in
34 any event after we've issued an estoppel certificate.

35

36 THE COURT: Oh, I think, Mr. Dearlove's worried about
37 special assessments, but again, if those are not outstanding at the time of the sale.

38

39 MR. PAWLYK: Exactly.

40

41 MR. DEARLOVE: Well, this is what --

1

2 THE COURT: Under that section as I read it, Mr. Dearlove, if
3 there are no -- I think that catches purchasers who purchase in the face of levies that are
4 outstanding or in the face of unclear estoppel certificates.

5

6 MR. DEARLOVE: I don't know what --

7

8 THE COURT: You're not sure it's that clear?

9

10 MR. DEARLOVE: I don't know what -- you'll recall you saying it
11 wasn't that complicated what an estoppel certificate said, but I don't know what it does.

12

13 If the estoppel certificate -- I'm just trying to understand. Does the estoppel certificate
14 then give the purchaser -- and I shouldn't be asking you for legal advice, but I'm asking
15 this more rhetorically than anything, does the estoppel certificate say there are no
16 claims --

17

18 THE COURT: It estops the Condominium Corporation from
19 claiming anything is outstanding except as listed in the certificate. That's my
20 understanding of it. That's why it's called estoppel.

21

22 MR. DEARLOVE: Okay. Okay.

23

24 THE COURT: The Condominium Corporation says for all time
25 here's what we're owed, and if they make a mistake or they fail to include something,
26 they've got a problem except if, of course, you know, it's always arguable, usually a
27 condominium purchase agreement, to my knowledge, will include a condition that the
28 purchaser review all of the resolutions of the Board of the Condominium, the bylaws, and
29 that kind of thing. So if in the Board minutes or resolutions, it's disclosed that a special
30 levy has passed and somehow the Condominium -- and you, the purchaser, reviews that,
31 and somehow the estoppel certificate is silent on that, there might be an issue. But I
32 think the estoppel certificate speaks, period.

33

34 Is that your -- Mr. Pawlyk, you're in the practice area, not myself. Is that more or less
35 your understanding as well?

36

37 MR. PAWLYK: That is exactly it, My Lady.

38

39 MR. DEARLOVE: Okay. The only other thing I'd ask that the
40 order include is a reservation of the right to speak to the matter of costs. It's not our
41 intention to do so if the order isn't appealed, but if it is appealed, we may wish to --

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THE COURT: Revisit.

MR. DEARLOVE: And here -- the only reason I'm asking is the contempt application, which we didn't pursue, but may be relevant on a costs application, which, as I said, I don't expect to be seeking, but want to leave the option open.

THE COURT: I have no problem with that, Mr. Pawlyk, unless you have some very persuasive argument to the contrary. Mr. Dearlove's just looking for a reservation.

MR. PAWLYK: I think that's fine, My Lady.

THE COURT: Okay. Thank you. Mr. Barr?

MR. BARR: Can we also have a provision in the order that simply indicates that we can approve of the order via facsimile and in counterpart, please?

THE COURT: Yes, of course.

MR. BARR: Thank you.

THE COURT: Now, counsel, I am in the city until next Wednesday in terms of execution of the order and then I'm not available for about a week and a half. So I don't know that it's necessary for me to sign it immediately, but in case -- just in that case.

And I also have -- and I confess I don't recall who I got this from -- I have the transcript of the cross-examination of Mr. Schneider. I think that was yours, Mr. Barr. And then I also have the -- and this is yours, I think, Mr. -- or no, this is to you, Mr. Pawlyk, from Mr. Legeyt. That's the answers to undertakings of Mr. Yeo.

MR. PAWLYK: Yes, those I had sent by e-mail to you, My Lady.

THE COURT: Yes. And I had Mr. Legeyt's hard copy in the --I took it from him in the courtroom on the 27th.

All right, counsel. I think that's it until our next scheduled attendance, which is 2:00 on July 28th. Thank you. We're adjourned.

1 MR. PAWLYK:

Thank you, My Lady.

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4 PROCEEDINGS CONCLUDED

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1 **Certificate of Transcript**

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